# TC04666

**Appeal number: TC/2015/00385**

***INCOME TAX – Permission to give late notice of appeal – s 49(2) TMA 1970 – penalty under para 3 Sch 55 FA 2009 - whether assessment of penalty notified – no – permission granted – effect of non-notification on validity of penalty assessment – none – whether reasonable excuse – no – whether special reduction justified – no – assessment confirmed.***

***PROCEDURE – Withdrawal of case under Rule 17 First-tier Tribunal Rules in default paper case – whether possible after consideration on paper and before final decision issued – yes – meaning of withdrawal of "case" in Rule 17 – whether Tribunal may make a decision after Rule 17 withdrawal – yes – effect of s 54 TMA agreement.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MR DARREN PATRICK** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**

**The Tribunal considered the appeal on 24 April 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 5 January 2015 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 19 February 2015. The Tribunal wrote to the Appellant's representatives on 19 January 2015 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received**

## DECISION

1. This decision deals with an application by the appellant for permission ("the application") under s 49(2)(b) Taxes Management Act 1970 ("TMA") to give to the Commissioners for Her Majesty's Revenue and Customs ("HMRC") a notice of appeal against the assessment of a penalty of £100 under paragraph 3 of Schedule 55 Finance Act 2009 ("Schedule 55"). Schedule 55 imposes penalties for failures to file returns by the due date and applies (in theory at least) to a wide variety of taxes, and in practice, as a result of a Commencement Order, to income tax returns under s 8 TMA as in this case.

2. I have given permission for the late appeal to be given and I have then gone on to consider the appeal, and have held that although the penalty assessment was not notified to the appellant this is not relevant to the validity of the assessment, and in the absence of a reasonable excuse or special circumstances, I have upheld the penalty assessment.

**The delay in issuing this decision**

3. Some explanation is required for the delay in issuing this decision, given that this is a "Default Paper" case and that I considered the papers in this case in April. Default Paper cases are those described as such in, and which have been allocated to be considered without a hearing under, Rule 23(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (In this decision from here onwards "the TC Rules" refers to SI 2009/273, and a reference to a rule with a number but no more is a reference to that numbered rule of the TC Rules). It is expected that in a Default Paper case the papers will be read and considered and that a decision will be arrived at on the day allocated, and that the decision will be written up (usually in "summary" form – see rule 35(3)(a)) and sent to the Tribunal administration centre for distribution to the parties on the day or the next day.

4. On 24 April 2015 I considered five Default Paper cases. In four of them I was able to send a decision to the Tribunal administration centre the next day. But this case took a rather convoluted turn. When I first read the papers the case seemed to be limited to an appeal against penalties charged under paragraphs 4 and 5 of Schedule 55. So far as paragraph 4 is concerned I decided (in the sense that I resolved) to direct that that appeal should be stayed because that type of penalty will be considered by the Court of Appeal following the decision of the Upper Tribunal to grant leave to appeal in *Donaldson v HMRC* [2014] UKUT 536 (TCC).

5. So far as the paragraph 5 penalty is concerned I came to the view on 24 April that the appellant did not have a reasonable excuse. However because in a penalty appeal the burden is on HMRC to show that the penalty has been correctly imposed, I also considered that HMRC had not discharged that burden because the assessment seemed to me to be invalidly made. No argument to that effect had been made by the appellant in his grounds of appeal, and, for obvious reasons, none had been made by HMRC. In those circumstances, I decided that it was appropriate to direct that the

parties could, if they wished to, make submissions on the issue, and to enable them to do that I included in the directions an extract of the decision I had prepared on this point setting out my reasoning.

6. For reasons I do not need to go into, the directions were not issued until 11 June 2015 and they gave the parties until 10 July 2015 to respond. After that date had passed I was informed by the Tribunal administration centre that the appellant had withdrawn his appeals and the papers had been put away. The letter from the appellant's representative (dated *17 October 2014* but enclosed with an email of 8 July 2015) said:

> "On behalf of our above client we now wish to withdraw from this case after further consideration"

7. I took the view that this was a withdrawal under rule 17, and I asked the Tribunal administration centre to inform the parties that my view was that a withdrawal could not be made at the stage in the proceedings which had been reached. The parties were given a further period (until 30 July 2015) to respond to the directions, if they wished to do so.

8. On 3 August HMRC's Solicitor's Office wrote to the Tribunal. In the letter it disagreed with my view that a withdrawal could not be made at that time. It said:

> "It is HMRC's long-standing view that a withdrawal under Rule 17 can be made at any time up until the appeal is settled. An appeal is only settled[1] (in respect of Direct Tax appeals) when the Tribunal issues a decision pursuant to s50 TMA."

The footnote signified in the text says:

> "[1]See HMRC Appeals, Reviews and Tribunals Guidance ARTG2740, ARTG8460."

9. ARTG 2740 is about withdrawal of appeals before the Tribunal has started to consider the case, whether on paper or at a hearing, and so is not relevant in the particular circumstances of this case. I accept that, in a case to which s 50 Taxes Management Act 1970 ("TMA") applies, once the Tribunal has "decided" an appeal under ss (6) or (7), the appeal has been determined, as is hinted at in ss (8), and therefore "settled" in HMRC's terms, and so withdrawal under rule 17 after that date is not possible.

10. If a Tribunal announces its decision at the end of an oral hearing, then that marks the decision point in terms of s 50 TMA, and so any withdrawal must be made during the hearing and before that decision is announced - rule 17(1). If after an oral hearing the Tribunal reserves its decision, then I would agree that a withdrawal in writing may still be effective until a decision disposing of all the issues has been promulgated.

11. Dealing with cases on the papers, which was not possible before 2009, requires a different analysis. Of course in the vast majority of Default Paper cases, as mentioned above, a decision is sent to the Tribunal administration centre for issue on,

or the day after, the day on which the judge considers the papers, and in such a case a written notice of withdrawal after the date of issue of the decision would be ineffective. This is made clear by the original of rule 17(1)(a) (ie before the amendments in 2013 made by rule 39 of the Tribunal Procedure (Amendment) Rules 2013 (SI 2013/477)) in relation to Default Paper cases (and I do not consider that the 2013 amendments to rule 17(1)(a) intended to alter the effect of that sub-paragraph). Obviously in such a case the appellant is unlikely to know when the judge considered the appeal until they receive the decision.

12. I have considered the points made by HMRC carefully and accept that in in the very unusual circumstances of this case, in effect a reserved decision in a Default Paper case, it is in order for any party to give notice of withdrawal in writing under rule 17 before the decision has been sent to the Tribunal administration centre for distribution to the parties.

13. But despite what HMRC say in the part of their letter quoted at §8, I do not think s 50 TMA has a great deal to do with this matter, which is primarily a question of the meaning of Rule 17. I say this particularly as s 50 does not apply in this case. What applies in late filing penalty cases is paragraph 22 Schedule 55 which says nothing about "deciding", "determining" or "settling". Paragraph 21(2)(b) disapplies s 50 TMA which is otherwise made applicable by paragraph 21(1).

14. I therefore accept that in this case the appellant was entitled to withdraw in accordance with rule 17. What its letter says though is that it is withdrawing "from this case". I interpret that as meaning that it wished to withdraw its appeals. Rule 17(1) however says that a party may withdraw "*its* case, or part of *its* case" (My emphasis) .

15. The other paragraph of HMRC's guidance which the Solicitor's Office of HMRC uses as authority for the tax consequences when an appeal is settled is ARTG 8460. Unlike ARTG 2740 that does deal with withdrawal at a point after the hearing. The relevant parts say:

> "**ARTG8460 Preparing For Tribunal: Withdrawal Of Case Before The Tribunal**
>
> Either the customer or HMRC may withdraw all or part of its case at any time before the tribunal makes its decision by
>
> • writing to the tribunal, or
>
> • saying so during the hearing.
>
> The tribunal will notify the other parties of any withdrawal.
>
> In First-tier Tribunal cases this rule is subject to the normal rules on settlement of an appeal (S54 TMA 1970 or equivalent (direct taxes) and S85 VATA 1994 (VAT) (indirect taxes)). The rule does not require a settlement to be made before the case can be withdrawn, neither does withdrawal, in itself, constitute a settlement.

> The party who withdrew their case can apply to have it reinstated by writing to the tribunal within 28 days (First-tier Tribunal) or 1 Month (Upper Tribunal) of
>
> - the date the tribunal received the notification of withdrawal, or
> - the date of the hearing at which the party said they were withdrawing their case.
>
> If a party withdraws their case, the effect will be as if the tribunal had decided against their case (or relevant part of it) and had disposed of the proceedings (or relevant part of them). ….
>
> …"

16. The first sentence of this paragraph of ARTG repeats the correct wording of rule 17 and is obviously a correct statement of the law. And as such it is reinforced by a decision of the Upper Tribunal's Administrative Appeals Chamber. In *AE v Secretary of State for Work and Pensions* [2014] UKUT 0005 (AAC) (Judge Jacobs) the Tribunal said of the equivalent to rule 17 (also rule 17) in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) ("the SEC Rules")

> "30 Rule 17 is not limited to appellants. It applies to all parties, and to judicial review proceedings as well as to appeals. That explains why it uses the word *case* rather than, say, *appeal*. The rule allows a party to withdraw a case or *part* of a case. The rules do not define either *case* or *part*. Without having received argument on the point, I do not consider that a party can withdraw from the scope of an appeal a favourable part of the decision, leaving only the unfavourable part for the tribunal to decide. That favourable part is in no sense the party's *case* that can be withdrawn. The position is that there is a decision under appeal, part of which is to the claimant's advantage and part of which is not. If the claimant's case is simply that the latter was wrong, there is nothing to withdraw in respect of the favourable part. If the case is that the former is right and the latter is wrong, it would be strange to withdraw the case that the former was right. But, even if it this were permissible and it were withdrawn, it could not alter the fact that it was part of the decision that was under appeal. The content of the decision under appeal is not part of a party's case. Rather, it is what that case is about."

17. The reference to rule 17 of the SEC rules applying to judicial review proceedings is slightly puzzling as I can find no reference to such proceedings in the SEC Rules, but the point the judge is making in referring to such proceedings is that it is not only in appeals that rule 17 of the SEC Rules can be invoked. The SEC Rules also deal with "references" and the starting of proceedings (see the definition of "party" in rule 1(3) of the SEC Rules). In the same way the TC Rules do not simply apply to appeals, but apply to applications and references to which rule 21 applies. The remarks by Judge Jacobs in my view apply equally to the TC Rules as they do to the SEC Rules.

18. ARTG 8460 goes on to say in the last sentence quoted that withdrawal of a case is tantamount to a decision of the tribunal against the withdrawing party. The important word there is "tantamount", because in practice what happens is that, on being notified of a withdrawal under rule 17, the Tribunal office will simply to put away their papers. But that does not always happen as the Tribunal still has the ability to make a decision which does actually decide the appeal, and in the recent case of *Vaultdawn Ltd & ors v HMRC* [2015] UKFTT 383 (TC) ("*Vaultdawn*"), Judge Kempster did just that (see [12]). And I see nothing which suggests that the Tribunal must automatically decide in favour of the non-withdrawing party, particularly if it is the appellant who withdraws but HMRC have the burden of proof.

19. I would like to be able to say that the analysis in §§16 to 18 was what led me to get the Tribunal administration centre to tell the appellant's representative that they could not withdraw the appeals. But it wasn't: it was my probably erroneous reading of rule 17(1). However in the light of the above analysis I consider that the appellant did not withdraw his appeals, he withdrew his case in relation to the appeals, that is to say that he had a reasonable excuse for not filing his returns in time. As *Vaultdawn* shows I could have gone on to make a decision. But in their letter of 3 August HMRC went on to say:

> " … On receipt of [the] directions HMRC considered it would be unable to comply within the time permitted and sought to settle the appeal.
>
> Justiciable issues between the appellant and the Commissioners have now been determined by agreement pursuant to s54(1) TMA 1970."

20. The first sentence quoted above surprises me because HMRC Solicitor's Office does not seem to have thought that they could have requested, with reasons, an extension of the time for compliance with the directions (which I would certainly have granted).

21. As to the second sentence I note first that by virtue of the words in rule 17(1) "Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings", s 54 will, if necessary, overrule rule 17. An agreement under s 54 TMA may be made at any time "before the appeal is determined by the Tribunal": see s 54(1) TMA. Section 54 applies to penalties charged under Schedule 55 where the tax in relation to which the penalty is imposed is income tax (as in this case): see paragraph 21 Schedule 55. In relation to the paragraph 5 penalty I consider that I had not "determined" this issue within the meaning of s 54 TMA. Nor had I of course determined the paragraph 4 penalty as I had intended to stay it. It follows that the parties were entitled to come to a s 54 agreement, and HMRC's Solicitor's Office have confirmed that the agreement covers "all matters that were under appeal by way of the Appellant's notice of appeal". Those appeals were against the paragraph 4 and 5 penalties.

22. Accordingly I am not giving any decision about either the paragraph 4 or paragraph 5 penalty.

23. I have one final observation about the HMRC letter, and that is about what it did not contain. I am surprised that HMRC did not see fit, or ask the appellant, to notify the Tribunal in these very unusual circumstances that a s 54 TMA agreement had been reached, and to set out which matters had been settled in that way. The appellant's letter gave no hint of that: it simply implied that the appellant, for his own reasons, did not wish me to give a decision on the paragraph 5 appeal even though it appeared that I was inclined to find in his favour.

24. I now turn to the matters which were not the subject of a s 54 agreement.

**The paragraph 3 penalty: background**

25. When I read the papers I saw that the Notice of Appeal stated that the amount of the penalty was £1,200. I assumed therefore that the application concerned the paragraph 4 (£900) and paragraph 5 (£300) penalties. But the notice of assessment of the paragraph 4 and 5 penalties was issued "on or around" 18 August 2014. The time limit for an appeal is set out in s 31A TMA which, by virtue of paragraph 18(3)(a) of Schedule 55, applies to the late filing of an income tax return under s 8 TMA. Section 31A(1) TMA provides that a notice of appeal must be given within 30 days of the date of issue of the assessment. Allowing for HMRC's inability to be precise about which day was the date of issue, and their practice, reflected in their Self-Assessment Manual, of giving 37 days to appeal from the date of issue of the assessment, the date by which an appeal should have been made to have been in time would seem to be certainly no earlier than 20 September 2014 and probably in practice after that date.

26. The agent's letter of 2 September 2014 refers to the HMRC letter dated 18 August 2014 and goes on to say "we *also* appeal against it" [Tribunal's emphasis]. That "letter dated 18 August" must I consider be a reference to the notice of assessment of the paragraph 4 and 5 penalties which HMRC say was issued "on or around" 18 August. That being the case, the appeal against those penalties made in a letter of 2 September was clearly in time.

27. HMRC must have thought so too, as on 22 September 2014 HMRC wrote to the agent saying that the officer had considered the appeal against the paragraph 4 and 5 penalties and rejected the agent's claim of reasonable excuse. HMRC do not consider a claim of reasonable excuse for a default if they do not accept that an appeal may be given after the statutory date for giving it.

28. So far as concerns the paragraph 4 and 5 penalties there was clearly no late notice of appeal. So why, I wondered, did the agent say on the Appeal Form to the Tribunal that there was? I consider that the agent was in fact referring to an appeal against the £100 paragraph 3 penalty, for the reasons set out in the next paragraph.

29. The appeal against the £100 paragraph 3 penalty was made on 4 August, at least four months after the date by which a notice of appeal had to be given to be in time. It was this notice of appeal which was considered in a letter from HMRC of 21 August 2014 and in which they stated that they could only accept a late appeal if there was a reasonable excuse for the lateness, and asked the agent to supply the appellant's excuse if any. They also say that if the appellant did not agree that the appeal was too

late to be considered, HM Courts and Tribunal Service would arrange for the Tribunal to consider the appeal. This it seems to me is a reference to the provisions of s 49(2)(b) TMA under which the Tribunal may give permission for an appeal to be made if HMRC do not agree to it being made.

30. The agent replied on 4 September reiterating his argument that the client received his first notification of the £100 penalty on 28 July 2014. HMRC in reply on 22 September reiterated the appellant's right to go to the Tribunal for them to "review our decision" and "to consider your appeal". They gave the appellant a deadline of 22 October 2014 to write to the Tribunal. I do not understand why HMRC set such a deadline as there is no time limit laid down in s 49 TMA. They must I consider have been confusing the situation with that in s 49H TMA which does indeed impose a 30 day deadline for notifying an appeal to the Tribunal in a case where a review of an appeal has been offered and not accepted. Where the matter is one of giving a notice of appeal late, the question of a review is irrelevant, as until notice of appeal has been effectively given and accepted as given by HMRC, or the Tribunal, there is nothing for HMRC to review.

31. In fact it was on 5 January 2015 that the agent completed the Notice of Appeal on which he stated in Section 6 ("Time for making or notifying appeal, and if outside the time limit for appeal, request for permission to make or notify appeal late") that the latest date for making or notifying the appeal was 23 October 2014. That date is only explicable on the basis that he considered that the deadline he had to meet was the deadline that HMRC had given him for notifying his application *in relation to the paragraph 3 penalty* to the Tribunal. The date the agent should have entered on Part 6 of the Notice of Appeal Form relating to late appeals is 19 March 2014, 30 days from the date of the issue of the paragraph 3 penalty. The agent also put a cross in the box in section 6 marked "Yes" after "If appeal is made or notified late, I request permission to appeal, or to notify the appeal, outside the relevant time limit. (Please mark X)".

32. Since both HMRC and the agent were clearly considering a late given notice of appeal in the context of the paragraph 3 penalty, I consider that I have jurisdiction to consider an application under s 49(2)(b) TMA for notice of a late appeal against the paragraph 3 penalty to be given to HMRC. My only slight concern about doing so is that HMRC have not put anything in their Statement of Case about the permission application. They cannot however have been under any misapprehension that there was to be such a hearing, and did not raise any points with the Tribunal when asked if they had any objection to permission. In any event it is clear from the papers that HMRC's view on the matter is that the appellant did not have a reasonable excuse for the lateness and I take this into account.

33. It is the normal practice of the Tribunal when dealing with applications for permission under s 49 TMA to move straight on to the appeal if it does in fact give permission. This practice is only not followed if HMRC object, and in this case they have raised no objection.

34. To deal with the permission to give a late notice of appeal to HMRC against the paragraph 3 penalty and then to consider the appeal if I give permission it is necessary to set out the facts as they relate to all the penalties as they are inextricably intertwined. Having done so I then consider only the paragraph 3 penalty by reference to the submissions made.

**The facts**

35. From the documents supplied to me I set out the relevant facts. Unless I have indicated otherwise the facts are not in dispute, and I find them as facts.

(1) A notice to file a tax return for the tax year 2012-13 was issued to the appellant on 6 April 2013.

(2) The appellant had not delivered a return for that tax year by the end of 31 January 2014.

(3) "On or around" (in their words) 18 February 2014 HMRC issued a notice of assessment of a penalty of £100 under paragraph 3 of Schedule 55. The notice was dated 18 February. The appellant denies receiving this notice of assessment, and I come to a finding about this issue later.

(4) In March 2014 HMRC issued a "Self Assessment Statement" to the appellant showing he owed £100 (the late filing penalty for 2012-13) and that it was payable by 27 March 2014. The appellant also denies receiving this statement.

(5) On 3 June 2014 and 1 July 2014 HMRC issued respectively a 30 day and a 60 day "daily penalties reminder letter". The appellant also denies receiving these letters.

(6) On 28 July 2014 HMRC's Debt Management and Banking unit issued a "warning letter". It is not disputed that the appellant received this letter, because on 4 August 2014 the appellant's agent, Adkins & Morris (Rugby) Ltd ("the agent"), referred to it in making an appeal against the £100 penalty on the appellant's behalf. The grounds for appeal were that the warning letter was the first document that the appellant had received regarding this matter and that the appellant was under the mistaken belief that his previous accountant had submitted the return. The agent undertook to submit the return as soon as they had the necessary information.

(7) "On or around" 18 August 2014 HMRC issued a notice of assessment of a penalty of £900 (£10 a day for 90 days) under paragraph 4 of Schedule 55.

(8) Also "on or around" 18 August 2014 HMRC issued a notice of assessment of a penalty of £300 under paragraph 5 of Schedule 55. It is not clear from the papers whether there were two notices of assessment, one for each penalty, or one combining the two penalties.

(9) On 21 August 2014 HMRC wrote to the agent "rejecting" the appeal against the £100 penalty as it was late. The agent replied on 2 September 2014 and in that reply he appealed against the assessment letter of 18 August, i.e. the assessment of the two penalties under paragraphs 4 and 5 Schedule 55.

(10) On 22 September 2014 HMRC said that the appeal against the paragraph 3 penalty (£100) could still not be accepted as it was late, but that if the agent could not agree that it was made late, they could ask the Tribunal to consider the appeal, and that the request for the Tribunal to act should be made to the Tribunal by 22 October 2014.

(11) The agent maintains that in a letter of 17 October 2014 he requested a review of HMRC's decision. HMRC deny receiving the letter and so as of the date of this decision no review had been carried out. I make no finding in relation to this matter as it is not relevant to the appeals.

(12) On 27 October 2014 the appellant delivered a tax return for 2012-13.

36. Because it is of importance in relation to the question mentioned at §35(3), I also set out here certain entries from the "SA Notes" for the appellant (which is also not in dispute as a record of what HMRC recorded on their computer about the appellant and when):

> "1 01/07/2014 60 day daily pens reminder letter issued 01/07/2014 for 12/13
>
> 2 03/06/2014 30 day daily pens reminder letter issued 03/06/2014 for 12/13
>
> 3 03/07/2012 Base Address changed from THE WHARF INN, NN7 3QB
>
> 4 20/01/2009 Base Address changed from THE WHARF INN, NN6 6JQ"

To this I add that on a "Self Assessment Statement" dated March 2014 in the papers Mr Patrick's address is shown as "The Wharf Inn, The Wharf, Bugbrooke, Northants, NN7 3QB."

**Submissions**

37. The grounds of appeal as stated in the notification to the Tribunal are:

> "The first document received from HMRC was dated 28 July 2014. HMRC state this document had been sent earlier but have not proved what address was on those documents and are suggesting that the Royal Mail deliver every letter and always return undelivered mail. No correspondence was received before July 2014 regarding the 2014 tax return."

This ground of appeal was also put forward to justify the lateness of the appeal. The appellant's submission is that "all penalties should be dismissed." I note that in their letter of 29 July 2014 (see §35(6)) the agents state as an alternative ground of appeal that the appellant was under the misapprehension that previous agents had filed the return. This point is not apparently pursued and I take no account of it.

38. HMRC's submission is that the penalties were charged in accordance with the legislation and there is no reasonable excuse for the default (the late filing of the return). They further say that there are no special circumstances such as would justify a special reduction, and they asked for the penalties of £900 under paragraph 4 and £300 under paragraph 5 to be confirmed. These submissions clearly relate to the paragraph 4 and 5 penalties.

39. But they also add in the statement of case:

> "Correspondence has been sent to the address as shown in HMRC's records at the time; under Taxes Management Act (TMA), part XI, Section 115, it is deemed to have been served on Mr Patrick. Undelivered correspondence is recorded by HMRC and there are no records held to show any mail was returned undelivered. Therefore the correspondence is deemed to have been served within the ordinary course of post-delivery in line with Section 7 of the Interpretation Act 1978."

This part addresses the appellant's argument in correspondence that he did not receive the notice of the £100 paragraph 3 penalty.

**Discussion**

*Late appeal: discussion*

40. The law on late appeals in relation to income tax assessments and other decisions applies to the penalty in this case. This is a result of paragraph 21(1) Schedule 55 which makes applicable the income tax and capital gains tax ("CGT") rules for appeals where the tax with which the penalty is concerned is income tax or CGT, as it is here.

41. That law is in a small compass in s 49 TMA 1970 which provides:

> "(1) This section applies in a case where—
>
> (a) notice of appeal may be given to HMRC, but
>
> (b) no notice is given before the relevant time limit.
>
> (2) Notice may be given after the relevant time limit if—
>
> (a) HMRC agree, or
>
> (b) where HMRC do not agree, the tribunal gives permission.
>
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
>
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
>
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
>
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
>
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

42. In deciding whether to accept the application I am not limited to considering the question whether there was a reasonable excuse for the lateness. HMRC consider that *they* are so bound and the only issue they considered was whether there was a reasonable excuse for the lateness of the attempt to give notice of appeal. What HMRC ignore or overlook is that while, before 2009, s 49 TMA, as it then was, only appeared to allow HMRC to accept a late notice of appeal to be given if the appellant had a reasonable excuse for the lateness, two changes affected that position. Firstly in 2006 in *Advocate-General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 ("*Aberdeen GCs*"), Lord Drummond Young had held in the Outer House of the Court of Session that HMRC were *not* limited to considering the question of reasonable excuse, but could consider all the same matters as the appellate tribunals which included other matters such as prejudice to either party. Secondly, in 2009, s 49 as originally enacted was substituted by a new version which provided that if there was a reasonable excuse HMRC were bound to admit the giving of notice, but did not otherwise limit the freedom of action of HMRC. So it did not, any more than the original version of s 49 TMA, prevent HMRC from continuing for example with their invariable practice before 2009 of overlooking a few days or weeks of lateness (see in this regard the affidavit of the Inspector in *R v Special Commissioners of the Income Tax Acts, ex parte Magill* [1981] STC 479 at p 484).

43. Although *Aberdeen GCs* is not technically binding on me sitting as I did in England, as a decision of a court of record on a matter which is a UK wide matter it is one I intend to follow as if I were bound. In recent times there has been some debate, both in this tribunal and in the courts, as to the correct approach to application for relief from sanctions, which approach has translated across to applications of this nature as well. That debate was initiated by changes to the Civil Procedure Rules in 2013. The outcome is that in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC) and *HMRC v BPP Holdings Ltd and others* [2014] UKUT 0496 (TCC), the Upper Tribunal has endorsed the approach described by Morgan J in *Data Select Ltd v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) (*Data Select*) as the one to be adopted in this Tribunal. I also note the decision of this Tribunal in *Technetix Ltd v HMRC* [2015] UKFTT 369 (TC) where Judge Richards said

> "32. In deciding whether to follow *Leeds City Council* or *McCarthy & Stone* [an earlier conflicting decision of the Upper Tribunal], I have applied the "general rule" to which Lord Denning referred in *Minister of Pensions v Higham* [1948] 1 All ER 863 namely that:
>
> > … where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision.
>
> Since the *Leeds City Council* decision fully considered the decision in *McCarthy & Stone*, I have followed *Leeds City Council*."

44. The judgment of Morgan J in *Data Select* comments that the judgment of Lord Drummond Young in *Aberdeen GCs* is consistent with his own judgment, so given

that *Aberdeen GCs* was about s 49(1) TMA while *Data Select* was about s 83G of the Value Added Tax Act 1994 where the considerations may be different, I consider that *Aberdeen GCs* is equally, if not more, relevant. In that case Lord Drummond Young says at [23]:

> **"**Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s 49, these include the following; it need hardly be added that the list is not intended to be comprehensive. *First*, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. *Secondly*, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? *Thirdly*, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? *Fourthly*, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s 33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. *Fifthly*, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late." [my emphases]

45. These are similar to the questions that Morgan J says in *Data Select* that judges should ask themselves on any application to extend time:

> "(1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time."

46. One difference between the *Data Select* questions and the *Aberdeen GCs* questions is that the latter specifically refer to "reasonable excuse" (the first question).

"Reasonable excuse" is, and has been for decades, the only expressly stated ground in the statute governing late appeals for income tax, but is not specifically mentioned in the VAT statutes that were subject of *Data Select*. I therefore consider here the questions in *Aberdeen GCs.*

47. (1) Reasonable excuse. I need to take some care here to distinguish between the question whether there was a reasonable excuse for the failure to appeal in time, and the question whether there was a reasonable excuse for the appellant's failure to deliver a return in time, as if I admit the late appeal against the paragraph 3 penalty that latter question is relevant there too. The appellant's representative says that no appeal was made in time because the appellant did not receive any correspondence from HMRC about the penalty until July 2014, and in support said that HMRC had made errors about the address in the past. HMRC on the other hand have said that a number of communications were sent to the appellant at the address they had on file, and were not returned undelivered by Royal Mail.

48. HMRC say that they "issued a notice of penalty assessment on or around 18 February 2014". The papers contains a screen shot of the "View/Cancel penalties" page on the appellant's record which shows:

"Late filing penalty 18/02/14 £100 Cancel N"

as well as entries for the paragraph 4 and 5 penalties which the appellant accepts he was notified of. I assume that "Cancel N" means that the penalty has not been cancelled, eg as a result of a successful appeal.

49. This is the only evidence that an assessment was made, but in the absence of any dispute that one was made I am satisfied on the balance of probabilities from this record that notice of the penalty assessment was issued "on or around" 18 February 2014. But in the light of the grounds of appeal against the assessment and for the application to appeal late I now consider whether the assessment has been notified to the appellant as is required by paragraph 18(1)(b) Schedule 55.

50. Notices to be given by HMRC under the Tax Acts may be given in three ways. They may be:

(1) Delivered into the hands of the intended recipient (personal delivery)

(2) Sent by post

(3) Electronically communicated.

I observe that in the case of the first method there will be evidence potentially available from the person who served the notice to prove delivery, but in the case of the second and third methods there will be at most proof that the documents or data left HMRC's offices or computers. There are (rebuttable) presumptions of good service in legislation however for the second and third methods.

51. Taking the last method first, it is true that the assessment itself is made electronically. The procedure for paragraph 3 assessments is automatic in the sense that the Self Assessment computer system is programmed in such a way that in

February each year an algorithm is run that interrogates the database which indicates whether a return has been logged and captured, and if it hasn't, the computer generates an assessment without further human intervention. But after that what happens is that the computer causes a paper notice to be printed and it is then enveloped and posted. So in this case while there is electronic creation of the assessment and an electronic instruction to print, there is no electronic communication to the person assessed. In that case the provisions of ss 132 and 133 FA 1999 and the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) with their presumptions as to service are not engaged, even though paragraph 18 (assessments) of Schedule 55 is mentioned as one of the applicable provisions in regulation 2(1)(a)(vii) of those regulations.

52. Personal delivery is, and has been since 1803, the default method of service for income tax. The requirement that a document must be placed in the hands of the intended recipient to effect good service was tempered to an extent by legislation dating back to (at least) 1880 and appearing currently in s 115(1) TMA. This allows as an alternative to personal delivery a delivery which leaves the document at a person's usual or last known address. This could, if there was no other legislation to suggest otherwise, encompass a postal worker putting a letter though a letterbox as long as the letterbox was in the property which was the person's usual or last known place of address. But given that the next subsection in s 115, subsection (2), dating from 1880, provides a rule for postal service, and it appeared in income tax legislation, as far as I can tell, at the same time as the predecessor of s 115(1), s 115(1) must I think be limited to an attempt by an officer of HMRC or their agent to serve a document by turning up at the intended recipient's place of abode and leaving the document there without that recipient being present or willing to accept service. There is no evidence that this is what happened here and it would be an exception to what is clearly the general practice of HMRC which is to use postal services to give notices etc to taxpayers.

53. Some rules for service by post are contained in s 115(2) TMA as mentioned. I find, in agreement with HMRC's Statement of Case, that s 115(2) TMA applies in this case. This is for three reasons.

54. The first is that there are no rules of service in Schedule 55 itself. The second is that the procedural rules for assessments to income tax (which are in TMA) are incorporated by paragraph 18(3)(a) Schedule 55. The third is that s 115(2) is expressed to apply to notices given under "the Taxes Acts". If Schedule 55 is part of the Taxes Acts then s 115(2) applies. Section 118 TMA contains a "definition" of the Taxes Acts as used in s 115, which is that they mean "this Act" (TMA) and the "Tax Acts". "Tax Acts" is defined in Schedule 1 to the Interpretation Act 1978 to mean, among other things, the "Income Tax Acts". That term is also defined in that Schedule to mean "all enactments relating to income tax". Schedule 55 is an enactment that relates to income tax (as well as other taxes) as shown by Items 1, 2 and 3 in the Table in paragraph 1 Schedule 55. Thus s 115(2) applies in this case.

55. The subsection says relevantly:

> "(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person—
>
> (a) at his usual or last known place of residence, or his place of business or employment, ..
>
> (b) …."

56. What is notified to a person under paragraph 18(1)(b) Schedule 55 is a "notice" (a notice of assessment). Section 115(2) displaces the default presumption that personal service is required if the notice is served by post addressed to the intended recipient at one of the locations specified in paragraph (a) (which are the same locations as in ss (1)).

57. Section 7 Interpretation Act 1978 ("IA") supplements s 115 TMA. The first part of section 7 IA (the second part as to timing is not relevant here) provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document …"

The effect of this (taken with s 115(2) TMA) is that there is a presumption of good service if a letter is addressed to the recipient's usual or last known place of residence or place of business or employment, pre-paid (ie stamped or franked) and posted, but that presumption may be rebutted if the intended recipient shows on the balance of probabilities that the notice etc was not received: see *Romasave (Property Services) Ltd v HM Revenue and Customs* [2015] UKUT 254 (TCC) ("*Romasave*") at [33] to the effect that despite the words "unless the contrary is proved" being only in the second part, they apply to the first part as well).

58. I am content in this case to assume that the notice was pre-paid (by being franked) and actually posted. Both s 115(2) TMA and s 7 IA then require that the notice is addressed to one of the specified locations. If the address is not one of those locations then the presumption in s 7 IA cannot apply, and s 115(2) does not apply. With these provisions in mind then I turn to the facts.

59. The only document put in evidence which shows an address for the appellant at the relevant time is the "Self Assessment (SA) Statement" dated March 2014 which shows an address ending "Bugbrooke, NN7 3QB". The Royal Mail's Postcode and Address Finder shows that NN7 3QB does indeed cover addresses in Bugbrooke, Northants. The SA Statement also shows that a late filing penalty for 2012-13 of £100 was put on Mr Patrick's Statement on 27 March 2014 and the notice of this penalty is, in the agent's terms, a communication about the penalty.

60. But, as is set out in §36, another document exhibited by HMRC, the SA Notes, says:

"3 03/07/2012 Base address changed *from* THE WHARF INN, NN7 3QB."
[My emphasis]

This address is one of the addresses listed under NN7 3QB in the Postcode and Address Finder and is the address on the SA statement. The inference I draw from the entry on the SA Notes is that HMRC were told or discovered that this address with the NN7 postcode had ceased to be the appellant's address long before February 2014.

61. The Notice of Appeal dated 5 January 2015 shows the appellant's postcode as NN6 6JQ and the address as 1, Wharf Barns, Welford, Northants. The SA Notes also show at Item 4

"20/01/2009 Base address changed from THE WHARF INN, NN6 6JQ"

The Royal Mail's Postcode and Address Finder shows that NN6 6JQ covers addresses in Welford, Northants, about 20 miles from Bugbrooke. One of those addresses is 1, Wharf Barns. Another is the Wharf House Hotel.

62. There is no evidence in the papers to show whether the Wharf House Hotel was previously the Wharf Inn, nor whether the use by HMRC of two different postcodes for the "Wharf Inn" shows either that it made a mistake about one of them, or that the appellant had lived at two different places both called the Wharf Inn in the same county but 20 miles apart. Both places, Bugbrooke and Welford, are on the Grand Union Canal.

63. Taking all of this into account, I consider it is more likely than not that the notice of the penalty assessment was not served as required by s 115(2) in February 2014, as it was not addressed to a location within that subsection, and that as a result s 7 IA cannot apply to presume service. This is because HMRC's records in the form of the SA Notes show that the NN7 address ceased to be the appellant's "base address" in July 2012: it cannot therefore be the appellant's last known (to HMRC) address and so the notice of assessment was not "properly" addressed. Secondly the appellant's address in January 2015 is given as the NN6 address, 1 Wharf Barns, Welford (and I note without taking it into account that the agent's business address is also in NN6 in the same village and that the appellant had become his client no later than July 2014) and on the balance of probabilities I find that that address was the appellant's address within the meaning of s 115(2)(a) TMA.

64. I should add that my finding about the application of s 115(2) TMA and s 7 IA does not have as a necessary consequence that the appellant did not actually receive the notice, such as by its being forwarded to him by the person living at the address to which it was posted. HMRC as usual say that the letter was not returned using the Returned Letter Service but that proves nothing about whether it actually reached the intended recipient (or, indeed, did not reach him). And since this discussion is about whether the appellant had a reasonable excuse for not appealing, rather than whether the failure to notify him within the meaning of paragraph 18(1)(b) Schedule 55 (read with s 115 TMA and s 7 IA) has any legal consequences (as to which see §§73 to 86), I am free to find that the appellant did in fact receive the notice at a time which made his appeal late, and to consider whether that would still give him a reasonable excuse.

65. However, the appellant has stated that he did not receive any communication about the penalty until the Debt Management and Banking Unit of HMRC sought payment on 28 July 2014. This is consistent with the fact which I have found that the notice was posted to an address which was not his address within s 115 TMA, and there is no reason to suppose that, some two years after he seems to have left the address on the notice that the current occupier at that address would have any knowledge of the appellant's whereabouts in 2014. I therefore accept his statement at face value, and as a result I consider that on the balance of probabilities the appellant did not receive the notice of assessment of the penalty at all. Therefore he had a reasonable excuse for not appealing within 30 days of the date on the notice.

66. I am fortified in coming to this view by the decision of the Divisional Court in *Regina v General Commissioners of Income Tax for Tavistock (ex parte Adams)* 46 TC 154 (see Lord Parker CJ at p 166).

67. I would observe here, given that I have derived substantial assistance from the decision of Judges Berner and Falk in *Romasave*, that I have some doubts about whether their view that the postal service rules in s 98 Value Added Tax Act 1994 are permissive reads across to s 115(2) TMA, given the history of that subsection. But in view of my findings it is not necessary to air them, or to consider whether I am bound by *Romasave* on that matter.

68. Since HMRC are bound by s 49(3) TMA to allow the giving of notice of the appeal if the appellant had a reasonable excuse for lateness, then for this reason alone I would grant permission for notice to be given. But in case I am wrong about that I briefly consider the other questions suggested as relevant in *Aberdeen GCs.*

69. (2) Reasonable expedition after excuse ceased. In this case the appellant says the first he knew of the penalty was in a letter of 28 July 2014 from HMRC putting him on notice that he had been charged a penalty of £100. Between then and 4 August the appellant engaged an agent to help him, and the agent contacted HMRC on 4 August to appeal. That is reasonable expedition by any standards. (And his very promptness in doing this reinforces my view that the 28 July approach by HMRC was the first he knew of the penalty).

70. (3) Prejudice to appellant and to HMRC. In relation to the appellant he would be required to pay a penalty of £100 without any possibility of arguing that he had a reasonable excuse for his failure to deliver a return or putting forward any other reason why the penalty was not due. For HMRC there is no prejudice that I can see as the question of reasonable excuse was equally relevant to the paragraph 4 and 5 penalties for which there were timely appeals as for the paragraph 3 one.

71. (4) Public interest issues. I bear in mind here what Morgan J said at [37] in *Data Select*:

> "The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision.

> The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. Nonetheless, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

The remarks about finality echo those in *Aberdeen GCs* in the text cited above on the first issue in the fourth question considered there. There is no lengthy delay here (unlike the 10 years in *Aberdeen GCs*) and no issue at all about finality since after the notice of appeal was given further penalty assessments were made in relation to the same default and were appealed. As to the policy issue (which I take to be equivalent to the first of Morgan J's questions), the policy on late appeals has always been to allow a reasonable excuse to trump the time limit, and in practice the Inland Revenue often allowed a great deal more time than 30 days.

72. (5) Quality of evidence There is no issue here.

73. Accordingly I grant permission for the appeal against the paragraph 3 penalty to be given out of time.

*Discussion: is the assessment invalid?*

74. The grounds of appeal against the penalty were also that the first document the appellant received from HMRC was dated 28 July 2014, and that HMRC have not proved to which address any earlier communication was sent. I have taken this as an argument that because the notice of assessment was not received the penalty should be cancelled (and that is the outcome which the Appeal Form seeks).

75. Where an appellant is not represented or is represented by an agent who does not profess to be a tax expert the Tribunal will take a generous view of the grounds of appeal that may be argued, and will in appropriate cases consider arguments that an appellant might have brought forward but did not. I consider that the appropriate approach in this kind of case is that of the Tribunal (Judge Roger Berner and Mr Harvey Adams) in *David Collis v HMRC* [2011] UKFTT 588 (TC) (*"Collis"*) where the Tribunal said at [25]

> "Although set out in this way, there will be many cases, in fact it is likely to be common, where a taxpayer subject to a penalty will want to make an appeal under more than one of the heads of appeal available. In many cases taxpayers will be unrepresented, and will not make any distinction, based on para 15, in the nature of the appeal that is made. In such cases, in the interests of fairness and justice the tribunal should be slow to exclude any avenue of appeal available to an appellant purely on the technical nature of the appeal that has been made. Issues of liability and amount will often go hand in hand and should normally be considered in that way by the tribunal. Accordingly, if a tribunal affirms the decision of HMRC that a penalty is payable, it should normally go on to consider the amount of that penalty, including any

> decision regarding the existence or effect of any special circumstances, and also any decision whether or not to suspend the penalty and any conditions of any such suspension."

76. *Collis* was a case involving Schedule 24 FA 2007 (inaccuracy in a return etc) (hence the reference to suspension, which is not an issue in Schedule 55) but it is equally pertinent in relation to Schedule 55. In this case in addition to taking the stated grounds as a submission that the penalty should be cancelled for a failure to inform the appellant, I will also consider whether there is a reasonable excuse for the appellant's default, and whether there might be special circumstances that would justify a reduction in the penalty.

77. As set out in §39, in its statement of case HMRC had considered the question of the service of the notice of assessment and submits that there is presumed to be valid service under s 115 TMA and s 7 IA and that there is no reasonable excuse (although it is not entirely clear whether it links the two points). HMRC have also, they say, considered the issue of special circumstances. They have not addressed the question whether the assessment is invalid, so on that point I need to be cautious before finding that there is an invalid assessment.

78. As to the issue of possible invalidity, paragraph 20(1) permits "P" (the person liable to a penalty) to "appeal against a decision that a penalty is payable by P." That does not mean that an appellant is confined to appealing on the grounds of having a reasonable excuse. But it does raise the question of what here is the "decision". "Decision" seems to be used interchangeably with "assessment" (see eg paragraph 21(2)(a)), and there is no indication that they mean different things, so I read "decision" as a synonym for assessment.

79. If P was not notified of an assessment of a penalty (as is required by paragraph 18(1)(b)); if the notice did not state the period in respect of which the penalty was assessed (paragraph 18(1)(c)); or the procedural rules for income and capital gains tax assessments in s 30A TMA etc were not followed (paragraph 18(3)), the assessment may be susceptible to cancellation.

80. The only one of those matters that might be relevant in this case is the first, as it is the appellant's contention that he received no communications about the penalty until 28 July 2014, thus saying that he was not notified of the assessment. I have already found, in connection with the application for permission to give a late notice of appeal, that the notice was not served on the appellant within the meaning of s 115(2) TMA and s 7 IA and that he did not receive it by any other means. The question now is what are the necessary consequences of that failure to serve.

81. In this case the appellant is liable to a penalty of £100 by virtue of paragraph 3. HMRC then must assess the penalty (paragraph 18(1)(a)) and in this case I accept that they have done that, finding that the screen shot evidences the HMRC record of a penalty assessment.

82. HMRC must also notify P of the assessment (paragraph 18(1)(b)) and this is what I have found has *not* been done. The notice must contain the period in relation

to which the penalty is assessed (paragraph 18(1)(c)). I am willing to assume based on the screen shot that this was done in the notice of assessment that was printed by HMRC and issued (in the sense of its leaving HMRC).

83. Paragraph 18(3) provides that the assessment is treated for procedural purposes in the same way as an assessment to tax (which must I consider be a reference to income tax and CGT). This rule is subject to any procedural rule that is in Schedule 55. The main procedural rules for income tax and CGT not catered for in Schedule 55 are in s 30A TMA which includes the requirement that the time limit for appeal must be stated in the notice of assessment. Again I have no evidence that the assessment did not meet the procedural requirements for income tax and CGT assessments.

84. So the only thing that HMRC have not done which Schedule 55 requires them to do is to notify the appellant of the assessment. Is that failure something which allows the appellant to successfully appeal under paragraph 20(1)? I do not think so. The failure by HMRC to notify the assessment does not alter the fact that the appellant failed to file his return in time. There is no basis for saying that the appellant is not liable to a penalty of £100, simply because he was not notified of the assessment. Assessment and notice of it are two different things. There is clear authority for this view in relation to income tax in *Honig v Sarsfield (HM Inspector of Taxes)* 59 TC 337. In that case there was a time limit for making an assessment. The assessment was physically made by HMRC using the procedures then in force before the deadline, but the notice of the assessment, after being sent and returned undelivered twice, finally reached the assessee after the time limit. In the Court of Appeal, Fox LJ, upholding Vinelott J in the High Court, said at pp 349/350:

> "It seems to me that the words in s 29(5) "notice of any assessment to tax" necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of an assessment until there has been an actual and valid assessment. In subs (6) one finds the words "After the notice of assessment has been served on the person assessed.". The reference there to "the person assessed" implies to my mind that there has been an assessment. It is clear that that subsection contemplates that an assessment is different from and will be followed by the notice of assessment and that its validity in no way depends on the latter. They are two wholly different things. The learned Judge referred to s 114(2) of the 1970 Act, which provides:
>
> > "An assessment shall not be impeached or affected - (a) by reason of a mistake therein as to - (i) the name or surname of a person liable, or (ii) the description of any profits or property, or (iii) the amount of tax charged, or, (b) by reason of any variance between the notice and the assessment".
>
> That Section again draws a clear distinction between the assessment and the notice of assessment, and shows that they are different, the assessment being in no way dependent upon the service of the notice.
>
> In my view the result of these provisions is that the Court is not concerned here with the question of the date when the notices of assessment were served. The Court is concerned with a totally

> different question, namely: When were the assessments made? The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provisions which makes the validity of the assessment in any way conditional upon the notice."

85. I do not think however that the failure to notify the assessment can be wholly without consequences. Paragraph 20(2) states that a penalty which has been assessed must be paid before the end of the period of 30 days beginning with the date on which notification of the penalty is "issued". In the absence of argument I do not decide whether a notification can be regarded as "issued" for the purposes of this sub-paragraph if the intended recipient is unaware of the assessment. I observe that the equivalent provision for an income tax assessment which is not a self-assessment in s 59B(6) TMA sets a latest date for payment by reference to the "day on which notice of assessment is *given*", and since an assessment of a penalty may be combined with an assessment to tax (paragraph 18(3)(c) I would think it unlikely that "issued", "notified" and "given" had different meanings in this context.

86. Nor do I think that there is anything that prevents HMRC now notifying the assessment to the appellant at the correct address which would start the clock for payment, and this facility might argue against the original notice having been "issued" for the purposes of paragraph 20(2). However the remarks of Vinelott J in *Honig v Sarsfield* at p 346 would need to be borne in mind by HMRC:

> "Mr. Honig pointed out that there could be a serious injustice to a taxpayer were the Revenue to make an assessment but keep the same without service for many years, but in my judgment an aggrieved taxpayer is likely to have a public law remedy were the Revenue to behave in such fashion. I do not think that such considerations can affect the clear inference to be drawn from the statutory language."

87. I therefore consider that the assessment is valid.

*Discussion: is there a reasonable excuse?*

88. The discussion above is predicated on the basis that there is no reasonable excuse for the failure to file the return in time. If there is, the issues discussed there fall away, so I address that question. Although HMRC's statement of case refers only to the paragraph 4 and 5 penalties, the submission in it is that there was no reasonable excuse for the failure to deliver the return on time, and that submission applies to the paragraph 3 penalty as well.

89. In addressing this issue HMRC say that the notice to file was issued to the appellant at "the address as shown on HMRC's records at the time" on 6 April 2013 and was not returned by Royal Mail as undelivered. Therefore they say, by virtue of s 115 TMA and s 7 Interpretation Act 1978, this notice is deemed to have been served on the appellant. All this is said clearly in the context of "reasonable excuse".

90. The only grounds of appeal put forward by the appellant are that he did not receive any communication about "the penalty". That does not mean that he did not receive the notice to file. It might however mean that he did not receive any warnings

from HMRC that the deadline for electronic return filing was approaching and that he would become liable to penalties if he missed the deadline. But whether anything about the penalty under paragraph 3 including the assessment was or was not received after the filing deadline is in my opinion irrelevant to the issue of a reasonable excuse.

91. For there to be a reasonable excuse within the meaning of paragraph 23 of Schedule 55 to the Finance Act 2009 the excuse has to be for the failure to file a return before 1 February 2014. In this regard see *Morgan and Donaldson v HMRC.* [2013] UKFTT 317 (TC) (Judge Barbara Mosedale and me as the member, as I then was) at [105] where we said:

> " … we consider that to be a reasonable excuse, by definition the excuse must be both reasonable and causative. It cannot be an excuse for a default at all if it was not the cause of the default."

Accordingly nothing that happened after 31 January 2014 can have caused the default, and HMRC's and the appellant's submissions, though ostensibly addressed to the paragraph 4 and 5 penalties, apply with equal force to the paragraph 3 penalty.

92. There is no suggestion by the agent that the appellant did not know he had to file a return by 31 January or, knowing that he had to file by then to avoid a penalty, was prevented by some event from doing so. According to HMRC's statement of case the appellant had been making returns since 2004-05 and had delivered his return late for several years. A print out for the appellant from HMRC's records in the papers before me shows that he was charged late filing penalties for the tax years 2006-07, 2009-10 and 2010-11. Against this background can the fact, if it is a fact, that the appellant did not receive a "warning" letter before the deadline amount to a reasonable excuse for the failure to file?

93. The term "reasonable excuse" is not defined in Schedule 55, but, as many Tribunal decisions have noted, in *The Clean Car Co Ltd v Commissioners of Customs and Excise* [1991] VATTR 234 Judge Medd QC said in the context of VAT default surcharges:

> "…the test of whether or not there is a reasonable excuse is an objective one. 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?"

94. In my opinion it is correct to take the same approach when considering whether a person has a reasonable excuse for failing to deliver an income tax return by the filing date.

95. Taking this approach I do not consider that a person with many years' experience of self-assessment and making tax returns, and who has been charged with penalties in earlier years for the same failure can reasonably take the view that he was intending conscientiously to comply with his obligation to deliver his return on time,

but was prevented from doing so because he did not receive a non-statutory warning about the impending deadline.

96. I therefore hold that the appellant had no reasonable excuse for not delivering his return by the filing date.

*Discussion: special circumstances*

97. In their statement of case HMRC say that they have considered whether there were any special circumstances in this case that would allow the penalty to be reduced. They found none. I can only consider the question afresh if I find that the decision of HMRC to that effect was flawed in judicial review terms (paragraph 22(3) and (4)), in that they took into account something which they should not have, or did not take into account something they should have, or made a mistake in law or their decision was otherwise irrational, one to which no reasonable officer of HMRC could come to.

98. HMRC give no reasons why they consider there were no special circumstances. Giving no reasons may in itself cause a decision to be flawed (see *Barber White v HMRC* [2012] UKFTT 378 (TC) (Judge Brannan) at [68]). I therefore consider that I can look at the matter afresh. While in this case there was something which was out of the ordinary, namely the claim that the notice of assessment and other communications about the penalty had not been received by the appellant, they do not in my view affect the question why the appellant failed to file his return on time.

99. HMRC consider that a reduction for special circumstances may be given where the result on the basis of the law without mitigation is at odds with the clear compliance intention of the law. That seems to me to be a reasonable stance, and approaching the facts in that way, the question to ask is what is the purpose of the £100 penalty under paragraph 3? It is in effect a slap on the wrists of the taxpayer but it also hoists a warning flag for the taxpayer as the notices accompanying it will warn the taxpayer that there are much worse penalties to come (up to £900 and the £300 or more) if the default is not remedied quickly. I can see no reason why the "slap on the wrists" element should allow a reduction in this case. Failure to serve the notice correctly meant that the warning about later heavier penalties did not reach the appellant, and nor apparently did any subsequent warnings that may have been issued. But against allowing any reduction for this element is the fact that the appellant is an experienced filer of income tax returns and one who is no stranger to the Schedule 55 penalty regime. I conclude that no reduction is justified.

**Decisions**

100. Permission is given by virtue of s 49(2)(b) TMA for the notice of appeal against the assessment of a penalty of £100 under paragraph 3 Schedule 55 FA 2009 to be given to HMRC.

101. The assessment of that penalty is affirmed in accordance with paragraph 22(2)(a) Schedule 55 FA 2009.

102. 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: 15 OCTOBER 2015**