[2018] UKFTT 295 (TC)

TC06525

Appeal number: TC/2018/01154

CAPITAL GAINS TAX – non-resident CGT return – penalty of £100 for failure to file return within 30 days of completion of house sale – whether error in notice of assessment as to period in paragraph 18(1)(c) Schedule 55 FA 2009 makes assessment invalid: no, s 114(1) TMA applies - whether HMRC have shown penalty due: yes – whether reliance on third party reasonable excuse: yes – whether ignorance of law reasonable excuse: yes, following* Perrin *in Upper Tribunal – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ERIC SCOWCROFT **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 25 May 2018 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 24 January 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 April 2018 and the Appellant's Reply dated 10 April 2018.

DECISION

1. The penalty under appeal is for the tax year 2017-18 (though the HMRC Statement of Case ("SoC") describes that tax year as the "period ending 2017-18") and is £100 for the failure to make and deliver a non-resident capital gains tax ("NRCGT") return until 105 days after the due date. The failure is that of Mr Eric Scowcroft ("the appellant").

2. Astute readers will note that a daily penalty was not charged even though the return was more than three months late. The reason for this will become apparent.

The facts

3. I take the facts from the SoC filed by the respondents ("HMRC") and from the documents attached to that Statement.

4. On 15 September 2017 the appellant delivered an NRCGT return to HMRC in electronic form. A printout of the return entries shows:

(1) the appellant's address as 157 Princes Drive, Britannia Heights, Nelson, New Zealand 7010,

(2) the disposal of a property at 112 Valley Mill, Cottonfields, Eagley, Bolton, BL7 9DY,

(3) the date of conveyance was 3 May 2017,

(4) no election was made for an alternative method of computation,

(5) the computation showed a loss of £14,400, and

(6) the amount of CGT due was nil.

5. On 2 October 2017 HMRC (NRCGT) wrote to the appellant. The letter was headed "Non-resident Capital Gains Tax (NRCGT)" in large bold type. The next line also in bold type was "Late filing penalties (*sic*) of £100".

6. After salutations and listing the address of the property in the UK, the letter continued:

> "I've received an NRCGT return from you relating to the disposal of the above property on 3 May 2017.
>
> An NRCGT return should have been filed within 30 days of the sale being finalised, which was 2 June 2017.
>
> However you filed it on 15 September 2017.
>
> This letter is a notice of assessment for (*sic*) a late filing penalty under Schedule 55 Finance Act 2009."

7. The second page contained the actual notice of the assessment which charged £100.

8. Appeal rights were then described, that an appeal must be made in writing by 30 October 2017. The letter was signed by L Patel, Administrative Officer.

9. On 12 October 2017 the appellant wrote to L Patel. In that letter he said:

> "I am in receipt of your letter dated October 2 referenced above.
>
> While I fully accept both that the NRCGT return was filed after the 30 day period of grace had expired and the legal principle that ignorance of the law is no excuse, I would ask you to consider the following:
>
> During a fortunate conversation with a fellow expatriate in September in New Zealand I mentioned that I had sold a property in the UK.
>
> He informed me that he had also sold a property and had been instructed by his solicitor at the time of the sale to file a NRCGT return. Upon checking with my UK accountant I was informed that this was indeed a legal requirement. I filed the NRCGT return immediately.
>
> My position therefore is as follows.
>
> …" [See grounds of appeal set out later in this decision]

10. On 10 November 2017 A Akbani, an Assistant Officer of HMRC, replied. The appellant's letter had been taken as an appeal, and he was informed that the officer:

> "did not agree that you have a reasonable excuse because it is your responsibility to ensure the NRCGT return is submitted on time, all the relevant information has been clearly publicised on Gov.uk website. It states the process, timelines and what penalties will be charged if the return is submitted late."

11. The letter went on to explain what HMRC consider to be the test for the existence of a reasonable excuse. It said that in particular HMRC did not accept that "ignorance of basic law" could be a reasonable excuse. It added that "We'll consider the facts in each case", but no more was said about the facts presented by the appellant.

12. An explanation of the appellant's right to provide further information, request a review or to ask the tribunal to decide the matter was given.

13. On 27 November 2017 the appellant replied to the HMRC letter. He enclosed a cheque for £100 *to avoid interest*. He said that he was asking for a review and had sent in a completed Form SA634. He explained why he thought he had behaved as a reasonable person who wanted to meet their tax obligations would have done in the same circumstances.

14. On 28 December 2017 Mrs S Lindley wrote to Mr Scowcroft with the conclusions of the review. She addressed him as "Dear Scowcroft"![1]

15. Her conclusion having conducted her review was to uphold the penalty. By way of explanation Mrs Lindley described the main reasons for the appeal and addressed each of them to show why she had reached the conclusion she had[2].

16. She then addressed the issue of special circumstances and mentioned three things which she had taken into account. These were also three of the matters she had identified as the reasons for the appeal[3]. She informed the appellant what his rights were and what would happen if he did nothing.

17. On 24 January 2018 the appellant notified the tribunal of his appeal. On 3 April HMRC served their SoC. The appellant gave his comments on it on 10 April 2018.

Law

18. I set out first the law as to filing returns that applies to non-resident with UK sources of taxable income or chargeable gains.

19. This is in s 8 Taxes Management Act 1970 ("TMA"), as it is for residents, which provides as follows:

> **"8 Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take

[1] I was last addressed in a letter by my surname alone in 1985. This was in the Civil Service and was by a particularly pompous superior officer. I hope this is a slip and not a clumsy and somewhat offensive way of being gender-neutral.

[2] The account of the appellant's four reasons for the appeal were not in reported speech apart from the first. As a result Mrs Lindley appears to be saying that one of the reasons for the appeal was that *she* had always been compliant with her tax and in 45 years had always filed her tax returns on time. In fact Mr Scowcroft was saying that he, not she, had always been compliant. It is also odd for Mrs Lindley to set out as the appellants reasons two questions that he had asked of HMRC (although without question marks) as if she was asking them.

[3] And they were also set out in direct and not reported speech.

into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source

…

…

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

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

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

…

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

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

20. There are special pages for non-residents that fall within the scope of s 8(4). Section 8(1) has therefore always been apt to require a non-resident to return information for the purposes of capital gains tax[4].

21. As to NRCGT returns, TMA provides a rather more complex picture:

"**NRCGT returns**

12ZA Interpretation of sections 12ZB to 12ZN

(1) In sections 12ZA to 12ZN—

"advance self-assessment" is to be interpreted in accordance with section 12ZE(1);

"amount notionally chargeable" is to be interpreted in accordance with section 12ZF(1);

"filing date", in relation to an NRCGT return, is to be interpreted in accordance with section 12ZB(8);

"interest in UK land" has the same meaning as in Schedule B1 to the 1992 Act (see paragraph 2 of that Schedule);

[4] Since the original enactment of capital gains tax ("CGT") in 1965 a non-resident individual has been liable to CGT on gains on assets forming part of or used for a branch or agency in the UK of a trade. (The Taxation of Chargeable Gains Act 1992 ("TCGA") has not been updated to refer to a permanent establishment, and still refers to s 82 Taxes Management Act repealed in 1995). A non-resident has also been taxable to CGT since 1973 on the disposal of exploration or exploitation rights and assets and unlisted shares deriving their value from such rights (but not from such assets) – s 276 TCGA.

the "taxable person", in relation to a non-resident CGT disposal, means the person who would be chargeable to capital gains tax in respect of any chargeable NRCGT gain (see section 57B of, and Schedule 4ZZB to, the 1992 Act) accruing on the disposal (were such a gain to accrue).

(2) In those sections, references to the tax year to which an NRCGT return "relates" are to be interpreted in accordance with section 12ZB(7).

(3) For the purposes of those sections the "completion" of a non-resident CGT disposal is taken to occur—

(a) at the time of the disposal, or

(b) if the disposal is under a contract which is completed by a conveyance, at the time when the asset is conveyed.

(4) For the meaning in those sections of "non-resident CGT disposal" see section 14B of the 1992 Act (and see also section 12ZJ).

(6) In this section "conveyance" includes any instrument (and "conveyed" is to be construed accordingly).

12ZB NRCGT return

(1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and Customs, on or before the filing date, a return in respect of the disposal.

(2) In subsection (1) the "appropriate person" means—

(a) the taxable person in relation to the disposal, …

…

(3) A return under this section is called an "NRCGT return".

(4) An NRCGT return must—

(a) contain the information prescribed by HMRC, and

(b) include a declaration by the person making it that the return is to the best of the person's knowledge correct and complete.

(7) An NRCGT return "relates to" the tax year in which any gains on the non-resident CGT disposal would accrue.

(8) The "filing date" for an NRCGT return is the 30th day following the day of the completion of the disposal to which the return relates.

But see also section 12ZJ(5).

12ZBA Elective NRCGT return

(1) A person is not required to make and deliver an NRCGT return under section 12ZB(1), but may do so, in circumstances to which this section applies.

(2) The circumstances to which this section applies are where the disposal referred to in section 12ZB(1) is—

(a) a disposal on or after 6 April 2015 where, by virtue of any of the no gain/no loss provisions, neither a gain nor a loss accrues, or

(b) the grant of a lease on or after 6 April 2015 which is—

(i) for no premium,

(ii) to a person who is not connected with the grantor, and

(iii) under a bargain made at arm's length.

(3) For the purposes of subsection (2)—

"connected" is to be construed in accordance with section 286 of the 1992 Act;

"no gain/no loss provisions" has the meaning given by section 288(3A) of the 1992 Act;

"lease" and premium" have the meanings given by paragraph 10 of Schedule 8 to the 1992 Act.

…

(7) Paragraph 1 of Schedule 55 to the Finance Act 2009 (penalty for late returns) does not apply in relation to an NRCGT return which is made and delivered by virtue of this section.

…

12ZE NRCGT return to include advance self-assessment

(1) An NRCGT return ("the current return") relating to a tax year ("year Y") which a person ("P") is required to make in respect of one or more non-resident CGT disposals ("the current disposals") must include an assessment (an "advance self-assessment") of—

(a) the amount notionally chargeable at the filing date for the current return (see section 12ZF),

….

But see the exceptions in section 12ZG.

12ZF The "amount notionally chargeable"

(1) The "amount notionally chargeable" at the filing date for an NRCGT return ("the current return") is the amount of capital gains tax to which the person whose return it is ("P") would be chargeable under section 14D … of the 1992 Act for the year to which the return relates ("year Y"), as determined—

(a) on the assumption in subsection (2),

(b) in accordance with subsection (3), and

(c) if P is an individual, on the basis of a reasonable estimate of the matters set out in subsection (4).

(2) The assumption mentioned in subsection (1)(a) is that in year Y no NRCGT gain or loss accrues to P on any disposal the completion of which occurs after the day of the completion of the disposals to which the return relates ("day X").

(3) In the determination of the amount notionally chargeable—

(a) all allowable losses accruing to P in year Y on disposals of assets the completion of which occurs on or before day X which are available to be deducted under paragraph (a) or (b) of section 14D(2) or (as the case may be) section 188D(2) of the 1992 Act are to be so deducted, and

(b) any other relief or allowance relating to capital gains tax which is required to be given in P's case is to be taken into account, so far as the relief would be available on the assumption in subsection (2).

(4) The matters mentioned in subsection (1)(c) are—

(a) whether or not income tax will be chargeable at the higher rate or the dividend upper rate in respect of P's income for year Y (see section 4(4) of the 1992 Act), and

(b) (if P estimates that income tax will not be chargeable as mentioned in paragraph (a)) what P's Step 3 income will be for year Y.

(5) An advance self-assessment must, in particular, give particulars of any estimate made for the purposes of subsection (1)(c).

(6) A reasonable estimate included in an NRCGT return in accordance with subsection (5) is not regarded as inaccurate for the purposes of Schedule 24 to the Finance Act 2007 (penalties for errors).

(8) For the purposes of this section—

an estimate is "reasonable" if it is made on a basis that is fair and reasonable, having regard to the circumstances in which it is made;

"Step 3 income", in relation to an individual, has the same meaning as in section 4 of the 1992 Act.

…

(10) Section 989 of ITA 2007 (the definitions) applies for the purposes of this section as it applies for income tax purposes.

(11) For the meaning of "NRCGT gain" and "NRCGT loss" see section 57B of, and Schedule 4ZZB to, the 1992 Act.

12ZG Cases where advance self-assessment not required

(1) Where a person ("P") is required to make and deliver an NRCGT return relating to a tax year ("year Y"), section 12ZE(1) (requirement to include advance self-assessment in return) does not apply if condition A, B or C is met.

(2) Condition A is that P … has been given, on or before the day on which the NRCGT return is required to be delivered, a notice under section 8 or 8A with respect to—

(a) year Y, or

(b) the previous tax year,

and that notice has not been withdrawn.

…

12ZH NRCGT returns and annual self-assessment: section 8

(1) This section applies where a person ("P") … —

(a) is not required to give a notice under section 7 with respect to a tax year ("year X"), and

(b) would be required to give such a notice in the absence of section 7A (which removes that duty in certain cases where the person has made an NRCGT return that includes an advance self-assessment).

(2) In this section, "the relevant NRCGT return" means—

(a) the NRCGT return by virtue of which P is not required to give a notice under section 7 with respect to year X, or

(b) if more than one NRCGT return falls within paragraph (a), the one relating to the disposal which has the latest completion date.

(3) P is treated for the purposes of the Taxes Acts as having been required to make and deliver to an officer of Revenue and Customs a return under section 8 for the purpose of establishing, with respect to year X, the matters mentioned in section 8(1).

(4) For the purposes of subsection (3), section 8 is to be read as if subsections (1E) to (1G) of that section were omitted.

(5) If P does not give a notice under subsection (6) before 31 January in the tax year after year X, the Taxes Acts have effect, from that date, as if the advance self-assessment contained in the relevant NRCGT return were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(6) If P gives HMRC a notice under this subsection specifying an NRCGT return which—

(a) relates to year X, and

(b) contains an advance self-assessment,

the Taxes Acts are to have effect, from the effective date of the notice, as if that advance self-assessment were a self-assessment included, for the purposes set out in section 9(1), in a return under section 8 made by P and delivered on that date.

(7) References in the Taxes Acts to a return under section 8 (for example, references to amending, or enquiring into, a return under that section) are to be read in accordance with subsections (5) and (6).

(8) A notice under subsection (6)—

(a) must be given before 31 January in the tax year after year X;

(b) must state that P considers the advance self-assessment in question to be an accurate self-assessment in respect of year X for the purposes of section 9.

(9) The "effective date" of a notice under subsection (6) is—

(a) the day on which the NRCGT return specified in the notice is delivered, or

(b) if later, the day on which the notice is given.

(10) The self-assessment which subsection (5) or (6) treats as having been made by P is referred to in this section as the "section 9 self-assessment".

(11) If P—

(a) gives a notice under subsection (6), and

(b) makes and delivers a subsequent NRCGT return relating to year X which contains an advance self-assessment,

that advance self-assessment is to be treated as amending the section 9 self-assessment.

(12) For the purposes of subsection (11), an NRCGT return made and delivered by P ("return B") is "subsequent" to an NRCGT return to which P's notice under subsection (6) relates ("the notified return") if the day of the completion of the disposal to which return B relates is later than the day of the completion of the disposal to which the notified return relates."

22. The provisions set out above have effect in relation to disposals made on or after 6 April 2015 – paragraph 43 Schedule 7 Finance Act ("FA") 2015. Section 12ZBA TMA came into force on 15 September 2016 (it was inserted by s 91 FA 2016 with effect from Royal Assent, as no specific start date was contained in that section) but has retrospective effect back to 6 April 2015 – see s 12ZBA(2).

23. The provisions of Schedule 55 Finance Act ("FA") 2009 imposing penalties for late returns that are relevant to this case are lengthy and, unlike those for NRCGT returns, familiar to many likely readers of this decision so I have put them in an Appendix.

Grounds of appeal and HMRC response

24. The appellant says in his appeal notified to HMRC on 12 October 2017:

(1) His solicitor did not inform him of the need to file an NRCGT return, and when questioned about this said it was not his role and that he was not authorised to give tax advice, that was the role of an accountant.

(2) Although he had in fact given his accountant all the records he needed for his 2016-17 tax return in May 2017 when he sold the house, he had no need to speak to his accountant until the following year, and that even then it is unlikely he would have mentioned the sale of a house which was a principal private residence and produced a loss.

(3) He was unable to see in what circumstances he could have been aware of the requirement to make an NRCGT return.

25. In his request for a review he explained that his reason for not accepting HMRC's decision was that a reasonable person selling their primary residence, the gain on which has never been taxable, would not consider the need to complete a NRCGT return, especially when the sale had resulted in a considerable loss.

26. In his notification to the Tribunal he gave as his grounds for appeal:

(1) His response to HMRC's telling him that the test for whether he had a reasonable excuse for his admitted failure was "to consider what a reasonable person, who wanted to meet their tax obligations, would have done in the same circumstances". His view was that he was such a reasonable person as he had an unblemished 45 year tax history of compliance.

(2) His question to HMRC (which he had asked in correspondence) whether such a reasonable person (as he was) should ever be expected to consider the need to check the CGT position on the sale of a family home on which a substantial loss had been incurred, unless advised to do so by a party to the sale process who had knowledge of the relevant tax requirements.

(3) The term "Capital Gains Tax Return" does not lend clarity to the situation where there is no capital gain.

(4) In response to HMRC's statement that all the relevant information is available on the gov.uk website, he asked whether in the light of items (1) to (3) a reasonable person would ever think to search the internet to see if any further documents pertaining to the sale need to be completed.

(5) In his two previous experiences of selling a family home, all legal documentation was handled by a solicitor. How, he asked, could a reasonable person be expected to know that this time it was different. He was not told by his solicitor, and he had no reason to inform his accountant until at the earliest April 2018 of the sale.

27. He added that he was not seeking to appeal to get the penalty amount back, but to remove the blemish on his 100% compliance record. In his response to HMRC's SoC he asked whether if the tribunal finds in his favour the £100 could be given to a charity.

28. HMRC's contentions as set out in the SoC are:

(1) The appellant confirms that he lives outside the UK and has been living in New Zealand.

(2) It is not disputed that he sold a residential property in Bolton during 2017-18.

(3) The appellant is the "appropriate person" within the terms of the legislation to make a NRCGT return.

(4) The return was submitted 105 days after the 30th day from the date of completion.

(5) Accordingly, paragraph 1 Schedule 55 FA 2009 applies and penalties under paragraphs 3, 5 and 6 of Schedule 55 are payable.

29. In response to the appellant's claim to have a reasonable excuse for his failure HMRC say:

(1) Whether a person has a reasonable excuse depends on the particular circumstances in which the failure occurs. The test is to consider what a reasonable person who wanted to meet their tax obligations would have done in the same circumstances and decide if the action of the person met that standard.

(2) By reference to that test in this case the appellant's lack of awareness of the law is not a reasonable excuse, because ignorance of the law is not a reasonable excuse.

(3) There was "extensive" information available both before and after the change of legislation, and the appellant had an obligation to stay up to date with legislation affecting his activities in the United Kingdom.

(4) A prudent person exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts, is expected by HMRC to have researched what is expected regarding their tax obligations.

(5) The information on the gov.uk website regarding NRCGT "clearly states that the deadline for reporting the disposal is 30 days", and the Guidance Note was on HMRC's website from 6 April 2015. There is no suggestion that the appellant had actually consulted HMRC's website.

(6) The appellant did not take care to avoid the failure to ensure that the NRCGT returns (*sic*) were filed within the statutory 30 day limit.

30. The next passage of the SoC says:

> "HMRC did not issue late filing penalties where a late CGT return was received by 7 May 2016. The penalties were suspended for the first year and 30 days of the operation of Non-Resident Capital Gains Tax to allow taxpayers and agents sufficient time to become familiar with them."

31. They go on to point out that the fact that no CGT is payable does not remove the requirement to make a return, unless the disposal was within s 12ZBA Taxation of Chargeable Gains Act 1992 ("TCGA"), that is where a no gain/no loss disposal within s 288(3A) TCGA resulted from the disposal.

32. After an analysis of what s 12ZBA means, HMRC return to the issue of reasonable excuse to say that:

(1) HMRC consider that the appellant as a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what his tax obligations were.

(2) The obligation to file was not complex or uncertain, nor was any complexity or uncertainty in the law the reason for the failure to file on time. The appellant did not file on time simply because he were (*sic*) unaware of the obligation to do so. Such ignorance of basic law is not a reasonable excuse.

(3) HMRC contends (*sic*) that the reason the appellant did not file his NRCGT return on time was that he was simply not aware of the requirement.

(4) HMRC contends that the appellant does not have a reasonable excuse for the late submission of his NRCGT returns (*sic*) so the penalties (*sic*) have been charged correctly.

(5) While his mistake was an honest one this does not amount to a reasonable excuse. [I assume that what is meant is that the fact that a mistake made is honest does not in itself give the taxpayer a reasonable excuse for their failure].

(6) The principle (*sic*) purpose of requiring an NRCGT return to be made is to establish whether a payment on account is due. The requirement was introduced after consideration of representations on an alternative withholding tax mechanism.

33. As to the special reduction that HMRC may make, they say:

(1) An exemplary tax compliance record should not be unusual or special: on the contrary it should be the norm. By itself it cannot amount to a special circumstance. HMRC expects all of its customers to settle their tax bills (*sic)* on time and this is to be the standard and not the exception.

(2) Other matters considered in this context are the appellant's questions to HMRC as to whether a reasonable person would be expected to check the capital gains tax position on the sale of a family home and whether such a person would ever think to search the internet to see if any further documents pertaining to the sale would need to be completed. HMRC do not say what their answers are to these questions which they say they considered.

They then repeat the point about settling tax bills on time as the norm.

34. I add that the SoC does not refer to paragraph 23(2)(b) Schedule 55 which says that reliance on a third party cannot be a reasonable excuse unless reasonable care was taken by the taxpayer to avoid the failure (to deliver the return). That paragraph did feature in the review conclusions which said that:

> "Whilst I appreciate that you engaged a professional body (*sic*) to deal with the sale of your property, HMRC would expect all tax agents/solicitors/accountants to keep themselves aware of *all* [*my emphasis*] new legislation. Details of the new requirements were included in 'Agent Update' issue 51 which is available for all professional and interest (*sic*) parties to read.
>
> HMRC does not consider an agent who did not fulfil your expectations as a reasonable excuse to have late filing penalties cancelled. It is your responsibility to ensure all your tax obligations are met. If you fell that your agent failed in their professional capacity or have not followed specific instructions, then you should seek redress directly from them."

35. The review conclusions also say:

> "Although you trusted the agent dealing with the sake of the property, the ultimate responsibility to ensure your tax obligations are met lies with the individual (*sic* – which individual is not stated)

Discussion

The issues and the burden of proof

36. There are two main issues in this, as in most penalty cases. The first is whether the penalty was correctly and validly imposed in accordance with any requirements of the law. The second arises if the penalty was correctly imposed and is whether there is any provision in the law that allows the person assessed to argue that the penalty should not have been imposed at all (or in a lesser amount).

37. HMRC rightly recognise that it is for them to show that the penalty was correctly imposed and that it is for the appellant to show that there is a reason why the penalty should not have been imposed.

Was the penalty correctly imposed?

38. In my opinion HMRC have to show, on the balance of probabilities, that:

(1) the obligation which the appellant failed to meet fell within the Table in paragraph 1 Schedule 55 FA 2009 at the time of the failure.

(2) the appellant was the person who failed to meet that obligation required by law by the date required (and if relevant any later date).

(3) the appellant was not excepted from the obligation by any provision of law (apart from one requiring a claim).

(4) an assessment was made and was within the time limit laid down by law.

(5) notice of the assessment was given to the appellant.

(6) that notice stated the period in respect of which the penalty was assessed.

(7) that notice explained the appellant's appeal rights

The obligation

39. By paragraph 1(1) Schedule 55 a penalty is payable by a person who fails to make or deliver a return specified in the Table in that paragraph on or before the filing date, the date by which it is required to be made or delivered.

40. The Table contains at item 2A an NRCGT return under s 12ZB TMA. This item was inserted by paragraph 59(1) Schedule 7 FA 2015 with effect from 26 March 2015, and by paragraph 59(2):

> "… Schedule [55], as amended by sub-paragraph (1), is taken to have come into force for the purposes of NRCGT returns on the date on which this Act is passed."

41. That day was 23 March 2015. As a result Schedule 55 so far as it applied to a failure described in item 2A was in force at the time of the failure to deliver an NRCGT return on or before the filing date.

42. The filing date for an NRCGT return is the 30th day following the day of completion of the relevant disposal, which in this case is, according to the details of

the screenshot of the NRCGT return in the bundle including the evidence, 3 May 2017, making the filing date 2 June 2017. I find that the return was therefore late as it was delivered[5] electronically on 15 September 2017.

Was the appellant the person with an obligation to file an NRCGT return?

43. Section 12ZB TCGA provides:

> "(1) Where a non-resident CGT disposal is made, the appropriate person must make and deliver to an officer of Revenue and Customs, on or before the filing date, a return in respect of the disposal.
>
> (2) In subsection (1) the "appropriate person" means—
>
> (a) the taxable person in relation to the disposal, …"

44. A "non-resident CGT disposal" is defined in s 14B TCGA to mean:

> "(1) For the purposes of this Act a disposal made by a person is a "non-resident CGT disposal" if—
>
> (a) it is a disposal of a UK residential property interest (within the meaning given by Schedule B1), and
>
> (b) condition A or B is met.
>
> But see also subsections (5) and (6).
>
> (2) Condition A is—
>
> (a) in the case of an individual, that the individual is not resident in the United Kingdom for the tax year in question (see subsection (3)),
>
> …
>
> (3) In subsection (2)—
>
> (a) "the tax year in question" means the tax year in which any gain on the disposal accrues (or would accrue were there to be such a gain);
>
> …
>
> (4) Condition B is that—
>
> (a) the person is an individual, and
>
> (b) any gain accruing to the individual on the disposal would accrue in the overseas part of a tax year which is a split year as respects the individual.

[5] Paragraph 1 Schedule 55 penalises a person who fails on time to "make *or* deliver". Sections 8(1), 8A(1) and s 12ZB(1) TMA all require a person to "make *and* deliver", while paragraph 3(1) Schedule 18 FA 1998 (corporation tax return) only requires delivery. No doubt HMRC would not accept an argument from a taxpayer that they "made", in the sense of completing the boxes etc, their return before the due date even though they delivered it, by submitting it, after that date, and so should not be penalised.

(5) A disposal by a person of a UK residential property interest is not a non-resident CGT disposal so far as any chargeable gains accruing to the person on the disposal—

(a) would be gains in respect of which the person would be chargeable to capital gains tax—

(i) under section 10(1) (non-resident with UK branch or agency), or

(ii) under section 2 as a result of subsection (1C) of that section (corresponding provision relating to the overseas part of a split year), …

…

(6) A disposal of a UK residential property interest is not a non-resident CGT disposal if … section 517C of ITA 2007 (gains etc on certain disposals treated as trading profits for income tax purposes) applies in relation to it."

45. The meaning of a disposal of a UK residential property interest is set out in Schedule B1 TCGA 1992 of which paragraphs 1, 2 and 4 relevantly say:

"1—(1) For the purposes of this Act, the disposal by a person ("P") of an interest in UK land (whether made before or after this Schedule comes into force) is a "disposal of a UK residential property interest" if the first … condition is met.

(2) The first condition is that—

(a) the land has at any time in the relevant ownership period consisted of or included a dwelling, or

(b) the interest in UK land subsists for the benefit of land that has at any time in the relevant ownership period consisted of or included a dwelling.

…

(4) In sub-paragraph (2) "relevant ownership period" means the period—

(a) beginning with the day on which P acquired the interest in UK land or the relevant date (whichever is later), and

(b) ending with the day before the day on which the disposal occurs.

(4A) In sub-paragraph (4) "the relevant date" means—

(a) for the purpose of determining whether a disposal is a non-resident CGT disposal, 6 April 2015;

…

(6) In this paragraph—

…

"dwelling" has the meaning given by paragraph 4.

…

2—(1) In this Schedule, "interest in UK land" means—

(a) an estate, interest, right or power in or over land in the United Kingdom, …

…

other than an excluded interest.

(2) The following are excluded interests—

(a) any security interest;

(b) a licence to use or occupy land;

(c) in England and Wales or Northern Ireland—

(i) a tenancy at will;

(ii) a manor.

…

4—(1) For the purposes of this Schedule, a building counts as a dwelling at any time when—

(a) it is used or suitable for use as a dwelling, or

(b) it is in the process of being constructed or adapted for such use.

…"

46. What is required here is evidence:

(1) as to the non-residence status of the appellant for the tax year in which the disposal accrues (s 14B(2) TCGA) or that Condition B in s 14B as to a split year is satisfied (s 14B(4)),

(2) that the disposal is not one to which subsections (5) or (6) of s 14B applies

(3) that the disposal is of a UK residential property interest in that the land disposed of comprised or included a dwelling in the relevant ownership period or that the appellant had an interest in UK land that was not an excluded interest (Schedule B1 TCGA).

47. The evidence of HMRC provided in the bundle consists of:

(1) The screenshot of the NRCGT return

(2) The correspondence and other documents emanating from HMRC officers including the notice of assessment to penalties.

48. What I do not have is:

(1) the income tax returns made by the appellant, or details of them, for 2016-17 or any earlier tax year, including especially any SA109 (residence) pages submitted

(2) any details of the addresses which HMRC held on their computer systems for the appellant, and any SA Notes relating to those addresses.

(3) any statements by the appellant in relation to his residence status and any change in it, and any document from HMRC acknowledging or agreeing to any change, including any SA Notes which would show what tax forms and documents were issued to the appellant and when.

(4) the nature of the income arising in the UK on which the appellant is chargeable and as a result was required to make a self-assessment,

(5) a copy of the NRCGT return showing what it says that is not on the screenshot, and of any guidance notes for its completion.

49. From the screenshot and the HMRC correspondence I find the following facts relating to this issue:

50. In the NRCGT return (which he has declared to be true)

(1) the appellant gives an address and phone number in New Zealand.

(2) He certified (even though he was not required to do so) that he met the "day count" test for tax years after 5 April 2015.

Nothing on the NRCGT return explains what the "day count" test is, nor are there any guidance notes for completing the return beyond what is on the HMRC website. On the relevant pages about NRCGT returns there is no reference to "day counts" but there is a hyperlink from the words "non-resident individual", one of the list of person who must file a NRCGT return. That hyperlink takes anyone clicking on it to pages about the statutory residence test ("SRT") and from there to HMRC's 105 page guidance on the SRT. That document contains no reference to the term "day count test". Page 8 contains some information about the number of days spent in the UK that will make a person resident, and there are other references to a day count for this and other "automatic tests".

(3) He has returned a "non-resident loss".

51. HMRC have not asserted, or sought to provide evidence of their own, that the appellant was non-resident and so they are leaving it for the NRCGT return and the fact of its filing to speak for itself.

52. In correspondence the appellant says he checked with his accountant who told him he had an obligation to file the return.

53. He has therefore not suggested that he was not required to make and deliver the return because he was in fact UK resident, and his submission of the return is evidence that he was not UK resident.

54. I find that in 2016-17 he was not resident in the UK.

55. I also find from the return and correspondence that the appellant sold his 50% share with his wife of a residential property in Bolton in a tax year in which he was non-resident. His share I assume comes from a joint tenancy or tenancy in common and I hold that such an interest is a UK residential property interest within the

meaning of Schedule B1 TCGA. I take judicial knowledge of the fact that Bolton is in the UK[6].

56. I find that the appellant was obliged by UK law to make the return as being the owner of an interest in land in the United Kingdom which he disposed of at a time when he was non-resident.

Was there an exception from the obligation to file?

57. Section 12ZBA TMA provides that there is no obligation to file if the disposal is a disposal where, by virtue of any of the no gain/no loss provisions in s 288(3A) TCGA, neither a gain nor a loss accrues. But that section also provides that an election may be made to make a return nonetheless, but that such a voluntary or elective return is not one to which paragraph 1 Schedule 55 applies

58. In the SoC HMRC refer to this provision and "contend" that in determining whether a gain or loss is made it is necessary to consider allowable deductions as well as the amount of consideration for the disposal[7]. They further contend that a disposal in the open market for neither gain nor loss cannot be a no gain/no loss disposal within the s 288(3A) provisions, so consequently s 12ZBA does not apply here.

59. The returning of an NRCGT loss is clear evidence that that return was not an elective one within s 12ZBA, and I so find. I have had to deduce this because there is nothing on the NRCGT return which allows a person to indicate expressly that the return is a voluntary s 12ZBA one: the fact that it was can only be discerned by nil entries in the both the box for the non-resident gains and the non-resident loss, but even that would not be conclusive as HMRC's second contention in §58 shows.

60. The policy behind this exception, which removes the obligation where neither a chargeable gain nor an allowable loss accrues, but not where any gain is exempt or a loss not allowable because any gain had one accrued would be exempt, is not something within my jurisdiction.

Was an assessment made and if so was it in time?

61. HMRC has produced no evidence showing that the penalty assessment itself was actually made and by whom or of the process by which the assessment was made. I have a document (see §7 & 8) demonstrating that a *notice* of assessment was given to the appellant by L Patel, an officer of HMRC.

62. The appellant did not suggest the assessment had not been made, nor put HMRC to proof that it had, unlike in *Corbally-Stourton v HMRC* [2008] SpC 692

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[6] The NRCGT return does not ask for the country in which the property is situated although it does ask for "the postcode". This request just for the postcode contrasts oddly with the request in relation to the current address of the taxpayer for "the UK postcode or non-UK postal/zip code".

[7] Who'd have thought it? The only faint reason I can think of for this "contention" at this stage of the SoC is that the s 288(3A) provisions are all ones which deem the consideration for the disposal to be such amount as would secure that no gain or loss accrues, and that is obviously done by deeming the consideration to be equal to the allowable deductions.

(Special Commissioner John Clark). In my view the presumption of regularity applies in such a case and I assume that by HMRC's issuing a notice of an assessment it follows that an assessment was in fact made.

63. I find that the assessment was made on (or possibly before) 2 October 2017 (that being the date of the notice, which is not necessarily the day the assessment was made). That date is less than two years from the filing date so by virtue of paragraph 19(2)(c) Schedule 55 FA 2009 it was in time, and I so find.

Was notice properly served?

64. The notice was addressed to the address acknowledged by the appellant and he obviously acknowledged receiving the notice. There is no other way that the appellant could have come by knowledge of the notice, and the address on the copy in the file is the address given by the appellant in correspondence so I accept that it was properly served by post within the meaning of s 115(2) TMA.

Did it state the correct period in respect of which the penalty was assessed?

65. On the second page of the notice is a box which reads (verbatim):

> "You have been charged penalties for the period from 2 June 2017 to 15 September 2017 A £100 fixed penalty
>
> Paragraph 3 of Schedule 55 to the Finance Act 2009."

There is no reference to a tax year.

66. Paragraph 18(1)(c) Schedule 55 requires a notice of assessment to

> "state … the period in respect of which the penalty is assessed".

67. There is no definition of this term in Schedule 55 but in paragraph 19 there are clues. FA 2013 amended paragraph 19(2) when RTI[8] return failures came within Schedule 55. The definition of "Date A", one of the dates which determines the time limit for assessing, was amended to make the time limit in an RTI return case 2 years from the "end of the tax month in respect of which the penalty is payable". The word here is "payable" not "assessed" as in paragraph 18(1)(c) but that is immaterial as a penalty is only payable when it is assessed.

68. It seems to follow from this that where a return covers, ie requires information in respect of, a tax year, that tax year is the period in respect of which the penalty is assessed if the return is late.

69. Other provisions imposing penalties introduced as part of the HMRC review of its powers in the noughties also require notice of a period. Paragraph 11(1)(c) Schedule 56 FA 2009 (penalties for late payment of tax) is in terms identical to paragraph 18(1)(c) Schedule 55, and that Schedule does not have a definition of "the period in respect of which the penalty is assessed" either.

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[8] RTI means Real Time Information, and the information to be given in an RTI return almost in real time is information about payments of earnings made by an employer.

70. Paragraph 16(1)(c) Schedule 41 FA 2008 (penalties for failure to notify chargeability etc) also contains the identical wording, and no definition of "the period in respect of which the penalty is assessed".

71. Schedule 24 FA 2007 (penalties for inaccuracies in returns and other documents which understate tax due) is somewhat different. Paragraph 13(1)(c) of that Schedule requires the notice of assessment of the penalty to state "*a tax period* in respect of which the penalty is assessed", not "the period". Paragraph 28(g) defines tax period to mean a "tax year, accounting period or other period in respect of which tax is charged", a definition which seems to say no more that what is in paragraph 18(1)(c) Schedule 55 save that it refers to two common examples of such periods.

72. Each of the provisions referred to above covers a range of taxes, with Schedule 24 FA 2007 and Schedule 41 FA 2008 dealing with the entire gamut of taxes and duties for which HMRC are responsible, while Schedules 55 and 56 FA 2009 are more restricted in practice, given that they are to come into effect by commencement orders and not that many have been made. But even in relation to Schedule 55 (and ignoring NRCGT) it is in force in relation to one tax charge that is not assessed by reference to a year, a month or a number of months.

73. That charge is the Stamp Duty Reserve Tax ("SDRT") charge under s 98 FA 1986. A notice must be given to HMRC in relation to each "relevant transaction". The "period" in respect of which a penalty is assessed for failure to give a notice by the "accountable date" can only be the day on which the relevant transaction occurred.

74. In relation to NRCGT the charging provision is s 14D TCGA 1992. A person is chargeable to CGT "in respect of any chargeable NRCGT gain accruing to the person in the tax year on a non-resident CGT disposal" (s 14D(2)). Such a person is charged on all gains accruing[9] in the tax year less any allowable NRCGT losses (s 14D(2)).

75. The obligation to make an NRCGT return is in sections 12ZA to 12ZN TMA. It arises under s 12ZB whenever an "appropriate person" makes a single non-resident CGT disposal (subject to the limited rule in s 12ZC that where two or more disposals have the same completion date and arise in the same tax year a single return may be made) and the return must be made and delivered by the 30th day following the date of completion of the relevant disposal. If a return is made after that day paragraph 1 Schedule 55 imposes the penalties to the assessment of which the provisions of paragraph 18 apply.

76. So what in these circumstances is the period in respect of which the penalty is assessed? An obvious answer which suggests itself is the tax year in which the disposal is made. Another is the tax year in which completion takes place. That they need not be in the same year can be seen from s 12ZC(c) which recognises that for the purposes of TCGA it is the date of an unconditional contract for sale is the date of disposal of the asset sold under it, not the date of completion – s 28 TCGA.

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[9] "Accruing" in TCGA has a meaning that would not be recognised by tax economists and academics and means "arising".

77. As it is clear from the inclusion of SDRT in Schedule 55 (§73) other possible answers are the single date on which the disposal accrues or on which completion takes place.

78. It seems to me though that in principle "the period in respect of which the penalty is assessed" in Schedule 55 should have the same meaning as the very similar term in Schedule 24 FA 2007, and that it should mean a period in relation to which tax is charged, and taking a cue from paragraph 19(2) Schedule 55 it should *in this case* mean the period in respect of which tax may be charged and assessed. As s 14B TCGA charges NRCGT by reference to the tax year of the accrual of any potential gain on the disposal, that seems to me to be the correct period. This is reinforced to a degree by s 12ZA(2) and s 12ZB(7) which provide that for the purposes of sections 12A to 12N an NRCGT return "relates to" the tax year in which any gain on the disposal (if there were any) would accrue.

79. Thus in this case the relevant period is, based on the appellant's return, the 2017-18 tax year. But there is no mention on the notice of assessment of the 2017-18 tax year or indeed any tax year. The notice then does not comply with the paragraph 18(1)(c) Schedule 55.

80. But the next question is whether that lack of compliance can be cured by s 114(1) TMA, or does it lead to the invalidity of the assessment so that it must be cancelled.

81. There is a valuable survey of the case law on s 114(1) TMA in a decision of the Upper Tribunal ("UT") in *HMRC v Mabbutt* [2017] UKUT 289 (TC) (Judges Colin Bishopp and Guy Brannan), a decision which is of course binding on me, although the remarks about s 114(1) seem to me to be strictly obiter.

82. The issue in the case was the validity of a purported notice of enquiry by an officer of HMRC into the tax return of Mr Mabbutt. The letter and accompanying documentation referred to the return to be enquired into as that for the "year ended 6 April 2009", whereas all tax returns are made for a year ended 5 April. The First-tier Tribunal ("FTT") (Judge Jane Bailey and Jane Shillaker) held that as a result the enquiry notice was invalid, with the result that HMRC were then out of time to begin another enquiry. In support of their decision the FTT had cited the Court of Appeal decision in *Baylis (HM Inspector of Taxes) v Gregory* 62 TC 1 ("*Baylis").*

83. The UT held that the reference to 6 April was an obvious clerical slip. There were no returns for any year ended 6 April and there could only be one return period ending in 2009. The notice was therefore valid as a notice of enquiry into the return for the year ended 5 April 2009. The UT also prayed a case in aid, *GDF Suez Teesside Power Limited v HMRC* [2017] UKUT 68 (Newey J and Judge Bishopp) ("*GDF Suez*") which had contained what they called a "critique" of the FTT's decision in *Mabbutt*.

84. In that critique in *GDF Suez* the UT had said:

> "118. We do not consider that what was said in *Baylis v Gregory* or in *Sokoya* leads to a different conclusion. The former concerned the validity of a formal demand, for which there is a prescriptive statutory framework, by which a taxpayer is made liable, subject to appeal, to make a payment to the state. One can well understand why protection of the taxpayer demands formality and complete absence of ambiguity in such a case. The latter concerned a penal provision: the taxpayer was said to be liable to a penalty for his alleged failure to comply with an information notice by a date which had been incorrectly identified. In other words, he was said to be liable to a penalty for failing to do something which he could not lawfully have been required to do; moreover, it is well established that in a penal context any ambiguity must be construed in favour of the person penalised. We see no true parallel between those cases and this."

85. In the UT the appellant relied on *Baylis*. The Tribunal in its decision at [73] said:

> "We consider that the reliance placed by Mr Gordon on the judgment of Slade LJ in *Baylis* is misplaced. As was noted in *GDF Suez* at [118], that case involved the formal assessment procedure, circumscribed by a detailed statutory framework, under which a taxpayer becomes liable to make a payment of tax. That statutory context required a more prescriptive and formal approach than is required in the context of a notice of an intention to open an enquiry under section 9A TMA."

86. At [75] they observed:

> "In relation to sections 9A and 114(1) TMA, we consider that the correct approach is to determine first whether a purported notice of enquiry is a valid notice under section 9A … and only if the answer to that question is in the negative move on to consider whether any mistake could, if necessary[10], be cured by section 114(1) TMA."

87. After coming to this decision which disposed of the appeal, the UT remarked that it was, strictly, unnecessary for them to consider s 114(1), but did so because it had been fully argued. They decided that had they held the enquiry notice to be invalid, the error would have been cured by s 114(1). This was because it was "manifestly a minor clerical error … which could have left a reasonable recipient taxpayer in no doubt as to what was intended", so that the error was neither "gross" or "misleading" two adjectives which had been used by Henderson J (as he then was) in *Pipe & others v HMRC* [2008] EWHC 646 (Ch) ("*Pipe*") to describe the kind of errors whose magnitude took them out of the scope of s 114(1) TMA.

88. In *Pipe* the facts were more like those in this case than those in *Mabbutt*. In that case on 7 September 2004 the General Commissioners for the Division of Barnstaple ("the Generals") had directed that the appellant was liable to a daily penalty for each

[10] I find the words "if necessary" somewhat curious. If the notice is invalid on its face, I do not understand why it would not be *necessary* to cure the error if it could be cured by the application of s 114(1). Perhaps "if possible" was meant.

day that her failure to deliver her return continued after the date of the direction, ie 7 September. That direction was sent to the appellant on 8 September.

89. On 29 September 2004 the appellant was sent a penalty notice, imposing a penalty of £840, being a penalty of £60 per day for the period 15 *April* 2004 to 28 *April* 2004. The amount was payable within 30 days of "the date of this notice".

90. Henderson J dealing with the taxpayer's appeal from a decision of the Generals that section 114 applied, noted at [10] that it could be seen at once that the reference to "April" must have been indeed to be "September", and in [13] he noted that HMRC wrote to correct the error on 25 February 2005. The appellant had argued before the Generals that s 114(1) did not apply, citing *Baylis* and other cases.

91. Henderson J dismissed the appeal, but not because s 114(1) applied, but because s 114(2)(b), which had not been referred to before the Generals but was put forward by HMRC in their appeal to the High Court, did apply to cure the error. But as in *Mabbutt*, Henderson J went on to consider whether, if s 114(1) had been in issue, he would have upheld the decision of the Generals. At [51] he said:

> "… If the case were one where HMRC had to rely on section 114(1) to cure the defect in the Penalty Notices, I would agree with Mr Conolly that the mistake was of too fundamental a nature to fall within the scope of that subsection. It was indeed a gross error, and one that, viewed objectively, might have been misleading, because it could have led the recipient to believe that an earlier determination had been made by the Commissioners in or before April 2004, and that such earlier determination had either not been notified at all or the notification had gone astray. If the Penalty Notices were the documents which founded liability to the penalties, there would be much to be said for the view, echoing Slade LJ in [*Baylis*], that specifying the correct dates is something HMRC must get right".

92. I also note that the appellant relied on two decisions of the Special Commissioners, *Austin v Price (HM Inspector of Taxes)* (2004) SpC 426 ("*Austin*") and *Jacques v HMRC* (2005) SpC 513 ("*Jacques*"), both decisions of Dr John Avery Jones who in them had invalidated penalties for failure to comply with information notices and who had said in *Austin* that "the taxpayer is entitled to know what he has failed to do for which the penalty is being imposed", and a few lines later

> "If a daily penalty is imposed it must be clear to the taxpayer how it is calculated and what is the total, and the notice must state what the taxpayer has failed to do."

93. A similar decision to those of Dr Avery Jones was reached by this Tribunal in another FTT case, *Sokoya v HMRC* [2009] UKFTT 163 (Judge Roger Berner). In that case the offending document was a letter accompanying a notice of penalty determination which recited that the deadline for complying with the information notice, failure to comply with which triggered the penalty, was 30 days from the date he received the notice, whereas it was in law (the later) 30 days from the date of the determination of the Special Commissioner in upholding the information notice.

94. From *Mabbutt* and the cases discussed in that decision I draw the following propositions, giving my basis for stating them.

(1) The formality of the document in question is an important distinguishing feature (see *GDF Suez* and *Mabbutt*).

Baylis, *Sokoya*, *Austin* and *Jacques* are examples of cases where the documents, notices of assessment and of penalties are of that formal quality. *Sokoya*, *Austin* and *Jacques*, though first instance decisions, have not been disapproved of or overruled. *Baylis* is of course binding. *Pipe* is another penalty case where had s 114(1) been in point it would probably not have cured the error.

(2) The error needs to be "gross" or "fundamental" (even in formal cases).

The errors which have resulted in assessments being invalidated have mostly been described as "gross" or "fundamental", a description which includes any error which is objectively misleading.

In *Baylis* an error over the year of assessment was too "integral, fundamental" a part of an assessment to be capable of being rescued by s 114(1). Also in *Baylis*, Slade LJ referred with approval to the dictum of Megarry J in *Fleming (HM Inspector of Taxes) v London Produce Co. Ltd.* 44 TC 582 ("*Fleming*") that s 114(1) could not "provide an impervious coverlet[11] for gross errors" and Slade LJ further said that the error in *Baylis* was a gross one.

In *Austin* Dr Avery Jones said the error of stating the wrong year in one of two penalty notices, was "completely misleading", and that this and errors in showing the penalty as £340 per day rather than £10 per day and misdescribing the notice concerned were gross errors.

In *Jacques* although the error was not as serious as in *Austin*, it was said to have introduced too much uncertainty to be valid. It is clear that the Special Commissioner was holding that the uncertainty was objectively misleading, as he said he rejected HMRC's contention that one could deduce the correct date. In *Sokoya* Judge Berner explicitly followed *Jacques*.

In *Pipe* the error was to misstate the month in which the daily penalty accrued. Henderson J held that the error was misleading and of too fundamental nature to be cured (citing *Baylis* in support).

(3) In formal cases the error does not have to be subjectively or objectively misleading if it is gross or fundamental

This too derives from *Baylis* where Slade LJ said that the error did not mislead its recipient. I note that in *Pipe*, Henderson J said, albeit obiter, at [51] having

[11] The HMSO Tax Cases report of *Baylis* shows the word used as "cover". But the All England Law Reports version shows "coverlet". "Coverlet" is shown in the extract from Megarry J's dictum quoted in the HMSO Tax Cases report of *Hart (H M Inspector of Taxes) v Briscoe and Others*; *Hoare Trustees v Gardner (H M Inspector of Taxes)* 52 TC 53. In the All ER report of *Fleming*, the word is "coverlet".

found the error to be fundamental and so a gross error, but he also said that viewed objectively the error might have been misleading. If Henderson J meant to say that an error, however gross, which did not mislead could be cured by s 114(1) I do not think that can stand in the light of *Baylis*, but I doubt that is what the he meant.

(4) In less formal cases, such as notices of enquiry, the enquiry should be to see if the error or mistake can be ignored before considering s 114(1).

This derives from *GDF Suez* and *Mabbutt*. I have to say that this could be seen as depriving s 114(1) of any relevance in other than formal cases, yet it is by no means confined to such formal documents as assessments, penalty determinations and warrants, as it covers "other proceedings" which in *Mabbutt* were held to cover the enquiry notices.

95. But before considering the application of s 114(1) to the facts of this case, I must refer to a decision of the Court of Appeal decided after *Mabbutt*, *Donaldson v HMRC* [2016] EWCA Civ 646 ("*Donaldson*"), particularly as this case involved the requirement to state a period in paragraph 18(1)(c) Schedule 55 FA 2009 which is the same requirement as in this case.

96. But the specific issue in *Donaldson* was different, covering as it did the interpretation of the unusual provisions of paragraph 4(1)(c) Schedule 55. It is worth repeating all that Lord Dyson MR (giving the only reasoned judgment) said on the paragraph 18(1)(c) issue:

> "*Paragraph 18(1)(c)*
>
> 23. Ms Murray [for the appellant] submits that the notice of the penalty assessment given by HMRC to Mr Donaldson did not state "the period in respect of which the penalty is assessed" as required by para 18(1)(c). It failed to state any period at all. The notice should have stated both the number of days in respect of which the penalty was assessed and the start and end dates of the period. The notice enabled Mr Donaldson to work out the number of days (90), but it did not state that number, nor did it state the period.
>
> 24. Mr Vallat's primary submission [for HMRC] is that the "period in respect of which the penalty is assessed" is the tax year to which the assessment relates (in this case 2011/12). This was stated in the notice. He points out that para 18 applies for the assessment of all penalties under the Schedule. There are no introductory words such as "where appropriate" which might suggest that a period need only be specified for some penalties. In some instances (for example, penalties payable pursuant to paras 3 and 8), the only possible "period in respect of which the penalty relates" is the tax year or other period to which the penalty relates.
>
> 25. I do not accept Mr Vallat's submission. It is true that in some contexts the phrase "period in respect of which the penalty is assessed" is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the

period over which the penalty has been incurred. It would have been surprising if Parliament had not intended that HMRC should notify P how a daily penalty has been calculated i.e. over what period he has incurred the penalty. He needs that information to enable him to decide whether to challenge the assessment of the penalty.

26. The next question is whether the notice of assessment in this case did state the period in respect of which the daily penalty was assessed. It undoubtedly did not state the start or the end dates of the period. It stated that Mr Donaldson was liable for the maximum penalty of £900 calculated at the rate of £10 per day for a maximum of 90 days. It also referred him to para 4 of the Schedule. In my view, this was not sufficient to satisfy the requirements of para 18(1)(c). The notice did not identify the three month period. Referring him to para 4 of the Schedule (as the notice did) did not enable him to work out (still less by doing so did the notice state) to which three month period it was referring. As I have said at para 8 above, this seems to have been the view of the UT. The notice should have specified the three month period, at least by stating when it started. It should not be a cause for surprise that Parliament intended that the taxpayer should be told not only the amount of the daily penalty, but how it has been calculated i.e. the start and end date of the three month period.

27. It is, therefore, necessary to consider Mr Vallat's alternative argument that the failure to state the period over which the penalty was incurred does not of itself invalidate the assessment because, despite the defect, the notice was in substance and effect in conformity with para 18 or accorded to its intent and meaning within section 114(1) of the Taxes Management Act 1970 ("TMA") Section 114(1) of TMA provides:

> 'An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding'

28. Ms Murray submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. I n my view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice "affected by reason of a mistake, defect or omission therein" (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions.

> 29. In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice. I do not, therefore, need to consider the further argument advanced by Mr Vallat based on section 114(2) of TMA."

97. What is clear from these extracts is that, rather surprisingly to my mind, where paragraph 4 penalties are imposed there is an obligation in paragraph 18(1)(c) to inform the taxpayer of the period over which the daily penalties run, but not apparently to inform them of the tax year to which the penalty relates and thus the tax year for which the return was required. Not every return is required to be made or delivered on 31 October or 31 January after the end of the tax year: see s 8(1E) to (1G) TMA, and it may well happen that two or more returns are due to be filed at the same time.

98. But Lord Dyson makes it tolerably clear that where other paragraphs of Schedule 55 are involved, the paragraph 4 obligation he identified does not apply, and that the correct answer in those cases is that it is the tax year which is the period to which the penalty relates. His rejection of Mr Vallat's submission in [25] relates to the general proposition that the relevant period is the tax year in all penalty-imposing paragraphs of Schedule 55. From the many specimen penalty notices I have seen in considering appeals against Schedule 55 penalties imposed for failures within Item 1 in the table in paragraph 1 (s 8 and s 8A TMA tax returns) I can say that the tax year is always mentioned on the penalty notice, if only in the form of referring to the return for the "year ended …", and indeed Lord Dyson says at [29] that the tax year was apparent.

99. Having found (see [26]) that the daily penalty period was not stated on the notice of assessment, Lord Dyson considered s 114(1) TMA. He came to the conclusion that s 114(1) did save the assessment. Section 114(1) covered omissions, which this was, but the omission in this case was one of form, not substance and neither confused nor misled the appellant.

100. In my judgment there is nothing in this case which casts any doubt on the propositions I have identified. The case is one involving penalty notices, like *Pipe*,

Sokoya, *Austin* and *Jacques*, but the omission, being one of form not substance, is, in terms of my second proposition, not significant because it is, as a matter of form only, not fundamental. The fact that the error was not misleading did not of itself, in my view, prevent it being a significant error, but whether there was any misleading is clearly a factor that must be taken into account (see *Fleming*).

101. Finally I should address a matter which arises from *Pipe*. It will perhaps be surprising to a reader of this decision that having held that the error was misleading and of too fundamental nature to be cured (see §95(2)) Henderson J allowed the appeal by Mr and Mrs Pipe. That was because he found that s 114(2)(b) applied. This point was noticed and considered in a decision of this Tribunal, *Chartridge Developments Ltd v HMRC* [2016] UKFTT 766 (TC) (Judge Robin Vos) about penalties for late returns for the ATED legislation in FA 2013. The relevant extracts are:

> "41. Henderson J [in *Pipe*] reviewed various previous authorities on the scope of s 114(1) TMA 1970 and discusses issues such as whether s 114 TMA 1970 can ever remedy a gross error which is likely to mislead the taxpayer. In the end however, in finding for HMRC, Henderson J relied on s 114(2) TMA 1970 and the distinction between the decision or determination that a penalty is payable on the one hand and the notice to the taxpayer of that decision on the other. The relevant part of s 114(2) TMA 1970 provides as follows:
>
> > '114(2) An assessment or determination shall not be impeached or affected -
> >
> > …
> >
> > (b) by reason of any variance between the notice and the assessment or determination.'
>
> 42. Henderson J made the point that any appeal was only against HMRC's decision that a penalty is payable (or against the amount of the penalty) and not against the notice. As the taxpayer had not alleged that HMRC had made any mistake in the determination of the penalty as opposed to the notice, it must be assumed that the determination was correct. On this basis, Henderson J found that s 114(2)(b) TMA 1970 applied so that any mistake in the notice did not affect the determination itself.
>
> …
>
> 44. *Pipe* was however dealing with a different statutory provision and it is necessary to look closely at the requirements of Schedule 55 FA 2009.
>
> …
>
> 48. Paragraph 18(1) Schedule 55 FA 2009 provides that:
>
> > '18(1) Where P is liable for a penalty under any paragraph of this schedule HMRC must –
> >
> > (a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.'

49. There are therefore specific requirements as to the contents of the penalty notice including the period in respect of which the penalty is assessed and the date from which the daily penalty is payable. These requirements as to the content of the penalty notice were not a feature of the previous regime in TMA 1970 which Henderson J was considering in *Pipe*.

50. Having said this, as was the case in *Pipe*, the taxpayer only has certain rights of appeal which are contained in paragraph 20 schedule 55 FA 2009:

'*Appeal*

20(1) P may appeal against a decision of HMRC that a penalty is payable by P.

20(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.'

51. However, taking all of these provisions together, it seems to me that it is difficult in the context of Schedule 55 FA 2009 to draw the same distinction as Henderson J did in *Pipe* between the determination of the penalty (i.e. HMRC's decision) and the notice which is sent to the taxpayer.

52. Whilst the taxpayer's right of appeal is against HMRC's decision that a penalty is payable or their decision as to the amount of the penalty which is payable, given the specific requirements as to dates which must be shown in the penalty notices, it must have been intended that the penalties shown in the penalty notice are the same as, and therefore reflect, the decision against which the right of appeal is conferred. It was not suggested to me that there is any separate record maintained by HMRC of its penalty decisions which might differ from what is contained in the penalty notices.

53. If this is right, there is no scope for s 114(2) TMA 1970 to apply as, in this particular case, there cannot be a variance between the assessment or determination (i.e. the decision) on the one hand and the notice on the other – they are one and the same thing."

102. Henderson J's decision in *Pipe*, dismissing the appeal because of s 114(2)(b) TMA is as binding on me as it is on Judge Vos if it applies to the facts of our cases. He has held that it does not apply. He says that because the assessment and the notice of it are one and the same thing there cannot be any variance between them. I do not agree that they are one and the same thing.

103. At §62 I referred to the case of *Corbally-Stourton v HMRC* which on this topic says:

"*The making of the assessment*

> 90. In the days before widespread computer use, when an inspector made an assessment he did so by writing it in the assessment book. In *Honig v Sarsfield* [1981] STC 247 the Court of Appeal held that for the purposes of the then provision of section 29 TMA (which differ from those relevant to this appeal) an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In *Barford v Durkin* [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to assess even though the assessment book was signed, at his direction, by another.
>
> 91. Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the Appellant. Once keyed into the computer the amount appears as a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the Appellant's statement which showed an entry for an "adjustment from [self-assessment] return 18 October 2004" recording the entries made when the Appellant was notified that she would be assessed.
>
> 92. Mr Barnett put the Respondents to proof that the Appellant had been assessed.
>
> 93. It seems to me that Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."

104. That this was also the procedure for determinations under s 100 TMA is clear from the Case Stated in *Pipe*, and supported by the provisions of s 113(1D) TMA.

105. There is no reason to think that where a Schedule 55 penalty is concerned the position is different: indeed paragraph 18(2) Schedule 55 suggests that it is not. The record on the computer is the assessment, and the letter issued to the taxpayer is the notice of it. Where I agree with Judge Vos is in thinking that there can be no question of variance between the two, because the notice is printed using the details from the assessment, and it could only be if there was any human intervention in altering the notice before despatch that a variance could arise.

106. In *Pipe* the notice of the assessment was a form SA521 (see paragraph 4(2) of the Case Stated by the General Commissioners at [2008] STC 1911 at 1913). The judgment in Pipe records the submission by Timothy Brennan QC at [43] that no mistake had been made in the determination (ie assessment) and that the mistake had been in the notice on SA521. The determination was not produced to the General Commissioners, let alone to Henderson J, nor was any evidence given by an officer of HMRC about the determination.

107. Henderson J naturally accepted Mr Brennan's word that the determination was correct in its description of the determination. No evidence was given as to whether the SA521 was completed manually by entry of details into a template or otherwise.

108. In my view it has been to all intents and purposes impossible for a variance to arise in an assessment to tax ever since assessments started to be made using carbon-paper backed assessment sets. In the days when notices of assessment were written out by clerks in longhand, or where they filled in the details on pre-printed forms using pen and ink, discrepancies could obviously occur, but not now.

109. Penalties to be determined under s 100 TMA are determined in the same way as assessments (see s 113(1D) TMA for support). Penalties under s 93(2) and (4) were made automatically by a computer and in those cases it is highly unlikely that the notice of determination was not also printed out by the computer. But s 93(3) was different, much like paragraph 4 Schedule 55 penalties, of which it was the predecessor. It was unusual in that leave of the General Commissioners had to be obtained before the penalties could be assessed. It would not be surprising if indeed the SA521 was a manually produced form and letter not printed by the computer that made the determination.

110. But under Schedule 55 the whole process including paragraph 4 penalties is automated. The computer is as *Donaldson* shows programmed to make the assessments at specific times and because an HMRC committee has decided that all failures to file a return that continue for three months are to be penalised, it is inconceivable that there is any room or time for human intervention in the process of issuing the notices of assessment.

111. It is also inconceivable that there can for that reason be any variance between the assessment and the notice, and in my opinion s 114(2)(b) TMA has had its day and cannot apply in this case.

Conclusion on the assessment

112. The notice of penalty assessment is a formal notice. If it is misleading that is capable of being a fundamental and incurable error. But in my view the omission to state the tax year is not objectively misleading in this case. The appellant could have been in no doubt that the penalty assessment related to his one and only failure to make his only ever NRCGT return, especially when the period referred to in the notice was the exact period during which he failed to make and deliver the return. The tax year is irrelevant for these purpose of the penalty which is calculated solely by reference to the date for filing the NRCGT return, not for filing the tax return in which any gain would be returned and any tax paid. And for these reasons it cannot be a gross or fundamental error.

113. The notice could be thought to be slightly misleading in this respect. The appellant may have been puzzled, as I was, by the statement in the box on the notice (see §65) that he was charged penalties for the period from 2 June 2017 to 15 September 2017, as if they were paragraph 4 Schedule 55 penalties, but the statement on the first page that the return should have been filed by 2 June 2017 but was actually filed on 15 September 2017 shows precisely why the penalty was charged and that there was a failure giving rise to a penalty. Nor can the inaccurate use of the word "finalised" when "completed " is meant alter matters.

114. I therefore accept that assessment to a penalty of £100 was validly made and notice properly given.

115. I add this. I have assumed from the return that the disposal was in 2017-18 as that was the "date of sale" shown by the appellant. I am sceptical whether an unassisted taxpayer would appreciate that the date that goes into this box on the return is the date of the contract for sale, the date that determines the year in which the disposal takes place for CGT purposes. There is no guidance on what is meant by "Date of sale" and I do not think it can be a coincidence that in every case I have seen where a full NRCGT return has been included in the papers is one where the date of sale and the date of completion are the same.

116. In *McGreevy v HMRC* [2017] UKFTT 690 (TC) ("*McGreevy*") I said that I was not satisfied that the appellant in the case had given the correct date of sale. In that case it would have been very relevant if the disposal had in fact been before 6 April 2015 (as it might have been in the ordinary course of residential conveyancing) as the regime only started on 6 April and so a disposal before then would not have triggered an obligation to make a return and hence no penalty. In this case the only feasible alternative tax year of disposal is 2016-17, a year in which the NRCGT rules applied. Even if it is within my power to go behind the date in the box (something which other decisions of this tribunal have questioned) I do not intend doing so. If it were to be relevant then it would be up to HMRC to enquire into the return.

Penalties under paragraphs 4, 5 and 6 Schedule 55

117. The only penalty for which evidence of an assessment has been provided is one under paragraph 3 Schedule 55. Yet in their SoC HMRC say that the return was 105 days late. That would trigger a penalty under paragraph 4 Schedule 55 which applies when a return is more than three months late, and no three month period can be more than 104 days (the longest possible is 92 days). So why is there no paragraph 4 penalty?

118. HMRC do not say. The reason seems to be that HMRC now realise that they cannot charge penalties under paragraph 4 because there has been no decision by any officer or committee of officers of HMRC to impose a paragraph 4 penalty in an Item 2A in the Table case. HMRC are hoist by the petard of their own making which they used to persuade tribunals and courts that paragraph 4(1)(b) Schedule 55 had the meaning they said it did.

119. In their SoC HMRC say that penalties are payable under paragraphs 5 and 6 Schedule 55. But they do not say why, given that 105 days is less than six months, the trigger period for paragraph 5, and *a fortiori* less than 12 months, the trigger date for paragraph 6 penalties. They have produced no evidence of an assessment under paragraph 5 or paragraph 6, so I have to assume that the reference to them in the SoC is another example of HMRC sloppiness.

Did the appellant have a reasonable excuse?

Approach of the Tribunal to this issue

120. The Upper Tribunal in the case of *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") has given some guidance to the First-tier Tribunal to the approach to be taken to claims that an appellant has a reasonable excuse for a failure to file on time.

121. At [81] it says:

> "When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

122. It can be seen from the grounds of appeal at various stages (initial appeal, review and notification to the Tribunal) that the appellant is putting forward two basic grounds for his having a reasonable excuse for his admitted failure:

(1) That he expected his solicitor handling the sale to deal with any relevant tax obligations or at least to inform him of them.

(2) That he could not be expected to know of the new requirements to make a NRCGT return, and that his actions, or non-actions, were those of the reasonable person acting in the way HMRC say such a person should.

If either is established that is sufficient.

Can the appellant rely on a third party?

123. In relation to the first excuse, that amounts to reliance on a third party to alert the appellant to his obligation. In the review conclusions letter HMRC said that his

reliance on the solicitor, an undoubted third party, did not amount to a reasonable excuse. The SoC, which is HMRC's pleadings on the appeal, does not refer to this ground of appeal in any of its 36 unnumbered paragraphs dealing with HMRC's contentions.

124. I must therefore assume that HMRC accepts that the appellant is entitled to rely on a third party's failure to inform him of his obligation as his reasonable excuse. The legislation however in paragraph 23 Schedule 55 FA 2009 makes it clear that reliance on a third party is not a reasonable excuse only if the appellant themselves did not take reasonable care to avoid the failure to file. I therefore look at this issue to see if that was indeed the case.

125. On this particular issue of third party reliance there is a valuable and often cited decision of this Tribunal (Judge Roger Berner), *Barrett v HMRC* [2015] UKFTT 329 ("*Barrett*"). The caveat I must enter about this decision is that the reasonable excuse provision it was considering, s 118(2) TMA, contains no qualified exception to the definition of reasonable excuse such as is found in paragraph 23(2)(b) Schedule 55. I consider that point later.

126. In *Barrett*[12] Judge Berner said about the question of reasonable excuse and in particular third party reliance:

> "154. The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.
>
> 155. Tribunals should, in particular, be cautious in making generalised statements concerning perceived categories of case, and equally circumspect about judging what is reasonable as a matter of the legal test by reference to perceived policy. Although the relevant statutory provisions may be subject to a purposive construction, that is not the same as the setting of parameters for the application of a reasonable excuse provision by reference to the tribunal's own perception of underlying policy. In the case of s 118(2) TMA, with which this case is concerned, and which contains no reference to reliance on third parties, it is not in my view possible or permissible to discern any underlying purpose or policy with regard to such reliance from the statutory language.
>
> 156. Nor do I consider that there can be any principled distinction between cases which involve complex or "arcane" provisions of tax law, and those which may be regarded as more commonplace. That is

[12] Anyone seeking to search for this decision on Bailii, rather than the FTT website, will be thwarted, because Bailii have ever since its publication shown that case as "Barett" (one R).

nothing more than one of the circumstances to be taken into account in the application of the objective standard.

157. I turn then to the facts and circumstances of Mr Barrett's case. I am concerned in this respect not with the failure of Mr Barrett to deduct tax and make payments to HMRC, but with his failure to make returns, starting with the annual return for 2006-07 that was due, under regulation 40A of the Income Tax (Subcontractors in the Construction Industry) Regulations 1993, on 19 May 2007, and subsequent monthly returns under the 2005 Regulations.

158. Mr Barrett has, since around 2000, been a self-employed small jobbing builder. He had some experience of the CIS, or at least its predecessor scheme, from the perspective of a sub-contractor, when working as part of a team on more substantial construction projects. That, argued Miss McCarthy, gave Mr Barrett an awareness of the CIS which, when coupled with his experience as an employer after 2000 and the need to operate an analogous deduction system for PAYE, would have put a reasonable taxpayer in Mr Barrett's position on enquiry as to his obligations as a contractor under the CIS.

159. Mr Barrett did not make any particular enquiry in this regard, whether in informing his choice of accountant, which was done without any investigation into Mr Aspros' capabilities and experience, but for convenience of access, or in seeking particular advice from Mr Aspros as to his obligations under the CIS. Mr Barrett simply provided Mr Aspros with the relevant paperwork, and signed, without question, everything which Mr Aspros put in front of him. Miss McCarthy submitted that Mr Barrett's failure to make any check as to the position, whether from Mr Aspros or from HMRC, was unreasonable.

160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.

161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the

individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.

162. I take into account the fact that Mr Barrett had some experience of a deduction scheme in the construction industry. However, that experience was as a sub-contractor in the context of larger projects, and would have given Mr Aspros no particular insight into the filing obligations of a contractor. Mr Barrett was himself unaware of those filing obligations when he first employed sub-contractors, but he had provided Mr Aspros with all the necessary paperwork from which Mr Aspros had been able to prepare Mr Barrett's accounts, including reference to expense incurred in relation to sub-contractors; accounts referring to such expenses, both for year end 31 January 2006 and 2007, had been completed well before the filing date for the annual return for 2006-07. In my view, a reasonable taxpayer in Mr Barrett's position, having employed an accountant to deal with both accounting and tax, including, PAYE, and having provided the accountant with all relevant information with respect to his business, would have been entitled to rely on that accountant to draw attention to any relevant filing obligation. It would also have been reasonable for such a taxpayer to have concluded, from his accountant's silence, that there were no such obligations outstanding.

163. The fact that the filing obligation cannot be described as particularly complex, or arcane, does not alter the position for a notional taxpayer in Mr Barrett's position. Mr Barrett was an ordinary small trader who, taking account of his previous experience of the CIS, cannot be imbued with any particular sophistication or knowledge of the CIS so as to put him on reasonable enquiry as to obligations he had incurred merely by employing a few sub-contractors in a small way and on individual occasions. In short, it was not unreasonable for a taxpayer in Mr Barrett's position not himself to have been aware of the particular filing obligations under the CIS. This is not a case in which a taxpayer, knowing of an obligation, merely delegates that task to a third party and does not take reasonable steps to ensure that it has been undertaken.

164. In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question, and by appointing an accountant in the way that he did Mr Barrett acted as a reasonable taxpayer, aware of his own limitations in tax and accounting matters, would have done. There was nothing unreasonable in the manner in which Mr Barrett conducted his relationship with Mr Aspros, or in the timely provision of relevant information from which Mr Aspros could reasonably have been expected to identify the relevant filing requirements for a business such as that of Mr Barrett. It was not unreasonable for such a taxpayer to have assumed that Mr Aspros was able to, and would, advise on any relevant tax obligation that was apparent from the information provided to him. Nor was it unreasonable for a taxpayer such as Mr Barrett, having received from Mr Aspros no indication that any filing

> obligation had been incurred in respect of his use of sub-contractors, not to have raised the question himself whether there might be a filing obligation of which he was unaware, either with Mr Aspros, or HMRC, or indeed anyone else.
>
> 165. Accordingly, I conclude that Mr Barrett had a reasonable excuse for the non-filing of the CIS returns for which the penalties under s 98A TMA have been determined."

127. I make no apologies for quoting so much of this decision. It is in my view as relevant to paragraph 23 Schedule 55 as it is to s 118(2) TMA so long as in the Schedule 55 case the appellant can show that they, not the third party, took reasonable care to avoid the failure.

128. The appellant says that he expected that the solicitor dealing with the sale of his dwelling in the UK would deal with the necessary obligations, as previous solicitors had done on earlier sales such as in relation to land registry obligations.

129. I find as fact that the appellant had that genuine and honest belief. I also consider that it was objectively reasonable for him to assume that a solicitor carrying out a residential property sale would inform him, knowing that he was living in New Zealand, of any relevant tax obligation. The property concerned was purchased in 2004 and I have no doubt that the solicitor involved in that purchase would have informed the appellant of the SDLT liability and dealt with it.

130. The fact that the solicitor not only failed to inform the appellant of his obligation but took the view that he was not required to do so is neither here nor there. As *Barrett* makes clear, the accountant in that case did not do what he should have done but that did not make Mr Barrett negligent or deprive him of a reasonable excuse.

131. Because of paragraph 23(2)(b) Schedule 55 I must go on and consider whether despite my finding that the appellant reasonably relied on a third party, the appellant did not take reasonable care to avoid the failure. I am at a loss to see what the appellant could have done to avoid the failure. What should he have asked the solicitor? He would have known that he was selling what had been his principal private residence for a loss so that even if he knew that non-residents had become liable to CGT on residential property disposals after 5 April 2015, that does not mean that he should have suspected there was a reporting obligation within 30 days of completion even if there was no gain.

132. In my view his reliance on a third party, however misguided it turned out to be, was reasonable and he took all reasonable care to avoid the failure, namely none as there were none he could have taken. So even if HMRC *had* pleaded that he could not rely on a third party I would not have accepted their contentions.

Does the appellant have any other reasonable excuse?

133. But in case I am mistaken about what I have said above, I go on to consider the other excuse that the appellant puts forward, that he personally could not have been expected to know or take steps to find out about his obligation and that his actions or

omissions in that regard were those of a reasonable person wishing to meet his tax obligations.

134. HMRC have put forward as the criterion or test by which the appellant's excuse is to be judged as being "to consider what a reasonable person who wanted to meet their tax obligations would have done in the same circumstances and decide if the action of the person met that standard."

135. This is a rewriting in their own words of what Judge Berner said in *Barrett* at [154]:

> "The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

136. I do not think HMRC's embellishment by reference to the taxpayer wanting to meet their tax obligations adds anything material. A taxpayer who did not want to meet their tax obligations would clearly not be a reasonable one.

137. HMRC say in their SoC that a reasonable taxpayer in the appellant's circumstances, that of a person who had become non-resident and who sold his main residence in the UK, would have:

(1) researched what is expected regarding their tax obligations

(2) consulted HMRC's website (this was also asserted by A Akbani of HMRC)

(3) taken "prudent and reasonable steps" to ascertain what his tax obligations were

(4) familiarised himself with the tax implications of owning property in another country

(5) equipped himself with the relevant knowledge to enable him to comply with his tax obligations under the self-assessment system for the UK

(6) settle his tax bill on time (an entirely irrelevant matter).

138. In my judgment this is a wholly unrealistic counsel of perfection. I cite again what Judge Berner said in *Barrett* at [161]:

> "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

139. At [160] Judge Berner rejected HMRC's suggestion (referred to at [158]) that because the appellant there was a sub-contractor who had some knowledge of the CIS scheme as a recipient of payments, that awareness of the scheme should have put a reasonable taxpayer on enquiry as to his obligations as a contractor under the same scheme and he should have made specific enquiries with an accountant or with HMRC.

140. In this case the appellant had no such familiarity with the NRCGT rules, and absolutely no reason to be put on enquiry about them.

141. But HMRC have played what they see as their trump card, that ignorance of the law is no excuse. The appellant did not suggest that his undoubted ignorance of the law was a reasonable excuse: indeed he said that he accepted as much in his first letter to HMRC.

142. What HMRC actually said in their first response and at one place (but not all) in the SoC was that HMRC do not accept as a reasonable excuse "ignorance of *basic* law". In my decision in *McGreevy* I said that the maxim that ignorance of the law is no excuse was not an absolute rule. In some subsequent decisions such as *Hesketh and another v HMRC* [2017] UKFTT 871 and *Welland v HMRC* [2017] UKFTT 870 and in *Hart v HMRC* [2018] UKFTT 207 Judges Barbara Mosedale and Guy Brannan have disagreed with me. In *Perrin* at [82] the Upper Tribunal said on this subject:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The *Clean Car Co* itself provides an example of such a situation."

This seems to me to make A Akbani's statement that ignorance of *basic* law is no excuse a correct statement of the position, and that in the SoC too sweeping.

143. What basic law is in issue in a penalty case? In my view failure to carry out something required by a provision which is or should be well known to all those who might be subject to it is a basic law. The most obvious in the case of individuals is the obligation, when required by notice to do so, to make and deliver a tax return under s 8(1) TMA. A claim by a person that they did not know about this provision of the law would be very unlikely to be accepted as a reasonable excuse in this Tribunal. In another case, *Robertson v HMRC* [2018] UKFTT 158 (TC), I held that ignorance of the High Income Child Benefit Charge was not a reasonable excuse. This was because there has been lots of publicity such as to make it a "water cooler" topic. By contrast in *Barrett* at [164] Judge Berner said:

> "In my judgment, in the circumstances of this case, it was not unreasonable for Mr Barrett to have been unaware of the filing obligations in question …"

144. The filing obligation in question was that of returns of payments made to subcontractors under the Construction Industry Scheme Regulations 2005. In *Clean Car Co Ltd v Commissioners of Customs and Excise* the law of which the appellant was ignorant was regulation 26 of the Value Added Tax (General) Regulations 1985. I do not classify the requirement to make an NRCGT return as basic law that can reasonable be expected to be known by everyone who falls within its ambit. In my view it is more arcane, less well known, less simple and straightforward than that in s 8 TMA and as equally obscure as the law in *Barrett* and *Clean Car Co*, if not more so.

145. I consider, applying the test in *Perrin* at [82] that it was objectively reasonable for the appellant to have been ignorant of the requirement to make an NRCGT return in his circumstances. I therefore hold that he had a reasonable excuse for his failure to file the return on time, irrespective of whether he could rely on a third party to establish such an excuse.

Special circumstances

146. In view of my decision on reasonable excuse I do not need to decide whether HMRC's decision was flawed in the judicial review sense and whether I would have remade the decision so as to reduce the penalty. I am inclined to think that what I said in *McGreevy* at [185] to [224] applies here as well.

147. But there is something said in the SoC in this case that was not mentioned in *McGreevy* (even though it would seem far more relevant to that case). In their SoC HMRC say that the principal purpose of requiring an NRCGT return to be made is to establish whether a payment on account is due. I do not know quite what they mean by a "payment on account". Section 59A TMA which deals with payments on account does not apply to CGT. Possibly HMRC mean an advance self-assessment ("ASA") as provided for by s 12ZE TMA. An ASA is required unless any of the conditions in s 12ZG is met. Condition A there is that the person making the NRCGT return has been required by a notice to make and deliver a return under s 8 or s 8A TMA. I do not know what percentage of all the individuals and trustees making an NRCGT return are, as HMRC say, "within self-assessment", but I would imagine, given that taxable gains are likely to arise only on let properties and in most of those cases a return will be made, that the percentage is more than 50%. It seems a very inefficient way of establishing whether an ASA is needed.

148. In terms of the special reduction though the question is whether "the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law" to quote HMRC's Compliance Manual at CH170600 and CH170800[13]. In their example HMRC say that these circumstances

[13] This often overlooked, not just by HMRC, alternative formulation has received the imprimatur of the Court of Appeal in *Euro Wines (C & C) Ltd v HMRC* [2018] EWCA Civ 46 at [9]

must be unusual for the reduction to apply, but CH170600 says no such thing, showing "unusual" circumstances and "contrary to the clear intention" as alternatives.

149. I can certainly see arguments that in circumstances where the policy of the law is as it is stated to be the case by HMRC, a penalty regime which penalises people to whom that policy cannot apply does not meet the "clear intention" test. But I do not decide it, leaving it for a case where it matters.

Observations

150. I was surprised to read in the SoC that HMRC did not issue late filing penalties where a late return was received by 7 May 2016, and that penalties were "suspended" for the first year and 30 days of the "operation" of NRCGT "to allow taxpayers and agents sufficient time to become familiar with them". I do not readily understand what "them" is: on grammatical grounds it must be the penalties. This is an example of a "soft landing" approach to penalties which is familiar to this tribunal in other contexts such as the Schedule 56 FA 2009 penalties for PAYE and CIS returns and RTI penalties under paragraph 6D Schedule 55 FA 2009. By contrast no such soft landing was used for Schedule 55 penalties for s 8 returns, presumably because it was "basic" law.

151. Becoming familiar with the NRCGT penalties obviously involves becoming familiar with the obligation to make the return. It is relatively easy to see that accountants and solicitors might need to be familiar with the obligation, solicitors more than accountants as many deal with sales of residential properties on behalf of non-residents in real time, and not many non-residents filing a self-assessment return in respect of rents from UK land would need to employ an accountant. But I cannot see how the suspension of penalties for 13 months would help an individual become familiar with the obligation to make the return: how would they be alerted to the need to become familiar? And if penalties were suspended it must follow that the individuals otherwise liable to them were ignorant of their obligations and those not disposing of properties in the suspension period would be unlikely to have become familiar with them because of the suspension.

152. And I query what power HMRC had to suspend the penalties, by which they must mean not assess them, as the power of suspension applies only to penalties for errors in returns etc under Schedule 24 FA 2007. Paragraph 18(1) Schedule 55 FA 2009 says that if a person is liable to a penalty HMRC *must* assess it. This is not discretionary, and contrasts with eg s 100 TMA. Article 1 of the Bill of Rights 1688 says:

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

153. A possible source of a legal suspending power is the powers of collection and management granted to HMRC by s 1 Commissioners for Revenue and Customs Act 2005. But in *R (oao Wilkinson) v Commissioners of Inland Revenue* [2003] EWCA Civ 814 Lord Phillips MR said at [46]:

> "No doubt, when interpreting tax legislation, it is open to the Commissioners to be as purposive as the most pro-active judge in attempting to ensure that effect is given to the intention of Parliament and that anomalies and injustices are avoided. But in the light of the authorities that we have cited above and of fundamental constitutional principle we do not see how section 1 of the TMA can authorise the Commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid, not because this will facilitate the overall task of collecting taxes, but because the Commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question."

154. This refers to taxes, not penalties, because it was tax that in issue. But I doubt that the Court of Appeal would have sanctioned the suspension (ie refraining from assessing) mandatory penalties.

155. There are two other possible sources of the dispensing power. It could be the case that HMRC decided that everyone making a late return before 5 May 2016 was in special circumstances within paragraph 16 Schedule 55, but it is difficult to think what those circumstances are and what would make them special. And why would someone who filed on 5 May 2016 be in different circumstances from someone who filed on 6 May, or who like Mrs McGreevy made an NRCGT return when she read the notes for completion of her s 8 return later in 2016.

156. The other possibility is that HMRC accepted in advance that anyone failing to file on time but who filed before 6 May 2016 had a reasonable excuse for their failure. Again it is difficult to see if that is the reason why that excuse would have come to an end on 5 May 2016 if the return was filed after then or if a late return was made of the first disposal by any particular individual as in this case. It would also mean that someone who, surprisingly, was aware of the deadline but simply did not file on time with no reasonable excuse would be treated as having one, which cannot be right.

157. I am not deciding this case on the basis that the suspension of penalties ought to have been applied to the appellant, as that would be outside my jurisdiction. But what I have said above does reinforce my view that ignorance of this particular law can be a reasonable excuse. It also reinforces the likelihood that had I had to do so I would have reduced the penalty under paragraph 16 Schedule 55 (special reduction where special circumstances).

Decision

158. Under paragraph 22(1) Schedule 55 FA 2009 I cancel the penalty of £100.

159. I am unable however to comply with the appellant's request in his email to the Tribunal of 10 April 2018 to arrange for the tribunal to make a donation to a charity. It is HMRC who will repay the £100 (with I imagine a small amount of repayment interest) to the appellant, and he can then donate it to the charity he refers to.

160. 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: 6 JUNE 2018

APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

…

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

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

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

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

	Tax to which return etc relates	*Return or other document*
…	…	…
2A	Capital gains tax	NRCGT return under section 12ZB of TMA 1970
…	…	…

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

SPECIAL REDUCTION

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

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

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

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.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.