[2018] UKFTT 356 (TC)

TC06570

Appeal number: TC/2017/08575

INCOME TAX – penalty for failure to pay tax Schedule 56 FA 2009 – whether assessment of penalties validly made: no, failure to state date by which appeal to be made not rescued by s 114 TMA 1970 & failure by HMRC to show notice served – whether special reduction due considered – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR HORST EIDENMÜLLER	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 22 June 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 29 November 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 25 January 2018.

1. This is an appeal by Dr Horst Eidenmüller ("the appellant") against a notice of assessment of a penalty of £212 made under the provisions of Schedule 56 Finance Act ("FA") 2009 because of the appellant's failure to pay income tax for the tax year 2015-16 before a date set out in that Schedule.

Basic Facts

2. I set out here the what the documents attached to the statement of case ("SoC") prepared by HMRC show.

3. HMRC's records, in the form a screenshot of a "Return Summary", show that the appellant was issued with a notice to file an income tax return for the tax year 2015-16 on 18 August 2016. That notice required the appellant to deliver the return by 25 October 2016 if filed in paper form or by 31 January 2017 if filed electronically ("the due date").

4. The same screenshot of a "Return Summary" shows that on 28 April 2017 the appellant delivered the return he had made in electronic form.

5. Included with the return was a self-assessment made by the appellant. I do not have any screenshot of the return entries, including any of the SA110 Tax Calculation Notes which contains the self-assessment, but I do have a "Tax Calculation" sent by HMRC to the appellant, which carries the statement "Some of the figures used in this calculation have been adjusted to agree with the taxpayer's self-calculation. Some of the arithmetic may appear incorrect".

6. The entries on the HMRC tax calculation are:

Pay from all employments:	£124,850.00
Total income on which tax is due:	£124,850.00
Of which	
£31,785 is taxed at 20% which equals:	£6,357.00
£93,065 is taxed at 40% which equalled:	£37,226.00
Totalling:	£43,583.00
Less tax deducted under PAYE:	£39,339.40
Total income tax due:	£4,243.89

7. HMRC's records, in the form a screenshot of a "View/Cancel Penalties" page, show that on 2 May 2017 HMRC issued a notice informing the appellant that a "30 days late payment penalty" of £212 had been assessed on him. No copy of the actual notice is included in the bundle of papers I have. A screenshot of address details on HMRC's system shows an address at St Hugh's College, Oxford as being effective from 10 February 2017.

8. HMRC's records, in the form a screenshot of a "View Statement" page, show that on 2 May 2017 the appellant made a payment of £4,272.98 which was credited as to £4,343.89 against the balancing payment for 2015-16.

9. On 26 July 2017 the appellant, through Wenn Townsend, Chartered Accountants appealed to HMRC against the late payment penalty, notice of which they said was given on 8 June 2017.

10. On 18 August 2017 HMRC rejected the appeal as they said that the appellant had shown no reasonable excuse for the failure to pay on or before the due date, 31 January 2017. They informed the appellant that he could provide any further information he wished to, he could request a review or he could notify his appeal to the Tribunal.

11. On 15 September 2017 the appellant requested a review.

12. On 30 October 2017 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalty was upheld

13. On 29 November 2017 the appellant notified his appeal to the Tribunal.

Further findings of fact

14. Before I consider the appeal I make further findings of fact about the circumstances in which the overpayment for 2014-15 arose and was processed.

15. In their appeal letter of 26 July 2017, Wenn Townsend say they made a phone call to HMRC on 25 July 2017 to the Self Assessment helpline who confirmed that the appellant had a credit of over £6,000 for 2014-15 and Wenn Townsend had expected that this would have been set off against the tax due for 2015-16.

16. In his attachment to the review request form, the appellant, who is Freshfields Professor of Commercial Law at Oxford University, took issue with the legal reasoning of the Administrative Officer of HMRC who had replied to the appeal letter. His point was that he had not paid late because his account was in credit with HMRC in excess of the amount of tax due. He added that HMRC's reasoning seems to imply that he should have made a separate payment for the amount due by 31 January 2017 even though HMRC owed him tax. He did not believe that UK tax legislation imposed any such requirement and to be charged a penalty in these circumstances is clearly absurd.

17. HMRC in the review conclusions letter said that "you should have returned your payable order advising HMRC that you would like the repayment to be set against your 2015-16 Self Assessment liability. You were aware that your 2015-16 liability was due and payable prior to receiving your 2014-2015 repayment".

18. The review officer added that the PAYE review of 2014-15 tax took place on 25 July 2017 and the calculation was issued on 26 July 2017.

19. In a letter to the review officer of 29 November 2017 Wenn Townsend argued that the reference in s 59B(1)(b) TMA 1970 (calculation of the tax payable) to deduction of "any payments on account made (whether under section 59A or 59AA of this Act *or otherwise*)" (their emphasis) includes tax repayable for a previous year.

20. They added that an explicit statement was made in box 19 of page TR7 in the tax return requesting the 2014-15 overpayment be set off against the liability for 2015-16.

21. They further pointed out in response to the review officer's statement that the review of PAYE was indeed only carried out on 25 July 2017 and that the review was prompted by Wenn Townsend's telephoning HMRC to query the fact that HMRC did not appear

to have dealt with the 2014-15 computations. A delay by HMRC in dealing with a given year, in this case delaying the date of the credit, should not adversely affect the date at which the credit is deemed to arise.

22. They took issue with the review officer's suggestion that their client should have returned the payable order and asked for set off. On 12 May 2017 the client had paid the tax as a result of HMRC's demands but did not receive the payable order until July. There was no reason why he should have returned it.

23. The SA Notes included in the bundle show the following relevant entries:

> (1) 10 August 2016: "NPS reconciliation for 15/16 identified SA Criteria, Record created".
>
> (2) 25 July 2017: "T/call from agt re O/P due for 14/15 on NPS. Repmt issued and agent states they are going to appeal the penalties and interest for 15/16."

24. A "reconciliation Summary Tax Calculation" for 2014-15 in the bundle shows:

Total non savings income:	32982.00
Total Allowance:	10000.00
Total Taxable income:	22982.00
Tax chargeable:	4596.40
Total tax paid:	10847.13
Total income tax due:	-6250.73
Cumulative tax liability:	6297.40

25. A screenshot of "P800 reasons" says "Not all personal allowance received" as an explanation for the overpayment arising.

26. Both of these documents must have been created after 26 May 2017.

27. A Contact History summary shows that on 25 July 2017 the agent (ie Wenn Townsend) phoned and the summary notes as "actions" for that entry "14/15 Recon, o/p as not all PA rec'd. Repmt to tp. Tp was previously RLS".

28. "RLS" in HMRC jargon means that post had been returned undelivered from a particular address. The address records in the bundle show that a flat in Oxford was the appellant's address from 16 March 2015 to the same day (there are two entries saying the same thing, and that same flat was his address from 15 December 2016 to 10 February 2017. There is a blank shaded box between the two periods covering 16 March 2015 to 15 December 2016. The address from 10 February 2017 is St Hugh's College.

29. What I do not have is any documentation, particularly screenshots, dealing with the reconciliation process for 2014-15. Drawing inferences from the matters I have set out in §§3 to 28 and other information that is publicly available I find, from a comparison of the amounts of earnings he received in 2014-15 and 2015-16 and from the lack of a personal allowance given in his code number for 2014-15 (as shown on the P800 and reasons) that the appellant began to be paid by Oxford University in 2014-15 (he was appointed to his chair on 1 January 2015 according to his personal website).

30. I find that HMRC were provided with an address for the appellant at the latest in March 2015.

31. I find that on the balance of probability Oxford University would have given HMRC P14 details for the appellant in or around May 2015. Those details would have been sufficient to show that on the face of it the appellant had overpaid tax.

32. I also find that on the balance of probabilities that there was an automatic reconciliation of the appellant's tax position in 2015 which would have revealed there to be an underpayment of over £6,000 and that this would be recorded on HMRC's NPS computer system (I find this on the basis of, particularly, HMRC's PAYE Manual paragraph 93001).

33. I find that no notification of the repayment due was given by HMRC to the appellant or his agent, and that this was because HMRC's system showed the appellant as "RLS" (see §§27 and 28).

34. I find that no communication was made by Wenn Townsend or the appellant with HMRC to query the lack of information about the reconciliation in the form of a P800 or the lack of a repayment until 25 July 2017.

35. The earliest date I can find that the appellant or Wenn Townsend were aware that HMRC owed the appellant over £6,000 and that this amount exceeded the 2015-16 liability is on or shortly before 2 May 2017, when the return for 2015-16 was delivered with the statement in TR7. In particular I cannot find that that the appellant or his agent were so aware on 2 March 2017.

36. I say this because, among other things, the appellant explicitly does not argue that he had a reasonable excuse for not filing his return on time (he has not appealed the late filing penalty of £100 under paragraph 3 Schedule 55 FA 2009) or that he had a reasonable excuse for failing to pay the tax by the penalty date of 3 March 2017.

The law

37. The law imposing the penalties for late payment of income tax is in Schedule 56 FA 2009 ("Schedule 56"). The relevant parts for this decision are set out below. Appendix 1 contains the rest of the text of those parts of Schedule 56 relevant to this appeal.

> "**1**—(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
>
> (2) Paragraphs 3 to 8 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraph 9, the amount of the penalty.
>
> (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.
>
> (4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid

3—(1) This paragraph applies in the case of—

(a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,

…

(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount."

38. Section 59B TMA relevantly provides:

"(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below …

(2) The following, namely—

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year …

shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.

…

(8) PAYE regulations may provide that, for the purpose of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations."

39. Paragraphs 9 and 16 of Schedule 56 provide respectively for a case where special circumstances may exist and where a person says they have a reasonable excuse for the failure to pay at the right time. They say:

"SPECIAL REDUCTION

9—(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, …

…

(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.

…

REASONABLE EXCUSE

16—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment 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."

Grounds of appeal & HMRC's response

40. The grounds of appeal as set out in the Notice of Appeal to the tribunal are:

(1) The appellant had an overpayment of tax, via PAYE, for the year ended 5 April 2015.

(2) He had a net tax liability for the year ended 5 April 2016, as shown by his tax return.

(3) The overpayment exceeded the underpayment.

(4) The overpayment had not been repaid at the time his self-assessment return was submitted.

(5) The appellant included a statement in his tax return asking for the overpayment to be used to settle the liability shown in that return.

It is therefore their contention that the tax liability for 2015-16 had been settled in full by the due date and accordingly the appellant should not be subject to a late payment penalty.

41. HMRC in their SoC argue that:

(1) The PAYE tax deducted in an earlier year cannot be given as a credit in 2015-16 because the appellant was not "in Self Assessment for 2014 to 2015 (*sic*) to formulate a balancing payment or create any [payment on account]".

(2) If the appellant knew he was due a PAYE repayment to the (*sic*) 5 April 2015, why, they ask rhetorically, did he not contact HMRC sooner to see why he had not received a tax calculation showing the overpayment due of £6,250.73.

(3) A prudent person exercising reasonable foresight and due diligence would have contacted HMRC well before filing his 2015-16 return on 28 April 2017 which was 88 days after the payment date.

(4) Although the appellant's agent stated that HMRC were in control of processing the PAYE repayment and that they could have dealt with the repayment before the payment date, the reconciliation of the PAYE records is an administrative rather than legislative function, and the overpayment was not crystallised until reconciliation and therefore could not be set off at the due date.

(5) HMRC consider that there are no special circumstances such as to warrant a reduction in the penalty.

Discussion

Procedural issues

42. No point was taken by the appellant about service of the notice of assessment. I note that it was issued in August 2016, a month apparently set as RLS on HMRC's address records. Nor do I have any information to say whether Wenn Townsend had been authorised, by a 64-8 or other means, to accept service on the appellant's behalf. Indeed it is not clear to me that the appellant or Wenn Townsend were informed that the appellant was to be included in the Self Assessment system (he was so included because on the reconciliation for 2015-16 in August 2016 he was found to be earning over £100,000 and so met one of HMRC's criteria for requiring a tax return, in what I assume is an automatic process).

43. I do not have a copy of the SA370 notice of assessment issued to the appellant. I do not even have a specimen. From my experience in another case (which will be published as *Gill v HMRC*) where the appellant has provided a copy of the notice (dated November 2017), I can say that it is more likely than not that the notice contained the same flaw as I held to be the case in my decision on that other case. I therefore hold that not only have HMRC failed to show that the notice was given to the appellant, they have not shown that the appellant was informed of the date by which he should make an appeal. For convenience I attach the relevant paragraphs from *Gill* as Appendix 2 to this decision.

44. The requirements of s 30A(3) TMA 1970, applied to notices of assessment under Schedule 56 by paragraph 11(3)(a) Schedule 56, have not been met, and the invalidity is not cured by s 114(1) TMA, for the reasons I gave in *Gill v HMRC*.

45. It follows that other matters do not need to be determined, but I give my views on those in case they assist HMRC in deciding whether to appeal or in any subsequent appeal that may be made.

Was there a failure to pay tax due under s 59B(3) or (4) TMA by the penalty date?

46. The appellant's grounds of appeal as set out in the Notice of Appeal to the Tribunal are at §40. However in the letter of 29 November 2017 to the review officer (§19) Wenn Townsend supply some legal reasoning for their contention that the tax had been paid by the due date for payment, that the reference in s 59B(1)(b) TMA 1970 (calculation of the tax payable) to deduction of "any payments on account made (whether under section 59A or 59AA of this Act *or otherwise*)" [their emphasis] includes tax repayable for a previous year.

47. HMRC say in response to this legal argument that payments on account ("POA") are advance payments towards a tax bill. Normally two POAs are made each year but that rule can only apply if a tax return was made for the previous year and the tax shown on that previous year's return exceeded certain limits. Since the appellant did not make a return for that tax year there can be no POAs.

48. HMRC are of course correct that the appellant was not required to make a POA under s 59A TMA in respect of 2015-16. But they miss the point that the appellant was making. He was not suggesting, nor could he reasonably suggest, that he had made POAs under s 59A. He had noted that s 59B(1)(b) referred to a deduction for POAs, whether under s 59A *or otherwise.* [His and my emphasis].

49. The question then is whether the appellant had made a payment on account otherwise than under s 59A TMA.

50. HMRC's Tax Summary Calculation Notes, which provide guidance on what makes up a self-assessment, show at page TCSN24 the following entries with a box to enter the amount, box A318 and A319 respectively:

- Payments or credits that have been made towards your 2015-16 payments on account

- Any other payments or credits not already included in boxes A316, A317, or A318 that have been made towards your 2015–16 tax bill

It is clear to me that the first entry for box A318 is intended to be where payments on account under s 59A TMA are to be entered.

51. As to A319, box A316 deals with adjustments arising from averaging claims or earlier year's losses and A317 with losses carried back from later years. There must then be a category of payments other than those within this box.

52. I can find no information on HMRC's website or in standard textbooks about what is encompassed by "or otherwise" in s 59B(1)(b). The only limitation is that they have to be made "in respect of" the tax year of the return. It would, it seems to me, clearly include a case where a taxpayer who was not required to make a s 59A POA made a voluntary payment to HMRC in advance of the due date, so long as they were making it in respect of the year.

53. In this case what the appellant has done was to make payments to HMRC on account of his income tax liability for 2014-15 which were involuntarily too high. Those payments, when made by his employer on his behalf through the PAYE system, were payments in respect of 2014-15. When in the tax year 2015-16 an automatic reconciliation established that there had been an overpayment for 2014-15 the appellant became entitled to a repayment and, had the system worked normally, that repayment would either have been made in 2015-16 long before the due date or possibly would have been reflected in the appellant's code for 2015-16. But it did not work normally, for whatever reason (probably the RLS signal), and the repayment remained in limbo.

54. While it was in limbo it is in my judgment not possible to say that it was "made by" the appellant within the meaning in s 59B(1)(b). I do however think it is possible to say that a payment is made by a person if it is in law set off. In the absence of argument about set off from the parties (to which I have no doubt the appellant would be able to make a valuable contribution) I am not going to come to a decision about whether there was a set off, but I would make the following observations.

55. First, I do not think it is necessary to show that any set off was made before 3 March 2017, the penalty date. That is because the tax that has to be unpaid is the tax payable under s 59B(4) TMA: that is the tax payable as calculated under s 59B(1). There is nothing in s 59B(1) that prohibits deduction, in arriving at the tax liability, of s 59B(1)(b) amounts made or suffered after the tax year or after the due date for payment, so long as they are "in respect of" the year.

56. Second, the appellant paid the liability shown on his tax return on 12 May 2017 but repayment was not made until July, and so there was no actual set off. The question would arise then whether at any stage there was in legal terms an agreement for a set off but one that unravelled, and whether that amounts to a valid set off, and whether the reason for the payment by the appellant is relevant.

57. I would also mention that both parties failed to mention the possibility that s 59B(8) TMA might be relevant. It is the regulations made under that subsection, in Part 9 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("the PAYE Regulations"), that can affect the s 59B(1)(b) amount. There is required to be added to the s 59B(1)(b) amount "any overpayment of tax from a previous tax year", which is what this overpayment was, but only if and to the extent "it was taken into account in determining the taxpayer's code for the relevant year" (see regulation 185(4) of the PAYE Regulations).

58. Here the tax code for 2015-16 would not I think have taken the overpayment into account, as, if it had, then the underpayment for that year would have been bigger than it was by the amount of the overpayment taken into account. The calculation clearly shows that the only item in the tax code was the personal allowance which, because of the operation of s 35(2) Income Tax Act 2007, was reduced to nil in the self-assessment calculation. So s 59B(8) does not assist the appellant.

59. My clear view is that a repayment from an earlier year may be an other POA within the meaning in s 59B(1)(b), but to qualify as a deduction it has to be "made" in the sense of being paid either directly to HMRC or by way of set off and it must be in respect of the same year.

60. I add for completeness' sake that the set off rules in s 130 FA 2008 are irrelevant here, as they operate only to enable HMRC not to repay but to set a repayment due against tax owing to HMRC.

61. I also add that I am completely unable to understand HMRC's review officer's suggestion that what the appellant should have done is to have returned the payable order he received and to have asked for the amount to be credited against the 2015-16 liability. What did they think this would achieve that would be of any use to the appellant?

Was there a reasonable excuse?

62. It is notable that HMRC have said more than once that a reasonable excuse had to exist for failure to pay the tax by the due date. That is wrong. Paragraph 16 Schedule 55 FA 2009 says:

> "Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if … there is a reasonable excuse for the failure."

63. The failure must be a failure which is penalised by Schedule 56. Paragraph 1 Schedule 56 says that the failure which is penalised is a failure:

> "… to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4."

64. That date is a date 30 days from the due date, so in this case is 1 March 2017, not 31 January, the due date.

65. But as I have pointed out, the question whether the appellant had a reasonable excuse (or when) was not an issue in this case. If it had been then I think that the point made by HMRC at §41(2) was a good one and required an answer which the appellant had not given. But I should not be taken as saying that I think that the appellant would have failed to show that he had a reasonable excuse.

Special circumstances?

66. I have also considered whether HMRC have made a decision as to whether there were special circumstances that might justify a reduction of the penalties, and if they have whether it is flawed in the judicial review sense (paragraph 15(3) and (4) Schedule 56).

67. HMRC say they have addressed the question whether there were special circumstances, but have found none. What the review officer says they addressed were that:

> (1) The tax year 2014-15 was reviewed on 25 July 2017, but the due date for payment was 31 January 2017
>
> (2) The appellant should have returned the payable order and told HMRC that he would like the repayment set against his liability for 2015-16, and that he was aware that the liability was due before he received the repayment.

68. But nowhere does the officer say why they thought these were not special circumstances. And it is in any case difficult to see why the appellant's omission to do something utterly pointless was something that should have been taken into account.

69. The decision is then flawed, not only for the reasons just given, but because it failed to take into other matters. It did not take into account that the repayment due was calculated in, probably, August 2015 but was not repaid or even mentioned to the appellant and was not coded in, contrary to regulation 14(1)(c) of the PAYE Regulations.

70. If that was due to the RLS signal, then it is difficult to see how HMRC managed to set the appellant up for self assessment and issue a notice to file in August 2016, still in the gap period for addresses. In this context HMRC did not take into account their obligation to either find out where to send the repayment (it cannot have been difficult for them to do that as they knew the appellant was employed by the University) or to give effect to it by changing the code number.

71. HMRC did not either take into account their failure to act on the note in box 19 on TR7 of the tax return.

72. But most importantly to my mind HMRC did not take into account that the amount due from the appellant was less than the amount due to him. Paragraph 9(2)(b) Schedule 56 prevents from counting as a special circumstance the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another taxpayer. But what happened here was a potential loss of tax from the appellant being balanced by a potential or actual overpayment by the same person, the appellant. That situation is not prevented from counting as a special circumstance, and the two person situation would hardly be mentioned as an exception, if the one person situation could not also count as a special circumstance.

73. Whether this situation here is unusual or out of the ordinary is perhaps not necessary to decide, but nevertheless I consider that in the particular circumstances of this case, it is unusual for there to be a potential overpayment arsing from an earlier year still not paid when a payment for the following year falls to be made.

74. I could then have remade the decision about special circumstances. In my view the matters I have identified *are* unusual and out of the ordinary, and would justify a reduction of the penalty to nil.

Decision

75. I cancel the penalty of £212.

76. 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: 27 June 2018

APPENDIX 1

SCHEDULE 56 PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

…

ASSESSMENT

11—(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 notice of the assessment 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 an amount of tax which was due or payable.

(4A) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of an amount of tax which was due or payable.

…

12—(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 date specified in or for the purposes of column 4 of the Table (that is to say, the last date on which payment may be made without incurring a penalty).

(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 amount of tax in respect of which the penalty is assessed, or

(b) if there is no such assessment, the date on which that amount of tax is ascertained.

(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.

APPEAL

13—(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.

14—(1) An appeal under paragraph 13 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.

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

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

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

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

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

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

APPENDIX 2

Extracts from *Sean Gill v HMRC*

"*Validity of penalty notice*

77. No point has been taken by the appellant about the validity of the notice to file a 2014-15 return or the penalty notice. As to the latter I hold that it meets the explicit procedural requirements of Schedule 56 FA 2009, and in particular it indicates the tax period to which the penalties relate.

78. In accordance with s 30A(3) TMA applied to this case by paragraph 11(3)(a) Schedule 56 FA 2009 it has also to be clear that the notice of assessment states the date on which it is issued and the time within which any appeal against the assessment may be made.

79. The date of issue is stated on its face. But as to appealing all the notice says is:

> "Do you need our help?
>
> See the enclosed notes, *especially if your tax return was late* for a good reason and you want to appeal." [my emphasis]

80. The notes that should have been enclosed are not included in the bundle, even as a specimen. Nor is there any evidence that they were in fact enclosed beyond what is said in the notice of assessment.

81. This is not sufficient to amount to a notice stating the relevant date, and therefore the notice is flawed, and potentially invalid. The question then is whether s 114(1) TMA can help HMRC. That says:

> "(1) An assessment … 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."

82. An important factor in considering s 114(1) is whether the error or omission (in this case the omission to give the relevant appeal date) was objectively misleading. In this case the appellant did find out how he could appeal before the date the notice of assessment was issued (even if he didn't follow the advice) and he did appeal, albeit to the wrong person, within the time that should have been stated.

83. But that does not detract from the fact that the notice is objectively misleading, because it suggests that the notes should be consulted "especially if your tax return was late for a good reason and you want to appeal", a statement that clearly refers to a Schedule 55 FA 2009 penalty, not a Schedule 56 penalty. That is likely to mislead a person who has received a late payment penalty into thinking that there is no appeal right against that penalty in the same way as there is no appeal right against interest on late paid tax.

84. In my view the omission of vital information about appeal rights from the notice and the discouragement of the recipient from consulting the notes, even if they can be taken into account, is a sufficiently gross or fundamental error to make the notice invalid. HMRC have, as they acknowledge, the burden of proof in this area, and they have not discharged it. Had the notes that should have been enclosed with the notice of assessment been provided in the bundle they *may* have helped HMRC, but I cannot guess what they say.

85. I do not need to invoke Article 6 of the European Convention on Human Rights but it is clear from art 6(1) that the right to fair trial in criminal matters is one of the rights protected by the convention. Whether or not a Schedule 56 penalty of this magnitude amounts to a criminal offence in the light of cases such as *Jussila v Finland* [2006] ECHR 996 is not a matter for me to decide, but I note that HMRC sent the appellant a Human Rights Act factsheet. A hearing by a tribunal of an appeal by a person on whom a penalty has been imposed can only be set in train if an appeal is made to that tribunal and, in a case such as this, notice of that appeal is given to HMRC within 30 days of the notice of penalty assessment. If it is given after that time, then the right to a "trial" is discretionary. Thus the time limit is crucial.

86. I therefore hold the notice of assessment to be invalid, as incapable of cure by s 114(1) TMA.