



[2020] UKFTT 0066 (TC)

**TC07562**

*INCOME TAX – late filing of returns – penalties under Schedule 55 to the Finance Act 2009 – residence outside the UK most of the tax year – problems with online access to taxpayer’s account – implementation of the 2-Stage Verification security measures – whether reasonable excuse – whether special reduction – Tribunal’s jurisdiction on ‘proportionality’ – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/02747**

**BETWEEN**

**DAVID FERGUSON**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON  
JAMES ROBERTSON**

**Sitting in public at George House, Edinburgh on 24 July 2019**

**Mr David Ferguson in person, for the Appellant**

**Mr Matthew Mason, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. Mr Ferguson ('the appellant') appeals against the penalties imposed under Schedule 55 to the Finance Act 2009 ('Sch 55') by the respondents ('HMRC') in respect of the late filing of his self-assessment tax returns ('SA returns') for the years 2013-14 and 2014-15.
2. The amounts of penalties imposed are as follows.

Year	Appealable decision	Amount £	Date notice issued
2013-14	Late filing penalty	100	18/02/15
	Daily penalty	900	14/08/15
	6-month late filing penalty	300	14/08/15
2014-15	Late filing penalty	100	17/02/16
	Daily penalty	860	26/07/16

3. Mr Ferguson has paid the late filing penalty of £100 for each tax year; the late filing penalties for the two years are therefore not under appeal. The total sum of penalties under appeal is £2,060, being £1,200 in relation to 2013-14, and £860 in relation to 2014-15.

### RELEVANT LEGISLATION

4. The following provisions from the Taxes Management Act 1970 ('TMA') are relevant:
  - (1) Section 8 places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer.
  - (2) Section 8(1D) provides for the due dates of filing, whereby a paper return is due by 31 October, and an electronic return is due by 31 January in the following tax year.
5. The penalties are imposed under Sch 55 FA 2009, which provides as follows:
  - (1) Paragraph 1 provides that '[a] penalty is payable by a person ("P") where P fails to make or deliver a return ... on or before the filing date'.
  - (2) Paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return.
  - (3) Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.
  - (4) Paragraph 4 further provides that a taxpayer is liable to a penalty under paragraph 4 'if (and only if)' HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable'.
  - (5) Paragraph 5 provides for a fixed penalty of £300 (or 5% of tax if higher) if the return remains outstanding after 6 months.
  - (6) The assessment of a Sch 55 penalty is provided under para 18(1) of Sch 55: '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.'

6. Paragraph 16 of Sch 55 provides for ‘special reduction’ whereby HMRC are given the discretionary power to reduce a penalty because of special circumstances. 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.

7. Paragraph 22 of Sch 55 provides for the Tribunal’s jurisdiction on an appeal against a Sch 55 penalty, and sub-paras (3) and (4) state as follows:

‘(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 of judicial review.’

8. Paragraph 23 of Sch 55 provides for the defence of ‘reasonable excuse’ as follows:

‘(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] 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 [the taxpayer’s] control,

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

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

9. In respect of a document delivered by post, s 7 of the Interpretation Act 1978 provides:

‘Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.’

## **THE FACTS**

### *Background*

10. Mr Ferguson describes himself as ‘well-educated’ with a degree from a Russell Group university and can speak three European languages fluently. He worked as a management consultant from the early 1980s to early 2000s. He left the consultancy business sector at around the age of 50 as he could no longer cope with the lifestyle demands from the extensive work travel, which he said had cost his first marriage.

11. Mr Ferguson stated that it was difficult to enter the jobs market in a different sphere. In 2006, he went to China with his second wife, who is Chinese, to look for work opportunities. He found work as a writer and editor and have one main contract with a Chinese publisher, which is renewed annually, along with similar work on a freelance basis. He said: 'I am not an expat ... on a generous salary and expat expense package. I work in the Chinese system for Chinese fees.' Since 2006, Mr Ferguson has lived and worked in China, with annual visits to the UK in the summer.

12. Mr Ferguson owns a flat in Edinburgh, on which he receives rental income, and is his principal source of UK income. He lives in the flat with his wife and their son during the summer, when he will also carry out maintenance and improvement works on the flat.

13. Mr Ferguson's annual stay in Scotland can be for weeks or months depending on constraints imposed by his work and his financial situation. There may be other irregular occasional visits as needs arise.

14. Mr Ferguson described how he completes and files his SATR in the following terms:

'Although the sums of money are small ... my affairs are complex, involving property income and expenses in the UK, other occasional earnings in the UK, other expenses in the UK, payments for books and translation and editing work in China, tax statements in China, and dozens if not hundreds of individual expense items in China. It is hard work to try to keep abreast of any changes in relevant legislation. The task itself is a time-consuming business that takes many hours, which for practical reasons has to be completed over a number of sessions – partly in Scotland and partly in China – and always accompanied by the fear of making a mistake.'

#### *Chronology of correspondence*

15. The following key documents were sent by HMRC to Mr Ferguson's correspondence address as maintained on HMRC's system, which is the same address on the Notice of Appeal to the Tribunal. Mr Ferguson's letter to HMRC and actions are in italics.

- (1) On 6 April 2014, s 8 TMA notice to file the return for 2013-14;
- (2) On 18 February 2015, the late filing penalty notice for 2013-14;
- (3) On 6 April 2015, s 8 TMA notice to file the return for 2014-15;
- (4) On 2 June 2015, a 30-day daily penalty reminder letter for 2013-14 tax year;
- (5) On 30 June 2015, a 60-day daily penalty reminder for 2013-14;
- (6) On 14 August 2015, the daily penalty notice of £900 and the 6-month late filing penalty notice of £300;
- (7) *On 20 August 2015, Mr Ferguson wrote to HMRC to appeal against the penalties in relation to 2013-14;*
- (8) *On 2 September 2015, Mr Ferguson filed his 2013-14 SA return electronically;*
- (9) On 5 November 2015, HMRC refused the appeal, advising that there was no reasonable excuse against the late filing of 2013-14 return;
- (10) On 17 February 2016, the late filing penalty notice of £100 for 2014-15;
- (11) On 31 May 2016, a 30-day daily penalty reminder letter for 2014-15;
- (12) On 5 July 2016, a 60-day penalty reminder letter for 2014-15;

- (13) On 25 July 2016, Mr Ferguson filed his 2014-15 SA return electronically;
- (14) On 26 July 2016, the daily penalty notice of £860 was issued.
- (15) On 25 November 2016, Mr Ferguson wrote to appeal against all penalties for 2013-14 and 2014-15.
- (16) On 29 December 2016, HMRC replied to advise that there was no reasonable excuse for the late filing of the two returns, and upheld the penalties.

#### *From the SA Notes*

16. The SA Notes maintained by HMRC which record communications with Mr Ferguson and of the actions taken in relation to his tax affairs are included in the bundle. We note:

- (1) In July 2007, the base address was changed to the current one in Edinburgh;
- (2) In May 2008, the agent details were updated;
- (3) In May 2009, the agent details removed;
- (4) On 1 August 2012, Mr Ferguson phoned in regarding daily penalties received (presumably in relation to the late filing of the return for 2010-11);
- (5) On 15 November 2013, Ferguson phoned in to say that he 'has no access to papers at the moment'; that he 'is abroad a lot', so delay in receiving correspondence; request HMRC to contact him by email; HMRC advised that 'we cannot contact via email'.

#### *Appeal and review*

17. The parties' respective positions in relation to the appeal of the penalties are evidenced from their correspondence:

- (1) Mr Ferguson's letter of 20 August 2015 in relation to the penalties for 2013-14:

'... I was unable to access the HMRC website and complete the online assessment. ... the new regime in China is implementing stricter controls in many fields of activity, ... Accessing foreign government websites is often problematic.

... as a contractor for a Chinese government media organisation, ... I am under even greater scrutiny than many other foreigners. I have a VPN (a type of proxy server) which in principle allows me to bypass the Chinese firewall and gain free access to blocked or 'problematic' sites, but in my case even this route has been regularly blocked. On some occasions I can actually see an outside agency interfering with my computer as I try to log on to the VPN.

I would have contacted HMRC earlier to flag up the problem, ... contacting HMRC by telephone can be problematic at the best of times as a result of the long queues. ... I am reluctant to discuss the above matters in detail from China either by telephone or in writing by post...

- (2) HMRC rejected the appeal by letter dated 5 November 2015:

'... although it may take some time for you to get together the full details of your income for the year, you are able to submit a tax return either by paper or online ...

Our records indicate that you have submitted your tax returns late for the last few tax years, and received penalties, ...

(3) The next letter included in the bundle was dated over a year later, on 25 November 2016 and from Mr Ferguson, who was appealing against penalties in relation to both tax years 2013-14 and 2014-15.

‘The Charges are completely disproportionate. ... amount to four or five times the tax payable.

The reason for my late submissions is outwith my control. ... to complete and file my tax returns I need online access to financial information. ... an additional layer of online security – a short-term code sent by text to a mobile phone. I cannot access these codes in China, as the codes expire before the texts are delivered, and often the texts do not arrive at all. This means that I can only access my financial information when I am back in the UK....

The problem is compounded by the fact that HMRC ... is now using this same additional layer of security for its online access. ... I cannot access the HMRC online services either, as I do not receive the tax codes. I cannot read my online messages from HMRC. I did not even know that a penalty had been imposed on me for year 2014-15 until today (25<sup>th</sup> November). The only reason I found this out was because I was able to access my online account during a brief and unplanned visit to the UK.

I have been able to submit my tax return for 2015-16 on time only because of the same unplanned trip to the UK.’

(4) In the letter of 25 November 2016, Mr Ferguson stated that he would not ‘receive the answer [from HMRC] to this appeal until some time next year’, as he was returning to China that day, and therefore: (a) he would not be able to read and access an online message; and (b) no one would forward the post arriving in the UK to China for him.

(5) The next letter from Mr Ferguson on his appeal was dated 2 February 2018, in which the point of proportionality was advanced in the following terms:

‘It is becoming a matter of considerable stress to me. Severe penalties have been imposed on me which I consider to be completely unreasonable, grotesquely disproportionate to any “offence” I may be guilty of, and well beyond my means to pay.’

(6) In his letter dated 15 February 2018, Mr Ferguson referred to HMRC’s reply of 1 February 2018 (not included in the bundle), in which his appeal was rejected. Mr Ferguson refuted the reasoning in the rejection letter by invoking ‘the Charter’, under which he asserted:

‘I also have a right to have my privacy respected. ... there are only two ways in which I can receive all the information necessary to complete my return if I am in China.

The first is to have all my financial information sent by post, with every likelihood that it could and will be intercepted en route, and fall into the hands of third parties with malevolent intent. ...no item of mail that has been sent to me from the UK to China has *ever* been received. (emphasis original)

The second is to have one of my tenants – a relative stranger – open all my bank and credit card statements, copy them, and send electronic copies to me.

Only a fool would undergo either of these risks ... it is totally unreasonable of HMRC to insist under penalty of law that I submit myself to either.’

(7) The letter of 15 February 2018 continued with the point on proportionality:

‘The late submission of my returns was insignificant in the larger scheme of things. I paid the tax due, and I paid the first late filing penalties, ...

Google and Amazon are engaged in activities within the UK that generate billions of pounds ... paid little or no tax ... the sanctions amounting to pennies in the pound relative to the taxes they had avoided.

... When I was six months late with my return, a sanction was imposed on me that amounted to approximately TEN TIMES the value of the taxes ...

I am willing to make a further good faith payment of £20.00 ... calculated on approximately the same basis as the settlements that were granted to Amazon and Google.’ (emphasis original)

18. On 14 March 2018, HMRC issued two review conclusion letters, one for each of the tax years. The penalties for 2013-14 were confirmed, along with the tax due for the year of £121.20. The penalties for 2014-15 were likewise confirmed; no tax was due for 2014-15. The Review Officer (Halse) stated as follows:

‘I appreciate that spending much of your time in China creates problems for you, but it is still your responsibility to find a way to file your tax returns on time. You have filed late virtually every year since 2005. ...

As you spend most of the year abroad, you should complete a residency page. This can only be completed online using third party software. A list of suppliers can be found here: [url link]. The alternatives are to file a paper return by 31 October, or to use a UK agent to file your returns.’

*From oral evidence*

19. The Tribunal asked Mr Ferguson if he managed to file his 2013-14 return on 2 September 2015, what prevented him from also filing his 2014-15 return before he left the UK. Mr Ferguson replied that he had to attend to a myriad of matters: (a) issues from the rental property, including carrying out improvement, repairs and maintenance, and securing tenants for the university term time; (b) spending time with his four adult children from his first marriage and three grandchildren; (c) assisting his elderly mother with her house and garden as he is ‘handy at DIY’; (d) dealing with his health matters; (e) personal administrative tasks, which he stated: ‘I always come home to dozens, or hundreds of items of mail to be dealt with’, including ‘preparing and submitting my tax return’.

20. Apart from these ‘regular’ commitments that required his attention, Mr Ferguson explained that in the summer of 2015, he also devoted considerable time to assist a friend who was encountering difficulty with government bureaucracy in relation to applying for initiative in tourism with a Chinese connection.

21. When asked how long it takes him to complete his tax return for submission, Mr Ferguson replied that it is ‘not in a single sitting’ but ‘over 3 to 4 weeks’; that he needs to note ‘every single cost’ on an excel spreadsheet; that he does not always ‘have time to sit down’ when in Scotland due to family commitments and matters requiring his attention. He described the task of completing his SA return ‘onerous and stressful’; that he would not think of using provisional figures or estimates; that the costs of engaging an agent to file his returns are too high for the income involved.

22. We asked Mr Ferguson that in the summer of 2015, when he had become fully aware of the daily penalties and the 6-month fixed penalty totalling £1,200 being imposed for the late

filing of his 2013-14 return, did he not consider the filing of 2014-15 return a matter of priority to avoid any potential penalties? Mr Ferguson's response was:

(1) He spent his time writing the letter of 20 August 2015 to HMRC against the £1,200 imposed, and that he had 'no way of thinking that the penalties would not be rescinded'; that he had 'reasonable expectations' that the penalties would be 'rescinded' just like 'the VAT fines [which are] systematically written off' by HMRC.

(2) On further questioning by the Tribunal, Mr Ferguson explained that he has retained his VAT registration number from his consultancy business, even though he has not been carrying out any business activities that could have given rise to any VAT matters.

(3) As a result of being VAT registered, Mr Ferguson has to file quarterly VAT returns, even if they are nil returns. The same problem to do with the 2SV security measure affects him similarly with his VAT return submission, and has rendered it impossible for him to submit his VAT returns when he is in China. He would have two outstanding VAT returns at a time, and 'fines' have been imposed automatically on these late returns, but have been 'systematically written off'.

## **The appellant's case**

### *The Notice of Appeal*

23. On 23 April 2018, Mr Ferguson lodged his appeal with the Tribunal, stating that: 'The case concerns discretionary penalties imposed on me for late filing of my tax returns for the years 2013-14 and 2014-15.'

24. The grounds of appeal were submitted in a 'Summary Statement of Case' dated 24 April 2018, which raised the following grounds summarised below:

(1) He was absent from the UK for several months at a time.

(2) The penalties are grossly disproportionate both to his original 'offence' and his ability to pay; and for one of the years, he owed no tax.

(3) He could not access his bank account information or HMRC website while in China due to the security coding measure, for which his mobile phone was unable to pick up the text message before the expiry of the code.

### *Submissions after the Notice of Appeal*

25. A hearing was listed for 12 November 2018, which Mr Ferguson applied to postpone. Judge Mosedale allowed the application by Directions issued on 12 November 2018, stating that 'despite the fact that it is made very late and without a good explanation for the delay', the appellant said that he had not yet received an electronic version of the bundle from HMRC which was needed for preparation of the case. With the consent of the parties, the appeal was directed to be determined on the basis of written submissions, and the parties must comply with the directions: (1) HMRC by 11 December 2018 for a Statement of Case and documents bundle, and (2) the appellant by 15 January 2019 to serve 'a document containing any submissions he wishes the Tribunal to consider'.

26. In all, Mr Ferguson served three documents to the Tribunal in relation to his appeal:

(1) 'Submissions' dated 15 January 2019 of 15 pages long with 109 paragraphs;

(2) 'A Statement of Case' in July 2019 (date unspecified) of 8 pages long, appending the full text of an email drafted by a Ms Gracie as litigator for HMRC on 29 January

2019. Ms Gracie's reply was in response to questions raised by Mr Ferguson in an email of 9 January 2019, and was separately forwarded by her on 16 July 2019 to Mr Mason, who represented HMRC at the hearing. Mr Mason produced to the Tribunal the internal chain of email correspondence of July 2019, which has the effect of verifying the authenticity of the content of the appended text in Mr Ferguson's Statement of Case.

(3) 'Submissions on Proportionality of Penalties' dated 16 July 2019 of 14 pages long with 98 paragraphs.

27. At the hearing, Mr Mason raised objection to the third document being admitted, as it was lodged significantly after the compliance date stated of 15 January 2019 by Tribunal direction. The second document was admitted, as it was in effect Mr Ferguson's speaking notes to make his representations to the Tribunal during the hearing, and the attached email was a reply from HMRC to Mr Ferguson's enquiry that was sent on 9 January 2019 before the due date of his compliance with Tribunal Direction. We accept Mr Mason's objection to the third document being admitted. Mr Ferguson, nevertheless, made oral representations to the Tribunal on the issue of proportionality founded on the arguments contained in the third document.

#### *Submissions at the hearing*

28. Mr Ferguson submissions are summarised as follows.

(1) On reasonable excuse:

(a) Regular and lengthy absence meant that he could not access his financial information until he was back in the UK;

(b) In 2014 HMRC implemented the 2-Step Verification (2SV) security policy. Mr Ferguson cited paragraphs from HMRC's email reply dated 29 January 2019 appended to his Statement of Case (the second document at §26):

'... to enhance the security offered by the Government Gateway service, HMRC security experts agreed we must follow the industry standard of including 2 Step Verification (2SV) as part of our security features. For individuals with a Personal Tax Account, 2SV was successfully introduced from 2014. HMRC began implementing 2SV for organisations from October 2017 and this was completed by mid-February 2018. These controls, alongside other security features we have in place, protect our users from fraudulent activity. The 2SV codes that are generated are "valid" via SMS, voice call and our mobile app, and expires after 15 minutes.'

(c) It is submitted that the 2SV was already in place when 2013-14 return fell due. It is impossible to receive text message in China within 15 minutes, which makes it impossible to access his online taxpayer's account.

(2) On special circumstances:

(a) As a result of the SV2 security measure, Mr Ferguson submits that his VAT returns will regularly be late, with two returns outstanding at the same time. The fixed penalties applied for his VAT returns being late are always waived when he brings his VAT returns up to date.

(b) His circumstances are 'special' because unlike expatriates working in China, he does not have the support of an employer who would deal with the security aspects of financial data transfer for its employees.

(3) In relation to Officer Halse's observation in the letter of 14 March 2018 stating that: 'You have filed late virtually every year since 2005', Mr Ferguson does not dispute the fact, but submits that this fact is of no relevance because:

(a) In every case he has never sought to avoid the £100 penalty, which he 'consider[s] to be both legitimate and proportionate', and indeed with the two years in question, he has settled the fixed £100 penalty.

(b) 'HMRC has no right under any of the relevant legislation to "punish" an offender for previous misdemeanours' when considering an appeal against penalties.'

(4) On the issue of proportionality, Mr Ferguson makes extensive submissions with reference to the Human Rights Act and the European Convention on Human Rights, and of the relevance of a judicial challenge based on *Wednesbury* principles. Since HMRC had known before the issue of the review conclusion letter that he wanted to challenge the penalties on ground of proportionality, Mr Ferguson submits that HMRC 'had a duty to inform [him]' on 'this specific matter', and to advise him that he would need to file a request for judicial review with the Court of Session within 90 days of receipt of the review conclusion letter dated 14 March 2018; that HMRC had failed in this duty as their website contains only information on appealing to the tribunal but not how to file a request for judicial review.

(5) Mr Ferguson submits that judicial review under English law and Scots law, while similar, is not the same; that a tribunal sitting under Scots law is not bound by *HMRC v Boshier* [2013] UKUT 0578 (TCC) in so far as the matters concern judicial review.

#### **HMRC's case**

29. Mr Mason submits that the conditions are met for the imposition of the penalties:

(1) The s 8 Notices to file an SA return for 2013-14 and 2014-15 were sent to the address HMRC held on the system at all relevant times, and was the only address provided by the appellant since July 2007.

(2) No correspondence was returned as undelivered, and s 7 of the Interpretation Act provides for effective delivery by post of HMRC's notices and letters to be deemed.

(3) The return for 2013-14 was filed electronically on 2 September 2015, and was 214 days after the due date of 31 January 2015 for electronic filing.

(4) The return for 2014-15 was filed electronically on 25 July 2016, and was 176 days after the due date of 31 January 2016 for electronic filing.

(5) The appellant does not dispute that the returns were filed late.

30. HMRC reject that the appellant had a reasonable excuse for the late filing of the returns:

(1) The appellant states that he is unable to access his HMRC online account from China, and he does not receive his post regularly.

(2) HMRC contend that while the appellant is not habitually resident in the UK, it is his responsibility to ensure that his returns are filed on time, and that he should take reasonable measure to ensure the obligations are met.

(3) HMRC's records indicate that Mr Ferguson has submitted his returns late virtually every year since 2005, and has received penalties in previous years.

(4) HMRC contend that the appellant could have appointed a UK-based agent who could ensure that the returns were filed by the due date, using estimated or provisional figures if necessary, which could be amended when the appellant had access to his records.

(5) The appellant states that he has ‘tried a number of times without success’ to contact HMRC since he returned to the UK. HMRC’s SA Notes show that there was no telephone contact to the Self-Assessment helpline from the appellant or anyone on his behalf since August 2012.

31. In relation to proportionality, Mr Mason submits that HMRC have no discretion on either the application of penalties or the level of penalties; and the Tribunal has no jurisdiction to consider whether the penalties are unfair or disproportionate.

32. As for ‘special reduction’, Mr Mason referred to the following factors which the review officer had taken into account in reaching the conclusion that there were no special circumstances as related in the review conclusion letter of 14 March 2018:

(1) The appellant spends much of his time in China and states that the only ways he could complete his return while residing abroad are to have his financial information sent by post, or to allow one of his tenants to send copies of his bank and credit card statements electronically, neither of which is reasonable.

(2) The appellant described the penalties as grossly disproportionate to any tax due, while large companies like Google and Amazon pay little or no tax despite huge profits.

(3) The appellant has paid the late filing penalty but is only willing to pay a further £20 in view of the disproportionate treatment.

## **DISCUSSION**

33. We have no issue with Mr Ferguson’s credibility as to matters of fact. In relation to his extensive submissions, having heard his representations at the hearing, and having regard to what he put forward in writing at various junctures to HMRC and to the Tribunal, we consider his grounds of appeal under the following headings:

(1) Whether he had a reasonable excuse for the late filing of the returns for 2013-14 and 2014-15;

(2) If no reasonable excuse for both or either year, whether there were special circumstances for reducing the penalties; and

(3) Whether the penalties are excessive and unfair.

### ***Whether reasonable excuse***

#### *Valid and effective service of notices*

34. The consideration of reasonable excuse is predicated on the fact that the penalties have been correctly imposed according to the terms of the legislation. To that end, we have regard to the following facts.

(1) Section 8(1) of TMA provides that a person can be required to make a self-assessment tax return ‘[f]or the purpose of establishing the amounts in which [he] is chargeable to income tax’ for a year of assessment, and ‘the amount payable by him by way of income tax for that year’.

(2) It has been observed that a notice to file issued to a taxpayer for any other purposes is not a notice to file under s 8(1), (see *David Goldsmith* [2018] UKFTT 5 at [138], and *Crawford v HMRC* [2018] UKFTT 392 (TC) at [46]).

(3) Notwithstanding the fact that there was little to no tax payable in the said years, Mr Ferguson does not dispute that the notice to require him to file an SA return is valid, and that he has an obligation to return income on his Edinburgh property.

(4) Furthermore, Mr Ferguson's tax residency status needs to be updated annually by completing and including the Residency Page in the SA return.

(5) Section 7 of the Interpretation Act 1978 provides that the service of the post is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document unless the contrary is proved: *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 (Ch).

(6) For the daily penalties to be impossible, three conditions are stipulated under para 4 of Sch 55, the third of which is that HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable' (sub-para 4(1)(c)). The legislation is emphatic that a taxpayer is liable to a penalty under paragraph 4 'if (and only if)' the required notice has been given.

(7) HMRC held the correct UK address for Mr Ferguson, which has remained the same since from 2007. The UK address is the chosen address for correspondence by Mr Ferguson, notwithstanding his prolonged absence from the UK. From the chronology of communications between Mr Ferguson and HMRC, there was positive evidence of effective delivery of correspondence, such as the daily penalty notice of £900 and the 6-month fixed penalty of £300 issued on 14 August 2015, which were promptly appealed to HMRC by Mr Ferguson by letter dated 20 August 2015 (§15).

35. There is no dispute that the SA returns for 2013-14 and 2014-15 were filed late, and the extent of delay was beyond the three months after their filing due dates for the daily penalties to be impossible. For present purposes, we regard the effective delivery of the penalty notices to Mr Ferguson's *chosen* address for correspondence to be operative. As a matter of fact, we are satisfied that HMRC have met the burden of proof for the imposition of the penalties under appeal in relation to the late filing of the returns for 2013-14 and 2014-15.

#### *No previous knowledge of the daily penalties*

36. Mr Ferguson asserts that he had no knowledge of the daily penalties being impossible until his return to the UK in the summer of 2015; and that he could not have any knowledge of the penalty reminders sent to warn him of the daily penalties being accrued at the time, since he could not access his post in the UK, nor view correspondence on his taxpayer's account online while he was abroad.

37. The Court of Appeal decision of *Donaldson v HMRC* [2016] EWCA Civ 761 confirms that the SA Reminder and the SA 326 Notice (the £100 fixed late filing penalty notice) are effective legal instruments for the purposes of meeting para 4(1)(c) condition for a daily penalty to be impossible, even if these notices are given in advance of a daily penalty being incurred. The notices state in terms that the taxpayer *would* be liable to a £10 daily penalty for every day after 31 January of the year following the year of assessment: 'a daily penalty will be charged' (SA Reminder); and 'if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding' (SA 326 Notice).

38. The £100 late filing penalty in the form of SA 326 Notice is therefore sufficient to establish that the requisite notice under para 4(1)(c) has been met for the daily penalties to be impossible. Mr Ferguson should be well aware of the content and substance of the fixed penalty notice of £100 (SA 326 Notice), since he was in receipt of which ‘virtually every year since 2005’ (§18). The SA 326 Notice carries the warning of the daily penalty accruing if the failure to file the late return is not rectified within 3 months of the filing due date of 31 January (for online filing).

39. We have regard to the fact that Mr Ferguson had no access to his Personal Tax Account to view the daily penalty notices at the time; that he only knew about the penalty notices *after* the relevant times. While the legislation is emphatic that a taxpayer is liable to a penalty under paragraph 4 ‘*if (and only if)*’ the required notice has been given, we are satisfied that: (a) such notice can be deemed to have been given by post as his UK address has been the chosen address for HMRC correspondence; and (b) that such notice was effectively given *in advance* by virtue of the SA Reminder and the SA 326 notice for the fixed £100 penalty for both tax years.

*Whether erroneous belief gave rise to a reasonable excuse*

40. Mr Ferguson repeatedly refers to the daily penalties being ‘discretionary’. Consequently, he had the expectations that the daily penalties would be ‘rescinded’ in like manner as his ‘VAT fines were systematically written off’ by HMRC. He avers that he ‘had no way of thinking that the penalties would not be rescinded’.

41. As a matter of fact, the belief that the basis of the daily penalty is by HMRC’s discretion is mistaken. As a matter of statutory construction, it is mandatory for HMRC to assess a penalty under Sch 55, as denoted by the use of the word ‘must’ in para 18(1) of Sch 55: ‘Where P is liable for a penalty under any paragraph of this Schedule HMRC must – (a) assess the penalty’.

42. We do not doubt that Mr Ferguson held the honest though mistaken belief that HMRC had the discretion to assess (or not to assess) the daily penalty. An honest and mistaken belief cannot, of itself, amount to a reasonable excuse. The reasonableness of a belief still needs to be subject to the same objective test for reasonable excuse as set out in case law authorities:

(1) Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239:

‘... can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. ... In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?’

(2) In similar terms, the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) stated the test for reasonable excuse at [71]:

‘In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times ...’

(3) As to the issue whether ignorance of the law can amount to a reasonable excuse, the Upper Tribunal decision in *Perrin* gives helpful guidance at [82] as follows:

‘... It is 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.’

(4) In *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC) where there was a *bona fide* mistake made, Judge Hellier states at [12] that while the mistake ‘was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable excuse.’

(5) Similarly, in *Coales v HMRC* [2012] UKFTT 477 (TC), Judge Brannan states at [32]: ‘The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.’

43. We consider whether Mr Ferguson’s mistaken belief is objectively reasonable, against the subjective attributes of him as a taxpayer.

- (1) Mr Ferguson has been in the self-assessment regime since at least 2005.
- (2) He had over a decade of experience with the SA return filing procedure and the penalty regime, given that he has been in default for virtually every year since 2005.
- (3) In August 2012, he telephoned HMRC regarding the daily penalties imposed on him for the late filing of his 2010-11 return (§16(4)).
- (4) The penalties for 2010-11 would appear to have been cancelled by HMRC on appeal by Mr Ferguson on that occasion.
- (5) Mr Ferguson is ‘well-educated’ and his detailed written submissions are evidence of his ability in looking into more complicated legal issues when he has the need.
- (6) A prudent taxpayer having proper regard to his duty to comply with his obligations would have ascertained the basis upon which the daily penalties (for 2010-11) had been imposed and found it to be mandatory.
- (7) The legislation concerning the mandatory basis for the imposition of the daily penalties is not complicated, and is widely publicised.

44. For all these reasons, we do not consider that Mr Ferguson had a reasonable excuse in holding the mistaken belief that the daily penalties would be ‘systematically written off’ due to the discretionary basis of their assessment.

#### *Whether security issues in accessing accounts a reasonable excuse*

45. In his first appeal letter to HMRC dated 20 August 2015 against the 2013-14 penalties, Mr Ferguson’s principal ground was the problems he experienced in accessing HMRC website while in China; that access was blocked by firewall; and that some outside agency interfered with his attempts to bypass the firewall by using the VPN mechanism (§17(1)).

46. The online access issues were further explained in his letter of 25 November 2016 as emanating from the difficulty posed by the 2SV security measure implemented by banks or by HMRC (§17(3)). The details of the implementation of 2SV to individuals’ Personal Tax Accounts were confirmed by HMRC’s email to Mr Ferguson on 29 January 2019 (§28(1)(b)).

47. We make the following findings of fact to determine whether a reasonable excuse existed.

(1) The SA Notes recorded the entry on 1 August 2012 when Mr Ferguson phoned in to appeal against the daily penalties (for 2010-11). The next entry after the August 2012 entry was some 15 months later on 15 November 2013 when Mr Ferguson phoned in regarding the late filing penalty of £100 for 2011-12.

(2) According to HMRC, Mr Ferguson has filed his returns late virtually every year since 2005. The late filing penalty for each of these years would appear to be confined to the fixed penalty of £100.

(3) Except for the 2010-11 return, which led to daily penalties (§16(4)), it does not appear that Mr Ferguson incurred the daily penalties every year since 2005.

(4) From these primary facts, we infer that most returns, while failed to be filed by 31 January online, were filed by 30 April, and did not cause the daily penalty to accrue.

(5) We further infer that in the years prior to 2014, Mr Ferguson was able to access his bank accounts and his Personal Tax Account (by whatever methods) while in China, in order to file his returns by 30 April.

(6) HMRC's email dated 29 January 2019 confirmed the timing of implementing the 2SV measure in relation to individuals' Personal Tax Account to be *from* 2014. The email stated the period of time to implement the 2SV measure for organisation as from October 2017 to mid-February 2018. We infer that the implementation of the 2SV measure to the individuals' Personal Tax Account would have started from 2014 and continued into 2015.

(7) In 2015, after the due date of 31 January 2015 had passed for filing his 2013-14 return, Mr Ferguson encountered problems in accessing his bank accounts and Personal Tax Account on HMRC website. The online access issues meant that he was unable to complete and file his 2013-14 return in the period between February and April of 2015 as would be his wont.

#### *Whether reasonable excuse for 2013-14 return filing*

48. Mr Ferguson agrees that he had failed to file his 2013-14 return by the due date of 31 January 2015. By that agreement, we infer that he neither intended nor attempted to file his 2013-14 return by 31 January 2015. He contends that he could not file his 2013-14 return due to multiple failures to access his bank and tax accounts online. By that contention, we infer that he had intended and attempted to file his 2013-14 return by 30 April 2015.

49. Applying the test of reasonableness to the facts of the case, and having regard to the attributes, experience, and the habitual pattern of Mr Ferguson as a taxpayer, we find that he did have a reasonable excuse for his failure to file the 2013-14 return in the period between February and April 2015. HMRC confirmed that the 2SV codes generated are only valid for 15 minutes, and we accept Mr Ferguson's explanation that he simply could not have picked up the 2SV codes so generated within 15 minutes in China.

50. Furthermore, we accept that Mr Ferguson did not have any forewarning of the implementation of the 2SV security measure that gave rise to his online access problems. We accept that it was between February and April 2015 when he first attempted to file his 2013-14 return that he encountered the online access issues due to the verification codes not being received before their expiry within 15 minutes of being generated. We further accept that Mr Ferguson was not fully aware of the root cause of the access issue when he first wrote to appeal

against his penalties in August 2015. It was later (probably through the similar access issues for filing his VAT returns) that he became aware of the 2SV security measure implemented by banks and HMRC alike to be the root cause of the online access issues he had encountered.

51. We consider that the distance between the UK and China is not easily breached even in the age of air travel; that Mr Ferguson would have had work and family commitments in China; and that his sojourn in the UK is habitually in the summer. The 2013-14 return was eventually filed on 2 September 2015 online when Mr Ferguson was in the UK. In the light of his residency pattern, we consider that the failure was remedied without unreasonable delay.

52. We find therefore that Mr Ferguson had a reasonable excuse in relation to the failure to file his 2013-14 return between February and April 2015, and that the reasonable excuse continued for the duration of the penalty period, namely from 1 May 2015 to 31 July 2015, for which the daily penalties and the 6-month late filing penalty have been imposed.

53. Accordingly, we cancel the daily penalties of £900 and the 6-month late filing penalty of £300 in relation to the late filing of the 2013-14 return.

#### *Whether reasonable excuse for 2014-15 return filing*

54. To decide whether Mr Ferguson had a reasonable excuse for his failure to file his 2014-15 return until 25 July 2016, we make the following findings of fact:

(1) Mr Ferguson was in the UK in the summer of 2015, during which he appealed to HMRC against his 2013-14 penalties, and filed his 2013-14 return on 2 September 2014.

(2) In the summer of 2015, Mr Ferguson was fully aware of the difficulties in accessing his bank accounts and Personal Tax Account online from China.

(3) In the summer of 2015, the penalty situation faced by Mr Ferguson in relation to the 2013-14 return was an immediate reminder of the likelihood of a similar situation arising with regard to the potential late filing of his 2014-15 return.

(4) A prudent taxpayer with Mr Ferguson's attributes could have anticipated that if he were to attempt filing his 2014-15 return from China in the habitual window between February and April of 2016, he could be circumvented by the same difficulties as he had experienced when attempting to file his 2013-14 return.

(5) The transactions to be included in his 2014-15 return are those up to 5 April 2015, and were obtainable in the summer of 2015 when Mr Ferguson was present in the UK.

55. In deciding whether Mr Ferguson had a reasonable excuse in relation to the late filing of his 2014-15 return, the question we ask is: What would a prudent and diligent taxpayer intending to comply with his obligations regarding tax, and with the experience and attributes of Mr Ferguson, would have done in relation to his 2014-15 return? A prudent taxpayer would have filed his 2014-15 return while he was in the UK in the summer of 2015, in view of the prospect he would not be able to file the return from China, and would have to wait until his next UK visit in the summer of 2016.

56. The reasonable excuse that existed in relation to the 2013-14 return cannot be extended to cover the late filing of the 2014-15 return. We are of the view that by the summer of 2015, Mr Ferguson had the full knowledge of the online access problems from China on the one hand, and of the consequences of late filing in the form of daily penalties on the other, to inform him of the responsible actions that he could have taken in relation to the filing of his 2014-15 return.

57. For the penalties to be discharged on the ground of reasonable excuse, the excuse has to continue for the duration of the failure, and the failure has to be remedied without unreasonable delay. The 2014-15 return was eventually filed online on 25 July 2016, which cannot be considered to have been remedied without unreasonable delay, even if a reasonable excuse had existed at the initial failure on 31 January 2016.

58. For the reasons stated, we are unable to find that that Mr Ferguson had a reasonable excuse for his failure to file his 2014-15 return by 31 January 2016, or his continual failure to file the return until 25 July 2016.

### ***Whether special circumstances***

59. Paragraph 16 of Sch 55 allows HMRC to reduce a penalty below the statutory minimum if they think there were special circumstances. Paragraph 22(4) of Sch 55 provides for the Tribunal to substitute its decision for HMRC's to a different extent if it thinks that HMRC's decision in respect of special reduction is 'flawed' in the judicial review sense. HMRC have confirmed that they did consider whether there were any special circumstances in this case, listing the factors considered in the review conclusion, which are those detailed in Mr Mason's submission. HMRC concluded that there were no special circumstances to merit reduction.

60. The legislation does not define 'special circumstances'. From case law, it is accepted that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC)).

61. We agree with Judge Helier's articulation of 'special circumstances' at [53] of *Rodney Warren & Co v HMRC* [2012] UKFTT 057, where it is stated that 'special reduction' 'envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer'. Judge Helier further observed at [54] that:

'The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special ... but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers.'

62. In the present case, the factors relevant to our consideration pertain to whether there were special circumstances that prevented Mr Ferguson as the particular individual in question from filing his 2014-15 return in the summer of 2015. We have regard to the following:

(1) To attempt to complete his 2014-15 return in the summer of 2015, Mr Ferguson would have to collate the information relevant to 2014-15, *in addition to* preparing his 2013-14 return for filing. There are disparate aspects of information with a cross-border dimension which would have taken time to collate for 2014-15. Mr Ferguson described his tax affairs to be 'complex' involving income and expenses arising from the UK and China; §14. HMRC have stated that Mr Ferguson should complete a residency page, which 'can only be completed online using third party software'; §18.

(2) HMRC contend that the service of a UK-based agent could have been engaged. Mr Ferguson did engage an agent in 2008, whose details were then removed in 2009 given that the costs in engaging an agent were, according to him, were disproportionately high

in relation to his income profile and small tax liability. In other words, while it is possible to delegate the task to an agent, the fees would appear to be prohibitive to Mr Ferguson, especially in view of the extra compliance issues involved in dealing with his tax residency and cross-border income and expenses.

(3) HMRC contend that Mr Ferguson could have used provisional or estimated figures. We note Mr Ferguson's particular attribute as a taxpayer, which is that he is meticulous to a fault, and for him, to use provisional and estimated figures in his 2014-15 return in order to meet the filing due date would be going against the grain, if not inconceivable.

63. The Tribunal is of the view that there are facts emerging from the hearing that were not evident to HMRC when they made their decision on special reduction, especially as regards Mr Ferguson's attributes as a meticulous compiler of his return figures. While we find Mr Ferguson to be meticulous, we also find that he seems to have a propensity for complexity, as illustrated by his decision to retain his VAT registration, even though he has no trading activities to merit the compliance burden so imposed on himself. It is peculiar that he would risk the prospect of surcharges being imposed on him continuously, and the rigmarole of asking for the surcharges to be 'systematically written off', rather than de-register from VAT.

64. This propensity for complexity is a factor relevant to the length of time taken to prepare his returns for filing, and in turn, contributed to the default. We also consider that the significant time he had volunteered to assist a friend in dealing with an application for a tourism initiative in the summer of 2015 could arguably be used to prepare and file his 2014-15 return as a matter of priority. We have regard to the fact that Mr Ferguson had since given priority to the filing of his 2015-16 return during his 'unplanned trip' to the UK in November 2016. This 'unplanned trip' (hopefully) would have made it possible for Mr Ferguson's return filing pattern to be reset by bringing forward the process by a whole year, thereby filing the return for 2016-17 in the summer of 2017, which seems to be the surer way to avoid future penalties from accruing.

65. For these reasons, we consider that there were mitigating circumstances for his failure to file the return for 2014-15, and we allow special reduction at 50%.

#### ***Whether penalties excessive and unfair***

66. Mr Ferguson has spent a disproportionate amount of time in his submissions on this irrelevant point. The misguided focus on proportionality could have jeopardised his entire appeal, as it has beclouded the real issues by making the fact-finding process far more onerous for the Tribunal. We would have dismissed the appeal in its entirety based on Mr Ferguson's misguided submissions on proportionality, but we have regard that it is in the interests of fairness and justice that we should find the relevant facts to consider his appeal on grounds of reasonable excuse and special circumstances, which Mr Ferguson has not fairly made.

67. In brief, we dismiss the ground on proportionality as without any merits for the reasons:

(1) Proportionality as a legal principle in relation to the design of a penalty regime has been considered by the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363, and is binding on this Tribunal. It has made explicit at [58] of *Hok* that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition is excessive or unfair. Parliament has laid down a relevant due date for the submission of a return and has provided for penalties in the event of a default. Although those penalties have been described by some as harsh, nevertheless they are held to be proportionate by the courts, and within the bounds of proportionality.

(2) As related earlier, it is mandatory for HMRC to assess a Sch 55 penalty upon certain conditions being obtained. The penalties under appeal are not ‘discretionary’ as founded on in this ground of appeal. Consequently, all submissions so founded are misguided in relation to the relevance of judicial review, including the criticism of HMRC not informing Mr Ferguson in the review conclusion letter on the time limit in lodging a judicial review claim with the Court of Session.

(3) It is plain that HMRC have no discretion in relation to the imposition of a Sch 55 penalty. The only provision for discretion comes under ‘special reduction’, and that discretion is exercised only *after* the mandatory penalties have been imposed according to the terms of the legislation. That discretion is provided to HMRC specifically under the statute. The Tribunal is given a limited supervisory jurisdiction as regards ‘special reduction’, which has been exercised in Mr Ferguson’s favour.

#### **DISPOSITION**

68. For the reasons stated, the appeal is allowed in part.

69. The penalties in relation to the late filing of the 2013-14 return in the total sum of £1,200 are discharged. The penalties in relation to the late filing of the 2014-15 return in the total sum of £860 is reduced by 50% to £430.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

70. 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.

**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 03 FEBRUARY 2020**