THE ROBERT MORGAN CASE – GROUNDS FOR APPEALING DAILY PENALTIES?

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A recent First-tier Tribunal decision has produced grounds for appealing daily penalties for late filing of Self Assessment Tax Returns. Whilst First-tier Tribunal decisions are only persuasive, it appears that the basis of the decision will allow many taxpayers to appeal against the application of daily penalties.

Robert Morgan v HMRC [2013] UKFTT 317 (TC)

The appeal against daily penalties was successful on the basis that HMRC failed to issue a notice in accordance with the relevant legislation.

FA 2009, Sch 55, para 4

As HMRC's procedures for daily penalties are standardised, the case will be relevant to other taxpayers who have received daily penalties. If your client has penalties which have not been appealed, see the end of this news item for a discussion of late appeals.

This news item first sets out the key parts of the legislation on daily penalties and what the case decided, before examining appealing penalties in more detail.

The legislation on daily penalties

A daily filing penalty can be charged under FA 2009, Sch 55, para 4 if the person's failure "continues after the end of the period of 3 months beginning with the penalty date", HMRC decides that a penalty is payable and HMRC gives notice to the taxpayer.

The legislation is quite complicated and it is useful to break the requirements down into four steps.

Step one: the penalty date

The penalty date is "the day after the filing date".

FA 2009, Sch 55, para 4

The filing date for a paper return is 31 October, so the penalty date is 1 November. The filing date for an online return is 31 January, so the penalty date is 1 February.

Step two: the earliest date from which a penalty is payable

According to FA 2009, Sch 55, para 4(3), the penalty "cannot be earlier than the end of the period mention in sub-paragraph (1)(a)" and that is "the period of 3 months beginning with the penalty date."

So, for a paper return, the earliest date from which a daily penalty can be payable is 1 February and for an online return it is 1 May.

This can be seen in the table below, which shows the dates in relation to the 2010/11 Tax Return.

	Online return	**Paper return**
Filing deadline	31 January 2012	31 October 2011
	Fixed penalty of £100	
3 months late	1 May 2012	1 February 2012
	£10 penalty for each day return outstanding, up to a maximum of £900	
6 months late	1 August 2012	1 May 2012
	£300 penalty or 5% of the tax due, whichever is higher	
12 months late	1 February 2013	1 November 2012
	£300 penalty or 5% of the tax due, whichever is higher	

Step three: notice to the taxpayer

HMRC also has to give 'notice' to the taxpayer specifying the date from which the penalty is payable. The decision in *Morgan* was decided on the basis that no valid notice has been given.

FA 2009, Sch 55, para 4(3)(b) says that HMRC can give notice that the penalties begin before the date on the notice, providing that date is not before the earliest date (step two above). In other words, the daily penalty period can start before the taxpayer is informed that this is the case.

However, in *Morgan*, the Tribunal (Judge Mosedal and Richard Thomas) decided that, although backdating the start date for daily penalties was allowed by FA 2009, Sch 55, para 4(3)(a), this was a discretionary power which was to be used only in exceptional cases such as when HMRC did not know until after it had received a Return whether it was late or not (such as is the case with inheritance tax).

Step four: HMRC must 'decide' that the penalties are payable

HMRC must decide the penalties are payable under FA 2009, Sch 55, para 4(1)(b). Judge Mosedale and Richard Thomas disagreed on what this meant, which is discussed below.

Facts of the case

Two taxpayers, Robert Morgan and Keith Donaldson, appealed late filing penalties for their 2010/11 Self Assessment Tax Returns. Mr Morgan appealed against a fixed £100 late filing penalty and daily penalties totalling £870. Mr Donaldson appealed against a fixed £100 penalty, daily penalties totalling £900 and a £300 penalty for filing more than six months late.

Both taxpayers filed paper Returns rather than submitting electronic Returns. As such, they were automatically given higher penalties as the filing deadline for paper Returns is three months earlier. Consequently, penalties are incurred at earlier dates:

Both taxpayers appealed against the fixed penalty and daily penalties on the basis that they had a reasonable excuse. Mr Donaldson also appealed against the six month penalty on the same basis.

Mr Morgan's excuse was that if he had been told by HMRC that he could have avoided daily penalties by submitting an online Return, he would have done so. He submitted his paper Return on 27 April 2012.

Mr Donaldson's excuse was that on receipt of the fixed £100 penalty in February 2012 (on account of failing to file and electronic Return), he contacted his accountant who subsequently failed to call him back. Mr Donaldson then filed his Return by post on 1 May 2012.

Decision of the Tribunal

The Tribunal partly upheld the appeals of the taxpayers, finding that the daily penalties were not payable because HMRC had failed to issue the notice as required by statute. The fixed £100 penalties and Mr Donaldson's six month penalty were correctly due.

In Mr Morgan's case, the Tribunal found that, even if it were wrong on the 'notice' point, HMRC had provided “less than complete information” about how the penalty regime operated. This constituted 'special circumstances' which meant that the daily penalties could be reduced to nil.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 123–145

The Tribunal found that there were no such special circumstances or reasonable excuse in the case of Mr Donaldson, who was given different advice by HMRC.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 161–169

Was a notice issued correctly?

The key question considered by the Tribunal was whether HMRC had given notice to the taxpayer specifying the date from which penalties were due in accordance with FA 2009, Sch 55, para 4(1)(c).

HMRC contended that this notice was contained in two separate notifications:

- the Self Assessment — Tax Return and payment reminder, and
- form SA326D — notice of the £100 fixed penalty for late filing

The Tribunal considered two questions:

a) does either document constitute a notice, and
b) does either specify the date payable?

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at para 56

At paras 69 to 72, the Tribunal considered whether form SA326D was a notice, which was HMRC's primary case. Form SA326D contains the following statement [emphasis added]:

*"If your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding. Daily penalties **can** be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns."*

The Tribunal concluded that these sentences, either separately or combined, did not constitute a notice. The second sentence does not state that daily penalties will be applied from the dates in question, just that they **may** be applied. The Tribunal concluded that this was a 'warning' rather than a 'notice'.

The Tribunal also expressed a view that HMRC did not draw attention to the daily penalties and relegated the 'notice', or what HMRC considered to be a 'notice', to the small print.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 69–72

The Self Assessment reminder was also not considered to be a notice for the same reasons.

Finally, the Tribunal noted that a notice under FA 2009, Sch 55, para 4(1)(c) need only be given once. The fact that two documents were cited illustrated that these were meant as warnings rather than the notice.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 73–75

The Tribunal also said that, under a purposive interpretation of the legislation, the object of small daily penalties was to encourage compliance by informing the taxpayer in advance of the date that penalties would apply from.

The Tribunal considered that Parliament intended for the power to backdate notices given in FA 2009, Sch 55, para 4(3)(a) to be used in limited circumstances. The broad intention is that taxpayers should be notified of the date that daily penalties are due in advance of them accruing in order to "incentivise compliance".

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 57–62

Did HMRC exercise its discretion unlawfully?

If this interpretation was correct, HMRC had arguably exercised its discretion unlawfully. However, the Tribunal did not decide this point, as it upheld the appeal with regards to daily penalties on other grounds.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 79–84

If the Upper Tribunal or a higher court were to decide that HMRC had issued a notice, then the question of whether HMRC had acted lawfully would arise. It is likely that any appeal by HMRC will need to address this issue. In the meantime, it gives recipients of daily penalties further grounds for appeal.

Did HMRC 'decide' that a penalty was payable?

Another important question considered by the Tribunal was whether HMRC had 'decided' to issue a penalty, as required by FA 2009, Sch 55, para 4(1)(a).

Judge Mosedale, who had the casting vote, accepted that a decision of an individual HMRC Officer was not required. Although the decision to charge a penalty must normally be taken by an authorised Officer according to TMA 1970, s 100, this section is specifically disapplied with regard to daily penalties by TMA 1970, s 103ZA.

She accepted HMRC's position that the decision mentioned in FA 2009, Sch 55, para 4(1)(b) was 'made' by HMRC at a policy level. This decision was that all taxpayers more than three months late in filing their self assessment returns should automatically be charged daily penalties.

Robert Morgan v HMRC [2013] UKFTT 317 (TC) at paras 23–50

However, the judgement was not unanimous. One Tribunal member, Mr Richard Thomas, dissented on this question and laid out his reasoning in an appendix at paragraphs 170 to 184 of the decision. Mr Thomas essentially makes five points:

FA 2009, Sch 55, para 20 provides that a person can appeal the ***decision*** as opposed to an assessment, and this looseness of language undermined HMRC's argument

- the wording of the legislation, in contrast to other provisions in FA 2009, Sch 55, suggests a purpose beyond a blanket application of daily penalties
- the policy decision was made in June 2010 when FA 2009, Sch 55 did not come into force until 6 April 2011
- FA 2009 Sch 55, paras 4(1)(a) and (b) use the present tense where the past tense would appear more natural if it were intended the decision could be made prior to the penalty becoming due
- the phrase "HMRC decide[s]" clearly means the decision of an individual Officer when used in other legislation. This includes the Counter-Terrorism Act 2008 and legislation for indirect taxes, such as VATA 1994, s 83G (both subscription sensitive)

In casting her deciding vote, Mrs Barbara Mosedale considered that HMRC was entitled to utilise a policy decision as a matter of expediency in this instance. However, Mrs Mosedale recognised that no submissions were made by either party on these points and qualified her decision as being in the absence of a challenge by the appellants.

The finding that a decision had been made correctly by HMRC is not a certainty at an appeal at the Upper Tier Tribunal.

Is HMRC appealing?

HMRC is not appealing the decision in the case of Mr Morgan. This is because special circumstances would have applied to Mr Morgan's case even if a notice had been properly issued. Daily penalties would be nil in any case.

In other words, they are not challenging the Tribunal's decision that HMRC's failure to provide full and proper advice to Mr Morgan when he contacted them, did constitute special circumstances.

HMRC will appeal the decision in the case of Mr Donaldson. The Upper Tier decision will therefore become a precedent which will apply to other taxpayers's appeals on similar facts. Of course, the losing party can ask for permission to appeal the Upper Tribunal decision.

What do you need to do?

The First-tier Tribunal decision may prove widely applicable to individuals who have received daily penalties, whether the taxpayer has submitted a paper or electronic Return.

HMRC practice with regards to the issuing of daily penalties has not changed in the past two years. It is likely that many of the relevant facts outlined in this case will be the same as those for other individuals who have received daily penalties. Since the case was determined on the basis that there was no 'notice', if this is upheld then daily penalties issue will be unenforceable.

In addition, it may also be the case that a valid 'decision' has not been made by HMRC. That is, Mr Thomas' dissenting opinion is upheld by the Upper Tribunal.

Finally, if a notice has been correctly issued, and if the decision has been validly made by HMRC, the final argument available is that HMRC has exercised its discretion to backdate notices unlawfully.

As a First-tier Tribunal decision is not binding, it is therefore a sensible approach to appeal any daily penalties on the grounds that:

- HMRC did not issue a notice in accordance with FA 2009, Sch 55, para 4(1)(c)
- HMRC did not decide to issue a penalty in accordance with FA 2009, Sch 55, para 4(1)(b), and
- HMRC has used its powers under FA 2009, Sch 55, para 4(3)(a) unlawfully

Who can appeal on the basis of this decision?

HMRC usually gives individuals 30 days to appeal a penalty assessment where the individual has a 'reasonable excuse' for failing to comply with legislation.

There is a 30 day time limit for appealing a penalty, but HMRC can extend this time limit if there is a 'reasonable excuse' for the delay.

TMA 1970, ss 49(2), (3)

If HMRC does not accept the late appeal, you will need to apply to the Tribunal for permission.

TMA 1970, s 49(2)(b)

The Tribunal will take into account all the circumstances of the case. For a helpful summary of the case law, see the Upper Tribunal decision in *Data Select Ltd v RCC* [2012] UKUT 187 (subscription sensitive).

It is therefore possible to appeal on behalf of any individuals who have received daily penalties for Self Assessment Tax Returns relating to 2010/11 and 2011/12, including those who have already paid HMRC the requested amount of penalties.

See the Standard document — letter appealing daily penalties on the basis of the Robert Morgan case for a suitable letter for appealing against daily penalties relating to Self Assessment Returns for 2010/11 and 2011/12.

Daily penalties under FA 2009, Sch 55 apply to other returns and taxes. It is possible that HMRC has not administered daily penalties in accordance with the legislation in other situations including:

- partnership tax returns
- trust tax returns
- corporation tax returns
- construction industry scheme deductions
- stamp duty land tax returns, and
- accounts for inheritance tax purposes

FA 2009, Sch 55, para 1

Where daily penalties have been issued in any of these cases, you should analyse the relevant facts in that instance to ensure that HMRC has correctly applied the legislation. The *Morgan* case provides a very useful framework for analysing whether that is the case.