Moves like *Jagger*

A First-tier Tribunal decision encourages failure to make nil tax returns.

In *S Jagger v HMRC* [2018] UKFTT 0623 (TC) (reported at page 5), the First-tier Tribunal allowed an appeal against HMRC's decision to impose late-filing penalties. Paradoxically, the decision encourages taxpayers that are between six and 12 months late in making a nil tax return to fail to make the return. By failing to make a return, the £300 late-filing penalty that would be imposed if the return is made after six months is prevented from being imposed after 12 months.

Late-filing penalties for most taxes (stamp duty land tax is an exception) are imposed at the following four intervals (where the penalty date is the day after the 'filing date'; i.e. the date by which a return is required to be made):

- Failure to make a return before the filing date: £100.
- Failure continues after three months of the penalty date: £10 per day late (£900 max).
- Failure continues after six months of the penalty date: 5% of the tax due or £300 if greater.
- Failure continues after 12 months of the penalty date: 5% of the tax due or £300 if greater.

The penalties are cumulative. But where a person is liable to more than one penalty which is determined *by reference to a liability to tax*, the total of those penalties must not exceed the amount of tax due (if any). The emphasised words are important, as we shall see.

This is (so far as material) a description of the regime introduced by FA 2009 Sch 55 (penalty for failure to make returns etc.).

Mr Jagger was late in making nil income tax returns. HMRC imposed late-filing penalties for a number of tax years. Mr Jagger appealed, arguing that the six-month and 12-month penalties should not exceed the liability to tax. (It was accepted that no tax was payable.) The tribunal agreed. It held that in order to determine the six-month and 12-month penalties one must consider two amounts and establish which is the greater. The first is 5% of any liability to tax and the second is £300. In this case, the first amount was nil because the tax due was nil; hence, the second amount (£300) was greater. But that amount had been determined 'by reference to a liability to tax'. This means that the rule in Sch 55 para 17(3) was engaged, which caps the total of the six-month and 12-month penalties to 100% of the amount of tax due; ie. the total of the penalties must not exceed nil.

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Equivalent provisions exist for the Scottish and Welsh devolved taxes (see Revenue Scotland and Tax Powers Act 2014 s 159(3) and Tax Collection and Management (Wales) Act 2016 s 124(1), respectively). The result means that a taxpayer who chooses to file a nil tax return more than six months' late but not more than 12 months' late would be £300 worse off than a taxpayer who chooses not to file a nil tax return at all. It is not known whether HMRC will seek leave to appeal the decision. It is difficult to argue against HMRC's submission that this result is contrary to the intentions of the legislation, which is to penalise for further delay and non-compliance.

So far as stamp taxes are concerned, nil tax returns may be required, for example:

- where the amount or value of the consideration for an acquisition (other than the grant, assignment or surrender of a lease) is between £40,000 and the nil rate threshold;
- on the third anniversary of the grant of a lease of Scottish premises where neither the amount of rent nor the term of the lease has changed since the last review; and
- where a dwelling-owner is within the annual tax on enveloped dwellings and every day in the chargeable period is relievable. ■

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