TC06691

Appeal number: TC/2018/02390

INCOME TAX – penalties for failing to file self-assessment returns in order to claim relief for expenses exceeding £2,500 - whether the penalties under paragraphs 5 and 6 of Schedule 55 Finance Act 2009 in respect of one of the tax years of assessment were properly determined in the light of paragraph 17(3) of that schedule – yes – whether the penalty notices were received by the Appellant and complied with the requirements of Schedule 55 Finance Act 2009 – yes, with one exception – whether the Respondents exceeded their powers in requiring the returns to be filed – no – whether the fact that the Appellant was due to receive a repayment of tax following submission of the returns amounted to "special circumstances" – no – whether the Appellant had a reasonable excuse for his failure – no - appeal upheld in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK BUTTERWORTH **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR DAVID WILLIAMS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3 August 2018

Mr Michael Butterworth for the Appellant

Mr Gareth McKinley, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to seven penalties which have been imposed by the Respondents on the Appellant as follows:

(a) A penalty of £100 under paragraph 3 of Schedule 55 Finance Act 2009 ("Schedule 55") for a failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2015 by the date on which it was required to be filed (in relation to a tax year of assessment, the "filing date", in relation to that tax year of assessment);

(b) A penalty of £900 under paragraph 4 of Schedule 55 comprising £10 for each day after the period of 3 months beginning with the day after the filing date in relation to the tax year of assessment ending 5 April 2015 (in relation to a tax year of assessment, the "penalty date" in relation to that tax year of assessment) in which the above failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2015 continued, up to a maximum of 90 days;

(c) A penalty of £300 under paragraph 5 of Schedule 55 for a failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2015 by the date falling 6 months after the penalty date in relation to that tax year of assessment;

(d) A penalty of £300 under paragraph 6(5) of Schedule 55 for a failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2015 by the date falling 12 months after the penalty date in relation to that tax year of assessment;

(e) A penalty of £100 under paragraph 3 of Schedule 55 for a failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2016 by the filing date in relation to that tax year of assessment;

(f) A penalty of £900 under paragraph 4 of Schedule 55 comprising £10 for each day after the period of 3 months beginning with the penalty date in relation to the tax year of assessment ending 5 April 2016 in which the above failure to file a self-assessment return in respect of that tax year of assessment continued, up to a maximum of 90 days; and

(g) A penalty of £300 under paragraph 5 of Schedule 55 for a failure to file a self-assessment return in respect of the tax year of assessment ending 5 April 2016 by the date falling 6 months after the penalty date in relation to that tax year of assessment.

Background

2. The background to the appeal to which this decision relates is as follows:

(a) The Appellant contacted the Respondents by letter dated 17 January 2016 seeking a tax refund in relation to expenses incurred wholly, exclusively and necessarily in the performance of his duties as an employee of a company called N J Richards Projects Limited in the tax year of assessment ending 5 April 2015;

(b) The amount of the expenses claimed was greater than £2,500 and the Respondents' published policy was to require any such claim to be made by filing a self-assessment return. Accordingly, the Respondents allege that they wrote to the Appellant on 26 February 2016 to inform him that he would need to file a self-assessment return in respect of the tax year of assessment ending 5 April 2015 and that they sent to the Appellant on 3 March 2016 a self-assessment return (including a notice to file) in respect of the tax year of assessment ending 5 April 2015;

(c) On 2 June 2016, the Appellant contacted the Respondents by letter seeking a tax refund in relation to expenses incurred wholly, exclusively and necessarily in the performance of his duties as an employee of N J Richards Projects Limited in the tax year of assessment ending 5 April 2016;

(d) The amount of the expenses claimed in the Appellant's letter of 2 June 2016 was greater than £2,500 and the Respondents' published policy was to require any such claim to be made by filing a self-assessment return. Accordingly, the Respondents allege that they wrote to the Appellant on 29 July 2016 and then again on 17 May 2017 to inform him that he would need to file a self-assessment return in respect of the tax year of assessment ending 5 April 2016 (and, in the case of the letter of 17 May 2017, reminding the Appellant that the self-assessment return in respect of the relevant tax year of assessment was still outstanding) and that they issued to the Appellant on 4 August 2016 a notice to file a tax return in respect of the relevant tax year of assessment;

(e) The Respondents allege that, on 14 June 2016, they issued a letter to the Appellant in the form of the template letter SA326D included at page 72 of the hearing bundle imposing the late filing penalty in respect of the tax year of assessment ending 5 April 2015 and referring to the fact that, if the return was not received by a specified date, the daily £10 penalty would start to accrue in respect of the tax year of assessment ending 5 April 2015;

(f) In relation to the tax year of assessment ending 5 April 2015, the Respondents allege that they issued to the Appellant on 11 October 2016 a 30 day late filing daily penalty reminder, that they issued to the Appellant on 15 November 2016 a 60 day late filing daily penalty reminder, that they issued to the Appellant on 13 December 2016 a letter imposing the £900 late filing daily penalty and the £300 6 months' late filing penalty

and that they issued to the Appellant on 13 June 2017 the £300 12 months' late filing penalty. The actual letters referred to in this paragraph were not included in the hearing bundle but templates of those actual letters were provided to us at the hearing;

(g) The Respondents allege that, on 7 February 2017, they issued a letter to the Appellant in the form of the template letter SA326D included at page 72 of the hearing bundle imposing the late filing penalty in respect of the tax year of assessment ending 5 April 2016 and referring to the fact that, if the return was not received by a specified date, the daily £10 penalty would start to accrue in respect of the tax year of assessment ending 5 April 2016;

(h) In relation to the tax year of assessment ending 5 April 2016, the Respondents allege that they issued to the Appellant on 6 June 2017 a 30 day late filing daily penalty reminder, that they issued to the Appellant on 4 July 2017 a 60 day late filing daily penalty reminder and that they issued to the Appellant on 11 August 2017 a letter imposing the £900 late filing daily penalty and the £300 6 months' late filing penalty. The actual letters referred to in this paragraph were not included in the hearing bundle but templates of those actual letters were provided to us at the hearing;

(i) On 30 August 2017, the Respondents received the Appellant's on-line self-assessment returns in respect of the tax year of assessment ending 5 April 2015 and the tax year of assessment ending 5 April 2016;

(j) The Appellant appealed against the above penalties on 16 October 2017 and the Respondents rejected the appeal on 13 November 2017;

(k) Following a request for a review made by the Appellant on 11 December 2017 (enclosing a letter dated 4 December 2017 which set out the grounds for his request), the Respondents informed the Appellant on 24 January 2018 that its decision to charge the penalties was correct;

(l) Following a further appeal made by the Appellant on 15 February 2018, the Respondents wrote to the Appellant on 23 February 2018 once again rejecting the appeal; and

(m) On 9 April 2018, the Appellant notified the First-tier Tribunal of the appeal.

The relevant law

3. The penalties for failing to make a self-assessment return are contained in Schedule 55.

4. Paragraph 1(1) of Schedule 55 provides that a taxpayer is liable to a penalty if he or she fails to deliver a return of a type specified in that paragraph by the filing date. A self-assessment return under Section 8 TMA 1970 is one of the returns specified in that paragraph.

5. Paragraph 3 of Schedule 55 specifies that the penalty in question is £100.

6. Paragraph 4 of Schedule 55 specifies that the taxpayer is liable to a penalty of £10 a day for up to 90 days if the return continues to remain unfiled after the date falling 3 months from the filing date.

7. Paragraph 5 of Schedule 55 specifies that the taxpayer is liable to a penalty which is the higher of 5% of the liability to tax which would have been shown on the relevant return and £300, if the return is more than 6 months late.

8. Finally, paragraph 6(5) of Schedule 55 specifies that the taxpayer is liable to a penalty which is the higher of 5% of the liability to tax which would have been shown on the relevant return and £300, if the return is more than 12 months late.

9. The legislation provides that a taxpayer may be relieved from penalties if he or she can show that there was a "reasonable excuse" for the default. Curiously, there are two potentially applicable "reasonable excuse" provisions in this case, which are not identical. This is because the obligation to file the return is set out in the Taxes Management Act 1970 (the "TMA 1970"), which contains a relief in cases of reasonable excuse at Section 118(2) TMA 1970, whilst the penalty legislation is set out in Schedule 55, which contains a relief in cases of reasonable excuse at paragraph 23 of Schedule 55.

10. As both of the above provisions appear to be applicable, a taxpayer in the position of the Appellant can rely on either of them. If he or she can establish that he or she has a reasonable excuse for the purposes of Section 118(2) TMA 1970, then the return will be deemed not to be late (and so liability to the penalties will not arise). If he or she can establish that he or she has a reasonable excuse for the purposes of paragraph 23 of Schedule 55, then, although the return will remain late, the penalties will be required to be discharged. The end result is the same in either case.

11. The only differences between the two provisions is that paragraph 23 of Schedule 55 specifically refers to the extent to which an insufficiency of funds or reliance on a third party can amount to a reasonable excuse, whereas Section 118(2) TMA 1970 makes no such reference.

12. Section 118(2) TMA 1970 provides as follows:

"For the purposes of this act, the person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

13. Paragraph 23(1) of Schedule 55 provides 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 P's control,

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

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

14. So, under both provisions, we are required to consider whether the Appellant had a reasonable excuse for his failure to file the return throughout the period between the date when he was required to do so and the date when he did so. In that context, it is expressly provided in one of the provisions but not the other that reliance on a third party is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

15. Paragraph 16 of Schedule 55 provides that, "if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule" and paragraph 22 of Schedule 55 provides that the exercise of that discretion by the Respondents is open to challenge at the Tribunal if the decision is "flawed" in the light of the principles applicable in proceedings for judicial review. It is clear from the terms of the above provisions that the decision as to whether any particular circumstances constitute "special circumstances" is entirely a matter for the Respondents to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account or otherwise reached a decision that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo. As for what circumstances might amount to "special circumstances", the House of Lords held in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 ("*Crabtree*"), in the context of a provision in the chargeable gains legislation, that the phrase meant circumstances which were "exceptional, abnormal, or unusual".

16. Paragraph 17(3) of Schedule 55 provides that, where a taxpayer "is liable for a penalty under more than one paragraph of this Schedule which is determined by reference to a

liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax". If and to the extent that this provision applies to any of the penalties which are the subject of this appeal, as to which see further below, the "relevant percentage" would be 100%.

17. In addition to setting out the circumstances in which a penalty for failing to file a return can be imposed, Schedule 55 also sets out various requirements as to the form required to be taken by the notices imposing the penalties. In that regard, so far as a daily penalty under paragraph 4 of Schedule 55 is concerned, paragraph 4(1)(c) of Schedule 55 requires that the taxpayer must have been informed of the date from which the daily penalty would become payable and, so far as every penalty under Schedule 55 is concerned, paragraph 18(1)(c) of Schedule 55 requires that the relevant penalty notice must set out the period in respect of which the penalty is assessed. The Court of Appeal in *Donaldson v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2511 ("*Donaldson*") held that, in this context, "the period in respect of which the penalty is assessed" is, in the case of a penalty under paragraph 4 of Schedule 55, the period over which the penalty has accrued and, in the case of other penalties such as the ones under paragraphs 3, 5 and 6(5) of Schedule 55, the tax year of assessment to which the relevant penalty relates.

18. The Court of Appeal in *Donaldson* also addressed the circumstances in which, even though notification of a penalty has not strictly met one or more of the requirements set out above, the relevant penalty could still be considered to have been validly notified by virtue of Section 114(1) TMA 1970 because the failure is a matter of form and not substance. Section 114(1) TMA 1970 provides that:

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

19. It is well accepted that, in penalty cases such as this one, it is for the Respondents to establish that:

> (a) the failure which has given rise to the relevant penalty has occurred and the relevant penalty has been properly imposed; and
>
> (b) the taxpayer has been notified of the relevant penalty in the appropriate form

and then, once they have done so, it is for the taxpayer to establish that he or she has a reasonable excuse for his or her failure or that the Respondents' conclusion that the relevant circumstances were not special circumstances was "flawed" in the sense described above.

Preliminary matters

20. Before addressing the substantive issues involved in the appeal, there are two preliminary matters which need to be addressed.

21. First, both the appeal to which this decision relates and the notice of the appeal to the First-tier Tribunal were made late. However, the Respondents raised no objection to the appeal on those grounds and we were accordingly content to give permission for the appeal to proceed.

22. Secondly, in the light of the fact that:

> (a) the Respondents, in presenting their case in relation to the £100 penalties under paragraph 3 of Schedule 55 and the £900 penalties under paragraph 4 of Schedule 55, had provided only a template letter SA326D in the form of the actual letters which they alleged had been sent to the Appellant, and not the actual letters themselves;
>
> (b) section 3 in the template letter SA326D refers to the fact that the 90 day daily penalty regime under paragraph 4 of Schedule 55 starts on 1 February for paper returns and 1 May for on-line returns; and
>
> (c) the 90 day period in respect of which the Respondents in fact imposed the daily penalty in relation to the tax year of assessment ending 5 April 2015 commenced on 11 September 2016 (3 months and one day after the self-assessment return in respect of that tax year of assessment was due) and not 1 May 2016,

we asked Mr McKinley at the start of the hearing to explain whether the letter actually sent to the Appellant in this case in relation to that penalty would have specified 11 September 2016 as the date on which the £10 daily penalty would start to accrue or would instead simply have specified the date of 1 May 2016 as set out in the template. He conceded that the latter would have been the case and that, therefore, the relevant notice would not have complied with the requirement in paragraph 4(1)(c) of Schedule 55 to state the date from which the daily penalty in respect of the tax year of assessment ending 5 April 2015 would start to accrue and would not have been sufficiently clear to the Appellant to fall within the safe harbour for errors set out in Section 114(1) TMA 1970 as interpreted by the Court of Appeal in *Donaldson.*

23. On that basis, Mr McKinley agreed that, to the extent that the appeal in this case related to the £900 penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2015, the Appellant was entitled to succeed.

24. Mr McKinley went on to say that he had become aware of this procedural error when looking through the case papers on the evening before the hearing. The above means that the Appellant's appeal is upheld to the extent that it relates to that penalty.

Discussion

25. So far as the other penalties are concerned, the Appellant set out a number of different grounds of appeal in his letter of 16 October 2016, his letter of 4 December 2017 accompanying his request for a review of 11 December 2017 and his further

letter of appeal of 15 February 2017. However, at the hearing, Mr Butterworth senior explained that those various grounds could be distilled into the following four submissions:

(a) the Appellant had no tax liability in respect of either of the tax years in question. Instead, he was due a repayment of £1,476.40 in respect of the tax year of assessment ending 5 April 2015 and a repayment of £3,330.42 in respect of the tax year of assessment ending 5 April 2016. Since the penalties which the Respondents were seeking to impose under paragraphs 5 and 6 of Schedule 55 were, by the Respondents' own admission in their skeleton argument, "tax geared", paragraph 17(3) of Schedule 55 – which specifies that, where a person is liable for a penalty under more than one paragraph of Schedule 55 "which is determined by reference to a liability to tax, the aggregate of the amounts of those penalties must not exceed the relevant percentage of the liability to tax" - meant that those penalties could not exceed nil as the liability to tax which would have been shown in the relevant returns in respect of the relevant tax years was nil;

(b) the Respondents were required to act in accordance with the law in seeking to impose penalties and they had not done so in imposing the requirement that a person claiming relief for expenses in respect of any tax year of assessment exceeding £2,500 had to file a self-assessment return in order to do so. There was no legislation that specified such a limit and therefore the Respondents had acted in an arbitrary and unreasonable way in creating that requirement;

(c) the fact that the Appellant was due to receive a refund of tax in respect of the relevant tax years of assessment meant that his case involved "special circumstances" within the meaning of paragraph 22 of Schedule 55 and the Respondents' conclusion that it didn't was "flawed" in the sense described above; and

(d) in any event, the Appellant did not receive all of the letters and notices which the Respondents claim to have sent to him. However, Mr Butterworth senior and the Appellant candidly admitted that they could not identify which of the various communications that the Respondents allege to have sent to the Appellant as described above were not received and which of those communications were received.

26. In the course of the hearing, Mr Butterworth senior said expressly that the Appellant was not seeking to rely on the fact that he had a reasonable excuse for his failure to file the relevant returns. However, it appears to us that the ground of appeal set out at paragraph 25(d) above is capable of being construed in that way. In other words, it is not clear to us whether, in making this argument, Mr Butterworth senior is merely saying that the Respondents have not discharged the burden of establishing that they sent to the Appellant the penalty notices and letters which they allege to have sent or instead saying that, because the Appellant did not receive some of those penalty notices and letters, he has a reasonable excuse for his failure to file the relevant returns.

27. Mr Butterworth senior also said expressly at the hearing that the Appellant was no longer seeking to rely on special relief under paragraph 3A of Schedule 1AB TMA 1970, as outlined in the Appellant's letter to the Respondents of 15 February 2018 but, in any event, we understand that both parties agree that that relief is not relevant in the context of penalties.

28. We now turn to consider, in turn, each of the grounds of appeal set out at paragraph 25 above.

The limitation in paragraph 17(3) of Schedule 55

29. In relation to the ground of appeal set out at paragraph 25(a) above, we would first observe that this argument is relevant only to the penalties in respect of the failure by the Appellant to file the self-assessment return in respect of the tax year of assessment ending 5 April 2015 because it is only in relation to that failure that penalties under both paragraph 5 and paragraph 6(5) of Schedule 55 have been imposed. Paragraph 17(3) of Schedule 55 applies only in circumstances where the relevant taxpayer is liable for a penalty under more than one paragraph of Schedule 55 which is determined by reference to a liability to tax. In the present context, the penalties under paragraph 3 and paragraph 4 of Schedule 55 are clearly not determined by reference to a liability to tax. Only the penalties under paragraph 5 and paragraph 6(5) of Schedule 55 can potentially fall within the relevant language and, as no penalty has been imposed on the Appellant under paragraph 6(5) of Schedule 55 in respect of the tax year of assessment ending 5 April 2016, this ground of appeal clearly does not apply in relation to the penalties in respect of that tax year of assessment.

30. Turning then to consider the relevant ground of appeal in relation to the penalties that have been imposed on the Appellant under paragraph 5 and paragraph 6(5) of Schedule 55 in respect of the tax year of assessment ending 5 April 2015, we are not convinced that Mr Butterworth senior is right in saying that, in respect of that tax year of assessment, the "liability to tax which would have been shown in the return in question" – which is the language used in both paragraph 5 and paragraph 6(5) of Schedule 55 - is nil.

31. The first point to note in this context is that paragraph 24 of Schedule 55 defines the meaning of the phrase "liability to tax which would have been shown in a return" as being the amount of tax which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates. There is, in that basic definition, no reference to the fact that the tax in question needs actually to be shown in the return itself although one might say that the reference in paragraph 24(2)(b) of Schedule 55 to there being an adjustment in the penalty after the taxpayer actually makes the relevant return "by reference to the amount of tax shown to be due and payable in that return" suggests that, in relation to income tax returns, the draftsman is still proceeding on the assumption that the tax return will both set out the taxable income for the tax year of assessment covered by the return in question and the amount of income tax which is due and payable in respect of that taxable income.

32. Be that as it may, the fact is that the self-assessment return itself does not show either a tax liability or a repayment of tax. Instead, it merely contains the details of the relevant taxpayer's income, informs the relevant taxpayer to make payment electronically of any tax which remains to be discharged in respect of the tax year of assessment in question and asks the relevant taxpayer to provide his or her bank account details if he or she believes that an overpayment of tax has been made and a repayment is due in respect of the tax year of assessment in question. It also says the following as regards calculating the tax liability or repayment which is due in respect of the tax year of assessment in question:

> "Calculating your tax – if we receive this paper tax return by 31 October 20[ ] or if you file online, we'll do the calculation for you and tell you how much you have to pay (or what your repayment will be) before 31 January 20[ ]. We'll add the amount due to your Self Assessment Statement, together with any other amounts due.
>
> **Don't** enter payments on account, or other payments you have made towards the amounts due, on your tax return. We'll deduct these on your Self Assessment Statement. If you want to calculate your tax, ask us for the 'Tax calculation summary' pages and notes. The notes will help you work out any tax due or repayable, and if payments on account are necessary."

33. The fact that no provision is made in the self-assessment return itself for showing either the tax which needs to be paid by the taxpayer in respect of the tax year of assessment in question or the refund which is due to the taxpayer in respect of the tax year of assessment in question suggests to us that, regardless of the implication in paragraph 24(2)(b) of Schedule 55 that one should be looking solely at the return in question to identify the tax liability which would have been shown in the return in question, the phrase "liability to tax which would have been shown in the return in question" which appears in paragraph 5 and paragraph 6(5) of Schedule 55 should, at least in the context of income tax, be construed as referring to the amount of income tax which is shown, in the tax calculation made by the Respondents following the submission of the relevant return, as being due and payable in respect of the tax year of assessment to which the return in question relates.

34. This in turn leads on to the question of whether the reference in paragraph 24 of Schedule 55 to the tax which is shown to be due or payable in respect of the relevant tax year of assessment should be construed as meaning the tax which is shown in that calculation as being due or payable in respect of the relevant tax year of assessment before taking into account payments of taxes already made by the filing date in relation to the relevant tax year of assessment or only the tax which is shown in that calculation as being due or payable in respect of the relevant tax year of assessment after taking into account those payments of taxes. This question is highly relevant in the present case because the tax calculation which was made in respect of the tax year of assessment ending 5 April 2015 – which is set out at page 55 of the hearing bundle - first sets out the aggregate income on which tax is due and then sets out the income tax liability in respect of that income – in this case, £10,156.60 - before setting out the tax which has already been deducted in respect of that tax year of assessment. It then compares the two relevant figures and concludes by showing that, in this case, a repayment of tax was due in respect of that tax year of assessment.

35. So, in this case, the tax calculation showed that the Appellant had an income tax liability of £10,156.60 in respect of the tax year of assessment ending 5 April 2015 but that, as a result of prior tax deductions, the Appellant had in fact discharged the whole of that tax liability by the filing date in relation to that tax year of assessment and had, in fact, overpaid his tax liability in respect of that tax year of assessment.

36. In seeking to answer the question posed in paragraph 34 above, we gain no guidance from the terms of paragraph 24 of Schedule 55 itself. In the context of corporation tax, paragraph 24(3) of Schedule 55 expressly says that, in calculating the amount of tax which is due or payable, no account is to be taken of any relief under Section 458 Corporation Tax Act 2010 which is deferred under sub-section (5) of that section but that provision is looking at a relief from the tax which becomes due and payable in respect of the accounting period in question (and therefore a true reduction in the tax which becomes due and payable in the first place). It is not dealing with a situation where there is a tax liability but part of that tax liability happens to have been discharged. Accordingly, the provision does not provide any guidance by implication as to whether the amount of tax which is due or payable in respect of a period should be calculated after taking into account taxes which have actually been paid before the time when the return in respect of that period was required to be filed.

37. Left to our own devices, we would say that the phrase "any liability to tax which would have been shown in the return in question" should be construed as referring to the amount of tax which is shown in the relevant tax calculation as being due or payable in respect of the income arising in the relevant tax year of assessment before taking into account any tax payments which have actually been made for or on behalf of the relevant taxpayer prior to the filing date in relation to the relevant tax year of assessment and not to the amount of tax (if any) which remains payable by the taxpayer as at the filing date in relation to the relevant tax year of assessment. Moreover, we are aware of the fact that, in the context of penalties for inaccuracies in Schedule 24 of the Finance Act 2007, the Respondents take the view that the "potential lost revenue" which is to be determined pursuant to paragraph 5 of that schedule – by reference to the additional amount of tax which is due or payable as a result of correcting the relevant inaccuracy - should not take into account taxes paid before the inaccuracy is corrected (see *Curtises Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 227 (TC) at paragraphs [28](a) and [29] to [32]) and, although Schedule 55 is imposing penalties in a different context (where one might perhaps mount a stronger case for reaching the conclusion that the tax which is due or payable should be determined only after taking into account previous payments of tax), one might have expected the Respondents to adopt a similar approach to the language in the context of Schedule 55.

38. Of course, if the view set out in paragraph 37 above were to be right, then the penalties imposed by the Respondents under paragraphs 5 and 6(5) of Schedule 55 in respect of the tax year of assessment ending 5 April 2015 and the penalty imposed by the Respondents under paragraph 5 of Schedule 55 in respect of the tax year of assessment ending 5 April 2016 would in each case be too low. The relevant paragraphs stipulate that the penalty is in each case the higher of 5% of any liability to tax which would have been shown in the return in question and £300 and, in this case,

5% of the income tax liability in respect of the tax year of assessment ending 5 April 2015 was £507.83 (5% of £10,156.60) and 5% of the income tax liability in respect of the tax year of assessment ending 5 April 2016 was £780.85 (5% of £15,617.00 – as set out at page 56 of the hearing bundle). So it would seem by their actions that, notwithstanding their approach in the context of Schedule 24 of the Finance Act 2007 (as recorded above), the Respondents have interpreted the phrase "any liability to tax which would have been shown in the return in question" in the same manner as Mr Butterworth senior. Given that that is the case, we are content to proceed on the basis that, in relation to both tax years of assessment which are relevant to this appeal, the "liability to tax which would have been shown in the return in question" is nil, recognising that this involves giving a different interpretation to the phrase "due or payable" than the one adopted by the Respondents in the context of Schedule 24 of the Finance Act 2007.

39. That in turn means that we must go on to consider whether the limitation in paragraph 17(3) of Schedule 55 applies only in circumstances where the penalties imposed under paragraph 5 and paragraph 6(5) of Schedule 55 are the amounts calculated by reference to 5% of the liability to tax in respect of the relevant tax year of assessment (as set out in paragraph 5(2)(a) and paragraph 6(5)(a), as the case may be) or whether that limitation also applies where the penalties imposed under paragraph 5 and paragraph 6(5) of Schedule 55 are the fixed amounts of £300 set out in paragraph 5(2)(b) and paragraph 6(5)(b), as the case may be.

40. The question of whether the limitation set out in paragraph 17(3) of Schedule 55 applies in a case where the penalties which are sought to be imposed under paragraph 5 and paragraph 6(5) of Schedule 55 are the fixed amounts of £300 is, we think, a difficult one. We recognise that there are arguments to be made in support of either conclusion.

41. On the one hand, the fixed penalty of £300 which is described in each of paragraph 5(2)(b) and paragraph 6(5)(b), as the case may be, is simply a fixed amount which is set out as such in the legislation. That amount of £300 is obviously not itself calculated by reference to any liability to tax but is instead merely set out in the legislation as a fixed amount.

42. On the other hand, each of paragraph 5 and paragraph 6(5) of Schedule 55 provides that the £300 penalty arises only if it is greater than 5% of the liability to tax which would have been shown in the return in question. So, before reaching the conclusion in any particular case that the appropriate penalty to impose in that case is in fact the £300 set out in paragraph 5(2)(b) and paragraph 6(5)(b), as the case may be, it is first necessary to determine the amount of the liability to tax which would have been shown in the return in question and then to conclude that 5% of that amount would have been less than £300.

43. There is little guidance in the context of Schedule 55 itself which sheds any light on which of these interpretations is to be preferred. It is true that, in defining the "relevant percentage" for the purposes of paragraph 17(3) of Schedule 55, paragraph 17(4) of Schedule 55 refers to each of paragraph 6(3) and paragraph 6(4) of Schedule

55 as a whole when, if the first interpretation were to be correct, one might have expected the relevant references in paragraph 17(4) of Schedule 55 to be limited to paragraph 6(3)(a) and paragraph 6(4)(a) of Schedule 55, but we do not believe that this implication is sufficient to displace the first interpretation if the first interpretation amounts to the better construction of the phrase "which is determined by reference to a liability to tax".

44. Conversely, one can see how, from the policy perspective, Parliament might well have intended the limit in paragraph 17(3) of Schedule 55 to operate only in circumstances where the penalties under paragraph 5 and paragraph 6(5) of Schedule 55 are significant amounts and not to operate in circumstances where those penalties are merely £300.

45. In conclusion, although we can see the arguments to the contrary, we believe the better view to be that where the penalties imposed under paragraph 5 and paragraph 6(5) of Schedule 55 are £300, those penalties are not "determined by reference to a liability to tax". It is true that they are imposed only in circumstances where 5% of the liability to tax is less than £300, but, in our view, that is simply the pre-condition to the operation of paragraph 5(2)(b) and paragraph 6(5)(b), as the case may be, and does not mean that the £300 that is set out in each of those paragraphs is "determined by reference to a liability to tax".

46. For the reasons set out at paragraphs 29 to 45 above, we have concluded that the Appellant should not succeed in the appeal on the basis of the ground set out at paragraph 25(a) above.

Respondents acting outside their powers

47. The ground set out at paragraph 25(b) above raises the issue of the extent to which the First-tier Tribunal is entitled to take into account matters of public law in exercising its jurisdiction. There is a considerable body of authority in this regard; principally, *Wandsworth LBC v Winder* [1985] AC 461, *Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864, *Oxfam v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 3078, *Hok Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 363 (TCC), *The Commissioners for Her Majesty's Revenue and Customs v Noor* [2013] UKUT 71 (TCC) and *The Trustees of the BT Pension Scheme v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 713. There is an excellent and thorough summary of the effect on this question of all of the above decisions in the Upper Tribunal decision in *R & J Birkett v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0089 (TCC) ("*Birkett*") at paragraphs [24] and following.

48. We believe that the conclusions that should be drawn from the above cases, as stated by the Upper Tribunal in *Birkett*, are that:

(a) the First-tier Tribunal has no general judicial review jurisdiction;

(b) however, it may in certain cases have to decide questions of public law either in the course of exercising the jurisdiction that it does have or to determine whether it has jurisdiction in the first place;

(c) in each case, therefore, in assessing whether a particular public law point is one that the First-tier Tribunal can consider, it is necessary to consider the specific jurisdiction that the First-tier Tribunal is exercising and then to determine whether the particular public law point that is sought to be raised is one that falls to the First-tier Tribunal either in exercising that jurisdiction or in determining whether it has jurisdiction; and

(d) since the First-tier Tribunal is a creature of statute, this is ultimately a matter of statutory construction.

49. Applying the above principles in the present case, we can see no basis in the terms of the legislation as a whole, and particularly not in Schedule 55, to justify the conclusion that, in considering whether a penalty under one of the paragraphs of Schedule 55 has been properly imposed, we can take into account the reasonableness or otherwise of the Respondents' decision to require a self-assessment return to be filed in any particular case. We are merely permitted to consider whether the Appellant was obliged to file a self-assessment return and failed to do so for the requisite period. Thus, in this case, as long as we find that the Appellant was required to file a self-assessment return in respect of both tax years of assessment because the Respondents sent him a notice to that effect, that is the end of the enquiry.

50. We would add that, although, for the reason set out above, it is not strictly relevant to consider this question, we do not see how the Respondents' decision to require a self-assessment return to be filed in a case where the taxpayer in question is claiming relief for expenses of more than a de minimis amount – in this case, determined by the Respondents to be £2,500 – is unreasonable. It seems to us that:

(a) Section 8 TMA 1970 permits the Respondents to give a notice to any person for the purpose of establishing the amounts in which that person is chargeable to income tax in respect of any tax year of assessment;

(b) in the performance of their obligation to collect revenues, the Respondents are entitled to decide that they wish to exercise a greater degree of scrutiny in relation to claims for expenses of a more than de minimis amount and therefore to require a greater degree of formality in the making of such claims; and

(c) as the Respondents have pointed out, the requirement to file a self-assessment return in such cases was clearly flagged in the form P87 (of which the Appellant's agent was aware – as to which, see point 3 of the agent's letter of 16 October 2017), on the Respondents' website and in the letters that the Respondents sent to the Appellant on 26 February 2016, 29 July 2016 and 17 May 2017. So the Appellant can hardly allege that he had no way of knowing about the requirement.

51. For the reasons set out at paragraphs 47 to 50 above, we have concluded that the Appellant should not succeed in the appeal on the basis of the ground set out at paragraph 25(b) above.

"Special circumstances"

52. In relation to the ground set out at paragraph 25(c) above, even if it was up to us to determine the issue by ourselves, de novo, we do not think that the circumstances in this case amount to "special circumstances". As noted at paragraph 15 above, we are not permitted to reach our own view on that issue in any event. We are merely permitted to determine whether the view reached by the Respondents was unreasonable in the sense set out in *Wednesbury*. In that regard, not only do we think that the view reached by the Respondents on this question was not unreasonable in that sense; we agree with it. It seems to us that there is nothing remotely "special" about the circumstances of the Appellant in this case. Mr Butterworth senior sought to persuade us that the Appellant's circumstances were "special" because, in consequence of the deduction obtained by the Appellant by virtue of his claim for expenses, the Appellant became entitled to a refund of tax. However, we believe that obtaining a refund for a previous overpayment of taxes is a fairly common occurrence; we certainly do not see how it qualifies as "exceptional, abnormal or unusual", to adopt the phraseology of the House of Lords in *Crabtree*.

53. For the reason set out at paragraph 52 above, we have concluded that the Appellant should not succeed in the appeal on the basis of the ground set out at paragraph 25(c) above.

Were the penalty notices received and in proper form and reasonable excuse

54. Finally, in relation to the ground set out at paragraph 25(d) above, as mentioned at paragraph 26 above, it is not clear to us whether, in making this argument, Mr Butterworth senior is merely saying that the Respondents have not discharged the burden of establishing that they sent the various penalty notices which they allege to have sent or instead saying that, because the Appellant did not receive some of those penalty notices, he has a reasonable excuse for his failure to file the relevant returns.

55. We have therefore considered this submission on both of those alternative bases.

Were the penalty notices received and in proper form

56. In doing so, we have concluded that the Respondents have discharged the burden of establishing that, on the balance of probabilities, they sent to the Appellant the penalty notices in relation to the penalties under Schedule 55 which they allege to have sent. We say this for the following reasons:

(a) In the course of his argument at the hearing, Mr McKinley provided us with templates of those penalty notices. In addition, Mr McKinley provided us with extracts from the Respondents' records in relation to the

Appellant which set out the dates on which those penalty notices were despatched;

(b) Mr McKinley also produced evidence from the Respondents' records in relation to the Appellant to show that the Respondents had recorded the Appellant's address throughout the period under consideration as being 93 Eastcombe Avenue, Charlton, London SE7 7LL and Mr Butterworth senior and the Appellant confirmed at the hearing that this was in fact the Appellant's address throughout that period. Moreover, the fact that the Appellant has conceded that he did receive at least some of the penalty notices and letters that the Respondents allege to have sent to him suggests that the address on the Respondents' records was correct;

(c) Mr McKinley also drew to our attention Section 7 Interpretation Act 1978, which provides as follows:

"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"

and Section 115 TMA 1970, which provides as follows:

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

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment…";

(c) Mr McKinley, rightly in our view, pointed out that the combined effect of these provisions is that service of the relevant penalty notices is deemed to be effected by properly addressing, pre-paying and posting a letter containing the notices; and

(d) On the basis of the evidence referred to above, the Respondents have satisfied us that, on the balance of probabilities, they did properly address, pre-pay and post the penalty notices in relation to the penalties under Schedule 55 to the Appellant on the dates when they say they did. The fact that the Appellant cannot identify which of the communications from the Respondents he did not receive tends, in our view, to support this conclusion.

57. As for whether the relevant penalty notices complied with the requirements of Schedule 55, although the Respondents have not provided us with copies of the actual penalty notices that they sent to the Appellant in relation to the penalties under that schedule, they have provided us with templates of those notices and we are satisfied that, based on those templates:

(a) The penalty notices which were sent to the Appellant imposing the penalties under paragraph 3, paragraph 5 and paragraph 6(5) of Schedule 55 would have complied with the requirement in paragraph 18(1)(c) of Schedule 55 to state the period in respect of which the relevant penalty was being imposed – that is to say, as set out in *Donaldson*, the tax year of assessment in respect of which the relevant penalty was being imposed;

(b) In relation to the penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2016, the penalty notice which was sent to the Appellant imposing the penalty under paragraph 3 of Schedule 55, in the form of the template SA326D at page 72 of the hearing bundle, would have correctly set out the starting date of the 90 day period in respect of which the daily penalty under paragraph 4 of Schedule 55 was going to accrue – ie 1 May 2017 - and therefore the Respondents would have complied with the requirement in paragraph 4(1)(c) of Schedule 55 in respect of that penalty (unlike the penalty notice in relation to the daily penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2015, as mentioned in paragraphs 22 to 24 above); and

(c) The penalty notice imposing the penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2016 would not have complied with the requirement in paragraph 18(1)(c) of Schedule 55 to state the period in respect of which the relevant penalty was being imposed because the template does not stipulate the 90 day period in respect of which that penalty accrued. Instead, it merely states the tax year of assessment in respect of which the penalty is being imposed and the fact that the penalty has been calculated at £10 a day for a maximum of 90 days. As noted in *Donaldson*, this is not sufficient for the relevant penalty notice to comply with the requirement of paragraph 18(1)(c) of Schedule 55 because, in the case of the penalty under paragraph 4 of Schedule 55, paragraph 18(1)(c) of Schedule 55 requires the relevant penalty notice to set out the period in respect of which the daily penalty is calculated and not just the tax year of assessment to which the relevant penalty relates. However, for the same reasons as are set out in *Donaldson*, we are satisfied that this omission falls within the relief set out in Section 114 TMA 1970. There can be no doubt that the Appellant, having received the earlier penalty notice under paragraph 3 of Schedule 55, informing him that the daily penalty of £10 would start to accrue on 1 May 2017 and that the accrual would continue for a maximum of 90 days – see the template SA326D at page 72 of the hearing bundle –would have had no difficulty in working out, on receiving the penalty notice imposing the penalty under paragraph 4 of Schedule 55 that the period over which the daily penalty had accrued was the 90 day period commencing on 1 May 2017 (and that is even without taking into account the 30 day accrual warning which the Respondents allege to have sent to the Appellant on 6 June 2017 and the 60 day accrual warning which the Respondents allege to have sent to the Appellant on 4 July 2017).

58. For the above reasons, we are satisfied that, on the balance of probabilities, each of the penalty notices which are the subject of this appeal were received by the Appellant and, with the exception of the penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2015, complied with the requirements of Schedule 55.

Reasonable excuse

59. As for whether or not the Appellant has satisfied us that he has a reasonable excuse for his failure to file the returns because he did not receive some of the letters, penalty notices and reminders which the Respondents allege that they sent to him, we would start by saying that there is no meaningful difference between the two reasonable excuse provisions set out at paragraphs 9 to 14 above in the context of this appeal. The Appellant is not seeking to rely on the fact that he has a reasonable excuse by reason of an insufficiency of funds. In addition, the Appellant is not seeking to rely on the fact that he has a reasonable excuse by reason of having relied on a third party to take care of his tax affairs. Instead, he merely seeks to rely on the fact that he did not receive some of the relevant communications. As a result, to all intents and purposes, there is no difference in this context between the application of the two reasonable excuse provisions.

60. Under both provisions, we need to consider whether the Appellant had a reasonable excuse for his failure to file each return between the filing date for that return – 10 June 2016, in the case of the return in respect of the tax year of assessment ending 5 April 2015 and 31 January 2017, in the case of the return in respect of the tax year of assessment ending 5 April 2016 - and shortly before the date when he actually filed that return, on 30 August 2017. This is because, under both provisions, the taxpayer in question needs to show that, in order to have a reasonable excuse, where the circumstances that constitute the reasonable excuse cease to exist, the taxpayer needs to remedy the relevant failure without unreasonable delay after that is the case.

61. It is clear from the decided cases in relation to what constitutes a reasonable excuse, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ("*Clean Car*"), that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

62. In that regard, the Appellant has not satisfied us that he has a reasonable excuse by reason of having failed to receive some of the communications that the Respondents allege that they sent to him over the period in question. We have already set out at paragraph 56 above the reasons for our conclusion that, on the balance of probabilities, the Appellant received all of the penalty notices which are relevant to this appeal. As for the other communications which the Respondents allege that they

sent, we consider that the fact that the Appellant cannot identify which of those communications he did not receive is somewhat fatal to his case in this context. Although Section 7 Interpretation Act 1978 is technically not in point when dealing with communications such as reminders and letters which are not despatched pursuant to a statutory provision – see the language in Section 7 Interpretation Act 1978 and in Section 115 TMA 1970 - we think that, on the balance of probabilities, the Appellant probably did receive most, if not all, of those other communications. In any event, we have already concluded that, on the balance of probabilities, he received all of the penalty notices and, by his own admission, he received at least some of those other communications. So we think that, on that basis alone, he cannot argue that he has a reasonable excuse for his non-compliance in this case. In our view, the hypothetical responsible taxpayer, conscious of, and intending to comply with, his obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself at the relevant time, would, upon receipt of even just some of the communications from the Respondents, have taken steps to understand and comply with his obligations under the tax legislation.

63. Thus, even if only some of the relevant communications arrived, a hypothetical taxpayer who was conscious of, and had the intention of complying with, his tax obligations – which is the objective standard described in *Clean Car* – would not simply have ignored those communications. So, we do not think that that meets the standard set out in *Clean Car* to amount to a reasonable excuse.

64. In consequence of the above, we do not believe that the Appellant has a reasonable excuse for his failure to file the relevant returns by their respective filing dates, whether under Section 118(2) TMA 1970 or under paragraph 23 of Schedule 55.

65. For the reasons set out at paragraphs 54 to 64 above, we have concluded that the Appellant should not succeed in the appeal on the basis of the ground set out at paragraph 25(d) above.

Conclusion

66. For the reasons set out above, we uphold the Appellant's appeal to the extent that it relates to the £900 penalty under paragraph 4 of Schedule 55 in respect of the tax year of assessment ending 5 April 2015 and we dismiss the Appellant's appeal to the extent that it relates to the other penalties set out at paragraph 1 above.

67. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 29 August 2018