Neutral Citation: [2022] UKFTT 00155 (TC)

Case Number: TC08482

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/08964

Penalty – oral evidence given from outside the UK – Schedule 55 Finance Act 2009 – late return – taxpayer alleged that an earlier criminal tax investigation left him with a debilitating fear of making a mistake on his tax return for 2014/15 – whether a reasonable excuse – whether special circumstances – appeal dismissed

Heard on: 14 April 2022
Judgment date: 3 May 2022

Before

JUDGE GUY BRANNAN

Between

MICHAEL BREEN

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ross Birkbeck, of counsel

For the Respondents: Katharine Elliott, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by Mr Breen against the decision of the Respondents ("HMRC") to issue a penalty of £10,664.69 ("the Penalty") under Schedule 55 Finance Act 2009 ("FA 2009") on 20 June 2019 in respect of Mr Breen's failure to file his self-assessment tax return for the year ended 5 April 2015 ("the Return").

2. The only issues in this appeal are whether Mr Breen had a reasonable excuse for his failure to file the Return on time for the purposes of paragraph 23 Schedule 55 FA 2009 and whether there were special circumstances which may justify the reduction of the Penalty under paragraph 16 Schedule 55 FA 2009.There was, otherwise, no challenge to the manner in which the Penalty had been issued or its amount.

3. In broad terms, Mr Breen argues that he was prevented from filing the Return because of a debilitating fear of making a mistake which was caused by his earlier experience of a criminal investigation of his tax affairs by HMRC.

4. HMRC, for their part, argue that Mr Breen does not have a reasonable excuse for his failure to file the Return and that the Penalty is, therefore, valid.

5. For the reasons given below, I dismiss this appeal.

THE EVIDENCE

6. I was provided with an electronic bundle of documents. Mr Breen produced two witness statements and was cross-examined. In addition, an HMRC officer, Mr Arthur Williams, produced a witness statement but was not required to give oral evidence.

ORAL EVIDENCE GIVEN FROM OUTSIDE THE UK

7. When Mr Breen commenced to give his evidence by video link, he indicated that he was doing so from California, USA. This was the first intimation that I had received that Mr Breen was giving his oral evidence from outside the UK. I drew the parties' attention to the decision of the Upper Tribunal in *Agbabiaka* [2021] UKUT 286 (IAC) concerning the procedure to be followed when a party to a case wishes to rely upon oral evidence given by video or telephone by a person (including the party themselves) who is in the territory of a Nation State other than the United Kingdom

8. The decision in *Agbabiaka* includes the following:

> "[12] There has long been an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's diplomatic relations with other States and is, thus, contrary to the public interest.
>
> …
>
> "[19] Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom … what the Tribunal needs to know is whether it may take such evidence without damaging the United Kingdom's diplomatic relationship with the other country.
>
> … [I]t is not for this (or any other) tribunal to form its own view of what may, or may not, damage the United Kingdom's relations with a foreign State."

9. The decision records – and treats as determinative – the stance of the Foreign, Commonwealth and Development Office (FCDO) that only the giving of oral evidence from a

Nation State requires the permission of that State. Permission is not needed for written evidence or for submissions (whether oral or written).

10. As regards proceedings before this Tribunal, guidance in relation to the taking of oral evidence from outside the UK is to be found at https://www.judiciary.uk/publications/first-tier-tribunal-tax-chamber-guidance-oral-evidence-from-abroad/

11. It is the duty of counsel and those instructing them to ascertain in advance of the hearing when and what permission is required from the FCDO and its newly established Taking of Evidence Unit.

12. In the present case, Mr Birkbeck informed me that he had only become aware of Mr Breen's intention to give evidence from California the day before the hearing.

13. In the circumstances, I briefly adjourned the hearing and ascertained that, in relation to the United States, approval had been received by the FCDO for the taking of oral evidence in relation to proceedings before administrative tribunals. Accordingly, it was possible to proceed with Mr Breen's evidence.

THE FACTS

The criminal investigation

14. Mr Breen is a solicitor who was in private practice in London he qualified as a solicitor in or around the late 1980s. In 2002 until 2005 he was an employee at a private bank. Throughout this period his accountants prepared his self-assessment tax returns. In relation to the tax years 1996-2008, Mr Breen said that he (or his firm) employed Deloittes (Cardiff) to prepare his returns. His impression was that they used junior people to "bash out" returns. He said that he received very little advice from Deloittes. He considered that he had an Irish domicile. He did not recall telling Deloitte about his overseas income. He did not believe it was taxable in the UK if earned offshore because he had an Irish domicile, unless it was remitted to the UK.

15. In 2008 HMRC opened an enquiry into his 2005/2006 tax return in relation to certain items omitted from that return. In March 2008, Mr Breen and HMRC reached a settlement under which Mr Breen paid £773.90 in tax and a 10% penalty.

16. In October 2012 Mr Breen received a notice from HMRC dated 15 October 2012 and entitled "Notice to Attend a Voluntary Interview Under Caution". The notice said that it was suspected that Mr Breen had committed a criminal offence, viz the fraudulent evasion of income tax and national insurance contributions with regard to an offshore investment account with a bank in Switzerland. The letter noted Mr Breen's right to have free independent legal advice.

17. Mr Breen instructed a solicitor, Dr Ashton, to accompany him at the interview. Mr Breen considered HMRC's behaviour an attempt to intimidate him. He was very concerned about the possibility that he would be charged with tax fraud and possibly sentenced to imprisonment.

18. At the interview, Mr Breen said he was repeatedly questioned about offshore bank accounts and foreign property. Mr Breen said of the HMRC officer conducting the interview:

> "I repeatedly answered his accusations by stating that there were no other off-shore accounts or any foreign property but he made it very clear that he did not believe my answer."

19. Mr Breen accepted that he had not complained about the conduct of this interview until the Penalty had been raised. He had not complained because he did not think it would go well for him if he did.

20. On 17 June 2013 HMRC wrote to Mr Breen informing him that they were no longer pursuing a criminal investigation. The letter noted that "all casework has been referred to the Specialist Investigation, Off-shore Coordination in Birmingham who will be conducting there [sic] own investigation on a civil matter." He described the eight months preceding receipt of that letter as extremely stressful and a huge strain on his mental health.

21. However, on 18 July 2013 HMRC (Specialist Investigations, but based in Glasgow not Birmingham) wrote to Mr Breen informing him that they suspected him of having committed tax fraud and that they intended to investigate him under HMRC's Investigation of Fraud Code of Practice (COP 9). HMRC asked Mr Breen to make full disclosure of the tax fraud that he had committed and would enter into a contractual commitment not to prosecute him. The letter also contained a denial form which allowed Mr Breen to state that he had not committed tax fraud. Mr Breen said that he did not trust HMRC and he refused to admit a crime which he said he had not committed.

22. Throughout this time Mr Breen was represented by Dr Ashton, but in December 2013 he decided to dispense with Dr Ashton's services because he was dissatisfied with the advice he had been receiving. There followed litigation between Mr Breen and Dr Ashton, during which Dr Ashton retained his copies of the correspondence with HMRC. Thereafter, Mr Breen was unrepresented for a period.

23. HMRC wrote to Mr Breen on 24 October 2013 acknowledging receipt of his denial form but noting that in some circumstances their investigation into suspected tax fraud may turn into a criminal investigation.

24. On 24 January 2014, Mr Breen wrote to HMRC about a number of matters, particularly the difficulty he had in obtaining documents. In the course of that letter he asked HMRC whether it would be possible to submit a provisional return for the tax year ended 5 April 2012 (something which he said he had previously asked Dr Ashton to enquire about). On 7 March 2014, HMRC replied and, *inter alia*, said:

> "Where a tax return cannot be submitted by the due date because actual figures are not know [sic], for whatever reason, then it is acceptable to submit a return with provisional or estimated figures so long as it is made clear that the figures are provisional or estimated. The return should then be amended as soon as possible and certainly no later than 12 months from the date it was filed with the correct figures. The filing date should not be allowed to go past without anything being submitted as this will lead to a penalty being charged."

25. HMRC's letter of 7 March 2014 also gave advice to Mr Breen in relation to HMRC's request for documents and the difficulty that he was having in obtaining them. HMRC indicated that Mr Breen would have to show what steps he had taken to obtain the documents.

26. Mr Breen, in his oral evidence, said that he had difficulty in obtaining the documents relevant to the tax year ended 5 April 2015. They were held by Credit Suisse and eventually he said he had to go to Switzerland to obtain them.

27. In February 2014, HMRC assessed Mr Breen to £520,000 for the tax year 1994/1995.

28. On 19 May 2014, HMRC issued a notice under Schedule 36 Finance Act 2008 requiring the production of certain documents. HMRC imposed a penalty of £300 on Mr Breen for his failure to comply with the Schedule 36 notice. Mr Breen claimed that HMRC already had the information required by HMRC.

29. Mr Breen said that by a notice of assessment dated 5 February 2015, HMRC claimed that owed £1,092,429.96 in tax with interest and penalties in addition. At this stage, Mr Breen said his mental health took a turn for the worse. He considered HMRC to be a group of individuals

who were not regulated, were above the law and as they were the government it was a lost cause as they could literally get away with daylight robbery of taxpayers.

30. Mr Breen said that he had an extreme distrust of the British State in consequence of his upbringing in the Catholic part of Belfast in Northern Ireland and he recounted an incident on when attempting a ferry crossing from Liverpool to Belfast where he was interviewed by Special Branch police officers the six hours and abused.

31. Mr Breen said:

> "Needless to say I was deeply traumatised by my treatment and this experience has stayed with me for life. I now believe that it resulted in PTSD and a fear of future unjust treatment at the hands of the British forces and actors. It simply endorsed everything I knew and had experienced in Ireland. My view of the British Government has been coloured accordingly and the interrogation by HMRC's criminal investigation team brought back real vivid memories of the trauma that I suffered as a result of that previous interrogation. It caused me extreme anxiety before I had even attended at their offices.
>
> It was clear that HMRC were/are trying to make an example of me hence the overly oppressive, bullying and wholly inappropriate threat of criminal prosecution. It appears to me that this approach was deliberate and was possibly to deter other advisors from advising their clients (be they musicians, actors or sports personalities) from setting up a legitimate off-shore financial structure. They have clearly operated a government sanctioned "hostile environment" against me as well as other perceived tax avoiders/evaders.
>
> Various assessments raised by HMRC in relation to my tax liability bear no relation to reality. It is just figures plucked out of thin air which are not based on any evidence….
>
> HMRC continued to raise unjustified assessments in relation to my tax liability for multiple years (post 2012) even though they must have known or ought reasonably to have known that such assessments were fundamentally erroneous as I was a 50% shareholder in a business with my wife (who was the other 50% shareholder) and thus HMRC had received tax returns from my wife relating to such years making it perfectly clear how much tax was due for me for the same years.
>
> In my opinion HMRC waged a campaign against me using maximum aggression to intimidate me in order to force me to capitulate and pay their vastly inflated and unjustified assessments to tax. These tactics included sending, I suspect deliberately, correspondence to my neighbours address (despite my repeatedly asking them not to – for example see my email to Mr Edwards dated 23rd October 2012) to cause me maximum embarrassment, which they succeeded in doing.
>
> **My 2014/15 Tax Return**
>
> Given HMRC's criminal investigation and general behaviour I became extremely anxious that if I submitted a tax return which was in any way incorrect then HMRC would use this against me as a means of prosecuting me for a criminal offence (as repeatedly threatened in correspondence) and ultimately as a means of sending me to prison. This in turn would mean I would never be able to practice as a solicitor.
>
> This was (and still is) a very real and genuine fear and all of HMRC's subsequent actions towards me have only further endorsed this fear. Every evening I would return home from work in trepidation that a brown envelope from HMRC would be awaiting me containing further intimidating threats of

> action related to yet more imaginary or inflated assessments to tax. It would sometimes take me a whole week to overcome my anxiety just to be able muster the courage to open the envelope. My sleeping and health (both physical and mental) suffered to the point where I had become an insomniac. Consequently, I was constantly exhausted and would drink up to 10 cups of coffee a day just to be able to get through the day. My health has suffered enormously as a consequence. I have suffered from stress and at times I must confess that I have felt suicidal. I could not/cannot see a way out to a place where HMRC would start to behave reasonably towards me. I read various tragic newspaper articles over the years relating to other tax payers under investigation where HMRC have pursued the tax payer so relentlessly that the tax payer has committed suicide just to escape the constant intimidation. I can relate to this and understand why someone might ultimately be driven to this extreme as the only solution to escape from HMRC.
>
> The knock-on effect was that I was not prepared to submit my tax return in January 2016 without being absolutely sure that it was correct. I feared that if it was wrong in any respect HMRC would use this to bring criminal proceedings."

32. In his oral evidence, Mr Breen said that he considered that for the last 10 years HMRC had pursued him in a bullying and intimidating manner. He had been threatened with criminal proceedings. He felt he had no option but to refrain from submitting the Return. He said he was genuinely concerned that if he did anything wrong in relation to the calculations for the Return, HMRC would use it to bring criminal proceedings against him. HMRC had made excessive assessments. He had paid £50,000 of tax over what was due. He had relocated to the United States in order that he did not have to deal with HMRC again.

Mr Breen's dealings with HMRC in relation to the Return

33. On 3 August 2016 HMRC issued the Return to Mr Breen with a filing date 10 November 2016. Mr Breen failed to file the Return by the due date.

34. On 14 March 2017 a 30 day daily penalties reminder letter was sent to Mr Breen for 2014/15.

35. A 60 day daily penalties reminder letter for 2014/15 was sent by HMRC to Mr Breen on 18 April 2017.

36. By 12 May 2017 the Return was now six months late.

37. By 12 November 2017 the Return was 12 months late.

38. HMRC's files record that Mr Breen made a phone call to HMRC on 21 November 2017 stating his accountant would submit the 2012/13 to 2015/16 returns as soon as possible. Mr Breen said that he could not recall the telephone call. He said, however, that that he had received disputed assessments. He said that HMRC had sent bailiffs to his home and that this may have prompted the call. He later said that he could not remember whether the appearance of the bailiffs was related to this telephone call.

39. A Determination[1] warning letter dated 14 November 2018 was issued for 2014/15.

40. On 21 November 2018 Mr Breen called HMRC stating he was working to get his return to HMRC. The note on HMRC's files states:

[1] Under section 28C Taxes Management Act 1970, in broad terms, HMRC can make a determination of the amounts in which a taxpayer who should have made a return, but who has failed to do so, is chargeable to income tax and capital gains tax for the year of assessment. Within certain time limits, a determination can then be displaced by a tax return filed by the taxpayer.

> "He [Mr Breen] acknowledged that he would have to submit his returns quickly. He asked me to record that he telephoned and was now working to get his SATRs to us."

41. Mr Breen was cross-examined about this telephone call. Ms Elliott noted that there was no mention of any reasons for the delay in filing the Return. Mr Breen said that he would "probably" have said that he was in negotiations with HMRC but accepted that this was not recorded in HMRC's note of the conversation.

42. A Determination in the amount of £36,983.52 was made and issued by HMRC for the tax year 2014/15 on 26 November 2018.

43. Mr Breen wrote to HMRC on 21 December 2018 stating that he was urgently arranging for outstanding returns to be submitted. He wrote:

> "I am now writing to inform you (in order that this is all placed on record) that I am doing everything possible to get the outstanding returns completed as quickly as possible however wish to draw attention to two influencing factors both of which are outside of my control – the first is the Christmas holiday season (which means my accountants are not as available as would be normal) and the second is that January is an extremely busy time of year for all accountants as am sure you fully appreciate.
>
> Nevertheless, as stated, I have explained the urgency of the matter to my accountants and they are endeavouring to complete the returns as quickly as possible."

44. Mr Breen, in cross-examination, said that he thought that the context of his letter of 21 December 2018 was that he was close to reaching a settlement with HMRC (which would make the spectre of a criminal prosecution "go away"). He recognised, however, that this was not mentioned in his letter.

45. On 4 January 2019 HMRC responded to Mr Breen's letter of December 2018 by acknowledging his letter and stating that the determination would be displaced when the return was received.

46. On 23 January 2019 a new accountant, Newman Morris Chartered Accountants ("Newman Morris"), called HMRC to say they were working on Mr Breen's outstanding returns. A 64-8 authority for the new agent was received on 5 February 2019.

47. On 3 March 2019 HMRC received Mr Breen's returns for the years ended 5 April 2012, 2013 and 2014 in paper format and 2015 (i.e. the Return), 2016 & 2017 were filed electronically. The Return was approximately 27 months late. The tax liability derived from the Return was £35,547.70. Mr Breen commented, in cross-examination, the settlement negotiations with HMRC had not proceeded as he had thought or hoped. He had filed the Return because he now had found a good accountant (Newman Morris) who had convinced him that they could file the return and do such a good job that there was no risk of prosecution.

48. On 14 March 2019 HMRC wrote to Mr Breen seeking an explanation for the late submission of the Return and noting that a penalty under Schedule 55 FA 2009 was being considered.

49. Newman Morris responded in a letter of 15 April 2019. The letter stated:

> "We fully understand the position that you have taken in regard to the assessment of penalties in respect of the late filing of the 2014-15 tax return. [T]he circumstances around why this has happened would strongly suggest that Mr Breen had a very good excuse to act in the way that he has.

> Some seven years ago (on 22 November 2012) Mr Breen had to attend an interview with HMRC at their offices in Staines, Middlesex. This interview was conducted under caution and took over 2 and 1/2 hours to complete. The stated intention by HMRC was to bring criminal charges against Mr Breen. However, these charges have never been brought but over the seven year period since the interview Mr Breen (whose life has been on hold in the intervening period) has had to endure a substantial level of intimidation and, in Mr Breen's view, bullying. During this period Mr Breen was very concerned that any information that he submitted on his personal tax affairs, if there was even the smallest error on the return, would be used against him to bring criminal proceedings as HMRC adopted a very aggressive approach. This concern together with the knowledge that if criminal proceedings were taken against him he would not be able to practice [sic] as a solicitor lead [sic] him to come to the conclusion that he could not file his returns. In these circumstances we trust that you will agree that Mr Breen's actions were justified because he felt threatened and intimidated which we understand also affected his mental health. Accordingly, we would submit that Mr Breen did have a valid and understandable reason for holding back his returns."

50. I observe, at this point, that this was the first time that Mr Breen, through his new accountants, asserted that he was unable to file the Return because of his debilitating fear that even the slightest error on the Return could be used to bring criminal proceedings against him.

51. On 30 April 2019 HMRC wrote to Newman Morris, rejecting their assertion that Mr Breen had a reasonable excuse for his default and stating that a penalty would be charged.

52. Next, on 14 May 2019, HMRC issued a penalty explanation letter, which stated that HMRC have concluded that:

> (i) Mr Breen's late filing was deliberate and that he had withheld information from HMRC which would have helped to establish his correct tax liability; and
>
> (ii) disclosure made by Mr Breen (i.e. by filing the Return) was "prompted".

53. A full reduction was given for the quality of disclosure and a penalty of 35% of the tax due under the Return was charged (i.e. an amount of £12,441.69), with credit given for the 5% charged under the previously imposed six-month late filing penalty (£1,777). The result was a total penalty of £10,664.69. Mr Breen was told that he could supply any relevant information to HMRC.

54. On 20 June 2019, HMRC issued a penalty assessment notice for £10,664.69.

55. Newman Morris argued that Mr Breen had a reasonable excuse in an e-mail of 25 June 2019. The email stated:

> "In our case Mr Breen had been subjected to a very harrowing experience with HMRC and, as he explained to me, he was convinced that the officials at HMRC dealing with his case were determined to crush him both mentally and financially. Indeed, Mr Breen is of the view that your response is yet further clear evidence of this fact and of the oppressive attitude of HMRC towards him. The issue at the heart of the dispute with HMRC was that of remitting income to the UK and Mr Breen is very clear that in his view his actions were in no way criminal as he has an Irish domicile and was therefore perfectly entitled to pay tax on a remittance basis for the relevant period the subject of the investigation. This point was subsequently accepted by HMRC which

> explains why no criminal proceedings were ever commenced against Mr Breen.
>
> This experience was gained not just during the taped interview under caution which took place on 22nd November 2012 but from all the subsequent dealings with HMRC over the subsequent years. A further example of this is the fact that when Mr Breen submitted documentation to HMRC in response to an information request he was subsequently fined £300 for failure to submit the documents in time when he had in fact already submitted the said documents. Mr Breen subsequently raised a formal complaint in this regard and asked that a record be made that he had in fact complied in full with HMRC's information request and that he should be refunded the fine of £300. However to this day HMRC have failed to do so despite having acknowledged that he had in fact complied with the information request within the time line set down.
>
> It is because of these experiences that Mr Breen came to the conclusion that in filing his tax returns if he made even the slightest error HMRC would use it as a means to bring a criminal prosecution against him as previously attempted. This was not some vague notion which Mr Breen held but rather was that it posed a real and present threat as evidenced by the previous actions taken by HMRC in 2012 in interviewing him at length under caution whilst being recorded for such purposes. The motive was not to deliberately stop HMRC from assessing his tax liability but it was to ensure that he did not give HMRC any opportunity however slight which they could use as a basis to launch a criminal prosecution against him.
>
> It is also worth mentioning that the HMRC officials that Mr Breen was dealing with (in meetings and correspondence) were very much aware that he had not filed his tax returns for subsequent years. This was discussed in meetings with them and Mr Breen was convinced that HMRC were laying [sic] in wait to entrap him and that on receipt of the returns they would go over them and forensically examine every detail. Even now he is still firmly of that opinion. It is also worth mentioning that Mr Breen did not receive any helpful advice (as you have subsequently given) from HMRC on what to do as regards his returns in the circumstances that he found himself in. In fact, Mr Breen was given no advice whatsoever in that regard. This point alone should, I would suggest, be a reasonable ground for establishing a reasonable excuse for failing to file."

56. HMRC confirmed in a letter of 2 July 2019 in response to Newman Morris' e-mail of 25 June 2019 that its position had not changed in respect of the penalty and that it did not consider that Mr Breen had a reasonable excuse.

57. In an email dated 19 July 2019 Newman Morris again argued that Mr Breen had a reasonable excuse for his failure to file the Return on time. In that email Newman Morris quoted Mr Breen's comments in relation to his telephone call with HMRC of 21 November 2017 as follows:

> "6. Phone Call to HMRC - In 2017 I thought we were reaching a negotiated settlement with HMRC so it is entirely consistent that I felt I would soon be able to submit the outstanding returns, having agreed everything. Also as already stated as part of the negotiated settlement HMRC would have accepted my Irish domicile position…."

58. Mr Breen said that in 2017 he considered that he was still under threat of prosecution. He was being represented by a firm of lawyers and that he thought that a settlement was being reached which would remove the threat of prosecution. He accepted that the reference in the

email of 19 July 2019 to the 21 November 2017 telephone call to HMRC did not mention any visit by bailiffs.

59. On 24 July 2019 HMRC confirmed once again that its position had not changed and offered an independent review. Newman Morris confirmed in an e-mail of 14 August 2019 that a review was requested on the basis of reasonable excuse. The case was sent to the HMRC review team to consider and on 23 October 2019 the review was completed and the decision was upheld. The review concluded that:

(1) the late filing penalties issued by HMRC were validly issued;

(2) Mr Breen did not have a reasonable excuse for late filing;

(3) alternatively, any reasonable excuse would not have lasted for the whole period of the failure to submit the Return and Mr Breen did not act promptly to remedy the failure once a reasonable excuse ceased;

(4) Mr Breen had acted deliberately in failing to file the Return on time; and

(5) no special circumstances justified reduction under paragraph 16 Schedule 55 FA 2009.

60. On 18 November 2019, Newman Morris asked HMRC for a reconsideration of their decision.

61. Finally, on 21 November 2019, Newman Morris notified Mr Breen's appeal to the Tribunal.

62. Mr Breen accepted that he was aware of the obligation to file the Return and the potential for the imposition of penalties if you fail to do so. He accepted that he had decided not to file the Return by the relevant date. He described it as a conscious decision but said that he was so anxious that if he had filed return that was in any way incorrect HMRC would use it to launch a criminal prosecution.

63. In relation to claims in the correspondence from Newman Morris and in Mr Breen's witness statement that he may have been suffering from post-traumatic stress disorder ("PTSD"), Mr Breen accepted that he had produced no medical evidence to substantiate these claims. He also said that in relation to his claim that he was debilitated by mental health issues from filing the Return, he found it difficult to admit to his GP that he had mental health problems.

64. Mr Breen was asked why it was that during the period that he claimed to be debilitated from fear from filing the Return, he was running a business with his wife. Mr Breen noted that the business failed. He was trying but "was not in a good place." He said he had difficulty sleeping.

65. Mr Breen accepted that he was able to instruct lawyers and accountants, that he was able to travel abroad and run a business. It was suggested to him that this was not the life of someone debilitated by fear. Mr Breen said that he just had a major mental block in relation to his tax affairs. He feared that HMRC were trying to make an example of him.

THE LAW

66. There was no dispute as to the relevant law which can be summarised as follows.

Penalties

67. Schedule 55 FA 2009 provides that the following cumulative penalties apply if a taxpayer fails to file a self-assessment income tax return by the due date:

(1) A £100 fixed penalty if the return is not filed by the filing date (paragraph 3);

(2) If the return is more than three months late, a £10 daily penalty for each day that the failure to file continues, running for a maximum of 90 days from the date specified in the penalty notice (i.e. a total penalty of £900) (paragraph 4);

(3) if the return is more than six months late, a further penalty of £300 or 5% of the total tax liability arising from the returning question, whichever is the greater (paragraph 5);

(4) If the return is more than 12 months late, a second further penalty of £300 or a percentage of the total tax liability) to be determined according to the circumstances of the non-filing), whichever is the greater (paragraph 6). Where, by failing to submit the return, the taxpayer deliberately withholds category 1 information (as in the present case) which would enable or assist HMRC to assess the taxpayer's liability to tax but does not conceal that he has done so, the relevant percentage is 70% (paragraph 6 (2), 6 (4), 6(4A), 6A (1)).

Reasonable excuse

68. Paragraph 23(1) Schedule 55 FA 2009 provides that a taxpayer can escape liability for a late filing penalty if the taxpayer has a reasonable excuse for the failure to file the relevant return on time. Parliament has not defined what constitutes a "reasonable excuse", which is a matter to be determined by this Tribunal. However, paragraph 23 (2) provides that:

(1) an insufficiency of funds is not a reasonable excuse, unless attributable to events at size the taxpayer's control,

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

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

69. It was common ground that where a "reasonable excuse" defence is asserted, HMRC must establish on the balance of probabilities that events have occurred as a result of which the penalty is, *prima facie*, due. As I have said, it was also common ground that the penalty was, *prima facie*, due. Further, it was not in dispute that Mr Breen bears the burden of proof to establish that he had a reasonable excuse for his failure to submit the Return on time.

70. The way in which this Tribunal should approach a "reasonable excuse" defence was addressed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 0156 (TCC) (Judge Herrington and Judge Poole) at [70] – [73] and [81]:

> " [70] … the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> [71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in

which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

[72] Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. 'I thought I had filed the required return', or 'I did not believe it was necessary to file a return in these circumstances'), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on…

[73] Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

…

[81] When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

Special circumstances

71. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

"(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include-

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to-

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty."

This Tribunal's jurisdiction

72. Paragraph 22 Schedule 55 FA 2009 provides:

> "(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
>
> (5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1))."

73. It will be seen that this Tribunal's jurisdiction in relation to the "reasonable excuse" defence is wider than in relation to the consideration of "special circumstances".

DISCUSSION

74. By way of background, I should explain that in parallel with this appeal in respect of the Penalty, I understand that the substantive dispute between HMRC and Mr Breen to which HMRC's investigation related and which I believe to be about his domicile status, is pending before this Tribunal. I make no comment about that appeal. My comments below relate solely to this appeal.

Reasonable excuse

75. Essentially, Mr Breen's case was that his mental state during the relevant period was such that he was unable to file the Return. Mr Breen was, Mr Birkbeck submitted, suffering from a debilitating fear of making a mistake on the Return and that HMRC may use any inaccuracy as an excuse to prosecute him. This fear was caused, *inter alia*, by the threat of criminal prosecution in 2013 (the interview under caution and the letter of 18 July 2013), subsequent dealings with HMRC and the continued apprehension of prosecution, and against the background of his experiences relating to the Troubles in Northern Ireland.

76. I had considerable reservations about the reliability of Mr Breen's evidence.

77. I do not doubt that mental health issues can, in appropriate cases, constitute a reasonable excuse. Without wishing to be prescriptive, there would in most cases need to be evidence that the mental health issue in question was such that the taxpayer cannot deal with his or her affairs to such an extent that the taxpayer cannot submit a return or perform the necessary preparation to submit a return.

78. In the present case there is no medical evidence whatsoever. Mr Birkbeck did not seek to argue (as was mentioned in Mr Breen's witness statement and in the correspondence sent by

Newman Morris) that Mr Breen was suffering from PTSD and I consider that he was wise not to do so in the absence of any independent medical evidence.

79. I have set out above the correspondence and telephone calls between Mr Breen and HMRC in 2017-2018. There is no suggestion in any of those records that Mr Breen was suffering from the debilitating fear which he now claims. For example, in a telephone conversation when Mr Breen telephoned HMRC on 21 November 2017 Mr Breen stated that his accountant would be submitting the outstanding returns as soon as possible. One year later, on 21 November 2018, Mr Breen telephoned HMRC and the note of the telephone conversation states:

> "He [Mr Breen] acknowledged that he would have to submit his returns quickly. He asked me to record that he telephoned and was now working to get his SATRs to us."

80. There is no indication, in these examples, that Mr Breen was suffering from the debilitating fear which prevented him from submitting the Return. The first time that this was put forward as a reasonable excuse, as far as I can ascertain from the correspondence, was in Newman Morris' email of 15 April 2019 i.e. after HMRC indicated their intention to issue a further late filing penalty (see HMRC's letter of 14 March 2019).

81. I have carefully reviewed the correspondence relating to the criminal investigation in 2012-2013. Notwithstanding Mr Breen's assertions, I see no indication that HMRC's officers conducted themselves in an improper manner. I see no evidence of the bullying and intimidation which Mr Breen claimed. The interview in 2012 was attended by Mr Breen's solicitor and he was fully advised of his rights. HMRC also provided him with a list of topic areas to be covered at the interview. No complaint about the interview was raised at the time.

82. I have also examined subsequent correspondence from HMRC contained in the bundle of documents put before me. I can find no evidence of any impropriety in the conduct or content of that correspondence on the part of HMRC. I certainly do not think that it constituted intimidation or bullying.

83. As regards Mr Breen's claim that he was fearful that any mistake on the Return might be seized on by HMRC to launch a criminal prosecution, I think that claim is fanciful. Mr Breen was well aware of the fact that he could put in a provisional return indicating that the figures used were estimated or provisional and that could be amended up to 12 months after filing. Indeed, as was indicated in his letter to HMRC of 24 January 2014, Mr Breen was fully aware of this option and had even asked Dr Ashton to raise it with HMRC in relation to an earlier return.

84. I have therefore concluded that Mr Breen was not prevented from filing the Return by some debilitating fear of making a mistake and I reject his evidence to the contrary. In short, as regards the second step in the approach suggested by the Upper Tribunal in *Perrin* at [81 (2)], I consider that Mr Breen has not proved the facts on which he relies to establish a reasonable excuse.

85. Having reached the conclusion on the second step of the *Perrin* approach it is not strictly necessary for me to consider the remaining steps suggested by the Upper Tribunal. However, since the point was argued before me I shall express my views in relation to the third step set out at [81(3)]

86. I appreciate that undergoing a criminal tax investigation would be stressful for any taxpayer. I do not, however, accept that after it was made clear to Mr Breen in HMRC's letter of 17 June 2013 that HMRC were no longer pursuing a criminal investigation that Mr Breen had any good reason for fearing a criminal prosecution. I recognise that HMRC's letter of 18

July 2013 indicated that HMRC suspected Mr Breen of having committed tax fraud, but it was clear from that letter (and the 17 June 2013 letter) that this was a civil investigation and not a criminal one. The enclosures to the letter indicated that HMRC may still prosecute if misleading or dishonest information was provided. But that is far from saying that any innocent error or miscalculation would result in criminal proceedings. Certainly, if that investigation had uncovered fraudulent tax evasion it may be possible that a criminal prosecution would result but I do not think it is reasonable to take that letter as something which would justify a debilitating fear of putting in the Return for fear of making a mistake, still less do I accept that it was a manifestation of bullying or intimidation.

87. In any event, I do not consider that in the circumstances Mr Breen's conduct in failing to submit the Return was reasonable and therefore it did not constitute a reasonable excuse. Mr Breen had been in practice for many years as a solicitor at a senior level. Thereafter he was engaged in business. He was a professional man and experienced in business. He had previously been in the self-assessment tax return regime. He gave his evidence in a forceful and assertive manner – he was not a timid personality. I do not think it is reasonable for a taxpayer, in those circumstances, deliberately to refuse to submit a tax return. As I have indicated, I do not think that his fear of making a mistake had a rational basis – I do not think that his belief, if it was such, was reasonable. Therefore, I do not think that his failure to submit the Return in a timely manner was a reasonable course of action – it was not objectively reasonable.

88. Accordingly, even if Mr Breen had proved the facts on which he relied at step two of the *Perrin* approach, I do not think that those facts would have constituted an objectively reasonable excuse.

89. For completeness, I should deal with some other matters which were raised.

90. There was some suggestion raised by Newman Morris in their correspondence with HMRC, particularly their letter of 18 November 2019, that there was some alleged understanding that the Return would be resolved within the scope of HMRC's wider enquiry into Mr Breen's affairs. There was no documentary evidence to this effect. There was no written record of any HMRC officer giving any grounds for this understanding. It seems to me to be most unlikely and I reject the suggestion. On the contrary, as indicated above, HMRC reminded Mr Breen on numerous occasions that he needed to file the Return during the relevant period (i.e. from 3 August 2016 when the 4 Return was issued to 3 March 2019 when the Return was filed). For example, on 14 March 2017 HMRC issued Mr Breen with a daily penalties reminder letter and on 14 April 2017 issued a 60 day penalty reminder letter. It seems to me from reviewing the correspondence in the trial bundle, that Mr Breen and Newman Morris were well aware of (and acknowledged) the fact that Mr Breen needed to file the Return (for example, Mr Breen's letter of 21 November 2018 and the note of Newman Morris' telephone call on 23 January 2019).

91. Mr Birkbeck accepted that there was no evidence of estoppel binding HMRC or that it had ever been suggested that HMRC agreed that Mr Breen should not submit the Return.

92. Similarly, Mr Birkbeck also accepted that the difficulty of Mr Breen in disclosing documents did not go to the question of why he did not submit the Return but was, as he put it, just background. He accepted that it was not causative of the failure to submit the Return.

93. Furthermore, Mr Birkbeck accepted that suggestions in correspondence that HMRC had failed to provide Mr Breen with the necessary advice and that some correspondence had been sent by HMRC to the wrong address, were also not causative of the failure to submit the Return.

Special circumstances

94. In relation to paragraph 16 Schedule 55 FA 2009, which allows HMRC to reduce the penalty if they think it right because of special circumstances, this Tribunal can only interfere with HMRC's assessment if it concludes that HMRC's was flawed when considered in the light of the principles applicable to proceedings for judicial review (paragraph 22(3) and (4) Schedule 55 FA 2009). HMRC's decision in relation to "special circumstances" is contained in the review letter of 23 October 2019 which relevantly provides:

> "I have considered whether a Special Reduction under paragraph 16 of Schedule 55 FA09 applies. A penalty may be reduced if there are special circumstances. Special circumstances mean circumstances that are uncommon or exceptional. I have carefully considered all of the information I hold but do not think there are any special circumstances which allow me to reduce the penalty."

95. Mr Birkbeck characterised this paragraph in the review letter as a "cut and paste" job i.e. that the reviewing officer abdicated his responsibility to exercise his discretion.

96. Mr Birkbeck further argued that the reviewing officer had failed to take account of the special circumstances in this case. These were, he argued, that Mr Breen knew he had not filed and that he had not done so because of his anxiety of triggering a prosecution were he to make any mistake in the Return. In Mr Birkbeck's submission these constituted special circumstances. This was not, he maintained, a run-of-the-mill failure to file a tax return.

97. Ms Elliott argued that the reviewing officer had taken account of all the facts put forward and how concluded that there was no basis for him to exercise HMRC's discretion under paragraph 16 Schedule 55 FA 2009. The review letter recited all the facts that had been put forward, there was no evidence as regards illegality of procedural unfairness. HMRC had reduced the penalty to take account of a previous penalty. She submitted that there was no evidence of irrationality and that the reviewing officer's decision was within the reasonable range of decisions that were open to him.

98. In the light of my conclusion that I did not accept Mr Breen's evidence that he was prevented from filing the Return because of a debilitating fear of making an error, I do not think it can be argued that the reviewing officer's decision was flawed.

99. In relation to Mr Birkbeck's submission that the reviewing officer abdicated his responsibility, I consider that Mr Birkbeck's submission has some force. On balance, however, I do not think it can be sustained. On the face of the letter the officer says that he has considered all the information that he held. He also applied the correct test, viz that special circumstances mean circumstances that are uncommon or exceptional. There is, therefore, no basis for concluding that the reviewing officer did not consider whether to exercise HMRC's discretion to reduce the penalty.

100. That said, I acknowledge that the use by HMRC of *pro forma* language in relation to the special circumstances issue in review letters can give rise to the impression that the issue has not been properly considered. I also accept that that the repeated use of the same form of the words creates an impression that, if HMRC decide that the taxpayer has failed to establish a reasonable excuse, it therefore invariably follows that there will be no special circumstances for the purposes of paragraph 16. That is an unfortunate impression and, if correct, would constitute an error of law permitting this Tribunal to intervene. The special circumstances test is different from the considerations regarding the reasonable excuse defence.

101. In my view, HMRC must give reasons for their conclusion in relation to special circumstances even if those reasons are expressed concisely. Failure to give reasons means that

the decision is flawed. (see *Bluu Solutions Ltd* v HMRC [2015] UKFTT 95 (TC), *Majid Mukhles v HMRC* [2017] UKFTT 310 (TC) *Caunter v HMRC* [2017] UKFTT 335 (TC) *Quested (t/a Eyelevel Design Consultants) v HMRC* [2017] UKFTT 460 (TC)). However, in the light of my conclusions in relation to the second limb of the *Perrin* approach, even if the reviewing officer's decision was flawed in the judicial review sense for failure to give reasons, I conclude that the reviewing officer came to the correct conclusion.

CONCLUSION

102. For the reasons set out above, this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

103. 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.

GUY BRANNAN
TRIBUNAL JUDGE

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