[2015] UKFTT 0682 (TC)

TC04799

Appeal number: TC/2015/04841

INCOME TAX & CAPITAL GAINS TAX – penalties for failure to file tax return – whether return delivered electronically – presumed no by Reg 9 Income and Corporation Tax (Electronic Communications) Regulations – whether reasonable excuse – yes – appeals upheld.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS ANN HAUSER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
JANE SHILLAKER

Sitting in public at Tribunal Centre, London Rd, Southampton on 8 December 2015

The Appellant in person, assisted by Mr Gordon Hauser

Mr D Bradley, Presenting Officer, for the Respondents

DECISION

1. In this case Mrs Ann Hauser ("the appellant") was appealing against assessments to penalties for her alleged failure to file, before the penalty date of 1 February 2014, an income tax return (and self-assessment) for the tax year 2012/13. The penalties assessed are as follows:

Amount	Relevant paragraph of Schedule 55 FA 2009
£100	3
£900	4
£4,209*	5

*The penalty originally charged was £5,726 but the penalty was re-assessed under paragraph 24(2)(b) Schedule 55 Finance Act ("FA") 2009 after the delivery (or as the appellant would say, re-delivery) of a return for the year.

2. The issues for the Tribunal were whether the appellant had in fact delivered her return on 31 January 2014 or, if we found that she had not, whether she had a reasonable excuse for the failure or there were special circumstances such as to justify a special reduction in the penalties.

3. We have held that she did not deliver the return in time, but that she had a reasonable excuse for the failure and so we have upheld her appeals.

Evidence

4. We had a bundle of documents from HMRC which contained a document prepared by the appellant giving a chronology of events. This chronology also referred to her husband Mr Gordon Hauser's return and the filing of it. Mr Hauser gave evidence before us and assisted his wife in the presentation of her case, and we ascertained from him that he had no objection to his tax affairs, so far as relevant, being discussed. The appellant also gave evidence in the course of her presentation. Mr Bradley for HMRC also put in evidence some screenshots taken from an online tutorial to demonstrate what a person completing their return online would have seen (at least before the migration of HMRC's website to gov.uk).

5. We found the appellant and her husband to be honest and credible witnesses and we accept their evidence, which Mr Bradley did not challenge.

Law

6. HMRC's bundle contained a printout of Schedule 55 FA 2009 ("Schedule 55"). We have put the parts of it relevant to this case in the Appendix of this decision. We have also added relevant parts of s 8 Taxes Management Act 1970 ("TMA") (income

tax returns) and of the Income and Corporation Tax (Electronic Communications) Regulations 2003 (SI 2003/282).

The facts

7. From the documents in the bundle and the appellant's chronology and from the evidence of Mr and Mrs Hauser we find the following facts, none of which was in dispute. We make further findings of fact below in relation to matters which were in dispute.

(1) On the afternoon of 31 January 2014 the appellant and her husband sat down in front of their computer with a view to filing their tax returns. Mr Hauser was at the keyboard making the entries, and the appellant was with him checking.

(2) Mr Hauser competed his own return first and having, as he thought, finished the process, he then keyed in entries on the appellant's return. In the course of doing so he printed out a copy ("the printout") of the return entries at the stage (stage 7) where the screen which invites the person completing the return to save the entries for printing or keeping on a hard disk (or both). (We add that the stages in the process of completing a tax return after the entries for income and reliefs had been made were clearly illustrated by the screenshots Mr Bradley put in evidence).

(3) The printout was in evidence and shows the words "Not submitted" at the top. Although not shown on the printout the computer screen at that stage shows that the return process is 95% complete.

(4) On 18 February 2014 HMRC issued a penalty assessment on the appellant in the sum of £100 for failure to file the return by the due date (31 January 2014).

(5) On 5 March 2014 the appellant wrote to HMRC saying that she had filed her return on 31 January at 18.16, so did not miss the deadline. She added that she had paid the tax shown on the screen, and was at a loss as to why the penalty was issued, and looked forward to hearing from HMRC.

(6) On 18 March 2014 HMRC issued a letter to the appellant. In the letter (about which we have some observations later) HMRC treated the appellant's letter of 5 March as an appeal and denied that she had a reasonable excuse. Later in the letter they also addressed the point made by the appellant that she had in fact filed the return by saying that HMRC's records show that no return had been received and that this may be because she did not complete the final stage of the online process. They added that had she successfully completed the process "we would have sent an email confirming it". The letter asked the appellant to login and check that stage 8 of the process had been competed and that the "task bar" showed 100% complete.

(7) The letter also explained what the appellant had to do before 18 April 2014, which was to supply further information about the reason for the failure, ask HMRC to review the matter or to notify the appeal to the Tribunal.

(8) On 3 June and 1 July 2014 HMRC sent daily penalty reminders to the appellant.

(9) On 15 August 2014 HMRC issued a determination under s 28C TMA in the sum of £19,089.72 (net we assume of payments on account of £95,448.62).

(10) On 4 September 2014 Miss Haderland of HMRC's Debt Management & Banking ("DMB") spoke to the appellant to tell her that there were outstanding liabilities and her return was still not received. The note of the call showed that the appellant said that both she and her husband had filed online on 31 January and had made payments in accordance with the amounts shown on the screen when they filed their returns. Miss Haderland asked the appellant to send her the returns.

(11) On 9 September 2014 the appellant wrote to Miss Haderland. The appellant said in the letter that she understood that for some reason the HMRC website may not have captured her return. In evidence the appellant told us (and we accept) that this was what Miss Haderland had told her on 4 September, and that until then she was not familiar with the term "capture" in relation to the processing of tax returns.

(12) On 16 September 2014 Mrs Shah of DMB spoke to the appellant on the phone. Mrs Shah had noted that a copy of the entries on 2012/13 return (ie the stage 7 printout) had now been received. She had phoned the appellant to tell her to resubmit the return online.

(13) On 24 September 2014 an assessment of £900 (daily penalties) and £5,726 (tax geared 6 month penalty) was issued.

(14) On 27 October 2014 a return was successfully filed online and recorded on HMRC's computer system. As a result the determination was superseded and the tax geared penalty re-assessed in the amount of £4,209.

(15) On 12 February 2015 the appellant wrote to HMRC Self Assessment saying that her return was submitted online on 31 January 3014 and that penalty notices totalling £5,209 have continued to be incorrectly applied to her account, and she asked for them to be removed.

(16) On 19 June 2015 HMRC's Late Penalty Reasonable Excuse Team in Nottingham wrote to the appellant. They seem to have taken the appellant's letter of 12 February as a request for a review of the penalty assessment of £100 issued on 18 February 2014. The letter gave the conclusions of that review and in the letter HMRC state that they have checked with their Online Services and found that the appellant was logged in on 31 January 2014 but did not complete the filing process, and that there was no online activity again until the filing on 27 October 2014. The letter stated that on successful filing the screen shows 100% and there is an acknowledgment message on screen and that an email will be sent. They added that if there had been a successful filing on 31 January then the appellant would not have been able to file again in October.

(17) On 6 August 2015 the appellant notified her appeal to the Tribunal.

(18) The Tribunal, noting that the appeal involved daily penalties, issued a direction staying the appeals until the Court of Appeal had decided the case of *Donaldson v HMRC* [2014] UKUT 536 (TCC). The direction was to have effect only if the appellant did not object: but she did object, on the basis that she was not questioning the amount of the penalties but saying that they were not due at all because she had not failed to file in time.

8. In the course of the hearing Mr Bradley suggested there could be a number of reasons why the return had not been received and the figures instantly captured by HMRC's computer. A fault in HMRC's computer was one, but it was also a more likely possibility that there was a fault involving the appellant's ISP, or some other computer fault before HMRC's.

9. In view of the fact that the appellant's evidence was that her husband's filing on the same computer shortly before hers had met with the same fate as hers, and that in previous years (and indeed in subsequent ones) they had successfully filed online in time, we find on the balance of probabilities that Mrs (and indeed Mr) Hauser did submit their returns online but that a fault in the chain of online transmission resulted in the electronic data not reaching HMRC's computer.

10. We also consider that it is more likely than not that Miss Haderland said to the appellant on the phone that there could have been a glitch in the system which prevented capture of the data in the returns, although this phrase was not recorded in the SA Notes or Action History supplied to us.

11. We further find that the appellant had not received an email confirmation of a successful submission, but this was because, as Mr Bradley had informed us, that would only have happened if the appellant had signed up to receive such emails. We find from her evidence and that of her husband that she had not so signed up.

12. Finally we find that the appellant, as she maintained, had not received the letter from HMRC of 18 March 2014. We think that had she done so she would have taken at least one of the options suggested in the letter. We have, as we have already said, more to say about that letter.

Submissions

13. Mr Bradley for HMRC submitted that the evidence showed that the return had not been received by HMRC and so had not been delivered until 27 October 2014. He had personally checked whether any worklists gave any indication that the return has been received but not captured or that any other problem had arisen and there were no such reports. He further said that the system was such that the determination could not have been made had a return been captured, and further the October submission could not have been successful had a return already been captured. He pointed to a screenshot showing that the date the return was received was 27 October 2014. This entry could not be altered.

14. In relation to reasonable excuse he suggested that the appellant should have been aware that no notice of successful submission had been received. She should

also have been made aware that something had gone wrong when she received a penalty notice, and from all the later correspondence and phone calls. He also noted that there was no online activity on her account between 31 January and 27 October and that a reasonable person would have checked their online account to see what it said about the filing.

15. He had himself considered whether there were any circumstances that would justify a special reduction under paragraph 16 of Schedule 55 and did not consider that there were any.

16. The appellant maintained that she had submitted the return, citing the printout she had made at stage 7. She argued that she was told that the return had not been captured because of "a glitch in the system".

17. She also said that she did not check the online status of her filing because she had no reason to doubt that she had done it correctly. Once she was told by DMB that she should resubmit returns online she did so. All the tax had been paid at the right time.

Discussion

18. We have found that the return that the appellant says she submitted in 31 January 2014 was not received by HMRC so as to be recorded on their computer system. We have also found that the appellant did submit her return by clicking on the appropriate button at stage 8 of the online filing process. In the days of paper returns and manual logging of those returns we would have been considering s 115 TMA and s 7 Interpretation Act 1978, and making a finding as to whether the return had been posted so as to give rise to a presumption of good service and therefore delivery. That legislation is not relevant where returns are filed online.

19. Instead the relevant law is in the Income and Corporation Tax (Electronic Communications) Regulations 2003 (SI 2003/282). Regulation 2(1)(a) of those regulations confirms that the filing of a return under s 8 TMA is one of the matters in relation to which electronic communication may be used. Part 3 of the Regulations deals with "Evidential provisions" of which the only relevant ones here are regulation 8 (which applies in this case to treat Mr Hauser's physical act of clicking on the button on screen to submit the return as the appellant's on the assumptions that it was him who did that act and that she authorised him to do so) and regulation 9 which is headed "Proof of delivery of information and payments". Regulation 9(2)(a) provides:

> "9.—(1) …
>
> (2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the making of a payment, or the delivery of information—
>
> (a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has not been recorded on an official computer system; and

> (b) Regulation 2 defines "an official computer system" in terms that clearly include HMRC's Self-assessment system.

20. As there is no record on the HMRC computer system of the filing on 31 January 2014, then there is presumed to be no delivery of the return "unless the contrary is proved". We are not quite sure what the "contrary" is here: if it is to prove that the return was in fact delivered electronically in the sense that the relevant electric data did reach the HMRC system but were not recorded, it is difficult to see how anyone could do that. Equally if the burden is on the appellant to prove that the delivery has in fact been recorded on the HMRC computer system despite HMRC's denials, it is equally difficult to see how that can be proved by anyone without access to the system.

21. We have searched for any cases where this regulation or equivalents in the many regulations made in relation to electric communications in a variety of areas was in issue. The only one we have found is another case in this Tribunal, *The Mothers Union v HMRC* [2014] UKFTT 275 (TC) (Judge Cornwell-Kelly and Ms Newns). There the question was of the appellant denying that HMRC had delivered a notice of coding electronically, so what was in doubt was whether the appellant there had received the information on their own computer system, not HMRC's. "[S]uch evidence as there was" before the Tribunal suggested that the coding notice was received in the appellant's computer system but was not retrieved or was not retrievable, and in the absence of any further evidence from the appellant, which was not present or represented, the Tribunal decided that "the contrary" was not proved by the appellant.

22. In this case we also do not consider that the appellant has proved to the contrary, i.e. that the return was recorded on the HMRC computer system, and so we hold that she did fail to deliver her return before the penalty date. As a result paragraph 1 Schedule 55 is engaged and the assessment under paragraph 3 of that Schedule was correctly made. Since the return was not recorded on the HMRC computer system until 27 October 2014, it follows that both the paragraph 4 penalties and the paragraph 5 penalties fell to be imposed. As to the paragraph 4 penalty this is, as we have noted, subject to the outcome of *Donaldson*. As to the paragraph 5 penalty we have some slight doubts about whether the original penalty was charged in an amount which was to the best of HMRC's information and belief, but the re-assessed penalty is clearly in accordance with the requirements of that paragraph, taken with paragraph 24(2) and (3).

23. We have carefully considered whether despite this holding the appellant has a reasonable excuse for her failure to deliver the return on time. We find the matter finely balanced: we found that she did submit the return and we consider she was entitled to believe that that was enough. Since a reasonable excuse must be considered as at the time of the alleged failure, this is enough in our view to give her that excuse. But having a reasonable excuse at the time of the failure is not in itself enough. If the excuse ceases at any time subsequently, the failure must be rectified "without unreasonable delay". This is the aspect on which we have doubts.

24. This is because we are somewhat surprised that the penalty assessments and warning letters and even the determination did not trigger any reaction from her or any thought that she should check her online account.

25. But we accept that when she was informed by HMRC that a possible glitch in the system had led to her return not being captured, she did resubmit the return (as she was told) within a reasonable time from being so told. Had she received the letter of 18 March 2014 from HMRC we would have been much more inclined to find against her on "unreasonable delay" grounds.

26. On balance we hold that the appellant did have a reasonable excuse for her failure to file on time and that she remedied the failure without unreasonable delay.

27. Given this finding we do not have to consider whether a special reduction was due. Had we had to, we would have been inclined to say that we cannot impeach Mr Bradley's consideration of the matter.

28. This conclusion also means that we do not have to consider whether to redirect that the appeal against the paragraph 4 penalty should be stayed behind *Donaldson*.

Decision

29. In accordance with paragraph 22(1) Schedule A 2009, HMRC's decision to assess the penalty is cancelled, and so the appeals are accordingly upheld.

Observations

30. These observations are not part of our decision. They concern the letter from HMRC to the appellant of 18 March 2014. Both members of this Tribunal have seen similar letters from HMRC in cases that have come before us, and Ms Shillaker has seen many more in a professional capacity. We have both winced (inwardly we hope) when reading them.

31. We are fully aware that the ability of officers of HMRC to tailor the letters is limited and that they are based on templates and standard paragraphs. We are aware that the officers compiling them are relatively junior and cannot be expected to be expert in the provisions of eg TMA 1970. If what follows seems to be akin to shooting fish in a barrel this is not a reflection on the officer who wrote this letter (who we will not name) or the officers who have written the others we have seen. If there is a problem (and it will be seen that we think there undoubtedly is) then it is the fault of more senior levels of management within HMRC, or indeed the lack of appropriate management and supervision.

32. The letter is a response to the appellant's letter of 5 March. This said:

> "I am in receipt of a Notice of Penalty assessment. I submitted my tax return on line on Friday 31st January 2014 at 18:16, so did not miss the deadline. … I am therefore at a loss as to why you have issued the penalty assessment and I look forward to hearing from you."

33. The first bulleted paragraph of HMRC's letter says "I have considered your appeal against the late filing penalty …". The appellant did not in terms appeal, but sought information. It was we consider reasonable of HMRC to treat the letter as an appeal and this treatment is we note in accordance with the guidance in HMRC's Appeals, Reviews and Tribunals Guidance ("ARTG"). What is not reasonable is to purport to decide whether the appellant had a reasonable excuse for her failure when it is clear that she was arguing that there was no failure and was not presenting any kind of reasonable excuse, as to do so would have necessarily involved her in admitting her failure. We add here that at no time in her presentation did the appellant put forward an excuse: it was the Tribunal who suggested to her that it would be sensible for her to do so against the possibility that she failed on her main point.

34. It then goes on to say that "if you had successfully submitted your tax return online we would have sent you an email confirming we had received it." Mr Bradley told us that this was true only if a taxpayer had specifically signed up for this and the appellant said she had not.

35. The next paragraph is truly alarming. It says "I have treated your appeal as settled under S54(1) Taxes Management Act 1970." Section 54(1) says:

> "… where a person gives notice of appeal and, before the appeal is determined by the tribunal, *[HMRC] and the appellant come to an agreement*, whether in writing or otherwise, that the assessment … under appeal should be treated as upheld without variation … the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment … without variation …". [Our emphasis and substitution]

How HMRC can think that a s 54(1) agreement can be imposed on an appellant unilaterally is beyond us. The only circumstance in which a s 54(1) agreement is deemed to happen without agreement is in s 49C TMA where, if 30 days pass from the date of an offer to review without acceptance of the offer, HMRC's view is treated as if it were contained in an agreement in writing under s 54(1) TMA. Clearly this is not the case here as no review was *offered* in the letter and, even if it had been, the 30 days in s 49B would clearly not have passed. This smacks of sharp practice.

36. The next paragraph of the letter tells the appellant "what you need to do by 18 April 2014" (ie 30 days from the date of the letter) if "you think my view is wrong, and you still think you have a good reason" [sc for the failure to file on time]. Since the only view put forward was that there was no reasonable excuse then if the appellant thinks it is wrong it must be because they think they have a good reason, so the second clause is redundant. The options given are:

- Supply further information for consideration
- Ask HMRC to carry out an independent review
- Continue your appeal by sending it to the Tribunal.

37. Why is there a deadline at all? The only 30 day deadline imposed on an appellant in relevant legislation is in s 49C(4) and (8) TMA. But this only applies where HMRC offers a review, not where the appellant asks for one, for which there is no time limit (as is apparent from the fact that in this case HMRC carried out a review at the appellant's request in June 2015, over a year after the appeal).

38. This error is compounded by a later paragraph saying that "if you do not request a review … by 18 April 2014, your appeal will be treated as settled on the basis that you do not have a reasonable excuse and you will have to pay the penalty". There is nothing in s 49B TMA (appellant requests a review) to justify this statement.

39. Clearly there is no deadline that can be legally imposed on an appellant for the giving of further information, and in a situation where a review has not been offered there is no deadline for notifying the appeal to the Tribunal.

40. The letter goes on to tell the appellant what she needs to do if she decides to "ask for" (not accept HMRC's offer of) a review. She is told that she needs to "explain the reasons why you disagree with HMRC's decision" as well as being asked to provide any further information she wants considered. The latter point is quite correct and reflects s 49E(4) TMA. The former is pointless. The officer writing the letter has just been told, and is reacting to, the appellant's reasons for disagreement with HMRC's decision to assess the penalty. The papers will go to the reviewing officer if she does ask for a review (or the reviewing officer will obtain them), and the reasons for disagreement will not change in the very short time between the writing the letter of appeal and the review.

41. It does however occur to us that HMRC may think by saying "you can ask HMRC to carry out an independent review" that this amounts to an offer by HMRC within s 49C TMA. This would explain for example the deadline that HMRC say exists for notifying the Tribunal (if an appellant does not accept a s 49C offer they may notify the Tribunal, but they only have the same 30 days from the date of the letter making the offer to do so, unless the Tribunal gives permission for the notification (see s 49H TMA)). But s 49C uses the language of contracts, offer and acceptance. A request by the appellant for a review in response to this letter is not an acceptance of an offer – it is a unilateral request which HMRC are obliged to react to, and that is what s 49B covers. In contractual language what HMRC seem to be doing in this letter is making an offer to treat.

42. But there is another reason why the second option cannot be an offer to review within s 49C TMA. If it is, but the appellant takes the first option, that is to give HMRC further information, the s 49C clock has nevertheless started to tick because the offer has already been made. The clock only stops ticking before the passage of 30 days from the date of the letter if the offer is accepted or the Tribunal is notified of the appeal (s 49C(3) and (4)), ie the second and third options. And if the clock is not so stopped, the inevitable outcome of the passage of the 30 days of ticking is that there is deemed to be a s 54 agreement reflecting HMRC's view as set out in the letter of offer (s 49C(4) TMA).

43. The first option can therefore achieve nothing: even if HMRC accepted that any further information supplied under the first option justified a change of view by HMRC, they could not implement it because the clock would almost certainly have stopped and there would be a binding deemed s 54 agreement in place that HMRC's initial view was correct. If however the second option is a reference to s 49B TMA then the first option makes sense. No clocks are started ticking by putting forward further information without a review or a notification to the tribunal and if the further information does not satisfy HMRC then a review may still be sought or the appeal notified without any deemed agreement about the issue.

44. Then, after all the information about the appellant's options and about reviews and appeals, the letter returns to the actual subject of the appeal, the insistence that the appellant did in fact file in time. This part of the letter repeats the suggestion about an email confirming receipt. This ends our observations on the letter.

45. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 22 DECEMBER 2015

APPENDIX

RELEVANT LEGISLATION

TAXES MANAGEMENT ACT 1970

Section 8

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1D) A return under this section for a year of assessment (Year 1) must be delivered—

(a) …

(b) in the case of an electronic return, on or before 31st January in Year 2.

FINANCE ACT 2009

Schedule 55

1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document falling within any of items 1 to 3 and 5 to 13 in the Table, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970
…	…	…

Amount of penalty: occasional returns and annual returns

2 Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 3, 5 and 7 to 13 in the Table.

3 P is liable to a penalty under this paragraph of £100.

4—(1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5—(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

Special reduction

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Assessment

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) Sub-paragraph (6) applies if—

(a) an assessment in respect of a penalty is based on a liability to tax that would have been shown in a return, and

(b) that liability is found by HMRC to be excessive.

(6) HMRC may by notice to P amend the assessment so that it is based upon the correct amount.

(7) An amendment under sub-paragraph (6)—

(a) does not affect when the penalty must be paid;

(b) may be made after the last day on which the assessment in question could have been made under paragraph 19.

Appeal

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

Reasonable excuse

23—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Determination of penalty geared to tax liability where no return made

24—(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and

(b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).

The Income and Corporation Taxes (Electronic Communications) Regulations 2003

PART 1

Introduction

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Income and Corporation Taxes (Electronic Communications) Regulations 2003 and shall come into force on 5th March 2003.

(2) In these Regulations—

…

"official computer system" means a computer system maintained by or on behalf of the Board—

(a) to send or receive information or payments, or

(b) to process or store information;

…

(3) References in these Regulations to information and to the delivery of information shall be construed in accordance with section 132(8) of the Finance Act 1999.

Scope of these Regulations

2.—(1) These Regulations apply to—

(a) the delivery of information, to or by the Board, the delivery of which is authorised or required by or under—

(i) any provision of section 8 … of the Management Act,

…

PART 3

Electronic Communications— Evidential Provisions

Information delivered electronically on another's behalf

8. Any information delivered by an approved method of electronic communications on behalf of any person shall be deemed to have been delivered by him unless he proves that it was delivered without his knowledge or connivance.

Proof of delivery of information and payments

9.—(1) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, to have resulted in the making of a payment or the delivery of information—

(a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has been recorded on an official computer system; and

(b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has been recorded on an official computer system.

(2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the making of a payment, or the delivery of information—

(a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has not been recorded on an official computer system; and

(b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has not been recorded on an official computer system.

(3) The time of receipt of any information or payment sent by an authorised means of electronic communications shall be presumed, unless the contrary is proved, to be that recorded on an official computer system.