TC04240

Appeal number: TC/2014/05073

INCOME TAX – self-assessment – penalty for late filing of return – self-assessment declaration that taxpayer "may have to pay financial penalties and face prosecution" if he gives false information – whether statutory obligation to make declaration – whether FA 2009, Sch 55 penalties are criminal under the European Convention on human rights – whether they are criminal under UK law – whether Bill of Rights 1689 prevents HMRC from issuing civil penalties – whether "substantial compliance" with the statutory provisions sufficient to prevent a penalty arising – whether belief that Bill of Rights prevented issuance of civil penalties reasonable, so as to give the taxpayer a reasonable excuse – meaning of "circumstances" in the context of "special circumstances" – whether special circumstances exist – appeal dismissed .

FIRST-TIER TRIBUNAL
TAX CHAMBER

WAYNE PENDLE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 8 January 2015 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 18 August 2014 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 17 October 2014, the Appellant's Reply dated 10 November 2014 and his further email dated 11 December 2014.

DECISION

1. This was Mr Pendle's appeal against a penalty of £100, imposed under Finance Act 2009 Schedule 55 ("Sch 55"). Although Mr Pendle sent HMRC his self-assessment ("SA") return by the due date, it did not include the signed declaration at box 22 of that return.

2. Mr Pendle's main submissions are that:

(1) there is no statutory requirement for the declaration on the SA return to be signed, and as a result, the return was complete;

(2) the declaration, which includes the statement that "I understand that I may have to pay financial penalties and face prosecution if I give false information" is "erroneous," as the Bill of Rights 1689 prevents HM Revenue & Customs ("HMRC") from levying civil penalties. It follows that

(a) his refusal to sign the return was reasonable; and

(b) HMRC have no power to levy the penalty of £100 charged on him.

3. Mr Pendle also makes a number of other submissions, including whether by sending a return which was complete except for the declaration, he should be excused a penalty because he was in "substantial compliance" with the statutory requirements.

4. I first set out the facts, and then discuss each of Mr Pendle's submissions together with any response from HMRC. I then go on to consider whether Mr Pendle has a reasonable excuse for failing to file the return by the due date, and whether there are "special circumstances," so that the penalty should be reduced or cancelled. The relevant legislation is set out in the Appendix.

5. For the reasons given in the main body of this decision, I refused Mr Pendle's appeal and confirmed the penalty.

The facts

6. The Income Tax (Earnings and Pensions) Act 2003, s 681B provides that a person is liable to pay the high income child benefit charge ("HICBC") if he or his partner has an adjusted net income greater than £50,000, provided certain other conditions are met. The HICBC took effect from 1 January 2013.

7. During the tax year 2012-13, Mr Pendle was not registered for self-assessment, but at some point after the end of that year, HMRC became aware that his adjusted net income was sufficient to trigger the HICBC. In consequence, on 6 March 2014 HMRC issued him with a 2012-13 SA return. Mr Pendle was informed that the deadline for sending back the return was 13 June 2014.

8. On 25 March 2014 HMRC received Mr Pendle's SA return, which showed an adjusted net income for 2012-13 of £50,171.

9. On 17 April 2014 HMRC sent the return back to Mr Pendle because the declaration at Box 22 was not signed. It reads:

> "I declare that the information I have given on this tax return and any supplementary pages is correct and complete to the best of my knowledge and belief. I understand that I may have to pay financial penalties and face prosecution if I give false information."

10. On 25 April 2014 Mr Pendle replied to HMRC, citing the Bill of Rights and saying that by signing the declaration he would be signing away his constitutional rights.

11. On 6 June 2014 HMRC responded, enclosing Taxes Management Act 1970 ("TMA") s 8, which set out in the Appendix to this decision, and saying that if Mr Pendle delayed sending back a signed SA return, he "may be charged statutory penalties."

12. On 17 June 2014 HMRC issued Mr Pendle with a £100 penalty under Sch 55, para 1, for failure to file his SA return by the due date of 13 June 2014.

13. On 25 June 2014 Mr Pendle sent back the return, without signing the declaration. His covering letter stated:

> "I declare that the information I have given on the attached self-assessment return is to the best of my knowledge correct and complete."

14. On the same day, he appealed the penalty. His grounds are considered in later parts of this decision.

15. On 17 July 2014, HMRC responded to Mr Pendle's letter, rejecting his arguments and saying "if you still choose not to sign the return we will continue with our recovery processes."

16. On 29 July 2014 Mr Pendle sent back the return with the declaration signed. His accompanying letter said that he had done so "wholly under duress and under the threat of extra fines." The return was registered as received by HMRC on 1 August 2014.

17. On 12 August 2014, HMRC rejected Mr Pendle's appeal against the penalty on the basis that he did not have a reasonable excuse for the late submission of his return.

18. On 18 August 2014, Mr Pendle appealed to the Tribunal.

Whether there is a statutory obligation to sign the declaration

Mr Pendle's submissions

19. Mr Pendle said that the statutory requirement at TMA s 8(2) only required that:

> "Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete."

20. The subsection does not require that a person sign a declaration that he understands he may have to pay financial penalties and face prosecution if he gives false information. Furthermore, electronic returns do not have a signature at all, but the taxpayer merely ticks a box, so a signature cannot be a statutory requirement.

HMRC's submissions

21. HMRC submit that the statute gives them the power to include the declaration in the return. TMA s 8(1) states that (emphasis added):

> "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, on or before the day mentioned in subsection (1A) below, a return containing <u>such information as may reasonably be required</u> in pursuance of the notice."

22. Furthermore TMA s 113(1) provides that "any returns under the Taxes Acts shall be in such form as the Board prescribe."

Is there a statutory obligation to make the declaration?

23. Is a declaration that a person understands that he "may have to pay financial penalties and face prosecution if [he] gives false information" a statutory obligation under TMA s 8?

24. I agree with Mr Pendle that this declaration is not for the purpose of *establishing the amounts* in which a person is chargeable to tax, nor for the purpose of *establishing the amount* of tax payable by him. Rather, its purpose is to warn the taxpayer of the consequences of giving false information. It is not a statutory requirement under TMA s 8.

25. What about TMA s 113? HMRC are right that it provides for any returns under the Taxes Acts to be "in such form as the Board prescribe." It also continues at subparagraph (3):

> "Every assessment…shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual."

26. TMA s 113 therefore provides that forms prescribed, supplied or approved by HMRC are valid and effective. But it does not allow HMRC to include whatever they like in an SA form. Its content is prescribed by TMA s 8, namely information reasonably required to establish a person's taxable income and capital gains and the calculation of his tax liability.

27. That this is right can be seen from *HMRC v Cotter* [2013] UKSC 69, where Lord Hodge, giving the judgment of the Supreme Court, said at [25] that:

> "in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA, a 'return' refers to the information in the tax return form which is submitted for 'the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax' for the relevant year of assessment and 'the amount payable by him by way of income tax for that year' (section 8(1) TMA)."

28. I therefore agree with Mr Pendle that there is no statutory obligation for a taxpayer to sign a declaration stating that he understands he "may have to pay financial penalties and face prosecution if [he] gives false information."

What about the other part of the declaration?

29. The declaration on the SA return also requires the taxpayer to declare that "the information I have given on this tax return and any supplementary pages is correct and complete to the best of my knowledge and belief."

30. TMA s 8(2) says that "every return under this section shall include" such a declaration. It is thus a statutory requirement that the declaration is "included" in the return.

31. On 25 June 2014, Mr Pendle sent back the tax return, still unsigned, but he attached to the return a separate, free-standing document containing the declaration required by TMA s 8(2). That document was despatched after the 13 June 2014 filing deadline.

32. Mr Pendle did not sign the SA return until 29 July 2014, and it was not received by HMRC until 1 August 2014. As a result, a complete return was not sent to HMRC until that date. The separate declaration did not meet the statutory requirement that it be included in his return and it was in any event late.

33. Mr Pendle therefore failed to make the declaration required by TMA s 8(2) as part of his SA return, by the filing deadline. As a result, his return was late.

What about online filing?

34. Mr Pendle says that signing the declaration cannot be a statutory requirement, because online filers do not sign anything: they simply tick the box on the online form.

35. I agree that there is no explicit statutory requirement to "sign" the declaration: TMA s 8(2), as we have seen, requires that "return under this section shall include a declaration." However, the declaration still has to be both *made* and *included in the return* – and if the return is a paper return, I cannot think of any way in which these requirements can be satisfied other than by signing the return.

36. However, with electronic returns, the position is different. TMA s 8(1H)(a) allows HMRC to "prescribe what constitutes an electronic return" and at (b) to "make

different provision for different cases or circumstances." In Tax Bulletin 2001 HMRC said that:

> "Section 8(2) Taxes Management Act (TMA) 1970 requires that every return should include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete…where the taxpayer makes a return using the Internet service for Self Assessment the return should be personally authenticated by the taxpayer using their confidential password and User ID."

37. Under the broad powers given by TMA s 8(1H), HMRC therefore provide that the ticking of the box on a return which has been personally authenticated by the taxpayer is sufficient to meet the requirements in TMA s 8(2).

38. The fact that this arrangement is made for online returns does not change the position for a taxpayer using paper filing: he is required to sign his return.

Conclusion

39. There is no statutory obligation for a taxpayer to declare that he knows that if he gives false information he may have to pay financial penalties and may face prosecution.

40. However, a taxpayer **does** have a statutory obligation to declare that the SA return is to the best of his knowledge correct and complete. That declaration must be included in the return. Mr Pendle did not sign that declaration by the due date, and the copies of the return he filed before that date were therefore incomplete. When HMRC did receive the signed return on 1 August 2014 it was late.

41. The comparison with online filing does not change this conclusion.

Mr Pendle's submissions on the Bill of Rights in outline

42. The Bill of Rights declares that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." Mr Pendle argues that this means that penalties can only be issued after a "conviction."

43. As I understand his arguments, to fall within the protection of this part of the Bill of Rights the penalty charged must be "criminal" – presumably because it has to be possible for there to be a "conviction."

44. The next step of Mr Pendle's argument is that this part of the Bill of Rights has never been explicitly repealed, and as it is a "constitutional statute" it cannot be impliedly repealed. Therefore, it must still be in force. It follows that as HMRC is not a court, it cannot "convict" someone of an offence or impose a penalty.

45. HMRC say that these arguments have "no legal basis whatsoever" but do not analyse them, other than to say that the penalties are civil and not criminal.

46. I discuss at §47 whether the Sch 55 penalties are criminal under the European Convention on Human Rights ("the Convention"), and at §53 whether they are criminal under UK law. At §61 I consider whether the Bill of Rights has the consequences for which Mr Pendle argues: namely whether it prevents HMRC from issuing civil penalties.

Whether the penalty is criminal or civil

Whether the penalty is "criminal" under the Convention

47. Mr Pendle submits that the £100 penalty is "criminal" within the meaning of Article 6(1) of the Convention. HMRC say that because of "the small amount of the penalty" it is not criminal in nature, either under human rights law or UK law.

48. In *Engel v. Netherlands (No. 1)* (1976) 1 EHRR 647, the European Court of Human Rights ("ECHR") set out three criteria, usually referred to as the "*Engel* criteria" which must be satisfied before an action is classified as "criminal" for Convention purposes. These are:

(1) the classification of the proceedings in domestic law, i.e,. whether civil or criminal;

(2) the nature of the offence; and

(3) the nature and degree of severity of the penalty that the person concerned risked incurring.

49. *Öztürk v. Germany* [1984] ECHR 8544/79 considered whether Mr Öztürk came within the protection of Article 6. Mr Öztürk had committed a breach of traffic regulations. Although he accepted that the resulting penalty was civil under German law, he objected to having to pay a fee for the use of an interpreter, saying that this was incompatible with Article 6(3) of the Convention. The German government submitted that the Convention did not apply. At [50] the ECHR first repeated the *Engel* criterial, before holding at [53] that the penalty:

> "…retained a punitive character, which is the customary distinguishing feature of criminal penalties…It is a rule that is directed…towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction – and this the Government did not contest – seeks to punish as well as to deter…Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature. The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6. There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness…"

50. In *Jussila v Finland* [2006] A/73053/01; [2009] STC 29 the ECHR considered whether ten surcharges imposed for book-keeping errors, totalling 300 euros, were criminal for the purposes of the Convention. The Court held at [31] that:

> "The second and third [*Engel*] criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh and Connors*...§86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see *Öztürk v. Germany*, 21 February 1984, §54, Series A no. 73; see also *Lutz v. Germany*, 25 August 1987, §55, Series A no. 123)."

51. The approach in *Öztürk* and *Jussila* has been followed in a significant number of other ECHR judgments, the most recent of which is *Glantz v Finland* [2014] STC 2263 (App 37394/11). The ECHR have therefore consistently held that the minor nature of a penalty does not prevent it from being "criminal" under the Convention, and that classification under national law is not decisive.

52. Mr Pendle's penalty is also "deterrent and punitive in nature" and is of general application to all those submitting SA returns. On the authority of *Öztürk* and *Jussila* I find that it is not prevented from falling within Article 6(1) merely because it is relatively small in amount. As a result, it is "criminal" within the meaning of that Article.

Whether the penalty is criminal as a matter of UK law

53. Mr Pendle submits that the penalty imposed on him under Sch 55 is also "criminal" under UK law. As we have seen, HMRC say that this is not the case, because of "the small amount of the penalty."

54. How does one know if a matter is civil or criminal? In *C&E Comrs v City of London Magistrates' Court* [2000] 4 All ER 763 at [17] Lord Bingham of Cornhill said:

> "It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

55. This passage was subsequently endorsed by the House of Lords in *R(oao McCann) v Kensington & Chelsea LBC* [2002] UKHL 39 at [20]. Lord Steyn, who gave the leading judgment, went on to say at [21] that "absent any special statutory definition, in the relevant contexts, this general understanding must be controlling."

56. Sch 55 penalties are not prosecuted as criminal offences through the criminal courts by a "formal accusation made on behalf of the state…that a defendant has committed a breach of the criminal law." Instead, they are appealed to the First-tier Tax Tribunal, see Sch 55 para 21. The penalties do not "culminate in the conviction and condemnation" of the taxpayer, but simply require the payment of a fine. As a result, the penalties are not criminal under UK law.

57. This answer is not changed by the fact that the penalties are criminal under the Convention. In *Han & Yau v HMRC* [2001] EWCA Civ 1048, Mance LJ said at [88]:

> "The classification of a case as criminal for the purposes of art 6(3) of the convention, using the tests established by the Strasbourg jurisprudence, is a classification for the purposes of the convention only. It entitles the defendant to the safeguards provided expressly or by implication by that article. It does not make the case criminal for all domestic purposes.

Conclusion

58. My understanding of Mr Pendle's argument is that, to succeed, he must first show that the penalty is criminal in nature, because the Bill of Rights refers to "conviction." As a matter of UK law the penalty imposed on him is civil matter: there is no question of there being a "conviction." As put by Mr Pendle, this means that his argument fails.

59. However, I did not fully understand why it is necessary for the penalty to be "criminal" for it to come within the protection of the Bill of Rights: this seems to me to put too much weight on the reference to a "conviction," given that the concept of civil penalties did not exist in 1689.

60. In any event, the reasonableness or otherwise of Mr Pendle's Bill of Rights argument is material to whether or not he has a reasonable excuse, which I discuss at §98 below. I have therefore gone on to consider his argument.

Whether the Bill of Rights prevents HMRC issuing penalties

What does the Bill of Rights say?

61. The Bill of Rights contains a number of declarations, set out in the Appendix to this decision. One is that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." It is on this declaration that Mr Pendle relies.

62. The first question is: what does the declaration mean? In *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 the House of Lords confirmed at [28] that:

> "The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

63. The context of the Bill of Rights is that the catholic monarch, James II, had been deposed and parliament had invited William and Mary to rule in his place. The first of the declarations made in the Bill of Rights is that "the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall." In other words, it established parliamentary sovereignty.

64. One of the particular abuses which, according to the Bill of Rights, had been committed by James II, was to make:

> "severall grants and promises made of fines and forfeitures before any conviction or judgement against the persons upon whome the same were to be levyed."

65. The Bill prohibited this, stating that "all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." In modern language, I understand the declaration to mean that no penalties can be levied without due legal process.

66. It follows that Parliament, with the legislative sovereignty vested in it by the very same Bill of Rights, can give HMRC the power to impose and collect civil penalties, providing they are appealable to an independent judiciary. This is of course the position for Sch 55 penalties.

67. In his submissions, Mr Pendle refers to his attendance at the High Court to hear Collins J give judgment in *R (De Crittenden) v National Parking Adjudication Service* [2006] EWHC 2170 (Admin) ("*De Crittenden*") and cites extracts from that judgment. Mr De Crittenden sought judicial review of a decision made by the Parking Adjudicator, despite the fact that the Adjudicator's decision had been in his favour. The purpose of the judicial review was to put forward essentially the same argument in relation to parking fines as Mr Pendle now advances in a tax context.

68. Mr De Crittenden was refused permission to apply for judicial review; the decision of Collins J was upheld by Scott Baker LJ sitting in the Court of Appeal under reference [2006] EWCA Civ 1786.

69. Mr Pendle does not agree with the decision in *De Crittenden.* He invites the tribunal to disregard it, given that Mr De Crittenden had already won his case before the Parking Adjudicator. Although he does not use the Latin phrase, he is in terms submitting that the statements of Collins J on the Bill of Rights are *obiter.*

70. I do not rely on *De Crittenden*, which is unpublished (although copies of the transcript do exist and the case was cited in *R (Herron) v Parking Adjudicator* [2009] EWHC 1702 (Admin), *per* Keith J). However, I record that Collins J understands the meaning of this part of the Bill of Rights to be as follows:

> "[8]…The Bill of Rights' reference to fines and forfeitures before conviction or judgment means that what cannot prevail is a fine or a forfeiture in respect of which there is no right of appeal, whether ultimately to a court or through a system which is set up which is equivalent to a court."

71. This concurs with my own understanding, set out at §66 above, that the Bill of Rights does not have the effect argued for by Mr Pendle. I find that his argument falls.

Can the Bill of Rights be impliedly repealed?

72. Mr Pendle also argues that the Bill of Rights cannot be impliedly repealed. That may well be the case: he cites *Thoburn v Sunderland District Council* [2002] EWHC 195 (Admin) ("*Thoburn*") *per* Laws LJ, who said at [63] that "Ordinary statutes may

be impliedly repealed. Constitutional statutes may not" and at [62] that the Bill of Rights is a constitutional statute.

73. Although Mr Pendle may be right about this point, it does not assist him, given that (a) the declaration about "fines and forfeitures" contained within the Bill of Rights has not been repealed, either expressly or impliedly; and (b) Sch 55 is consistent with the requirements of that declaration.

74. If I were to be wrong in those findings, so that the "fines and forfeitures" declaration in the Bill of Rights means that civil penalties cannot be levied, I would have found that the declaration had been amended so as to allow such penalties. In *Thoburn* Laws J went on to say at [63] that:

> "For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual - not imputed, constructive or presumed - intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible."

75. Parliament has explicitly enacted civil penalty regimes in many areas of the law, from environmental penalties to parking fines, and it is inconceivable that all these provisions are illegal. To borrow the words of Laws J, the conclusion that the Bill of Rights has been amended would be "irresistible."

76. Again, I respectfully concur with Collins J, who said at [9] of *De Crittenden:*

> "Mr De Crittenden suggested, as I understood his argument, that Parliament was not able to amend or change the Bill of Rights. It certainly is not able to do so except explicitly, but it is able to do so. Parliament is supreme and can amend any Act or any provision of our law at any time. If it passes an Act which clearly states something which could arguably be said to be contrary to a previous Act, then if it is clear and if there is no argument that can be raised against its clear meaning, it will prevail."

Conclusion

77. Sch 55 is not in conflict with the Bill of Rights, but consistent with it. There is therefore no need to consider whether part of the Bill of Rights has been impliedly repealed. But if were I to be wrong in this, the doctrine of parliamentary sovereignty, and parliament's explicit enactment of numerous civil penalty regimes, would mean that the Bill of Rights had been amended so that these penalty provisions were lawful.

78. I therefore reject Mr Pendle's argument on the Bill of Rights, for the reasons set out above. I note that, faced with essentially the same submission, Collins J said it was "a completely baseless argument" and that Mr De Crittenden's reliance on the Bill of Rights was "utterly hopeless."

Mr Pendle's other legal submissions

79. Mr Pendle had a number of other legal submissions, which I now consider.

Substantial compliance

80. Mr Pendle submits that "by completing the return with the correct data and explaining my reason for not signing the return itself renders the form substantially compliant" so that the appeal should be allowed. He relies on *R(oao Herron) v Parking Adjudicator* [2011] EWCA Civ 905 ("*Herron*").

81. The issue in *Herron* was whether proven irregularities in the signage of a controlled parking zone ("CPZ") meant that parking fines had been invalidly imposed because it "could not be said that every part of every road in the CPZ had been marked with one or more of the road markings listed in Reg 4 [of the relevant parking regulation]." Burnton LJ, giving the judgment of the Court, said at [37]:

> "the question for the Adjudicator was whether the local authority had taken steps to secure that adequate information was conveyed to the Appellants as to the parking restrictions that they had infringed. The definition in reg 4, and whether the roads in the CPZ had been signed as it envisages, are relevant to that question. Provided in substance the requirements of the [statutory] definition are satisfied, the CPZ is valid. The test for invalidity is…whether there is substantial compliance with the statutory definition."

82. The historical background to the approach taken by Burnton J was summarised by the Privy Council in *Wang v Commissioner of Inland Revenue* [1995] 1 All ER 367 at 375ff. In summary, where a public body has a statutory duty, its obligations were classified into "mandatory" and "directory." If the requirement was mandatory, a failure to comply invalidated the act; where it was directory, substantial compliance with the requirement might be enough. By way of example, the courts have held that certain procedural provisions applying to HMRC are directory, not mandatory, see *R v HMRC, ex p Clarke* [1972] 1 All ER 545, and *Hughes v Viner* [1985] 3 All ER 40.

83. However, the "substantial compliance" defence is relevant to the exercise of a statutory power or the carrying out of a statutory duty by a public body or similar. In *Herron* it was the local authority who succeeded in arguing that it was in substantial compliance with relevant regulation. It does not apply to citizens who fail to comply with regulations. In particular, I am not aware of any case where a court has held that a taxpayer who has failed to fulfil a specific statutory requirement should not be subject to a penalty, because he was in "substantial compliance" with the legislation. The nearest equivalent is perhaps the concept of reasonable excuse, discussed at §98 below.

Appeal to HMRC a breach of Article 6(1)?

84. Sch 55, para 21(1) says that appeals against the penalties charged under that Schedule are:

> "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)."

85. Mr Pendle submitted that this procedure, whereby an appeal against the penalty is made by giving notice to HMRC, is a breach of his rights under Article 6(1) of the Convention, because HMRC is not a court of law.

86. This submission is without merit. Article 6(1) entitles everyone to "a fair and public hearing." A person's human rights are not breached if he is required to give notice of appeal to HMRC, because he also has the right to appeal to the tribunal. Making the appeal to HMRC allows the parties to consider whether they can resolve the dispute without needing to involve the tribunal. This an entirely sensible and proportionate procedure, consistent with Article 6(1).

Defects in the HMRC appeal form?

87. Mr Pendle submits that there are various defects in the HMRC appeal form, such as the failure to draw to his attention (a) the presumption of innocence; (b) the availability of other means of challenging the disputed decision; (c) the consequences of inaction, and (d) "who or what entity will hear the appeal."

88. The tribunal has no jurisdiction over the content of the HMRC appeal form, and this ground of appeal falls for that reason. In any event, Mr Pendle has not suggested that any of the alleged errors have affected the nature or content of his appeal.

Fetter on right of appeal

89. HMRC's responses to Mr Pendle's appeal documents and correspondence focused on whether or not he had a reasonable excuse. Mr Pendle says that this focus, together with HMRC's "total disregard" of his other grounds of appeal, constitute "a fetter of the statutory right of appeal."

90. This is not arguable. Mr Pendle is free to put whatever grounds of appeal he chooses to HMRC and to the tribunal, and has done so.

Mr Pendle's fact-based submissions

91. Mr Pendle had several submissions based on the facts of his case.

HMRC delays

92. Mr Pendle said that HMRC delayed sending back the unsigned return: they received it on 25 March 2014 but did not despatch it back to him until 17 April 2014. He submitted that this delay "contributed significantly to such a [penalty] notice being issued."

93. This is wrong on the facts. Mr Pendle received the rejected SA return before 25 April 2014, because he replied on that day. Had he signed and sent back the return with his letter of that date, no penalty would have been charged, because the return would have been submitted within the statutory deadline of 13 June 2014.

94. Although it took HMRC from 25 March to 17 April 2014 to return the form, this lapse of time did not contribute in any way to Mr Pendle's failure to meet the deadline. That was entirely caused by his refusal to sign the SA return.

Extensions to the filing deadlines

95. In correspondence with Mr Pendle, HMRC referred to extending the normal 2012-13 filing deadline of 31 January 2014 so as to allow people who were within the High Income Child Benefit Charge ("HICBC") but had not realised this was the case, to file after the 31 January deadline without penalty. Separately, HMRC referred to extensions of time being given where a taxpayer had encountered a difficulty with online activation codes. Mr Pendle (a) asked "why was the deadline extended for some but not others"; (b) complained that no-one in HMRC has explained to him what these extended deadlines were and (c) doubted whether HMRC had the legal authority to extend the deadlines.

96. HMRC responded to these challenges by saying that they have a discretion to extend filing dates where appropriate, depending on the merits of the case. There was no basis to extend the deadline for Mr Pendle because:

(1) he was not sent the 2012-13 SA return until 6 March 2014, so his filing date was in any event after the normal due date of 31 January 2014;

(2) he filed his return on paper, so had no difficulties with the online activation code; and

(3) there was no other reason for HMRC to exercise their discretion.

97. I agree with HMRC. TMA s 1 gives HMRC a general care and management power over the tax system. The extension of deadlines for those having difficulties with the HICBC and/or with activation codes are good examples of the proper use of that discretion. Mr Pendle faced neither of those difficulties, and has put forward no other reason as to why HMRC should exercise a discretion in his favour. Even were he to have made such a submission, this Tribunal has no general jurisdiction over the exercise of HMRC's discretion.

Reasonable excuse

98. Sch 55 para 23 says that if it appears to the tribunal that there is a reasonable excuse "liability to a penalty does not arise." The term "reasonable excuse" is not defined in the legislation, but in *The Clean Car Co Ltd v C&E Commrs* [1991] VATTR 234 Judge Medd gave the following helpful guidance:

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

Whether genuine and reasonable belief

99. Mr Pendle failed to file his return by the statutory deadline because he believed HMRC had no legal power to impose a penalty. There is no doubt that his belief is

genuine. However, I have found that this belief is incorrect for the reasons already set out at §61-71.

100. I considered whether Mr Pendle's strongly held but incorrect belief provided him with a reasonable excuse. I found that it did not, because his belief, while genuine, was not reasonable.

101. In coming to this conclusion I take into account Mr Pendle's attendance at the hearing of the *De Crittenden* case. He heard Collins J say that the legal submission put by Mr De Crittenden was "a completely baseless argument" and that his reliance on the Bill of Rights was "utterly hopeless." It is also clear from Mr Pendle's submissions to the Tribunal that he remembered what Collins J had said.

102. It cannot be reasonable for a person who is fully aware of the legal position, so plainly expounded by a judge of the High Court, to rely on an argument which that judge had so comprehensively dismissed.

103. Mr Pendle has referred to the fact that Mr De Crittenden had already won his case before the Parking Adjudicator, in terms submitting that the statements of Collins J on the Bill of Rights are *obiter*, but that does not alter my conclusion. Whether the decision was binding or *obiter* does not change the fact that Collins J clearly expounded the legal position. Mr Pendle's belief that he and Mr De Crittenden are nevertheless correct lacks any reasonable basis.

Whether reasonable not to sign the return

104. At §28 I decided that there is no statutory requirement for a taxpayer to sign a declaration stating that "I understand that I may have to pay financial penalties and face prosecution if I give false information." Does this give Mr Pendle a reasonable excuse for not signing the return?

105. In my judgment, it does not. Even though this part of the declaration was not a statutory requirement, the statement is true: a person who gives false information may face penalties and prosecution. A reasonable person would not refuse to sign the declaration, simply because it contained this extra sentence.

106. Had Mr Pendle simply crossed out the part of the declaration to which he objected, signed the return and sent it back within the deadline, the issue before the tribunal would have been different. It would not have been a question of reasonable excuse, but whether the return had been validly made.

107. That is not this case. I have to decide the appeal on the basis of the facts as they are, not as they might have been. I find that, acting reasonably, a person in Mr Pendle's situation would not have refused to sign the return, despite the fact that it included this additional sentence. Mr Pendle therefore does not have a reasonable excuse.

Special circumstances

108. The penalty can be reduced or cancelled if "HMRC think it right because of special circumstances," see Sch 55, para 16.

109. In *Algarve Granite v HMRC* [2012] UKFTT 463 (TC) (Judge Brannan and Mr Howard) the tribunal decided that HMRC are required to consider, before they issue the penalty notice, whether there are special circumstances. If they fail to do so, their decision is "flawed.". *Algarve Granite* related to Sch 56 penalties but the same analysis applies equally to Sch 55 penalties.

110. However, in *Agar v HMRC* [2011] UKFTT 773 (TC) (Judge Poole and Ms Tanner), the tribunal decided that there was no requirement to consider special circumstances before issuing a penalty.

111. In *Morgan & Donaldson* [2013] UKFTT 317 (Judge Mosedale and Mr Thomas) ("*Morgan & Donaldson*") the tribunal considered these conflicting judgements. I respectfully agree with the analysis set out at [110]-[118] of that decision, which is not repeated here. That part of the judgment concludes at [119]:

> "…even where the appeal is against an unreviewed decision, it is not flawed if consideration were given to special circumstances on notification of the appeal to HMRC. On the other hand if special circumstances are not considered until the hearing, then that is too late because it is clear that Parliament intended special circumstances to be considered by HMRC before the taxpayer lodged an appeal with the Tribunal."

112. Mr Pendle did not accept HMRC's offer of a statutory review. In their Statement of Case HMRC say they have considered special circumstances but have decided that there are none. However, there is no evidence that the question was considered by HMRC before the preparation of the Statement of Case. None of the letters from HMRC to Mr Pendle mention special circumstances.

113. As a result, HMRC's decision is "flawed" and it falls to the Tribunal to consider whether the special circumstances provisions apply (Sch 55, para 16(3)(b) and (4)).

What are "special circumstances"?

114. As the tribunal in *White v HMRC* [2012] UKFTT 364 (TC) (Judge Brannan and Mr Williams) helpfully identified, the Court of Appeal in *Clarks of Hove v Bakers' Union* [1978] 1 WLR 1207 held (at page 1216) that in the context of "special circumstances, the word 'special' means "something out of the ordinary, something uncommon. In *Crabtree v Hinchcliffe* [1971] 3 All ER 967 Lord Reid said (at page 976) that "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal.'" In the same case, Viscount Dilhorne said (at page 983) that "for circumstances to be special they must be exceptional, abnormal or unusual…"

115. The Oxford English Dictionary defines "circumstances" as:

> "The logical surroundings or 'adjuncts' of an action; the time, place, manner, cause, occasion, etc., amid which it takes place."

116. From this I find that the "circumstances" are normally something external to the person doing the action in question, in contrast to something within his control. So an illness, a burglary, or (as in Mr Donaldson's case at [137] of *Morgan & Donaldson*) where incorrect information is provided to the taxpayer by HMRC – may all constitute "circumstances."

Are there "special circumstances" in this case?

117. The sentence to which Mr Pendle objected was included in every return issued to taxpayers, so it was not something "exceptional, abnormal or unusual." It is true that Mr Pendle's belief that the Bill of Rights precludes civil penalties is unusual, but it does not form part of the "circumstances," because it is within Mr Pendle's control.

118. I therefore find that are there no "special circumstances" which would allow the reduction or elimination of Mr Pendle's penalty. That is unchanged, despite HMRC's decision being "flawed" because of their failure to consider special circumstances.

Decision

119. For the reasons set out above, there is no basis to set aside the penalty charged on Mr Pendle. I dismiss the appeal and confirm the penalty of £100.

120. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 20 January 2015

APPENDIX: LEGISLATION

Bill of Rights 1689

Preamble

Whereas the lords spirituall and temporall and comons assembled at Westminister lawfully fully and freely representing all estates of the people of this realme did upon the thirteenth day of February in the yeare of our Lord one thousand six hundred eighty eight present unto their Minister then called and known by the names and stile of William and Mary Prince and Princesse of Orange being present in their proper persons a certaine declaration in writeing made by the said lords and comons in the words following viz

Whereas the late King James the Second by the assistance of diverse evill councillors judges and ministers imployed by him did endeavour to subvert and extirpate the Protestant relgion and the lawes and liberties of this kingdome

By assumeing and exerciseing a power of dispensing with and suspending of lawes and the execution of lawes without consent of Parlyament…

By levying money for and to the use of the Crowne by [pretence] of prerogative for other time and in other manner then the same was granted by Parlyament…

And excessive fines have beene imposed.

And illegall and cruell punishments inflicted.

And severall grants and promises made of fines and forfeitures before any conviction or judgement against the persons upon whome the same were to be levyed.

All which are utterly and directed contrary to the knowne lawes and statutes and freedome of this realme…

And thereupon the said lords spirituall and temporall and commons…declare

Suspending power.--That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall.

Late dispensing power.--That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath been assumed and exercised of late is illegall…

Subjects' arms.--That the subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

Freedom of election.--That election of members of Parlyament ought to be free.

Freedom of speech.--That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

Excessive bail.--That excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.

Juries.--That jurors ought to be duly impannelled and returned. . . .

Grants of forfeiture.--That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

Frequent Parliaments.--And that for redresse of all grievances and for the amending strengthening and preserving of the lawes Parlyaments ought to be held frequently.

…Now in pursuance of the premises the said lords spirituall and temporall and commons in Parlyament assembled for the ratifying confirming and establishing the said declaration and

the articles clauses matters and things therein contained by the force of a law made in due forme by authority of Parlyament doe pray that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the said declaration are the true auntient and indubitable rights and liberties of the people of this kingdome and soe shall be esteemed allowed adjudged deemed and taken to be and that all and every the particulars aforesaid shall be firmly and strictly holden and observed as they are expressed in the said declaration…

Taxes Management Act 1970

8 Personal return

(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, on or before the day mentioned in subsection (1A) below, 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.

(1AA) …

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

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

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

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered—

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners—

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(4A)-(5) …

113 Form of returns and other documents

(1) Any returns under the Taxes Acts shall be in such form as the Board prescribe, and in prescribing income tax forms under this subsection the Board shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom.

(3) Every assessment…shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual.

HUMAN RIGHTS ACT: SCHEDULE 1: THE CONVENTION

Article 6: Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

FA 2009, SCHEDULE 55: PENALTY FOR FAILURE TO MAKE RETURNS ETC

1. Penalty for failure to make returns etc

(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, 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).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which payment 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 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.

6. (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 12 months beginning with the penalty date.

(2)-(4a) …

(5) In any case not falling within sub-paragraph (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.

16. Special reduction

(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.

18. Assessment

(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…

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)…

22.

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(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 9 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….

23. Reasonable excuse

(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.