[2020] UKFTT 00153 (TC)

TC07655

Appeal number: TC/2019/01004

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed – yes – late appeal against late filing penalty – permission to appeal late denied – appeal against daily and 6 month penalties - whether reasonable excuse - no - whether special circumstances - no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MISS TYRA RAFIQ **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 15 March 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 5 February 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 25 March 2019 and various correspondence between the parties.

DECISION

Background

1. This is an appeal against the following penalties visited on the appellant under Schedule 55 Finance Act 2009 ("**Schedule 55**") for the late filing of an individual tax return for the tax year 2016-2017.

(1) A late filing penalty of £100 ("**late filing penalty**").

(2) A daily penalty of £900 ("**daily penalty**").

(3) A 6 month late filing penalty of £300 ("**6 month penalty**").

2. The making of an appeal is a two-stage process, the first of which is an appeal to the respondents (or "**HMRC**"). The appellant made her appeal to HMRC in a letter dated 15 September 2018. It is HMRC's position that they had sent her a penalty notice for the late filing penalty on 13 February 2018 and in their view the last day to bring a valid appeal to them against that notice was 6 April 2018. And so the appeal against that penalty was made some five months out of time. I must decide, therefore, that if this is right, whether I should give permission to the appellant to bring her appeal against the late filing penalty, out of time. HMRC oppose her application to do so.

Evidence and findings of fact

3. From the papers before me I find the following facts:

(1) HMRC's records show that a self-assessment tax record was set up for the appellant on 5 September 2016 when she became self-employed.

(2) HMRC's records also show that the appellant's agents, Imran Watson, completed her 2015-2016 self-assessment tax return on 26 January 2017. HMRC's records show that they were not notified by the appellant that Imran Watson had been replaced as her agent.

(3) A notice to file a tax return for the year 2016-2017 was issued to the appellant on 6 April 2017. The due date for the submission of a paper return was 31 October 2017. For an electronic return, it was 31 January 2018. An electronic return for that year was received by HMRC on 31 August 2018.

(4) The address to which the notice to file was issued was 13 Markfield Avenue, Low Moor, Bradford, BD12 0UL. This is the same address which the appellant identified as her address in her notice of appeal dated 5 February 2019 ("**her home address**").

(5) On or around 13 February 2018 HMRC issued a notice of penalty assessment for the late filing penalty to the appellant. Their records show that it was sent to her home address.

(6) A self-assessment statement dated 11 March 2018 was sent to the appellant, to her home address, on or around the date of that statement.

(7) On 4 May 2018 and again on 17 May 2018 HMRC's debt management and banking department sent letters to the appellant explaining that she needed to file her tax return urgently and that HMRC had charged her the late filing penalty. These letters make clear that if she had not already paid the penalty and it was not under appeal, she should pay it and any tax due, and gives details as to how to pay by reference to a website. It also explains to the appellant that if she ignored the letter she would incur further penalties up to a total of £1600 and that "*filing your tax return online now ensures you pay the right amount of tax and prevents further penalties*".

(8) On around 31 July 2018 HMRC issued a notice of assessment for the daily penalty to the appellant, which notice was sent to her home address.

(9) On or around 10 August 2018 HMRC issued a notice of assessment for the 6 month penalty to the appellant, which notice was sent to her home address.

(10) In a letter dated 15 September 2018 to HMRC, the appellant appealed against the penalties. In that letter she states that:

> "*The paper return was sent off in time I sent the paper return in August 2017. Since I stopped trading through my company in Jan 2017 therefore I did not have an accountant acting on my behalf, so I decided to send in the paper return myself. I only became aware of tax return being delayed when I received the self assessment statement. Soon as I received this statement I contacted HMRC to confirm why have I been issued with this huge bill whereas I had no tax liability for the year. I was informed HMRC has not received the tax return.*
>
> *Now I have resubmitted the return. As you can see I have no tax to pay for the tax year 2016/17. You can see from record I have not been late in paying or submitting my taxes in the past. I would greatly appreciate if you can reconsider the decision after taking into consideration all the points mentioned above and remove the penalties that have been imposed."*

(11) HMRC's self-assessment notes which record contact between HMRC and the appellant show that following the issue of the various penalty notices, the appellant did not contact HMRC until 26 October 2018.

(12) In a letter dated 30 November 2018 addressed to HMRC's PAYE & Self-Assessment unit, Imran Watson state that:

> "*I am writing to appeal the penalty imposed on my client for the late filing of the 2016-17 SATR.*
>
> *My client said in a paper return as she had disengaged her previous accountant due to ceasing trade and no longer needing accountancy*

services, and did not have online tax account logins. Unfortunately she did not do a recorded delivery as no problems were anticipated by her.

Upon receiving fines I was approached to rectify the situation, my firm then submitted the return online at once. As I have been dealing with HMRC for some time now, I have personally experienced some issues with lost post etc., even with recorded delivery items being misplaced in the HMRC offices. This is human error and is acceptable to some degree. We believe the same has happened to my client's physical return, either lost in the post or misplaced in the HMRC office.

In light of the above justification, we would appreciate if you could revise the fines sent in relation to the above return. My client has been very punctual in filing taxes and returns whilst in business, it seems very unfair to impose such a large penalty when this is not her fault."

(13) In their letter of 8 January 2019 to the appellant, HMRC confirmed that they had written to the appellant on 26 October 2018 indicating that they could not accept her appeal against the late filing penalty because the deadline for making that appeal had passed.

(14) The appellant, or rather Imran Watson, on her behalf, notified her appeal to the tribunal in a notice dated 5 February 2019. Imran Watson were identified as the appellant's authorised representative, and the grounds of appeal essentially repeated those set out in their letter to HMRC dated 30 November 2018.

Legislation – late appeal

4. Section 31A TMA 1970 requires a notice of appeal against an assessment to be given in writing to the relevant officer of the Board within 30 days on which the notice of assessment was given to a taxpayer. The legislation which deals with late appeals is set out in section 49 TMA 1970.

"49. Late notice of appeal

(1) This section applies in a case where—

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

(7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

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

5. Paragraph 21 of Schedule 55 deals with appeals against penalties levied under that schedule.

"21

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

(2) Sub-paragraph (1) does not apply—

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

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

Legislation – the penalties

6. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970 ("**TMA 1970**"), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 and references below to paragraphs are to paragraphs in that Schedule.

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to me under paragraph 20, I can either give effect to the same percentage reduction as HMRC have given for special circumstances. I can only change that reduction if I think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(10) A taxpayer is not liable to pay a penalty if she can satisfy HMRC, or this Tribunal (on appeal) that she has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse

has ceased (paragraph 23(2)).

Legislation- delivery of documents

7. Under Section 115 TMA 1970:

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

8. Under Section 7 of the Interpretation Act 1978:

> "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 to be 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"

Case law - late appeal

9. In considering whether to admit a late appeal to the FTT, the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") considered that the approach to applications for relief from sanctions under CPR rule 3.9 should apply to applications for permission to appeal to the FTT outside the relevant statutory limit. The Upper Tribunal went on to say:

> "40. In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including
> >
> > [factors (a) and (b)]"."
>
> 41. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the

circumstances of the case are considered."

42. The Supreme Court in *BPP* implicitly endorsed the approach set out in *Denton*. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT.

43. In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in *Aberdeen* and *Data Select*; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be

established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

47. *Hysaj* was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed

evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

48. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore- Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

Case law - notification of the penalties

10. A summary of the relevant case law is set out below.

(1) As can be seen from [6(4)] above, in order to visit a daily £10 penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

(2) These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("***Donaldson***").

(3) The Court of Appeal decided that:

(a) the high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.

(b) a notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three months late and specified the date from which the penalties were payable. This was in compliance with the statute.

(c) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the TMA 1970 which the Court of Appeal held applied to the notice. And so they concluded that the failure to specify the period for which the daily

penalties had been assessed did not invalidate the notice.

Case law - Reasonable excuse

11. In the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***") the following guidance was given to the FTT when it needs to consider a reasonable excuse defence:

> "81 When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found herself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found herself at the relevant time or times. "

Case law - Special circumstances and proportionality

12. The issue of special circumstances and proportionality in the context of late filing penalties has been most recently, and definitively, considered by the Upper Tribunal in the case of *Barry Edwards v HMRC* [2019] UKUT 131 ("***Edwards***"). The relevant extracts are set out below:

> "66. We agree with Mr Ripley that the reasoning of *Bosher* is not applicable in relation to the question as to whether a penalty imposed pursuant to Schedule 55 to FA 2009 is disproportionate. Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is

in the context of that specific jurisdiction that the question of proportionality must be considered. We did not take Mr Carey to argue to the contrary. It is therefore clear that the FTT erred by determining that it had no general power to reduce a penalty on the grounds that it is 10 disproportionate on the basis of the reasoning of the Upper Tribunal in *Bosher*……

72. In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:

> "The respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".

73. The FTT then said this at [101] and [102]:

> "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
>
> 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration……..

84. However, we were referred to HMRC's guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC

is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due. A taxpayer who does not think she should be within the self assessment regime when she receives a notice to file because as a matter of course she will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to 35 the notice. That is precisely what ultimately happened in this case.

85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty……..”

13. There have been a number of other cases on special circumstances from which I derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

(1) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(2) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(3) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(4) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(5) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(6) I can allow the taxpayer's appeal if I find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill) (*John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(7) In deciding whether HMRC's decision was unreasonable, I should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(8) As Lady Hale said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome - whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(9) Having undertaken that assessment:

(a) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.

(b) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

14. A summary of the principles relating to proportionality is set out below:

(1) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(2) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23].

(3) In the context of its application to penalties, the principle of proportionality is that:

(a) penalties may not go beyond what is strictly necessary for the objective pursued; and

(b) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(4) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(5) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

Burden and standard of proof

15. The burden is on the appellant to explain why I should give her permission to

appeal against the late filing penalty out of time. One part of that analysis will be a consideration of whether, and if so when, HMRC issued the appellant with a valid notice of assessment of that penalty.

16. If I do give her permission then the burden that she is not liable for such penalty also rests with the appellant. And in any event the burden that is not liable for the daily penalties or the six month penalty lies with the appellant. But HMRC must establish that they have served valid notices to file on the appellant.

17. In each case the standard of proof is the balance of probabilities.

Notices

18. The issue and service of appropriate notices is important to both the appellant's application to bring her appeal against the late filing penalty out of time, and to the underlying appeal against the penalties.

19. HMRC claim to have served valid notices of assessment on the appellant. Importantly, the appellant has not denied that she received these. But I am still obliged to find as a fact that the requisite notices were properly given to the appellant. These notices comprise notices of assessment of the penalties pursuant to paragraphs 4 and 18 of Schedule 55, and notices to file a return under section 8 TMA 1970.

20. As evidence that they have served valid notices of penalty assessments for the penalties, HMRC have provided the following evidence that these were issued to the appellant and that their contents complied with the relevant paragraphs of schedule 55:

(1) A paper print out of HMRC's computer records entitled "View/Cancel Penalties" dated 23 March 2019. This document suggests that the notice of assessment for the late filing penalty was issued on 13 February 2018; for the daily penalty on 31 July 2018 and for the 6 month penalty, on 10 August 2018.

(2) A generic copy of notice SA326D which is the penalty notice for the late filing penalty.

(3) A pro forma notice SA370 which is the form used by HMRC to notify a taxpayer of a daily penalty and a 6 month penalty.

(4) An extract from HMRC's computer records which comprises a self-assessment statement dated 11 March 2018 which includes an entry for the late filing penalty.

(5) A printed extract from their records which identifies the address to which they claim all correspondence was sent to the appellant. This is her home address and corresponds to the address set out in the appellant's notice of appeal.

21. The appellant has had ample opportunity to challenge receipt of these notices. Neither she nor Imran Watson have done so. Although HMRC, as is par for the course, cannot produce copies of the actual document that was sent to the appellant, I find that

it is more likely than not that documents conforming to the pro-forma's set out in the evidence provided by HMRC were sent to the appellant's home address on or around the dates that they claim. And so HMRC have satisfied their obligation to prove that on the balance of probabilities notices of assessment of the penalties were properly served on the appellant.

22. I am also satisfied that a valid section 8 TMA 1970 notice to file a tax return, was given to the appellant. As evidence that they have done this, HMRC have provided the following documentary evidence:

(1) An extract from HMRC's computer which is headed "Return Summary" which suggests that a notice to file was issued on 6 April 2017. It also identifies the due date for filing an on-line, and paper return, and that the appellant's return was actually received by HMRC, online, on 31 August 2018.

(2) A pro forma copy of SA316 (i.e. the notice to complete a tax return).

23. I find that the evidence that a notice to file was sent to the appellant on 6 April 2017 is unreliable and treat it with considerable suspicion. It is well known that whilst this date appears on most if not all of HMRC's return summaries, the notices are in fact sent out (or are often sent out) on later dates.

24. However, given that the appellant does not deny receiving a notice to file, I think, on the basis of that and the evidence provided by HMRC, that it is more likely than not that HMRC did give her a notice to file even though it may not have been sent to her on the date recorded by HMRC.

Discussion and conclusion

Late appeal

25. I turn now to the question of whether I should give the appellant permission to make an appeal against the late filing penalty, out of time. I have found that notification of the late filing penalty was given to the appellant on 13 February 2018. An appeal to HMRC should have been made within 30 days of that date i.e. on 13 March 2018. I note that this is sooner than the date on which HMRC consider the appellant should have appealed to them which they say is 6 April 2018. But in any event no such appeal was made until 15 September 2018 some five or six months later. This is clearly a significant delay. But in the context of the appeals against the other penalties, I do not believe it to be serious given that the same issues need to be considered in all of the appeals.

26. The appellant has given no cogent reasons for this delay. The basis of her case is that she is not liable for the penalties since she submitted a timely tax return. She did this by sending a paper returns to HMRC in August 2017. And so she has made no representations (and nor have Imran Watson) as to why, having received notices that she was liable to pay the late filing penalty, and letters from the debt management unit confirming that, she took no positive action. Notwithstanding that she claims to have been unaware that her paper return had not been received until she received a self-

assessment statement (the only evidence of such statement that I have seen is the statement dated 11 March 2018 which I find is likely to have been sent to the appellant on or around that date) HMRC's records show that she did not actually contact them until 26 October 2018. And she had received other information from HMRC between February 2018 and October 2018 explaining to her that she was liable for penalties. In neither her appeal to HMRC nor her notification of that appeal to the tribunal has the appellant given any explanation as to why her appeal to HMRC was made late. The only comment regarding late filing is in the notice of appeal in which Imran Watson say that *"the letter may arrive past 07/02/2019 day deadline. It was due to January being extremely busy month due to personal tax return deadline of 31/01/2019."* This is irrelevant to the appeal to HMRC. And so I find that the appellant has given no reason, let alone any good reason, for her late appeal to HMRC.

27. Turning now to the final stage of the *Martland* test, I must evaluate all the circumstances of the case, balancing the prejudice to the appellant of not giving permission with the prejudice to the respondents of giving permission. And in this evaluation I am conscious that it is particularly important for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected.

28. At this stage, too, it is open to me to have regard to any obvious strengths or weaknesses of the appellant's case. The appellant's case for relief from the late filing penalty is identical to her case for relief from the daily and 6 month penalties, namely that she sent a paper return to HMRC in August 2017. She did not send it recorded delivery. There is no evidence that she kept a copy. If she is right then, of course, she cannot be liable to the penalties, and this would weigh very significantly in her favour when considering her application for a late appeal. The evidence that she sent this paper return to HMRC is simply a statement in her appeal. There is no corroboration. Repetition of this assertion in the letter from Imran Watson is evidentially worthless. And so can I take her at her word?

29. Service of the paper return is deemed to be good if the appellant can show that she sent it in a correctly addressed and properly stamped envelope. But she has provided no such evidence. Even if she could provide that evidence, it is only deemed to have been delivered, if the contrary is not proved. And HMRC say (and this of itself is not necessarily proof) that they did not receive it.

30. Furthermore there are a number of behavioural matters which suggest to me that it is unlikely that the appellant did in fact sent her paper return to HMRC in August 2017.

31. Firstly there is evidence that the appellant's accuracy of her recollection of events is suspect. For example, as mentioned above, she states that she was only aware of her tax return being delayed when she received a self-assessment statement. And that as soon as she received this statement she contacted HMRC. If by her self-assessment statement she means the document dated 11 March 2018, then she is clearly wrong given that she did not contact HMRC until October 2018. If by her self-assessment statement she means some other document she was sent by HMRC, that the same issue arises. She did not contact HMRC until October 2018 which is considerably after she

had received the debt management letters in May 2018, and the notices of the daily penalty and 6 month penalty in July 2018 and August 2018 respectively. This suggests to me that even though the appellant may honestly believe that she sent in her return in August 2017, her recollection of doing this may be flawed.

32. Secondly she did not appear to react to any of the documents or letters sent to her by HMRC in February, March, May, July, and August 2018. If she had filed her return in August 2017 and was therefore of the view (as she has expressed in her appeal) that she is not liable to any of the penalties, she would, in my view, have rushed to contact HMRC and told them that their notifications were misconceived since she had submitted a proper in time paper return. And so was liable for no penalties. If following discussions with HMRC, it was established that she had not in fact properly submitted a paper return, then she could have submitted an electronic return following notification of the late filing penalty, in February 2018, in sufficient time to avoid liability to the daily penalties or the 6 month penalty. Indeed, as HMRC point out in their statement of case, the debt management letters of May 2018 set out, very clearly, that the appellant has been charged the late filing penalty and what action she should take to pay. It also gives a telephone number which the appellant could have used to contact HMRC, and tell them, at that time, that in her view she owed no penalty because she had filed a timely paper return. It also told her that if she wished to appeal against the penalties she should go online to an HMRC website to obtain more details. There is no evidence that the appellant made any form of contact with HMRC following receipt of that letter. If she had indeed sent her paper return in to HMRC in August 2017, I would have expected her to have done so. A failure to do so is consistent with my view that she did not, even though she honestly believes that she did, send a paper return to HMRC in August 2017.

33. Finally, as I set out in more detail below, I consider that the appellant has neither a reasonable excuse nor are there any special circumstances which allow either myself or HMRC to reduce the penalties. And so, If I were to grant the appellant permission to appeal late against the late filing penalty, I would then go on to dismiss her appeal.

34. Statutory time limits should be respected. The appellant's appeal is some five or six months late, and she has provided no reasons as to why she has appealed late.

35. I do not think that HMRC will be prejudiced if I gave the appellant permission to appeal late. As I say, the issues are identical in the appeals against all three penalties.

36. However given the length of the delay, the lack of any cogent reasons for this delay, and the weakness of the appellant's case, her application for permission to appeal against the late filing penalty is refused.

Reasonable excuse

37. The test of whether a taxpayer has a reasonable excuse is set out in *Perrin*. It is an objective test i.e. do the facts demonstrate an objectively reasonable excuse for the default. But I must take into account the experience and other relevant attributes of this particular taxpayer in the situation in which she found herself at the relevant time.

38. The appellant's case, as mentioned above, is that she did file a paper return for the 2016-2017 tax year on time since she did so in August 2017. I have found as a fact that this was not the case, but there seems to be no reason why, in principle, an honestly held and objectively reasonable belief that she had so filed a paper return should not comprise a reasonable excuse.

39. However as far as the late filing penalty is concerned, I am not able to say, on the evidence before me (and I remind myself that it is for the appellant to establish that she has a reasonable excuse) that her ostensible belief that she had filed a paper return in August 2017 was honestly held and reasonable. The only evidence I have on this is her statement that she so filed a paper return, and, as I have said, and set out above, I think that her recollection in this regard is flawed. She has produced no corroborating evidence as to why I should find her belief that she submitted a return in August 2017, a reasonable one. In the absence of any such evidence, I find that the appellant has no reasonable excuse, based on a belief that she had submitted a paper return for the tax year 2016-2017, for having failed to submit a timely return for that tax year.

40. As regards the daily penalties and the 6 month penalty, the appellant was on notice as early as 13 February 2018 that, as far as HMRC were concerned, she had not filed a timely tax return. She was also on notice following the self-assessment statement of March 2018 and the debt management letters of May 2018 that HMRC thought that she had not filed a timely return. Yet she did nothing about it. Even if, therefore, I had found that the appellant did have a reasonable excuse for having failed to submit an online return on 31 January 2018, I would also find that excuse ceased on 13 February 2018. And so it cannot be a reasonable excuse in relation to the daily penalty and 6 month penalty since it ceased before they were imposed.

41. And so I find that the appellant has no reasonable excuse for failing to submit her tax return on time.

Special circumstances and proportionality

42. In their statement of case HMRC say that they have considered the issue of special circumstances and in particular have considered; that the appellant posted her paper return to HMRC in August 2017; that she only became aware of her return being delayed when she received a self-assessment statement; and that HMRC has misplaced items of post in their offices. HMRC consider that these do not comprise special circumstances which warrant a reduction of the penalties. In her appeal, the appellant states that her return evidence is that she has no tax to pay for the year 2016-2017. But there is no evidence of this in the papers that I have seen, nor is this something which has been pleaded on her behalf by Imran Watson in either their letter of 13 November 2018 or the notice of appeal. So there is no satisfactory evidence that the appellant owed no tax for that period. However, for the reasons set out at [45] below, the fact that a taxpayer owes no tax does not render a penalty disproportionate, nor, in my view, does it comprise a special circumstance.

43. I do not consider that these taken together, or individually, comprise special circumstances which would merit a reduction in the penalty. As I have said in the

context of reasonable excuse, an honestly held and reasonable belief that she had completed and submitted a paper return to HMRC in August 2017 might comprise a reasonable excuse in principle, and can, in my view, also comprise a special circumstance. However in the context of this case, I have found that the appellant was mistaken in her view that she had sent HMRC a paper return in August 2017, and there is no evidence on which I can find that her assertion that she did so is a reasonable one. And so this cannot comprise a special circumstance. It seems to me that as far as the daily penalty and 6 month penalty are concerned, the appellant is the author of her own misfortune. She was notified as early as February 2018 of the late filing penalty, and was subsequently further notified about it in March 2018 and May 2018, yet made no contact with HMRC. Had she done so, for the reasons I have set out above, she could readily have avoided those penalties.

44. It is clear from the case of *Edwards* that the penalty regime in Schedule 55 is a proportionate regime. It is intended to penalise taxpayers who fail to comply with their filing obligations. The penalties are not geared to the amount of tax which those late filed returns show is due from a taxpayer. They are designed to ensure filing compliance. In *Edwards* the fact that a taxpayer owed no tax was found not to be disproportionate.

45. I find that in the context of this appeal there are no special circumstances which might mitigate the appellant's liability to the penalties, and that the application of the penalty regime in Schedule 55 to this appellant is proportionate.

Decision

46. In light of the above, I dismiss this appeal.

Appeal rights

47. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 27 MARCH 2020