[2021] UKFTT 0047 (TC)

TC08033

INCOME TAX – Whether a notice to file pursuant to s 8 of the Taxes Management Act 1970 requiring taxpayer to file a return was validly issued – yes – Rogers & Shaw considered and applied – Whether late payment penalty correctly assessed and applied – yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03969

BETWEEN

WAYNE BURFORD **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA
MR LESLIE BROWN

The hearing took place on 29 January 2021. With the consent of the parties, the hearing was held remotely by video using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Tony Woon-Sam of Crown Accountants, for the Appellant

Mr Chris Evans, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant is appealing against penalties that HMRC have imposed under Schedule 56 of the Finance Act 2009 ("Schedule 56") for the late payment of tax relating to the 2016-17 tax year. The penalties charged on the Appellant were (i) a 30-day late payment penalty in the amount of £101 (dated 13 March 2018) and (ii) a six-month late payment penalty in the amount of £101 (dated 28 August 2018).

BACKGROUND

2. On 6 April 2017, HMRC issued a notice to file to the Appellant for the 2016-17 tax year. The filing date was 31 October 2017 for a paper return, or 31 January 2018 for an electronic return. The Appellant filed his tax return electronically on 22 January 2018 and this showed that the amount of tax due was £2,025. The Appellant did not however pay the outstanding tax liability by 31 January 2018 ('the legislative due date').

3. An outstanding debt letter was sent to the Appellant on 9 February 2018 and a statement of account was issued to the Appellant on 6 March 2018. As payment was not made by the legislative due date, HMRC issued a notice of penalty assessment on 13 March 2018, for the 30-day late payment penalty. On 29 March 2018, the Appellant's agents appealed against the penalty. Following exchanges of correspondence between the Appellant's agents and HMRC, the Appellant's agents notified the appeal to the Tribunal on 21 June 2018.

4. As payment had still not been made six months after the legislative due date, HMRC issued a notice of penalty assessment on 28 August 2018 ('the six-month penalty'). The Appellant paid the outstanding tax due on 22 November 2020.

5. On 14 June 2019, the appeal was stayed pending the outcome of the decision of the Upper Tribunal ('UT') in *R & C Commrs v Rogers & Anor* [2019] UKUT 0406 (TCC) (*"Rogers & Shaw"*). The basis of HMRC's application for a stay was that the Appellant's appeal raised the issue of the validity of a notice submitted under s 8 of the Taxes Management Act 1970 (hereinafter referred to as 'TMA').

APPELLANT'S CASE

6. The Appellant's grounds for appealing against the penalties (as set out in the agent's email to HMRC dated 5 June 2019 and the Appellant's Statement of Case), can be summarised as follows:

(1) A notice under s 8 TMA must be issued in order for a penalty to be lawful. HMRC have not demonstrated that a notice to file under s 8 TMA was issued to the Appellant.

(2) Paragraph 11(1)(a) of Schedule 56 provides that HMRC must assess the penalty. The penalty is computer generated at the maximum amount permitted by para 3(2) of Schedule 56 and it has therefore not been assessed. HMRC have not illustrated why it was not necessary to assess the penalty. The penalty is therefore unlawful.

(3) The assessment on which the 5% is calculated is a simple assessment based on the figures in the tax return submitted pursuant to s 7 TMA. Section 59B TMA refers to assessments other than simple assessments.

(4) The case of *Rogers & Shaw* did not deal with the situation where a tax return has been submitted pursuant to s 7 TMA.

(5) It is not possible for the Appellant to pay the outstanding tax liability for 5 April 2017.

7. By a letter dated 8 February 2018, the Appellant's agents (Crown Accountants) said this:

> *"The fact that payment of tax was not made by the due date is not disputed. Nor is reasonable excuse being claimed.*
>
> *The grounds of that appeal is that the penalty is unlawful."* [sic]

RESPONDENT'S CASE

8. HMRC's case can be summarised as follows (as set out in the Skeleton Argument dated 12 January 2021):

(1) The Appellant contends that he submitted his tax return pursuant to s 7 TMA and that late payment penalties do not therefore apply. Section 7 TMA relates to the requirement to give notice of liability to income tax and capital gains tax. HMRC's records show that a s 8 notice to file was issued to the Appellant on 6 April 2017 and the Appellant subsequently made and delivered his return to HMRC on 22 January 2018. The Appellant was not giving notice of liability to income tax but he was making and delivering a tax return in compliance with the notice to file issued to him.

(2) At the time the notice to file was issued, the Appellant's registered address was 25 Clematis Street. The Appellant does not dispute that this is the correct address and the notice to file was not returned undelivered. The Appellant does not dispute that the s 8 notice to file was received. There is therefore strong evidence to discharge the burden of proof to show that a s 8 notice to file was effectively served.

(3) It is not necessary for a specific officer of HMRC to be identified as having taken the decision to send a s 8 notice. It is permissible for HMRC to use a computer to perform the task of identifying which taxpayers meet the criteria for a notice to file to be issued.

(4) The Appellant did not pay his tax liability by 31 January 2018. Penalties were therefore due, in accordance with Schedule 56. The legislation does not define the method of assessment of the penalty. It is clear that what is required is for HMRC to conclude that an amount of tax or penalty is due, to calculate the amount owed and to notify the taxpayer of that assessment. The SA370 notice issued to the Appellant's agents on 13 March 2018 states the period in respect of which the penalty is assessed and this is the same notice that was issued to the Appellant. The penalty was correctly assessed and notified to the Appellant.

(5) The Appellant's agent has confirmed that reasonable excuse is not being claimed.

(6) HMRC have considered the Appellant's circumstances and the conclusion reached is that no special circumstances apply.

(7) The penalties are proportionate.

APPEAL HEARING

9. The documents before us included the following:

(1) HMRC's Skeleton Argument dated 12 January 2021;

(2) Documents Bundle consisting of 147 pages; and

(3) Supplementary Bundle consisting of 250 pages (pages A1 to E190).

10. At the commencement of the appeal hearing, both representatives confirmed that they had the same documents. During his submissions however, Mr Woon-Sam said that he did not have a copy of the Documents Bundle. There was no suggestion that this had not been served on the Appellant by HMRC and indeed Mr Woon-Sam confirmed, on at least two occasions before the hearing started, that he had received the Documents Bundle. Mr Woon-Sam submitted that he was content for the hearing to continue and that he accepted Mr Evans' submissions in relation to the documents included in the Documents Bundle. The hearing proceeded by way of submissions only.

Submissions

11. Mr Evans made the following submissions:

(1) The appeal concerns penalties for the late payment of tax. The issues are whether the notice to file was validly issued; whether the penalties were correctly applied; and whether the Appellant has established a reasonable excuse.

(2) A notice to file was issued to the Appellant on 6 April 2017, pursuant to s 8 TMA The Appellant submitted his tax return on 22 January 2018, in which he confirmed his employment income and the dividends he received.

(3) The Appellant previously did not dispute that a notice to file was received but the argument now presented on the Appellant's behalf is that the tax return was submitted

pursuant to s 7 TMA, which relates to the requirement to give notice of liability to income tax or capital gains tax. The Appellant was however making and delivering a return, pursuant to the notice to file issued on 6 April 2017, under s 8 TMA.

(4) The UT, in *Rogers & Shaw*, provided guidance on the evidence that the First-tier Tribunal ('FTT') should consider when deciding if a s 8 notice was served. The UT held that s 8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. It is permissible for a computer to perform the task. Section 103 of the Finance Act 2020 resolved any doubts about the conclusions reached by the UT in *Rogers & Shaw*. The interpretation of s 103 has been considered by the FTT in *Paul v HMRC* [2020] UKFTT 0415 (IAC).

(5) The "microfiche record" shows which documents were generated and issued to the Appellant by HMRC. The microfiche record shows that a notice to file was issued to the Appellant at his address. The only document issued to the Appellant on 6 April 2017 was the notice to file. The "Return Summary" also shows that the notice to file was issued on 6 April 2017 and this can be reconciled with the microfiche record. The Appellant has not disputed that the address held on HMRC's record is not his address and no correspondence was returned to HMRC undelivered.

(6) There is strong evidence to discharge the burden of proof that a notice to file was validly issued.

(7) Cap Gemini are HMRC's IT provider and the issue data sheet shows that a late payment penalty was triggered on 2 March 2018. The penalty type and amount are clearly identified and the name and address of the taxpayer are also set out.

(8) The payment deadline is set out at s 59B TMA. The Self-Assessment ('SA') system notes show that tax was paid on 30 November 2020. The Appellant failed to pay tax by the due date of 31 January 2018 and this led to the late payment penalties. The legislation does not define the method of assessment of a penalty. What is required is for HMRC to conclude that an amount of tax is due. Paragraph 11 of Schedule 56 does not impose a requirement that an officer of the Board makes the assessment.

(9) Paragraph 3(2) of Schedule 56 shows that the amount of the penalty is 5% of the unpaid tax. Paragraph 3(3) of Schedule 56 relates to the six-month penalty, which was issued on 28 August 2018.

(10) The penalties were calculated correctly. A notice to file was issued, tax remained outstanding and a penalty was incurred. The penalty was applied in accordance with the legislation and the case law.

12. Mr Woon-Sam made the following submissions in reply:

(1) It is not disputed that the Appellant received "something" from HMRC but the document that was received by the Appellant was not a s 8 notice to file. It is further not disputed that tax was paid late. Reasonable excuse is not being raised. It is common knowledge that the due date for a tax return and payment of tax is 31 January

(2) Penalties apply where tax that is due is late but this is only as a consequence of s 8 TMA. If a notice to file is issued a taxpayer is liable for a penalty.

(3) HMRC are required to assess a penalty and this process is set out at para 11 of Schedule 56. The word 'must' shows that HMRC should assess the penalty and the

amount of the penalty should be a matter of opinion. Paragraph 13(2) of Schedule 56 shows that a taxpayer can appeal the amount of the penalty.

(4) The procedure for operating taxes has changed and HMRC are mis-applying the law. Problems have arisen as a result of the changes in how the tax system is operated. The Tribunal must consider the amount of the penalty.

13. In response to questions from the Tribunal for the purposes of clarification, Mr Woon-Sam stated that he has been the Appellant's accountant for 20 years and his firm filed the 2016-17 tax return on the Appellant's behalf. He further added that the process is automatic and the firm has access to records of the Appellant's income, for the purposes of preparing the tax return. He re-iterated that he was unsure about the nature of the document that the Appellant had received from HMRC in April 2017. In his opinion, the document that the Appellant had received was a reminder to submit a tax return. He further added that whilst he had been content to proceed without the Documents Bundle, he was content for the Tribunal to consider the documents referred to and described by Mr Evans in his submissions.

14. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

15. The Appellant appeals against late payment penalties charged for the late payment of tax. The penalties were imposed under Schedule 56. We have derived considerable benefit from hearing the submissions made and from considering all of the documentary evidence before us. The parties are in agreement about the chronology in this appeal, save that they differ in view about what HMRC issued to the Appellant on 6 April 2017 and the conclusions that we should reach as a result of the chronological background.

16. The issues under appeal are firstly, whether a notice to file was validly issued; secondly, whether the penalties have been assessed in accordance with legislation and, thirdly, whether or not the Appellant has established a reasonable excuse for the default which has occurred. In *Perrin v R & C Commrs* [2018] BTC 513, at [69], the Upper Tribunal held that:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

17. The standard of proof is the civil standard; that of a balance of probabilities. The factual prerequisite is therefore that HMRC have the initial burden of proof: *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC).

18. Whilst Mr Woon-Sam submitted that reasonable excuse is not being relied on or raised, it is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute.

Q. Was a notice to file under s 8 TMA validly issued?

19. The first issue before us is that concerning whether a s 8 notice to file was validly issued to the Appellant. The UT in *Rogers & Shaw* (Zacaroli J and Judge Richards) provided guidance in relation to what the FTT should consider in determining whether a s 8 notice was validly issued and served. Mr Woon-Sam sought to distinguish the Appellant's case from *Rogers & Shaw* by submitting that *Rogers & Shaw* did not address the issues in the Appellant's case; namely that the return submitted by the Appellant was not pursuant to a s 8 notice to file. We are satisfied that the principles established in *Rogers & Shaw* are of material relevance to the issues in the appeal before us.

20. The UT in *Rogers & Shaw* held, at [50] – [51], that:

> "[50] …if HMRC fail to provide <u>any evidence at all</u> to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.
>
> [51] Where HMRC have given <u>some</u> evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems <u>record</u> a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was <u>actually</u> sent and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was <u>actually</u> sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so."

21. Mr Woon-Sam submits that the Appellant did not file his tax return in response to a notice to file. In further amplification of this argument, he submits that HMRC can only charge a penalty if a s 8 notice to file has been issued. The Appellant has been within the SA

regime since 2005. The incontrovertible facts in the appeal before us are that the Appellant filed his 2017 tax return electronically, before the filing deadline of 31 January 2018, having received what Mr Woon-Sam described as a "reminder to pay tax" on 6 April 2017.

22. The legislation (TMA) provides, so far as is material to this issue, that:

"**7 Notice of liability to income tax and capital gains tax**

(1) Every person who-

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B),

shall, subject to section (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

(1B) A person falls within this subsection if the person-

(a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains, and

(b) has received a notice under section 8B withdrawing the notice under section 8.

(1C) In subsection (1) "the notification period" means-

(a)in the case of a person who falls within subsection (1A), the period 6 months from the end of the year of assessment, or

(b) in the case of a person who falls within subsection (1B)-

(i)the period of 6 months from the end of the year of assessment, or

(ii) the period of 30 days beginning with the day after the day on which the notice under section 8 was withdrawn, whichever ends later.

8 Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given by an officer of the Board-

(a)to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

……..

23. It is clear from the legislation that s 7 TMA relates to notification by a taxpayer of chargeability to income tax or capital gains tax. Such notice is required to be given within six months of the end of the year of assessment and is commonly referred to as a "voluntary return". A return under s 8 TMA however is a return which the taxpayer has been required by a notice given to him by an officer of the Board to make and deliver to the officer. Therefore, s 8 notice is a formal step which creates a formal legal obligation to submit a tax return. As Judge Popplewell concluded in *Wood v HMRC* [2018] UKFTT 74 (TC), at [38], there is a clear link between (a) the delivery of a notice under s 8 and (b) the obligation to deliver a return. The obligation arises because of the notice and is not a voluntary act. When a taxpayer delivers a return in discharge of this obligation, the tax payer has "made" and "delivered" a return under s 8.

24. Section 115 TMA specifies the requirements for delivery and service of documents under the Taxes Act and allows HMRC to serve documents to a person's "usual or last known place of residence". The documents show the address that HMRC had on record for the Appellant, which was not disputed by the Appellant. We therefore find that the notice to file was sent to the address that HMRC had on file for the Appellant and there is no suggestion that it was returned undelivered. The Appellant does not dispute that this is his address. There is no suggestion on the evidence before us that there were any difficulties with the postal service at around the time of those deliveries.

25. The Interpretation Act 1978, at s 7 (which relates to service by post), provides that:

> "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".

26. The notice to file is therefore deemed to have been delivered, unless the contrary is proved.

27. We have derived considerable benefit from seeing all of the documents drawn to our attention. During his submissions, Mr Evans drew our attention to various documents included in the Documents Bundle, in support of the argument that what was issued to the Appellant on 6 April 2017 was a s 8 notice to file. Of material relevance are the "microfiche record" and the "Return Summary".

28. The microfiche record is set out as follows:

"060417201715110758655K MR W BURFORD 25 CLEMATIS STREET…

…….

[emphasis added]

29. The top left of the microfiche record shows the date that the notice was sent, i.e., 6 April 2017. The microfiche record also shows to whom the notice was issued, as well as the address to which the notice was sent. Therefore, the microfiche included in the Supplementary Bundle shows that it was sent to 25 Clematis Street and, at all material times, this was the Appellant's address.

30. We find that the Return Summary can be reconciled with the microfiche record. The Return Summary shows this:

"

Return Summary

Name **MR W D BURFORD** Reference **51107 58655**
……..

Tax Year 2016/17
……..

Return Issued Type	**Notice to File**
Return Issued Date	**06/04/2017**
Return Due Date	**31/01/2018**
Paper Return Due Date	**31/10/2017**

…….

Date of Receipt 22/01/2018"

31. In *Edwards v HMRC* [2019] UKUT 131 (TCC), the UT concluded that the date on HMRC's systems is acceptable, as follows:

> "[12] As is usual with these records, they always record that the return was issued on 06 April in the relevant tax year, which is the first day of the tax year, but it is well known that in practice notices to file are issued during the early part of the tax year."

32. We are not entirely sure whether Mr Woon-Sam fully appreciated the significance and consequences of accepting the accuracy of the documents referred to us by Mr Evans in his submissions. Having considered the documents, we are nevertheless satisfied that on 6 April

2017, HMRC issued the Appellant with a s 8 notice to file a tax return for the 2016-17 fiscal year at the address situated at 25 Clematis Street. The filing date for the Appellant's 2017 tax return was 31 October 2017 for a paper return, or 31 January 2018 for an electronic return. The Appellant proceeded to file his tax return electronically, through his agents, Crown Accountants, on 22 January 2018. We are satisfied that when the Appellant filed his tax return on 22 January 2018, he was doing so in response to the notice to file issued on 6 April 2017. Once a return is made under s 8 TMA, a number of statutory rights and obligations arise including, *inter alia*, the payment of tax.

33. The sting in the tail of Mr Woon-Sam's argument that the Appellant did not receive a notice to file is that by his own oral submissions, Mr Woon-Sam concedes that the Appellant received a "reminder to complete a tax return" in April 2017. It is unclear what the reminder to complete a tax return could have been if it were not a notice to file a tax return. Indeed, contrary to his email dated 5 June 2019 to HMRC in which he contended that the basis of the appeal was that a notice to file had not been issued, Mr Woon-Sam confirmed during a telephone call on 11 June 2019 with Christopher Jones, HMRC Litigator, that receipt of the notice to file was not being disputed. We find that the argument presented by Mr Woon-Sam goes against the weight of the evidence and the authorities. We hold that a notice to file was validly issued to the Appellant on 6 April 2017.

34. In respect of the argument that the notice to file was not issued by a named officer, the UT in *Rogers & Shaw* held, at [32] – [33], that:

> "[32] In our judgment properly construed, s 8 does not impose a requirement that an officer of the board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC…..the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer."
>
> [33] By virtue of s2 of the Commissioners for Revenue & Customs Act 2005 ('CRCA'), the 'officers' of HMRC are those staff that the Commissioners of Revenue & Customs have appointed for the purposes of exercising the Commissioners' functions. Section 2(4) of CRCA provides that anything commenced by one officer can be continued by another. Moreover, s113(1A) of TMA provides that:
>
> > '(1A) Any notice or direction requiring any return to be made under the Taxes Acts to an inspector or other officer of the Board may be issued or given in the name of that officer or, as the case may be in the name of the Board, by any officer of the Board, and so as to require the return to be made to the first-mentioned officer.'"

35. The UT therefore rejected the submission that a s 8 notice had to be given by *"an identified 'flesh and blood' officer".* At [35], the UT added that:

> "[35] the Commissioners (or 'HMRC') and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax."

36. The UT summarised the evidence heard, at [56]:

> "[56] The witness statement of Officer Michelle McClure in particular demonstrated that a team consisting of HMRC officers (the "Operational Excellence Business Delivery SA team") formulates, and keeps updated, criteria for deciding which taxpayers are to be required to submit tax returns. Having formulated those criteria, HMRC's computers perform an automated scan of their database to identify taxpayers who meet the criteria. A small team of HMRC officers then manually checks a small sample of 200 cases (essentially to check that those cases meet the criteria as a high level check of the automated scan). The witness statements of Officer Elisa Simmonds and Officer Martin Hodge explain that HMRC themselves send notices to file in digital form and that HMRC have outsourced the function of sending out notices in hard copy form to a third party provider called "Communisis'."

37. The UT then concluded, at [57]:

> "HMRC officers decided on applicable criteria and taxpayers meeting those criteria received s8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified. Nor does it matter that Communisis physically sent out hard copy s8 notices. The legislation does not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a s8 notice leaving the implementation of that decision to administrative staff and contractors."

38. Support for this can also be found in s 103 of the Finance Act 2009, which provides that:

> "(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise)."

39. Section 103 was considered by the FTT in *Paul v HMRC* [2020] UKFTT 0415 (TC) (Judge Hyde), at [74], as follows:

> "The appellant seeks to limit the application of section 103 by reading into the requirement that the function "may be done by HMRC" as still requiring human intervention, that is to say individuals in HMRC, not necessarily officers. I disagree. The natural meaning of the wording in section 103 is to allow something to be done by HMRC as a body, including automating processes that previously required something to be done by an officer of HMRC, being in the current appeal the issue of

section 8 notices. Provided that process is carried out "by HMRC" (which, without exploring the limits of artificial intelligence, must necessarily involve human intervention to programme the computer to issue the notices on the occurrence of certain events) it is valid, even without the identifiable authority of an identifiable human."

40. It is clear that there is no requirement that a specific officer is identified as having taken the decision to issue a s 8 notice. It is also clear that a return in response to an automated system remains a return: *Allam v HMRC* [2020] UKFTT 216 (TC), at [29], (Judge Greenbank), applying *Rogers & Shaw*.

41. Mr Woon-Sam expressed his dissatisfaction with the current SA system. In respect of the changes in the system for the collection of taxes, we have considered the principles in the case of *Ryanair v HMRC* [2013] UKUT 0176 (Warren J and Judge Bishopp), at [103] – [108]. The decision includes a discussion of the principle that *"the statute is always speaking"*. There, in an appeal concerning air passenger duty and a judicial review claim concerning less favourable treatment, the UT considered how legislation which was introduced when all tickets were issued in paper form should be construed now that almost all tickets are issued electronically. The UT considered that legislation which has not kept pace with technological change must be construed in accordance with "always speaking" principles—that is, it is necessary to ascertain what it is that Parliament intended and apply the words used, in a manner which respects that intention, to (in this case) a technique for documenting the right to take a flight not contemplated by Parliament in 1994, albeit, as s 43(1) shows, a "document" and, correspondingly, a "ticket" need not consist of paper.

42. We find that Mr Woon-Sam's argument fails to take into consideration the collection and management powers of HMRC. The collection and management powers of HMRC are found at s 1 TMA and s 5 of the Commissioners of Revenue & Customs Act 2005 ('CRCA'). The scope of those powers was described by Lord Hoffman in *R v HMRC ex parte Wilkinson* [2005] UKHL 30, at [20] – [21], as follows:

"[20] Section 1 of TMA gives them what Lord Diplock described in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 636, as

'a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection.'

[21] This discretion enables the commissioners to formulate policy in the interests of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of Parliamentary time. The commissioners publish extra-statutory concessions for the guidance of the public and Miss Rose drew attention to some which she said went beyond mere management of the efficient collection of the revenue. I express no view on whether she is right about this, but if she is, it means that the commissioners may have exceeded their powers

under section 1 of TMA. It does not justify construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women."

43. In *R (on the application of Davies and Anor v Revenue & Customs Commissioners* [2011] STC 2249, the Supreme Court considered the discretion in HMRC's duty of management. Lord Wilson said this, at [26]:

> "The primary duty of the Revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: see s1 of the Taxes Management Act 1970. Inherent in the duty of the management is a wide discretion. Although the discretion is bounded by the primary duty (see *R (on the application of Wilkinson) v IRC* [2005] UKHL 30 at [21], [2006] STC 270 at [21], [2005] I WLR 1718 per Lord Hoffman……."

44. We therefore find that the legislation makes provision for the actions of HMRC in respect of the collection of taxes and management of the system relating the collection of taxes.

45. We hold that a s 8 notice to file was validly issued.

Q. Were the penalties correctly calculated and applied?

46. We have found that the Appellant submitted his tax return in compliance with a s 8 notice, which gave rise to a number of statutory obligations and duties, including the payment of tax by the legislative due date. A simple assessment would fall within s 59B(3), which does not apply in this appeal. A simple assessment is defined at s 28H TMA, as follows:

> "**[28H Simple assessments by HMRC: personal assessments]**
>
> [(1) HMRC may make a simple assessment for a year of assessment in respect of a person (other than a person to whom section 28I applies) if, when the assessment is made, the person is not excluded by subsection (2) in relation to that year.
>
> (2) Subsection (1) does not apply to a person at any time in relation to that year of assessment if-
>
> (a) the person has delivered a return under section 8 for that year, or
>
> (b) the person is at that time subject to a requirement to *make and deliver such a return* [imposed] by virtue of a notice [to file] under section 8.

(3) A simple assessment is-

(a)an assessment of the amounts in which the person is chargeable to income tax and capital gains tax for the year of assessment to which it relates, and

(b) an assessment of the amount payable by the person by way of income tax for that year, that is to say, the difference between the amount in which the person is assessed to income tax under paragraph (a) and the aggregate amount of any income tax deducted at source."

47. Section 59B TMA provides that:

"[59B Payment of income tax and capital gains tax [:assessments other than simple assessments:

(3) In a case where the person-

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

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

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

48. The deadline for paying tax is therefore 31 January. A late payment penalty becomes due when payment is not made by this date. The Appellant was subject to a requirement to make and deliver a return by virtue of a notice to file under section 8. In the circumstances of this appeal therefore, payment of tax is due in accordance with s 59B(4) TMA. The 'penalty date' is defined at para 1(4) of Schedule 56, as the date falling 30 days after the date specified in section 59B(4) TMA as the date by which the amount must be paid.

49. Mr Woon-Sam did not seek to submit that the Appellant's tax was paid in time. The Appellant only made payment on 30 November 2020, which is significantly later than the legislative deadline of 31 January 2018. The Appellant therefore became liable to a penalty. Schedule 56 makes provision for the imposition by HMRC of penalties on taxpayers for the late payment of tax. The 30-day late payment penalty in this appeal was applied on 13 March 2018.

50. Mr Woon-Sam submits that the penalty was not assessed in accordance with para 11(a) of Schedule 56. We find that there is no merit in his argument. Paragraph 11(1) of Schedule 56 provides that:

> "***Assessment***
>
> **11**
>
> (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must-
>
> (a)assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed."

51. Whilst the legislation does not define the method of assessment, it is correct that HMRC are required to conclude that an amount of tax or penalty is due, calculate the amount owed and notify the Appellant of the assessment.

52. In accordance with para 3(2) of Schedule 56, the first penalty is calculated at 5% of the outstanding tax liability after the expiry of 30 days:

> "***Amount of penalty: occasional amounts and amounts in respect of periods of 6 months or more***
>
> **3**
>
> …….
>
> (2) P is liable to a penalty of 5% of the unpaid tax."

53. The six-month penalty is provided for at paragraph 3(3) of Schedule 56 as follows:

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

54. The income tax due for the 2017 tax year was £2,025. This matter (the amount of tax) is not in issue between the parties. The penalty amount was therefore £101. We are satisfied that the penalties were correctly calculated and we find that the Appellant was notified of the penalties.

55. The Appellant's tax became due on 31 January 2018. As the Appellant did not pay his tax by this date, the penalty notices were notified to the Appellant through penalty notices

issued on 13 March 2018 and 28 August 2018. This is confirmed by the issue data sheet included in the Supplementary Bundle. Mr Evans explained that in this regard HMRC's IT provider is a company known as "Cap Gemini". The issue data sheet shows the date that the 30 -day late payment penalty was triggered and lists the address to which the penalty was issued; which is the address at 25 Clematis Street. The issue data is set out as follows:

Print date	13 MARCH 2018
UTR	……
Name & address	MR W D BURFORD
	25 CLEMATIS STREET
	……
	……
	……
Office name	SELF ASSESSMENT
Tax year	2016-17
Penalty type & amount	LPP30D PENAMT 101
Trigger date	TRIG 02 March 2018
Debit amount	CHARGEDON 2025.00

56. Furthermore, an SA370 issued to the Appellant's agents on 13 March 2018, which includes the following information:

> "30 day late – a penalty of 5% of £2025.00 (the total tax unpaid at 02 March 2018)
>
> Paragraph 3(2) of Schedule 56 to the Finance Act 2009."

57. Any arguments that there were defects in the penalty notices or in the procedure that HMRC followed when issuing them, were considered, and rejected, by the Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761. Since we are bound by that decision, we have no alternative but to reject those arguments. We have concluded that payment of tax for the 2017 tax year was made on 30 November 2020. It should have been made by 31 January 2018. Subject to considerations of 'reasonable excuse' and 'special circumstances' set out below, the penalties imposed are due and have been calculated correctly.

Q. Does the Appellant have a reasonable excuse for the default that has occurred?

58. There is no statutory definition of 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Commrs* (2006) Sp C 548, at [18]. The test we adopt in determining whether the Appellant has a reasonable excuse is that set

out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

59. Although *Clean Car* was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

60. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word 'reasonable' imports the concept of objectivity, whilst the words 'the taxpayer' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question and having proper regard for their responsibilities under the Tax Acts: see *Collis v HMRC* [2011] UKFTT 588 (TC). The decision depends upon the particular circumstances in which the failure occurred.

61. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

62. Following that initial failure to pay, the first penalty notice was sent to the Appellant's address on 13 March 2018. We conclude that the notice should have prompted further action on the part of the Appellant or his agent, which would have avoided the second set of penalties. The Appellant's SA record was set up on 19 April 2005. This is clearly shown in the Individual Designatory Details included in the Documents Bundle. We find that whilst the Appellant may have honestly believed that he was not required to pay tax by the due date, having registered for self-assessment and in the absence of a request that the notice of file be withdrawn, in our judgment it was not objectively reasonable to have failed to consider the ramifications of such registration. In those circumstances, the initial belief is not objectively reasonable. Although the Appellant may well have relied upon the advice of his representative, that does not absolve the Appellant from the personal responsibility of ensuring that his tax obligations are met. We are not told of any efforts that the Appellant made to pay tax on time. In our judgment, that is insufficient.

63. We have borne in mind the recent comments of the Tribunal in *Hesketh & Anor v HMRC* [2018] TC 06266 about whether ignorance of an obligation to file could excuse late

payment. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The onus is upon an appellant to ensure that he or she properly understands their obligations under the law. Furthermore, in *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [8], Judge Mosedale stated the following:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

64. As held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at page 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

65. It is therefore trite law that ignorance of the law cannot come to the defence of a violation of the law. We conclude that the Appellant does not have a reasonable excuse for the late payment of tax for the 2017 tax year.

Q. Do Special Circumstances apply?

66. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. Paragraph 16(1) of Schedule 56 permits HMRC to reduce a penalty if special circumstances apply. There have been a number of cases on special circumstances, from which we derive the following principles: see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 95:

> (1) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152).
>
> (2) 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.
>
> (3) 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.

(4) 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.

67. Where a person appeals against the amount of a penalty, paras 22(2) and (3) of Schedule 55 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on para 16 (Special Reduction) but only if HMRC's decision was 'flawed' when considered in the light of the principles applicable in proceedings for judicial review'. That is a high test. We are satisfied that HMRC have considered the Appellant's grounds of appeal and found that his circumstances do not amount to special circumstances which would merit a reduction of the penalties. Accordingly, HMRC's decision not to reduce the penalties was not flawed. Even if we did have the power to make our own decision in respect of special reduction, the only special circumstance which the Appellant relies on is his agent's belief that a s 8 notice to file was not issued. We have explained above why we are satisfied that a s 8 notice to file was issued and why the Appellant's arguments are without merit.

68. Lastly, we have considered the case of *HMRC v Hok* [2012] UKUT 363 (TCC). There, the Upper Tribunal held that the FTT did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v Revenue and Customs Commissioner* [2014] UKFTT 657 (TC), it was accepted that the FTT's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The UT held, at [109], that the FTT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the UT found, at [116], that the jurisdiction of the Tribunal in cases of that nature was limited to considering the application of the tax provisions themselves.

69. For all of the foregoing reasons, we dismiss the appeal and uphold the penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2021