



TC06251

Appeal number: TC/2016/02064

*INCOME TAX – application to make late appeals – serious long term illness
–evidence of service of penalty notices - appeal allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr Geraint Teify Jones

Appellant

- and -

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

TRIBUNAL: JUDGE Rachel Short

**Sitting in public at Eastgate House, Newport Road, Cardiff on 1 February 2017,
15 May 2017 and 16 October 2017**

Mr Ben Elliott of Pump Court Tax Chambers for the Appellant

**Mr Daniel Hopkins, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

5 1. This is an application by the Appellant, Mr Jones, to make late appeals against penalties for the late submission of his self-assessment tax returns and late payment of his income tax for the tax years 2005-2006 to 2014-15.

2. The application can be split into two different categories:

(i) Late appeals to HMRC – s 49 Taxes Management Act 1970

10 This aspect of Mr Jones' application is for an extension of time to make appeals to HMRC under s 49 Taxes Management Act 1970. This category of appeals makes up the bulk of Mr Jones' application, including appeals for all the years from 2005-6 to 2013-14. This was considered at the Tribunal hearings on 15 May 2017 and 16 October 2017.

15 *(ii) Appeals to the Tribunal – 2011-12 – Section 49D Taxes Management Act 1970*

20 This element of Mr Jones's application is an application to the Tribunal in respect of his appeals against penalties imposed for late payment of tax for the 2011-12 tax year under s 49D Taxes Management Act 1970. According to the Appellant, those appeals should be treated as made in time to HMRC. The Appellant says that no review was offered by HMRC and there is therefore no deadline for Mr Jones' appeal to this Tribunal. This aspect of Mr Jones' application was considered at the Tribunal hearing on 1 February 2017.

25 The penalties outstanding falling within this category are a six month late payment penalty of £4111 issued on 14 August 2013 and a twelve month late payment penalty of £1680 issued on 25 February 2014.

In time appeal – 2013-14 – section 49H Taxes Management Act 1970

30 3. Mr Jones's appeal also includes one penalty which was appealed in time: a twelve month fixed late payment penalty of £396 for the 2013-14 tax year issued on 31 March 2016 which was appealed in time to the Tribunal on 8 April 2016.

Withdrawn penalties – 2011-12

35 4. After the date of the hearing on 15 May 2017, due to some administrative confusion, daily penalties for the late filing of Mr Jones' self-assessment tax return for the 2011-12 tax year (amounting to £790) which were included as part of Mr Jones' appeal and considered at the hearing on 1 February 2017 were reviewed by HMRC and removed by letter dated 7 March 2017, on the basis that Mr Jones had a reasonable excuse for late submission of his self-assessment tax return for that tax year.

Withdrawn penalties – 2010-11

5. Mr Jones also appealed against penalties charged for the late payment of tax for the 2010-11 tax year amounting to £16,464 issued on 25 April 2013 and 13 June 2013. HMRC accepted in their skeleton argument dated 3 May 2017 that Mr Jones had a reasonable excuse for the late payment of his tax for that year. Those penalties are therefore also treated as having been withdrawn. Those penalties amounted to £16,464.

6. There is no dispute that Mr Jones' appeals against all of the penalties (other than the late payment appeals for 2011-12 and one fixed twelve month late filing penalty appealed for 2013-14) were made late.

7. Mr Jones also argues, in respect of all the penalties save those issued for 2010-11 and 2011-12 that he has no record of receiving penalty notices and that HMRC need to prove that they were properly issued to him.

8. The total number of penalties to which this application relates is 40, with only one appeal having been made to the Tribunal in time and two arguably made to the Tribunal in time.

9. The penalties referred to in each of these categories are set out in a schedule attached as an appendix to this decision.

10. HMRC notified Mr Jones on 24 June 2016 that it did not consent to the late appeals being allowed and the Tribunal directed on 19 July 2016 that the application for permission should be considered as a preliminary matter.

The law

11. **Issuance and receipt of penalty notices:**

(1) S 59C Taxes Management Act 1970 - this applies to the imposition of penalties for periods up to the 2009-10 tax year:

“59C(5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge –

(a) Shall be served on the taxpayer, and

(b) Shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought”

“59(C)(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the day on which the surcharge is imposed”

(2) Paragraph 18 of Schedule 55 Finance Act 2009 – this applies to the imposition of penalties for the periods from 2010-11 for the failure to submit tax returns on time:

“18(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

(a) assess the penalty,

(b) notify P, and

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

(3) Paragraph 11 of Schedule 56 Finance Act 2009 – this applies to the imposition of penalties for the periods from 2010-11 onwards for the failure to make payments of tax on time:

10 11(1) Where P is liable to a penalty under any paragraph of this schedule HMRC must-

(a) assess the penalty,

(b) notify P, and

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

(4) Penalties assessed under these provisions are treated for procedural purposes in the same way as assessments to tax and appeals against them are treated in the same way as an appeal against an assessment to tax.

Service of tax documents

20 (4) S 115(1) Taxes Management Act 1970; this sets out the criteria for the service of documents such as the penalty notices appealed by Mr Jones:

“(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

25 (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 –

30 (a) at his usual or last known place of residence, or his place of business or employment,”

Service by post

(5) S 7 Interpretation Act 1978:

35 “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 and, unless the contrary is proved, to have been effected at the time at which the letter would be
40 delivered in the ordinary course of post”.

The time limits for making an appeal:

(6) S 31A(1) Taxes Management Act 1970 sets out the thirty day deadline for appealing a penalty notice to HMRC:

- 5 *“31A(1) Notice of an appeal under section 31 of this Act must be given*
- (a) in writing*
 - (b) within 30 days of the specified date*
 - (c) to the relevant officer of the Board.”*

10 12. **The basis on which Tribunal can extend time for making appeals:**

(1) S 49(1) and (2) Taxes Management Act 1970 set out the Tribunal’s general discretion for extending the deadline for making appeals. There is no statutory explanation of the basis on which that discretion should be exercised.

- 15 *“s 49 Late notice of appeal*
- (1) This section applies in a case where-*
 - (a) notice of appeal may be given to HMRC, but*
 - (b) no notice is given within the relevant time limit.*
 - (2) Notice may be given after the relevant time limit if –*
 - 20 *(a) HMRC agree,*
 - (b) where HMRC do not agree, the tribunal gives permission”*

(2) S 49D Taxes Management Act 1970 sets out the basis on which the Tribunal can accept an appeal if an appeal has been made in time to HMRC but no review has been requested or offered by HMRC:

- 25 *“49D Notifying appeal to the tribunal*
- (1) This section applies if notice of appeal has been given to HMRC.*
 - (2) The appellant may notify the appeal to the tribunal.*
 - (3) If the appellant notifies the appeal to the tribunal, the tribunal is to*
- 30 *decide the matter in question”*

(3) S 49G Taxes Management Act 1970, this is the basis on which an appeal can be made to the Tribunal after a review has been carried out by HMRC:

- “49G Notifying appeal to tribunal after review concluded*
- 35 *(1) This section applies if-*

(a) *HMRC have given notice of the conclusions of a review in accordance with section 49F, or*

(b) *the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.*

5 (2) *The appellant may notify the appeal to the tribunal within the post-review period.*

(3) *If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.*

10 (4) *If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.*

(5) *In this section “post review period” means-*

15 (a) *in a case falling within subsection 1(a) the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6) or*

(b) *in a case falling within subsection (1)(b) the period that-*

(i) *begins with the day following the last day of the period specified in section 49E(6) and*

20 (ii) *ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9)”*

13. **Basis on which the Tribunal can extend time for making an appeal:**

25 (1) There is no statutory definition of the criteria which should be applied to decide whether or not the deadline for making an appeal should be extended, but there are many authorities which have considered the question, including *Data Select v HMRC [2012] UKUT 187 (TCC)*.

14. The criteria referred to that decision are:

30 (1) The purposes of the time limit

(2) The length of the delay

(3) Whether there is a good explanation for the delay

(4) The consequences to the parties of extending or refusing to extend the time limit.

35 (5) The Upper Tribunal in that decision said “*while the burden is on the Appellant to show the reasons why permission should be granted to appeal out of time, the strength of the considerations that must be established by the Appellant to justify permission being granted will depend on the strength of the counter-veiling considerations militating against the grant of permission*”

15. **The basis on which penalties can be removed by the Tribunal:**

(1) S 59C Taxes Management Act 1970 (for periods prior to April 2011):

5 “59C(9) *On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may –*

(a) *If it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or*

(b) *If it does not so appear, confirm the imposition of the surcharge”*

10 (2) Schedule 55 Finance Act 2009 (for periods after April 2011):

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

15 (3) Schedule 56 Finance Act 2009 (for periods after April 2011):

“paragraph 16(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure to make a payment –

20 (a) *liability to a penalty under any paragraph of the Schedule does not arise in relation to that failure,.....”*

25 These allow the Tribunal to remove a liability to a penalty if the taxpayer can demonstrate that he has a “reasonable excuse” for the failure to make a return or a payment on time, throughout the relevant period of default. There is no statutory definition of what can be treated as a reasonable excuse.

16. We were also referred to these case authorities:

(1) *Anstock v HMRC* [2017] 0307 (TC)

(2) *BPP Holdings Limited v Revenue & Customs Commissioners* [2016] EWCA Civ 121

30 (3) *Bogle v Revenue & Customs Commissioners* [2014] UKFTT 201 (TC)

(4) *Calladine –Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch)

(5) *Data Select Ltd v Revenue & Customs Commissioners* [2012] UKUT 187 (TCC)

(6) *Denton v TH White Ltd & another* [2014] EWCA Civ 906

35 (7) *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537

(8) *Mr Olusegun Odunlami v HMRC* [2015] UKFTT 668(TC)

(9) *Romasave (Property Services) Ltd v Revenue & Customs Commissioners* [2015] UKUT 254(TCC)

(10) *SS (Congo) & others v Secretary of State for the Home Department* [2015] EWCA Civ 387

5 (11) *The appellant v HMRC* [2017] UKFTT 0839 TC

Background facts

10 17. Mr Jones is now seventy years old, but still owns a business known as “Geraint Jones 4x4”. The profits of this business are included in Mr Jones’ self-assessment tax returns.

18. Mr Jones has had significant health issues since 2005 and since that time he has taken a less active role in this business, in which his daughter and wife are also involved.

15 19. As at 21 January 2017 all late self-assessment tax returns had been made and all outstanding tax owing by Mr Jones had been paid to HMRC.

20. The remaining disputed matters concern the penalties and surcharges issued by HMRC to Mr Jones.

21. HMRC issued a bankruptcy petition against Mr Jones on 12 June 2015 for the surcharges and penalties then due to them, amounting to £136, 202.59

20 22. That bankruptcy petition was dismissed on 2 June 2017 and replaced with a registered charge over Mr Jones’ land.

Evidence

23. Mr Jones gave three witness statements to the Tribunal. These were taken as read. Mr Jones was not cross-examined by Mr Hopkins.

25 *Mr Jones’ business*

30 24. Mr Jones told the Tribunal that he runs a business called “Geraint Jones 4x4 Wales” which he has run since 1968, starting it from scratch. His involvement in the business has reduced dramatically since he became ill and he now has little involvement in the day to day running of it. This has meant that he has relied on his daughter and wife to run the business and other members of staff.

35 25. Mr Jones says that he spent at least 283 days in hospital from 2005 – 2015 and provided a list of the periods when he was in hospital for 2012 – 2015, including 129 days in hospital in 2012 when he was completely unable to run his business affairs. His current need for dialysis three times a week means that he is unable to focus on his business.

26. In respect of his financial affairs Mr Jones says

5 *“My ill health has had a significant impact on my ability to manage my financial affairs. It has been difficult for me to carry out general day to day tasks let alone be in a position to devote the attention and concentration required to manage my financial affairs and that of the business. The worst periods were 2012-14 when I spent considerable periods in hospital”.*

27. Mr Jones refers to the fact that Mr Johns is employed by him as an accountant, but explains that due to his ill-health it has been difficult for him to meet or speak to him and provide instructions.

10 28. As for the penalty notices issued to him, Mr Jones says

15 *“As a consequence of my ill health my recollection of events at the time when the penalties were apparently issued is not clear enough for me to confirm whether I have received the penalty notices and therefore I am relying on the Respondents’ correspondence” and “What I can say is that due to the way I was feeling even if they were sent I would not have been able to deal with them, let alone promptly enough to bring an appeal”*

Evidence of Mr Jones’ health issues

20 29. Mr Jones provided details about his health issues, explaining that he has suffered from ill-health since the age of 44, having had four heart attacks and three heart operations (in 2005, 2012 and 2016) and now also suffers from renal health issues requiring regular attendance at hospital for renal dialysis.

Medical professional evidence

30. The Tribunal saw medical evidence from health professionals setting out Mr Jones’ health issues:

25 31. (i) A schedule of Mr Jones’ hospital attendance from 2005 – 2015, including the periods when he was admitted to hospital being:

- (a) 3 February 2006
- (b) 4 – 7 November 2009
- (c) 2 – 16 June 2012
- 30 (d) 12 August – 22 October 2012
- (e) 23 October to 1 November 2013
- (f) 28 January to 4 February 2014
- (g) 11 March to 21 March 2014
- (h) 16 April to 29 April 2014
- 35 (i) 27 May to 3 June 2015

5 32. (ii) Letters from Mr Jones' consultant cardiologist of 9 October 2015 and 3 December 2015 setting out the "*very serious and life threatening disorders*" suffered by Mr Jones and explaining the need for him to attend hospital 3 times per week for renal dialysis.

33. (iii) A letter from Mr Jones' agents of 2 July 2014 setting out the dates of his stays in hospital during 2012 and 2013:

- (1) 2 June – 25 July 2012
- (2) 13 August – 5 November 2012
- 10 (3) 26 December – 8 January 2013
- (4) 30 September – 11 October 2013
- (5) 16 October – 1 November 2013

34. Mr Jones health issues are described (in summary) as;

- (1) Heart disease diagnosed 1991
- 15 (2) Chronic renal impairment 2005
- (3) Aneurysm diagnosed 2005 with surgical correction
- (4) Vasculitis treated 2012
- (5) Aortic rupture with emergency surgery June 2012
- (6) Myocardial infarction urgent October 2012
- 20 (7) Persistent renal failure – dialysis dependent
- (8) Being considered for renal transplant.

35. Mr Jones' consultant described Mr Jones' condition in December 2015 as

25 "*Notwithstanding the seriousness and life threatening nature of these conditions, the symptoms attributable to them have had a significant bearing on Mr Jones and his functional capacity. The long list of admissions, outpatient visits (to various specialities) and interventions provide testimony to the impact and restrictions which have been placed on Mr Jones*".

30 36. (iii) Other correspondence from the medical professional dealing with Mr Jones' renal impairment from 3 March 2010 to October 2011.

37. (iv) An update on Mr Jones' medical condition from Mr Laszlo Szabo dated 23 June 2016 referring to Mr Jones' endovascular thoracic aorta aneurysm repair in January 2016 and the risks of a kidney transplant for Mr Jones.

38. None of the medical evidence concerning Mr Jones was contested by HMRC. Neither was the fact that Mr Jones has serious and potentially life threatening health issues.

Mr John

5 39. Mr John provided a brief witness statement dated 21 September 2016 which was taken as read and was not cross-examined by Mr Hopkins. Mr John is Mr Jones' accountant and has worked with him since 2009. In his evidence he described the difficulties which he had in obtaining instructions from Mr Jones and communicating with him because of his illness:

10 *"It has been very difficult to act on his behalf during the last eight years or so. As a result of Mr Jones being extremely unwell his availability to meet with me and discuss his personal and business affairs has been restricted. This has in turn led to difficulties and delays in the filing of his tax returns, the making of payments to the Respondent and latterly the making of appeals in relation to the*
15 *penalties/surcharges levied against him"*.

Evidence of service of documents

40. HMRC provided the Tribunal with a document prior to the hearing on 17 October 2017 which was, in its first draft described as a "witness statement". This was
20 corrected in a finalised version which was served on the Friday before the hearing. The document was described as a "policy statement" and was dated 16 June 2017 and referred to Christine Phillipson as the policy author. Mr Hopkins explained that this was not intended to be treated as a witness statement, but was a statement from HMRC's policy team about the process which was applied for issuing penalty notices.

25 41. That document set out HMRC's standard process for issuing reminders and penalty notices for the periods before and after the introduction of the new penalty rules by the Finance Act 2009. The document described the processes for issuing reminders, penalty notices and late payment surcharges, but the process was the same in each case:

30 (1) HMRC's system ran a scan to identify those taxpayers who had not paid or had not filed on time. Those system scans were repeated periodically throughout the year.

(2) A file of data containing the details of customers who were late in filing or paying would then be sent to HMRC's print providers.

35 (3) The print providers would down load the customer data onto the relevant blank forms, print the forms and envelopes, which would be collected for postage in pre- agreed batches.

42. The policy author also said *"I am not aware of any specific issues that prevented these processes from applying in the manner described in the periods*
40 *covered by the appeals"*

Review and appeal correspondence

43. The Tribunal also saw correspondence between HMRC and Mr Jones and his agents for the period from 13 January 2014 until 3 March 2017 including:

5 (1) HMRC's letters of 17 March 2014, 27 May 2014, 12 August 2014, 28 October 2014 and 3 September 2015 concerning the penalties applied for the 2010-11 and 2011-12 tax years.

10 (2) Mr Jones' agents' appeal letter of 13 January 2014 against the 2010-11 and 2011-12 penalties, their letters of 2 July and 8 August 2014 concerning Mr Jones' health issues and their review request letters for the 2010-11 and 2011-12 penalties dated 10 September 2014.

(3) HMRC's letter of 21 January 2016 concerning the adjournment of Mr Jones' bankruptcy petition saying "*if your client wishes to pursue the Appeal against the charges in the Bankruptcy Petition then the correct procedure at this stage is to submit an application to the Tribunal*".

15 (4) Mr Jones' appeal notice to this Tribunal dated 8 April 2016.

44. The Tribunal saw copies of HMRC's computerised self-assessment records for Mr Jones including:

20 (1) Transcripts of telephone conversations between HMRC and the agents acting for Mr Jones from March 2005 to March 2017, including telephone conversations about the allocation of surcharges in June 2010 and allocations of tax payments in June 2011.

(2) Records of penalties and surcharges issued to Mr Jones from January 1999 to January 2016,

(3) Summary of penalties issued for the period April 2005 to April 2015,

25 (4) Example blank HMRC penalty notice.

Appellant's arguments

Issue and receipt of penalty notices

30 45. Mr Elliott argued that HMRC had not provided sufficient evidence that the penalty notices which Mr Jones says he did not receive had actually been properly served on Mr Jones as required for s 7 Interpretation Act 1978 and pointed out that HMRC have the burden of proving that the penalty notices for all of the periods in question were sent to Mr Jones.

35 46. Mr Elliott referred to the First-tier Tribunal decision in *Anstock* which described the evidence which was required to prove, in that case, that an information notice had been served:

5 “The respondents must prove that the Information Notice was properly sent to and received by the appellant. In many cases that will involve no more than demonstrating that the appellant has acknowledged receipt of the same. However, in a case where there is no such acknowledgement or admission, the respondents bear the onus of proving that such a Notice has been sent and received. If the respondents can prove that it has been sent, then they may be able to rely on the presumption of delivery in due course of post, but that presuppose that the respondents have established that the appropriate letter as committed in the care of the Royal Mail”[11]

10 and to the decision in *Calladine-Smith* “It (s 7 of the Interpretation Act) requires the sender to prove that the sender has properly addresses, pre-paid and posted the letter. If the sender cannot do that, then the sender cannot rely on s 7” [25].

15 47. Mr Elliott said that in order to demonstrate that they have addressed, pre-paid and posted the penalty notices to Mr Jones, HMRC are required to provide evidence, at least of their systems and that reliance on documents alone to demonstrate this is not sufficient.

20 48. Mr Elliott contended that the document provided by HMRC failed to contain the information requested in the Tribunal’s Directions of 2 May 2017 and did not provide sufficient details of the process by which HMRC issued and sent penalty notices. By reference to s 7 of the Interpretation Act HMRC needed to show that they had “properly addressed, pre-paid and posted” the penalty notices.

25 49. The evidence of this provided by HMRC was not a contemporary document and HMRC had not produced a witness who could confirm HMRC’s processes. The policy statement provided by HMRC was of “slight” evidential value only. HMRC had failed to produce any evidence of the process for issuing and posting penalty notices.

50. The fact that HMRC have no evidence that post was returned from the address which they had on record for Mr Jones is not evidence that post was actually sent.

Extension of time for appeals

30 51. On the premise that the penalty notices had been sent to and received by Mr Jones, Mr Jones’ arguments centred on the impact which Mr Jones’ illness had on his ability to manage his affairs. Mr Jones says that should be given permission to appeal out of time because he has a reasonable excuse for not lodging appeals on time due to his poor health. Mr Jones points out that it was HMRC who suggested, in their letter of 21 January 2016, that he should appeal to the Tribunal against all of the penalties.

35 52. Mr Elliott pointed out that while other family members (his daughter and wife) could manage running his business for him, including completing VAT returns for the business, they could not manage his personal income tax returns, which were personal to him and included other income (such as rent and farming income).

53. Mr Elliott also said that Mr Jones' agents could not complete his tax returns for him without significant in-put from Mr Jones, which they had struggled to obtain because of his ill-health.

54. Referring to the criteria for allowing an extension of time referred to particularly in the *Data Select* case, Mr Elliott said that there was a very strong reason for the delay in making the appeal applications, being Mr Jones' significant health issues. Refusing to extend the time limits would close off any opportunity for Mr Jones to bring these appeals and Mr Jones ran the risk of being adjudged bankrupt if he was not granted permission to appeal.

55. That there was no prejudice to HMRC in allowing the late appeals, they would be in the same position they would have been in had the appeals been made in time. HMRC would obtain a windfall if Mr Jones was refused the right to make his substantive appeals.

56. Mr Elliott particularly noted that HMRC themselves had told Mr Jones in January 2016 that he needed to apply to the Tribunal to make late appeals in the light of HMRC's bankruptcy petition against Mr Jones and that HMRC had voluntarily undertaken a review (out of time) in respect of the 2010-11 penalties in September 2015, effectively conceding that they were prepared to deal with them even though they were out of time.

57. Mr Elliott concedes that the bankruptcy petition served on Mr Jones by HMRC has now been dismissed by consent

58. Mr Elliott also stressed that Mr Jones' appeals had a strong prospect of success, particularly bearing in mind that HMRC had already accepted that Mr Jones had a reasonable excuse for the late filing and late payment for the 2011/12 tax year.

Implications of withdrawal of penalties for 2010-11 and 2011-12 on "reasonable excuse" grounds

59. HMRC had agreed to withdraw the 2010-11 penalties in recognition of Mr Jones' ill-health and it would be anomalous for them not to accept similar arguments for the other periods.

60. HMRC's own guidance in their manual stated that a prolonged and sustained illness could amount to a "reasonable excuse" and this had been accepted in the recent First-tier Tribunal decision *The appellant v HMRC*, referring to an earlier Tribunal decision: "*We do not accept the submission, made in HMRC's statement of case, that a person suffering from a lengthy period of ill-health ought to have sought help from HMRC or engaged professional help. Much will depend on the circumstances.....*"[95].

61. The fact that his wife and daughter were running the business did not mean that they could deal with Mr Jones' personal tax affairs. They could and did deal with the business' VAT affairs, but that related to the business and not Mr Jones' own tax position.

Late payment penalties 2011-12 - s 49D Taxes Management Act 1970 -

62. Mr Elliott argued that these appeals should be treated as made in time to the Tribunal. Mr Jones' accountant appealed these penalties to HMRC on 13 January 2014 by letter and HMRC did not offer a review of these. Nor did HMRC state that this appeal was out of time.

63. HMRC's letter of 12 August 2014 offered a review of the late filing penalties for 2011-12, but not these late payment penalties. Mr Jones therefore has no deadline for appealing to the Tribunal under s 49D Taxes Management Act 1970.

64. If HMRC did review these late payment penalties, that did not happen until 3 September 2015 and any time limits for making the appeal against these penalties should run from that date and no earlier. Mr Elliott pointed out that HMRC's letter of 3 September 2015 did not give any time limits for making an appeal against that decision. On that basis even if these penalties were appealed late, (by Mr Jones' appeal to the Tribunal on 8 April 2016) those appeals were only seven months late.

65. In fact, it was not made clear that Mr Jones needed to appeal to the Tribunal until HMRC said this in their letter of 21 January 2016, when, in the context of the bankruptcy petition having been issued to Mr Jones, HMRC said Mr Jones needed to appeal to the Tribunal.

66. There had been some confusion over the time limits and the procedure for making these appeals and therefore it was harsh to hold Mr Jones to the time limits for appealing to the Tribunal. The Tribunal should also take account of Mr Jones' health issues at this time, he had heart surgery in early 2016 and it had been difficult for his agents to obtain instructions. The strength of Mr Jones' arguments in the substantive case should also be taken account of.

Late payment penalties 2013-14

67. Mr Jones' accountant appealed against the late payment penalty of £396 imposed for the 2013-14 year as part of Mr Jones' appeal notice to the Tribunal of 8 April 2016, which was within the thirty days available for appealing against this penalty under s 49H Taxes Management Act 1970.

HMRC arguments

Issue and receipt of penalty notices

Evidence of service of penalty notices on Mr Jones

68. Mr Hopkins said that in accordance with s 115 Taxes Management Act 1970 HMRC had issued all of the penalty notices to Mr Jones' last known place of residence as notified by him to HMRC. Those notices had been properly served.

69. HMRC had not received any returned mail from the address which they had on record for Mr Jones. The penalty letters should therefore be treated as properly posted to and received by Mr Jones. HMRC had visited Mr Jones at the address to which notices had been sent in 2005, confirming that this was his correct address at that time. HMRC's records showed that they have been notified of and had updated their systems to reflect changes in Mr Jones' address.

70. Mr Hopkins also referred to evidence of telephone conversations between Mr Jones' agents and HMRC indicating that some penalty notices had been received (those for the 2010-11 tax years) and that Mr Jones had agents dealing with his affairs throughout the relevant period who were in contact with HMRC. HMRC's records show that Mr Jones' agents had contacted HMRC to discuss Mr Jones debts and appeals and none of them suggested that penalty notices had not been received.

71. HMRC believed that in accordance with s 7 of the Interpretation Act all notices have been deemed to be served on Mr Jones as "*nothing of the contrary intention has appeared*". HMRC has satisfied as far as possible the burden of proof that notices were properly issued to Mr Jones

72. Mr Hopkins resisted Mr Elliott's reliance on the *Anstock* decision which he said was not binding since it was only a First-tier Tribunal decision, but his main contention was that forcing HMRC to demonstrate precisely how penalty notices were issued in a particular case and for periods so long ago was an impossible burden for HMRC to satisfy.

73. Mr Hopkins said that the policy statement provided reflected HMRC's best knowledge of the relevant processes and HMRC were not aware of any issues with their procedures which would have impacted the issuing of the notices to Mr Jones for any of the relevant periods.

Extension of time for making appeals

74. Mr Hopkins made clear that HMRC were not disputing that Mr Jones was seriously ill. However, they did not accept that Mr Jones' illness could amount to a reasonable explanation for not making appeals on time in circumstances where Mr Jones business was still generating significant profits and he had third parties (his daughter and wife and his accountants) who could have acted on his behalf.

75. Mr Hopkins referred to the fact that Mr Jones' VAT returns had been done for his business and pointed out that it was illogical to suggest that some elements of Mr Jones' business could be delegated so that it was still possible to make profits, but the managing of tax affairs could not be delegated. Mr Hopkins referred to the level of profits made by Mr Jones' business for the relevant tax years:

- (1) 2009-10 £201,256
- (2) 2010-11 £323,450

(3) 2011-12 £316,366

(4) 2012-13 £156,402

5 76. HMRC referred to the criteria for allowing appeals out of time in *Data Select* and *Romasave* and that the Tribunal had to consider all relevant factors, conducting a balancing exercise taking account of all the circumstances of the case, including considering the matters listed at Rule 3.9 of the Civil Procedure Rules ("CPR"), but not giving any special weight to any particular factor.

10 77. Mr Hopkins referred to the process of considering an application for an extension of time set out at para 24 of *Denton* repeated in *Romasave*:

15 *"A Judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice, direction or Court Order" which engages Rule 3.9(1). If the breach is neither serious nor significant the Court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case as to enable [the Court] to deal justly with the application"."*

20 78. The decisions in *Romasave* and *Data Select* suggested that time extensions should be given only sparingly or exceptionally and that a delay of three months in the context of a statutory deadline of 30 days is serious and significant:

25 *"Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant" [96]*

The delay in Mr Jones' case was much more extensive than only a few months amounting to many years in most cases and should be considered to be serious.

30 79. Mr Hopkins referred to the comments of the Upper Tribunal in *Data Select* referring to *"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"*, [37] which applied to HMRC's position in the case of Mr Jones' appeals.

80. Mr Hopkins also relied on the comments in the First-tier Tribunal decision of *Olusegun Odunlami* that the 30 day time limit given by the tax statute to make appeals requires a taxpayer to act promptly

35 *"In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so to make an appeal. The taxpayer is required to act promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute..... or finality (should there be no*
40 *appeal).*

5 *On that basis we would not regard it as a matter of routine for the tribunal to allow an appeal to be made outside the normal time limits..... otherwise the purpose of the provision of the time limit would be undermined. There would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulty with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC” [41] – [42].*

10 81. Mr Hopkins pointed out that on any analysis the appeals in this case had been made with significant delay. The breach was serious and significant on Mr Jones’ part. The authorities suggested that a delay of up to three months could be treated as serious. Mr Jones’ appeals had all been made at least a year late. The time limits for making appeals were clearly stated on the penalty notices sent to Mr Jones.

15 82. The consequences of allowing an extension of time for HMRC would be the penalties which HMRC believed to have been final would be subject to appeal, which would be prejudicial to HMRC and to other appellants who have adhered to the relevant deadlines.

20 83. It would also cost HMRC resources, including in obtaining documents which related to tax years more than 10 years ago and which were in storage and would remove the finality which the imposition of deadlines was intended to achieve. HMRC would be obliged to re-consider decisions which were made many years ago (more than ten years in some cases).

84. HMRC have already allowed Mr Jones’ appeals against the penalties for 2010-11 amounting to £16,000 and for 2011-12 amounting to £16,464 and allowing any further appeals would increase the prejudice towards HMRC.

25 *Implications of appeals allowed 2010-11 and 2011-12*

30 85. Mr Hopkins explained that the 2010-11 penalties had been conceded for very specific reasons and because of evidence of Mr Jones hospitalisation on or around the dates when the tax return and payments were due (his attendance at A&E in June 2012). This cannot be extrapolated to all of the remaining periods for which late appeals were made. Mr Jones’ only other emergency appointment was on 3 Feb 2006 and HMRC considered that Mr Jones could have dealt with his tax affairs within 30 days of this.

35 86. Even if a reasonable excuse had been established for these periods, that could not operate infinitely and there had to be a date after which that excuse was no longer relevant.

Late payment penalties 2011-12 s 49D Taxes Management Act 1970

40 87. HMRC’s position is that Mr Jones’ appeal against the six month late payment penalty for 2011-12 issued on 18 August 2013 was made to HMRC late, being included in Mr Jones’ appeal letter of 13 January 2014, five months after the appeal deadline.

88. As for the twelve month late filing penalty issued on 25 February 2014, that could not have been included in Mr Jones' appeal letter of 13 January 2014 and so was also made late to HMRC.

5 89. However, Mr Hopkins accepted that HMRC did review these penalties; in their letter of 28 October 2014 and then on 3 September 2015. The time limit for making an appeal to the Tribunal therefore runs from 3 September 2015 at the latest and Mr Jones' appeal to the Tribunal in April 2016 was out of time by several months.

10 90. Mr Hopkins said that despite any health issues, Mr Jones had no emergency health issues to contend with immediately after the second review letter of 3 September 2015 was issued and did have agents acting for him at this time.

91. Mr Hopkins also referred to Mr Jones' long history of non-compliance and pointed out that his business was making profits during the relevant period. If Mr Jones' business could continue to trade it should be possible for Mr Jones to deal with his tax affairs.

15 *In time appeals – late payment 2013-14*

92. HMRC have accepted that this appeal against a third late payment penalty issued on 31 March 2016 for the 2013-14 tax year made by Mr Jones' accountant in his appeal notice of 8 April 2016 was made in time .

Findings of fact

20 93. On the basis of the evidence provided to the Tribunal I find as a fact that:

(i) Mr Jones had eight periods of critical illness when he was admitted to hospital for significant periods during the relevant tax years for which these penalties were applied.

25 (ii) During the periods for which these penalties were applied Mr Jones' business continued to generate profits and its VAT returns were properly dealt with.

(iii) Mr Jones had professional advisers acting for him throughout the relevant periods.

30 (iv) In their dealings with HMRC Mr Jones' agents did not refer to any problems with receiving correspondence from HMRC.

Decision

Were the penalty notices properly served on Mr Jones?

94. The starting point for the service of notices by HMRC is s 115 Taxes Management Act 1970 which sets out the criteria by which a notice such as these

penalty notices will be treated as served on a taxpayer such as Mr Jones. The onus to demonstrate that notices have been served is on HMRC.

95. In my view HMRC have demonstrated, on the balance of probabilities that they complied with the provisions of s 115 in serving each of the penalty notices on Mr Jones. I have come to this conclusion because (i) no evidence was provided by the Appellant that the penalty notices were not sent to Mr Jones' current address as recorded on HMRC's systems (ii) it was accepted by Mr Jones that some penalty notices were received and (iii) Mr Jones' agents did not refer to any problems with receiving correspondence in their contacts with HMRC.

10 Interpretation Act S 7

96. Mr Elliott argued that in order to rely on the presumption of delivery under s 115 HMRC also needed to prove that they did actually post the notices served on Mr Jones. As set out in s 7 of the Interpretation Act the service will be deemed to be effective only if the notice has been "*properly addressed, pre-paid and posted*".

15 97. Mr Hopkins referred to the question of what evidence HMRC need to provide to demonstrate that notices have been properly served on a particular taxpayer as a current issue. The suggestion that HMRC are required to provide evidence for each particular taxpayer leaves HMRC in something of a dilemma and runs the risk of providing an easy argument for taxpayers who wish to avoid their obligations. I accept that the need to demonstrate on a taxpayer by taxpayer basis that notices have been properly addressed and posted is an unreasonably high burden for a large organisation such as HMRC which has to rely on automated systems to deliver its services.

25 98. Mr Elliott suggested that the evidence of a system and process which HMRC did provide was of little evidential weight. I do not agree. That evidence, in the form of the policy statement provided by HMRC, does at least demonstrate that HMRC had a reasonable and rational system for issuing penalty notices, including committing them to the care of the Royal Mail.

30 99. In principle, the use of a reasonable and rational system must mean that the expected result will be achieved in a large majority of cases. The evidence provided by Mr Hopkins demonstrated that HMRC did have a reasonable (and not random) system in place for the service of penalty notices. Any failure to serve a notice under that system should therefore only arise as result of a specific failure at some point in that system. HMRC's policy statement said that there were no known systems failures which would have impacted the posting of these letters to Mr Jones.

40 100. Mr Jones suggests that of 40 penalty notices which are the subject of this application, only those for 2010-11, 2011-12 were received by him. Failures of this extent over a prolonged period suggest more than random, one-off failures in HMRC's system; they suggest a systemic failure over an extended period. Mr Jones did not suggest what the failure might have been but merely said that "*he had no recollection of receiving the penalty notices*".

101. I was not provided with any evidence of the type of systemic failure which might explain why these notices were not posted to Mr Jones. On the contrary, the evidence which I did see suggested that some notices were posted to Mr Jones: (i) Mr Jones did receive some penalty notices (the ones relating to the 2010-11 and 2011- 12 periods) and (ii) HMRC have provided records of Mr Jones or his advisers contacting them to discuss payments due from Mr Jones and appeals against the penalties, in none of those conversations is there a suggestion that penalty notices were not received.

102. If Mr Jones' failure to receive these penalty notices cannot be explained by reference to a systemic failure in HMRC's system for posting penalty notices, the only other explanation is that, for each of the penalty notices, a separate series of random errors led to the penalties not being properly posted to Mr Jones. In my view while that is a possible explanation, it is extremely unlikely.

103. This whole application rests on the fact that Mr Jones struggled to deal with his day to day affairs for the tax years starting in 2004-5 and ending in 2014-15. Mr Jones' has said that his long term illness made it difficult for him to deal with his tax affairs, and HMRC have accepted that this was the case for the 2010-11 and 2011-12 years

104. It seems to me that by far the more likely explanation for Mr Jones having no record of receiving these penalty notices is that he failed to properly take account of them and deal with them when they were posted to and received by him.

105. For these reasons I am satisfied that HMRC have met the burden of demonstrating that these penalty notices were properly posted to and served on Mr Jones for all of the periods under appeal.

25 **The 2005 – 2015 late appeals**

106. I have split the late appeals into three categories – those for the periods 2004-5 to 2009-10, (ii) those for the 2011-12 period and (iii) those for the 2012-13 to 2013-14 periods.

(i) Late appeals 2004-5 to 2009-10

30 107. I have considered all of the criteria which are relevant to deciding whether Mr Jones' application to allow his late appeals for these periods to be allowed under s 49(2)(b) Taxes Management Act.

The purpose of the time limit

35 108. It hardly needs re-stating that the purpose of imposing the time limits for responding to HMRC's penalty notices is, as stated by Judge Morgan in the *Odunlami* decision, to provide both HMRC and taxpayers with certainty about the cut-off point when penalties assessed become due and final. That taxpayers have a prescribed period of time to appeal a penalty notice is to ensure that litigation is conducted efficiently. In my view considering the purpose of the time limit given for appealing

against penalties does not suggest that the Tribunal should treat the time limit as flexible or negotiable.

The length of the delay

5 109. The total number of late appeals for this five year period is 23. The lateness of the appeals ranges from ten years (the penalty appeals for 2004 -5 tax year) to four years (the penalty appeals for the 2009-10 tax year).

10 110. All of these appeals were made very late. I consider that the reasons for extending the deadline for making the appeals would need to be correspondingly strong, bearing in mind in particular the approach of the courts in recent cases such as *BPP* and *Data Select*.

111. By reference to the first stage of the decision making process described in the *Data Select* decision, there is no doubt that the delay in making the appeals for each of these periods is serious. It is also persistent, failing to appeal against 23 penalties over a five year period.

15 *Reasons for the lateness*

112. The Appellant claims that he has a strong reason for failing to make any of these appeals in time; his incapacity as a result of his illness and the inability of his agents or family members to act on his behalf because of his incapacity and the need for personal information to complete his tax returns.

20 113. With respect, that is not the correct focus for this late appeal application; the question is not why returns and payments were not made, but why appeals against the penalty notices were not made.

25 114. The process for making an appeal is relatively straightforward; a letter to HMRC or the completion of a form to send to the Tribunal. In neither case would someone doing this on Mr Jones' behalf need to know extensive details of Mr Jones' tax or other financial affairs, all they needed to know was that the return had not been made and/or the tax had not been paid and a reason why this had not been done, which according to the Appellant was the same in each case; because Mr Jones was sick.

30 115. My view is that the Appellant has elided the capacity and information required to make tax returns and pay tax with the much less complicated requirements of making an appeal against a penalty. Mr Jones may well, for some of the periods under appeal, have struggled with the former, but I am not convinced that even someone with his level of health issues need to have struggled with the latter.

35 116. The existence of a long term illness does not give taxpayers carte blanche to fail to deal with their tax affairs. There must be a sufficient connection between the incapacity caused by the illness and the specific actions required at specific times which have given rise to a compliance failure.

117. In my view Mr Jones' case can be readily distinguished from *The appellant* case to which Mr Elliott referred. In that case the Judge held that serious and on-going mental health issues prevented the taxpayer from filing returns by the due date and was the cause of subsequent failures to meet tax obligations.

5 118. Without suggesting that Mr Jones was not seriously sick, or that this had a significant and detrimental impact on his ability to be involved in his business, I do not accept that this is a sufficient excuse for a failure by him to instruct agents to manage the relatively simple task of appealing against HMRC penalties over such an extensive period of time.

10 119. I agree with HMRC that someone in Mr Jones' position, suffering from the type of chronic illness which he had, should have realised at a relatively early stage that arrangements needed to be put in place to manage at least the most straightforward aspects of his tax affairs if he was not capable of dealing with them himself. As was stated in *the appellant* "*If the ill-health is or becomes long-term the reasonable taxpayer, having due regard to his obligations, is expected to make arrangements for*
15 *someone to act on his behalf in complying with his tax obligations during his incapacity*" [93]

120. In fact, Mr Jones has demonstrated that in some instances he was able to instruct agents to act on his behalf, as was done to deal with the 2011-12 penalties; Mr Jones
20 has not been able to distinguish between these periods when instructions were given, (for example the appeal and review request letters which were sent in January and September 2014 during which he was suffering one of his most acute periods of ill health) and earlier and later periods, when they were not.

121. For these reasons I do not accept that Mr Jones on-going ill health provides a
25 good explanation for his failure to appeal against these penalties in time.

Implications of allowed appeals

2010-11 appeals

122. HMRC removed the penalties charged on Mr Jones for the 2010-11 tax year
30 because he had a "reasonable excuse" for both filing his return late and make his tax payment late. HMRC's skeleton argument does not give any detailed reasons why these appeals were allowed.

123. Mr Elliott suggested that there was a logical link between the two decisions and that the hurdle for failing to put returns in and make payments "*a reasonable excuse*"
35 was actually higher than the hurdle required to allow a time extension for the making of an appeal.

124. I have inferred from earlier correspondence that HMRC have accepted Mr Jones' arguments that his health issues limited his ability to put in his tax return for

2010-11, which would have been due sometime between October 2011 and January 2012 and pay the tax due, which would have been due during 2012.

125. The only penalty notices which were served and which could have been appealed during that period (from October 2011 to December 2012) are: (i) a penalty notice for £100 served on 6 September 2011 for the late filing of Mr Jones' 2009-10 tax return and (ii) two late payment penalties (of £4037.04 and £749.95) for the 2009-10 tax year served on 23 July 2012.

126. No appeal was made against these penalty notices until 22 July 2015 and 8 April 2016 respectively.

127. Accepting that there is an overlap between the periods in which HMRC have accepted that Mr Jones had a reasonable excuse for the late filing in 2011 and 2012 and periods in which Mr Jones was late in making his appeals, does that mean that Mr Jones must also be treated as having a reasonable excuse for failing to make his appeals against penalties which were served during the same period of time?

128. I do not agree that there is any necessary logical link between the acceptance of a "reasonable excuse" for these periods and a decision to allow an extension of time for the making of any appeals against penalties issued during the same period. I say this for two reasons:

(i) The actions which are required for the completing and filing of a tax return and the payment of tax are of a different order than the actions required to appeal against a penalty notice. I can accept that the former may be difficult to delegate and if delegation is possible, may entail some detailed instructions of which Mr Jones may not have been capable during the relevant periods because of his illness. The fact that Mr Jones was not capable of the first does not necessarily mean that he was not capable of the second of these actions, either himself or with some delegation.

(ii) Even if I accepted that Mr Jones' illness during the periods for which HMRC have accepted a "reasonable excuse" for late payment and filing also affected his ability to appeal against penalties, the penalty notices for the relevant periods were not made for many years after the period of Mr Jones' critical illness, the period for which the "reasonable excuse" has been agreed to exist by HMRC. No appeals were made against these penalties until July 2015 and April 2016, up to four years later; no further explanation has been provided for these periods.

2011-12 appeals

129. Similarly, HMRC have accepted that Mr Jones has a reasonable excuse for the late filing and late payment of his tax for the 2011-12 tax year. The relevant periods during which actions were required to (i) put in his tax return and (ii) make payment for 2011-12 would have been from October 2012 until December 2013.

130. HMRC allowed Mr Jones' £4702 first late payment and £100 first late filing penalties for the 2011-12 tax year because at the relevant time for making the return and payment, in January 2013, Mr Jones had only just come out of hospital, as explained in their letter of 3 September 2015. They refused to remove the subsequent late payment and late filing penalties because they accrued for later periods (August 2013 and February 2014) and they did not accept that Mr Jones' on-going health issues could justify the later failures to pay and file.

131. Even if I accept that Mr Jones had health issues during the whole of 2013 (and I accept that he was hospitalised in late October and early November 2013) the only penalty notices which were served and which could have been appealed against during the period from October 2012 to December 2013 are those which have already been allowed by HMRC in respect of the 2010-11 tax year.

132. Therefore I do not accept that HMRC's acceptance of a reasonable excuse for specific periods for late payment and late returns for the 2011-12 tax year means that the same logic must apply to these late appeals.

Strength of Mr Jones' substantive appeal

133. It seems to me that there is only one aspect of Mr Jones' appeal to which HMRC's acceptance of a "reasonable excuse" for the 2010-11 and 2011-12 periods is relevant, and that is as part of the exercise required in weighing up the strength or otherwise of Mr Jones' case in deciding whether to allow these appeals to proceed out of time.

134. As part of a consideration of all the circumstances of Mr Jones' case, it does seem to me to be legitimate to consider Mr Jones' arguments in the light of HMRC's decisions to withdraw certain penalties during the process of this litigation.

135. My view is that HMRC's decisions for the 2010-11 and 2011-12 periods are of limited relevance since they relate to actions which were required at very specific periods during or close to the time when Mr Jones was sufficiently ill to be hospitalised.

136. In my view HMRC have properly made a distinction between periods when Mr Jones was critically ill and hospitalised, compared with periods when, while still sick, Mr Jones' illness might better be described as chronic and during which he might therefore be expected to be able to manage his affairs by delegation.

Implications for HMRC and taxpayer of not allowing appeals

137. Mr Jones makes the point that the implications for him of these appeals not being allowed are severe; HMRC have threatened him with a bankruptcy petition, although this has currently been withdrawn. Mr Elliott makes the point that the result for HMRC is merely that appeals in addition to those already allowed by HMRC will be allowed to proceed.

138. I have taken account of Mr Jones' age and health and the likelihood of him being able to carry on any future business ventures in considering the financial consequences for him of allowing these appeals. My view is that the financial consequences for Mr Jones in not allowing these appeals are not so severe as to outweigh the very significant failure to make these appeals on time.

139. In my view HMRC's concerns that allowing appeals which have been made so late would have adverse implications for their treatment of taxpayers who have made their appeals in time and the need to enforce time limits to ensure the finality of decisions plus the additional cost and resource which HMRC would need to apply to manage decisions which were made so long ago, are a more significant concern.

Conclusion

140. Having weighed up all of the relevant criteria and all the circumstances of the case, including the very large number of late appeals and bearing in mind in particular the extent of the lateness of all of these appeals, the strict approach to time limits encouraged by the *BPP* and *Data Select* decisions and the large number of failures over a very considerable period of time, I have concluded that the Tribunal should not extend the deadlines for Mr Jones to make any of his appeals against penalties for the 2004-5 to 2009-10 period and Mr Jones' applications for these periods are not allowed.

(ii) Late payment penalties for the 2011-12 tax year

The s 49D appeals – Were the appeals against the late payment penalties for 2011-12 in time?

141. Mr Elliott's starting point for these penalties is that there is no requirement for a late appeal application because there were in fact made in time to the Tribunal; Mr Jones appealed to HMRC against all outstanding penalties on 13 January 2014 but no review offer was made in respect of the late payment penalties. Under s 49D Taxes Management Act 1970 there is no deadline for Mr Jones to make an appeal to the Tribunal.

142. Mr Elliott assumed that Mr Jones' 13 January 2014 appeal was against all of the remaining penalties for 2011-12, but in fact the second of those late payment penalties was only issued on 25 February 2014, and so could not have been included in that appeal. However, HMRC's review letter of 3 September 2015 includes both of these late payment penalties, which I have taken as their acceptance that they should be treated as having been appealed in time to HMRC.

143. On the basis of the correspondence provided and in particular HMRC's letter of 3 September 2015, which clearly states that HMRC are undertaking a review and lists each of the late payment penalties, my view is that any time limits for appealing to the Tribunal under s 49G Taxes Management Act 1970 are triggered by this review date.

144. On that basis, Mr Jones' appeal to Tribunal was made late; Mr Jones' appealed to the Tribunal on 8 April 2016, seven months after HMRC's review letter and four months after HMRC informed him that his next step should be to appeal to the Tribunal. While this is a relatively short delay in comparison to the other appeals which I have considered, I am taking account of the statement in the *Romasave* case referred to by Mr Hopkins that even a delay of three months should be treated as a "serious" delay.

145. The same criteria need to be applied to these late appeal applications as to the appeals for the 2004-5 – 2009-10 periods. In my view the arguments differ only in the following respects for the application for these periods:

(1) The length of the delay is significantly shorter than for other periods, while still serious, at seven months.

(2) Mr Jones has said that he was hospitalised in early 2016 but I have seen no evidence of critical illness during late 2015, the start of the time period during which the appeals should have been made.

(3) Mr Jones' witness statement suggested that a further reason for the delay between HMRC's letter of 21 January 2016 and the appeal being submitted on 8 April, was due to the need to take instructions and prepare arguments before an appeal was made, which were hampered by his need to attend his regular hospital visits for dialysis.

(3) Mr Elliott suggests that Mr Jones' likelihood of succeeding in his appeal for this period is stronger; HMRC have already allowed penalties for periods just after Mr Jones came out of hospital in January 2013. The remaining penalties are levied for late payment in mid-2013 and early 2014. Mr Jones has provided evidence of hospitalisation later in 2013; 11 days of outpatient attendance in September and October and an emergency admittance in late October and early November 2013 as well as a hospital admission in early 2014.

I accept that the emergency hospital admittance in October and November 2013 and January 2014 suggests, by reference to the logic applied by HMRC for removing the penalties levied for earlier in 2013 a strong ground for arguing that a reasonable excuse exists for late payment for periods immediately after that hospitalisation.

(4) HMRC have already accepted some late appeals for this period, indicating that the repercussions for them of accepting similar late appeals for the same period are not as adverse as for earlier periods.

Conclusion

146. Applying the process and criteria set out in the *Data Select* decision, I have concluded that although the delay in making Mr Jones's appeal against these penalties was significantly shorter than the delay for many of the other periods to which this

application applies, in the light of a statutory period of 30 days for making an appeal, the delay in this appealing against the penalty notices for this period was serious.

147. Mr Jones therefore needs to demonstrate for these late appeals as for his other late appeals that he has a good reason for failing to appeal on time. I do not consider that Mr Jones has a strong reason for failing to make his appeal against these penalties on time.

148. I have not been provided with any medical evidence that Mr Jones was so critically ill during 2015 that he could not deal with this aspect of his tax affairs, although he was in hospital at the start of 2016.

149. Even if Mr Jones could demonstrate that he was sufficiently incapacitated during this period as to not be able to make these appeals, at the time when HMRC had written their review letter in September 2015 Mr Jones had advisers working for him who were aware of all relevant issues (as evidenced by their correspondence with HMRC in December 2015 and January 2016). I consider that those advisers should have been in a position to deal with these matters on Mr Jones' behalf, or at the very least have indicated to HMRC why any decision to deal with Mr Jones' appeal may have been delayed.

150. Even when HMRC notified Mr Jones that his next step should be to appeal to the Tribunal (on 21 January 2016), no appeal was made for a further three months (8 April 2016). Mr Jones' only real explanation for his delay in dealing with the appeal against these penalties for what he describes in his witness statement as a "slight delay" is the need to obtain legal advice and the need to consider the "*confusing procedural background and the way in which the respondents had dealt with requests for reviews*".

151. I do not accept that this is a sufficient explanation for this delay; Mr Jones had clearly been told by HMRC that he needed to make an appeal to the Tribunal in January 2016 and he has not convinced me that "further legal advice" was required to comply with the relatively straightforward process for making such an appeal.

152. I have taken account of the relative strength of Mr Jones' arguments in his substantive appeals for this period, but do not consider that this should be treated as out weighing the seriousness of Mr Jones' delay, which I do not consider to be "slight", and the lack of a good explanation for the delay.

153. I have also considered whether the fact that HMRC have demonstrated that they are willing to re-consider appeals for this period despite them being out of time, and allowed late appeals for other penalties during the same period should alter my conclusion. I have decided that this does weigh slightly in favour of allowing the appeals for this period.

154. I have finally considered whether, viewing all the circumstances of this case, Mr Jones' application for this period should be allowed. As part of those circumstances I have taken account of the many years of failures to deal with HMRC's penalty notices in a timely fashion; the failure to appeal against these penalties is one of a serious of

similar failures over many years. This, added to the length of the delay in making this appeal and the lack of a strong explanation for the delay has led me to decide that the time limit for appealing against these penalties should not be extended.

5 155. Mr Jones' application to make a late appeal against these penalties is therefore refused.

(iii) Late appeals for 2012-13 and 2013 -14

10 156. There remain five late appeals for the 2012-13 and 2013-14 tax years which were not appealed to HMRC but which were included in Mr Jones' appeal to this Tribunal of 8 April 2016. All of those appeals were made between two years and one year late. All of these appeals are against penalties for the late payment of tax.

15 157. I have considered the criteria for allowing these late appeals under s 49(2)(b) Taxes Management Act and have concluded that they should be treated in the same way as the late appeals for the 2004-5 to 2009-10 periods. These are not periods for which HMRC have already accepted that a "reasonable excuse" exists for any part of those periods, there is no suggestion from Mr Jones that his substantive arguments are particularly strong for these periods and the length of delay is significant.

20 158. The reason for the delay in making the appeals for these penalties is the same as those advanced for the earlier periods, Mr Jones' ill-health. The relevant period for making these appeals runs from mid-2014 until late 2015. The medical evidence shows that Mr Jones did have one period of hospitalisation during that period (from the end of May until early June 2015), but for the remainder of the time his hospital visits were regular outpatient appointments.

25 159. For the reasons set out above my view is that Mr Jones should have been able to organise his affairs during this time to provide for the relatively simple process of appealing against these penalties to be managed by someone else if he was not able to do it himself. I do not consider that Mr Jones has a strong explanation for his failure to act to deal with these penalties during this period.

30 160. In my view the other relevant criteria lead to the same conclusions as set out above in relation to the late appeals for the earlier periods.

161. For these reasons I have concluded that the deadline for the making of these appeals should not be extended and Mr Jones' application for these periods is not allowed.

35 ***(iv) In time appeal – 2013-14***

162. That leaves me to consider whether, for the appeal which was made in time, Mr Jones has demonstrated any basis on which those penalties can be removed.

163. The remaining in time appeal is against a third late payment penalty of £396 for the 2013-14 tax year issued to Mr Jones on 31 March 2016.

5 164. Mr Jones has provided evidence that he “*spent a considerable amount of time in hospital in 2016*” and his consultant has confirmed that he underwent an aneurysm repair in January 2016.

165. I accept that this period of acute ill-health and hospitalisation in early 2016 is likely to have adversely affected Mr Jones’ ability to arrange for the payment of his tax liabilities during this period and that he has a reasonable excuse for the late payment for this period.

10 166. The £396 late payment penalty imposed on Mr Jones for the late payment of his 2013-14 self-assessment tax is therefore removed.

Conclusion on all penalties:

15 167. The penalties to which Mr Jones is no longer to be treated as liable as a result of each of my conclusions are:

(i) The withdrawn penalties for 2010-11 amounting to £16,464.

(ii) The late payment penalty for 2013-14 amounting to £396.

168. All other outstanding penalties for the periods from 2004-5 to 2014-15 charged on Mr Jones are confirmed.

20 ***Costs***

25 169. This Tribunal can make an award of costs under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 Rule 10 for a case (other than a complex case) either “(a) under s 29(4) of the 2007 Act (wasted costs) or (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.”

170. Mr Elliott made an application for the Appellant’s costs of the wasted hearings caused by HMRC’s unreasonable management of the appeal.

Mr Elliott’s arguments

30 171. At the hearing on 1 February 2017 Mr Elliott put in a request for costs of the subsequent hearing, arguing that the subsequent hearing was required only because HMRC had failed to properly prepare to deal with the majority of the penalty appeals which were before the Tribunal, despite it having been made clear in the Appellant’s notice of appeal and witness statement which penalties were under appeal.

172. At the third hearing, on 16 October 2017 Mr Elliott made a costs application for the costs of all of the three hearings arguing that the third hearing had only been required because HMRC had failed to provide adequate evidence of the service of the penalty notices at the hearing on 15 May 2017.

5 173. Mr Elliott submitted that HMRC had not conducted itself in the manner of a reasonable litigant and had breached the Tribunal's Directions at both the second and third hearings by failing to provide proper evidence of the service of the penalty notices. In addition HMRC had made late concessions (the withdrawal of the 2011-12 penalties) and the decision in *Bogle* indicated that costs could be awarded against
10 HMRC in these circumstances.

174. Mr Elliott provided a detailed breakdown of the costs which he was requesting at the Tribunal hearing on 16 October 2017.

HMRC's arguments

15 175. At the hearing on 16 October 2017, with the caveat that he was unprepared to make any representations about costs, Mr Hopkins said that one of the reasons for HMRC's failure to address relevant points at the two previous hearings and this one was that the Appellant had consistently failed to serve its skeleton arguments until very late, or even on the day of the hearing, which he viewed as an intentional strategy on behalf of Mr Jones.

20 176. Mr Hopkins pointed out that it was unfair for Mr Elliott to complain about HMRC's ability to deal with the points raised by the Appellant; the Appellant was represented by counsel and a solicitor while Mr Hopkins was neither a barrister nor a solicitor.

25 177. Finally Mr Hopkins said that the contested evidence at the second and third hearings concerning what evidence HMRC could be required to provide to show that notices had been properly served on taxpayers was an open issue and was under consideration in other cases which were going through the tribunals. HMRC should not be punished for not providing evidence when it was not clear what evidence was really required to prove their case.

30 178. Mr Hopkins did not agree with Mr Elliott's contention that HMRC had failed to comply with the Tribunal's Directions from the two prior hearings, saying that in both cases it had only become clear at the hearing what information was actually required.

Decision on costs

35 179. I have decided to award the Appellant's costs for the second hearing on 15 May 2017 only, on the basis that, however late the Appellant's skeleton argument was served prior to that hearing, it should have been clear to HMRC from the date when they saw Mr Jones' appeal notice (of 8 April 2016) that Mr Jones was making an application relating to all of the outstanding penalties charged on him, not just the remaining penalties for the 2011-12 tax year. In my view it was unreasonable for

HMRC not to be prepared to deal with all the matters under appeal at the hearing on 1 February 2017, with the result that a further hearing was required on 15 May 2017

180. I award all of the costs set out in the Appellant's cost schedule for the 15 May 2017 hearing amounting to £12,409.78

5 181. I agree with Mr Hopkins that HMRC should not be penalised for failing to produce with more detailed evidence concerning the actual service of documents on this particular taxpayer at the hearing on 15 May 2017 and accept HMRC's point that as the law stands it is not certain what evidence should reasonably be demanded from HMRC in this context.

10 182. 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
15 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

20 **RACHEL SHORT**
TRIBUNAL JUDGE

RELEASE DATE: 2 DECEMBER 2017

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Schedule of Penalties

<i>Tax year</i>		<i>Penalty issued</i>	<i>Appeal deadline</i>	<i>Appeal date</i>	<i>Amount</i>
2004-5	Late payment	27 10 06	26 11 06	08 04 16	509.36
	Late payment	27 10 06	26 11 06	08 04 16	509.36
	Late return	12 09 06	12 10 06	08 04 16	100
	Late return	24 03 06	23 04 06	08 04 16	100
2005-6	Late payment	06 05 09	05 06 09	08 04 16	2,454.34
	Late payment	06 05 09	05 06 09	08 04 16	2,454.34
	Late return	05 10 07	04 11 07	08 04 16	100
	Late return	23 03 07	22 04 07	08 04 16	100
2006 -7	Late payment	06 05 09	05 06 09	08 04 16	2,905.70
	Late payment	06 05 09	05 06 09	08 04 16	2,905.70
	Late return	09 09 08	09 10 08	08 04 16	100
	Late return	25 03 08	24 04 08	08 04 16	100
2007-8	Late payment	23 03 10	22 04 10	08 04 16	1,587.90
	Late payment	23 10 09	22 11 09	08 04 16	1,587.90
	Late payment	06 05 09	05 06 09	08 04 16	1,750
2008 -9	Late payment	24 03 11	23 04 11	08 04 16	3,826.42
	Late payment	24 03 11	23 04 11	08 04 16	3,118.39
	Late return	07 09 10	07 10 10	08 04 16	100
	Late return	23 03 10	22 04 10	08 04 16	100
2009 -10	Late payment	23 07 12	22 08 12	08 04 16	4,037.04
	Late payment	23 07 12	22 08 12	08 04 16	749.95
	Late return	22 03 11	21 04 11	22 07 15	100
	Late return	06 09 11	06 10 11	22 07 15	100

2010-11	<i>Late payment</i>	<i>13 06 13</i>	<i>13 07 13</i>	<i>13 01 14</i>	<i>69</i>
	<i>Late payment</i>	<i>25 04 13</i>	<i>25 05 13</i>	<i>13 01 14</i>	<i>6,669</i>
2011 -12	<i>Late payment</i>	<i>13 06 13</i>	<i>13 07 13</i>	<i>13 01 14</i>	<i>69</i>
	<i>Late payment</i>	<i>25 04 13</i>	<i>25 05 13</i>	<i>13 01 14</i>	<i>6,669</i>
	<i>Late payment</i>	<i>13 06 13</i>	<i>13 07 13</i>	<i>13 01 14</i>	<i>69</i>
	<i>Late payment</i>	<i>25 04 13</i>	<i>15 05 13</i>	<i>13 01 14</i>	<i>2,919</i>
	<i>Late Payment</i>	<i>28 05 13</i>	<i>27 06 13</i>	<i>13 01 14</i>	<i>4,701</i>
	<i>Late Payment</i>	<i>25 02 14</i>	<i>27 03 14</i>	<i>08 04 16</i>	<i>1,680</i>
2012 - 13	<i>Late payment</i>	<i>14 08 13</i>	<i>20 09 13</i>	<i>13 01 14</i>	<i>4,111</i>
	<i>Late return</i>	<i>23 07 13</i>		<i>13 01 14</i>	<i>790</i>
	<i>Late return</i>	<i>12 02 13</i>		<i>13 01 14</i>	<i>100</i>
	<i>Late payment</i>	<i>24 04 14</i>	<i>24 05 14</i>	<i>08 04 16</i>	<i>2,570</i>
2013 -14	<i>Late payment</i>	<i>24 09 14</i>	<i>24 10 14</i>	<i>08 04 16</i>	<i>2,570</i>
	<i>Late payment</i>	<i>02 04 15</i>	<i>02 05 15</i>	<i>08 04 16</i>	<i>2,570</i>
	<i>Late payment</i>	<i>23 04 15</i>	<i>23 05 15</i>	<i>08 04 16</i>	<i>396</i>
2013 -14	<i>Late payment</i>	<i>20 09 15</i>	<i>20 10 15</i>	<i>08 04 16</i>	<i>396</i>
	<i>Late payment</i>	<i>31 03 16</i>	<i>30 04 16</i>	<i>08 04 16</i>	<i>396</i>
	<i>Late payment</i>			<i>16</i>	
<i>Italicised = allowed/removed</i>					