Neutral Citation: [2024] UKFTT 00707 (TC)

Case Number: TC09254

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House, London]

Appeal reference: TC/2023/15911

LATE APPEAL - Application for an extension of time to make a late appeal by the Appellant – Martland applied - length of delay one month – initial appeal timely but wrong form used – good reason given for the default - balance of prejudice to the parties – appeal admitted

INCOME TAX – Late payment of tax – failure to notify chargeability to income tax by the specified deadline of 5 October 2022 – payment due date for tax therefore remained 31 January 2023 – notice to file issued in February 2023 - support sought from HMRC's Extra Support Team due to the Appellant's personal circumstances - confusion as to instructions given by HMRC's webchat adviser in relation to three month time limit to "complete" the tax return – whether the Appellant's belief that filing and payment were due at the same time was objectively reasonable - yes – appeal allowed

Heard on: 24 June 2024
Judgment date: 26 July 2024

Before

JUDGE NATSAI MANYARARA
GILL HUNTER

Between

HADLEIGH COHEN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant-in-Person

For the Respondents: Mr Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is the Appellant's application, under s 49(2) of the Taxes Management Act 1970 ('TMA'), for permission to make a late appeal against a penalty that HMRC have charged for the late payment of tax. The penalty was charged pursuant to Schedule 56 of the Finance Act 2009 ('Schedule 56') as follows:

Tax Year	Date of Penalty	Legislation	Description	Amount
2021-22	2 May 2023	para. 3(2), Schedule 56	30-day late payment penalty	£2,868

2. The penalty notice was issued to the Appellant on 2 May 2023 and the Appellant had 30 days from that date to appeal. The deadline to appeal was, therefore, 2 June 2023. The Appellant filled out the wrong form to appeal (on 2 May 2023). The correct form was only sent to HMRC on 8 July 2023 (and received on 11 July 2023). At that stage, HMRC rejected the appeal as it was late.

3. In summary, we have decided to admit the late appeal for the reasons set out below. The first part of this decision deals with the application to make a late appeal and the second part of the decision deals with the substantive appeal.

4. The documents to which we were referred included: (i) the Amended Hearing Bundle consisting of 59 pages; (ii) the Legislation and Authorities Bundle consisting of 127 pages; and (iii) HMRC's Speaking Note, dated 24 June 2024.

BACKGROUND FACTS

5. On 7 December 2022, the Appellant signed up to receive paperless contact from HMRC.

6. On 5 February 2023, the Appellant was issued with a notice to file for the tax year ending on 5 April 2022. The notice to file was issued to the secure mailbox in the Appellant's online Personal Tax Account ('PTA').

7. On 9 February 2023, an email alert was also issued to the Appellant's verified email address. The filing date for the tax return was 16 May 2023, for either a paper or an electronic tax return.

8. The Appellant's tax return was filed, electronically, on 26 April 2023. The Appellant's tax liability was £58,835.84. This was later reduced by HMRC.

9. On 2 May 2023, HMRC issued a notice of penalty assessment as the tax due had not been paid by the 'payment date' specified at s 59B TMA. The 'penalty date' is defined at para. 1(4) of Schedule 56. The penalty date was 3 March 2023. The penalty was in the sum of 5% of the outstanding tax liability that was due by the payment date. The penalty was issued to the secure mailbox in the Appellant's online PTA and an email alert was issued to the Appellant's verified email address.

10. On 2 May 2023, the Appellant attempted to appeal against the penalty, but completed the wrong form on his online PTA account.

11. On 21 June 2023, HMRC rejected the Appellant's appeal as the wrong form had been used by the Appellant. HMRC subsequently sent the correct form to the Appellant.

12. On 7 July 2023, HMRC concluded that the Appellant was not liable to repay an income contingent loan in respect of student loans for the 2022 tax year. HMRC, therefore, corrected the Appellant's tax return and his tax liability was reduced to £57,379.84.

13. On 8 July 2023, the Appellant completed the correct appeal form that had been sent to him by HMRC. The appeal was received by HMRC on 11 July 2023.

14. On 2 October 2023, HMRC rejected the Appellant's appeal on the grounds that the appeal was late. The Appellant was notified of the option to appeal to the Tribunal.

15. On 17 October 2023, the Appellant notified his appeal to the Tribunal.

THE AUTHORITIES AND THE MARTLAND THREE-STAGED APPROACH

16. The principles applicable to determining the issue of delay have been the subject of much adjudication. In *BPP Holdings v R & C Comrs* [2017] SC 55 ('*BPP Holdings*'), a direction had been made by the First-tier Tribunal ('FtT') indicating that HMRC would be barred from participating in proceedings if the direction was not adhered to. This was the relevance of the strict approach in adhering to time limits. The differences in fact in *BPP Holdings* and in the application before us do not, however, negate the principle established in relation to the need for statutory time limits to be adhered to.

17. In *BPP Holdings,* the court endorsed the approach described by Morgan J in *Data Select Ltd v R & C Comrs* [2012] STC 2195 ('*Data Select*'). Mr Justice Morgan described the approach in the following way:

> "[34] … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.
>
> …
>
> [37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeal against a judicial decision."

18. In the context of an application to make a late appeal, the obligation is, simply, to take into account all of the relevant circumstances and to disregard factors that are irrelevant.

19. Helpful guidance can also be derived from the three-stage process set out by the Court of Appeal in *Denton & Ors v T H White Ltd & Ors* [2014] EWCA Civ 906 ('*Denton*') for a clear exposition of how the provisions of rule 3.9(1) should be given effect. Although the third stage of that guidance, as set out by the majority, includes the requirement to give particular weight to the efficient conduct of litigation and the compliance with rules etc., by way of summary, the majority in the Court of Appeal in *Denton* described the three-stage

approach in the following terms, at [24] (the references to "factors (a) and (b)" being to the particular factors referred to in CPR r 3.9):

> "We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". …"

20. Once the factors (a) and (b) are afforded no special weight or significance, that approach is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been one of the factors relevant to the Tribunal's determination. That is encompassed in the reference in *Data Select*, at [34], to the purpose of the time-limit and the length of the delay. The reason for the delay is a common factor in *Denton* and *Data Select*, as is the need to evaluate the circumstances of the case so as to enable the Tribunal to deal with the matter justly.

21. The approach to the consideration of an application to extend time should now follow that set out by the Upper Tribunal in *Martland v R & C Comrs* [2018] UKUT 178 (TCC) ('*Martland*'). That case itself concerned a late appeal to the FtT. The approach adopted followed on from a consideration of authorities, including *BPP Holdings*. *Martland* held that the principle of fairness and justice is applicable, as a general matter, to any exercise of a judicial discretion. Applying the three-stage approach adopted in *Denton*, the Upper Tribunal in *Martland* set out the following staged approach, at [44]:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances equate to the breach being "neither serious nor significant"), then the tribunal is unlikely to need to spend much time on the second and third stages – though this cannot be taken to mean that applications can be granted for very short delays without moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

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

22. This approach was confirmed by the Upper Tribunal in *Websons (8) Ltd v HMRC* [2020] UKUT 0154 (TCC).

SUBMISSIONS

23. Mr Marks' submissions can be summarised as follows:

(1) Under s 31A TMA, an appeal against a penalty assessment must be made within 30 days after the date of issue of the notice of penalty assessment

(2) It is accepted that the Appellant had completed the incorrect form when he purported to make an appeal on 2 May 2023. The Appellant subsequently completed an appeal on the correct form, on 11 July 2023. The Appellant's appeal was rejected as it was late. It is, however, accepted that the Appellant notified his appeal to the Tribunal within 30 days of HMRC's rejection.

(3) It will be for the Tribunal to determine whether use of the wrong form is a good reason.

(4) The Tribunal will consider the underlying merits of the appeal only if it determines the merits to either be hopeless, or to have a high chance of success, whilst balancing the prejudice between the parties.

24. The Appellant's submission can be summarised as follows:

(1) He appealed against the notice of penalty assessment in a timely manner and it was almost two months before he was informed that the wrong form had been used.

(2) He was not trying to delay matters and appealed again within days of being sent the correct form. He also appealed to the Tribunal within days of his appeal being rejected by HMRC on the grounds that it was late.

25. At the conclusion of the hearing on the preliminary issue, and following deliberations, we announced our decision and now give our full findings of fact and reasons.

DISCUSSION – LATE APPEAL

26. The Appellant's appeal to HMRC was made outside of the statutory deadline for appealing. HMRC have refused consent under s 49(2)(a) TMA. The application for permission to make a late appeal is governed by s 31A TMA. This permits taxpayers to appeal, but the appeal must be made within 30 days after the date the notice of the penalty is given to the taxpayer. Section 49 TMA permits, in one of two situations, a taxpayer to lodge a late appeal. The first circumstance in which a taxpayer is permitted to lodge an appeal late is where HMRC are satisfied that there is a reasonable excuse for not giving the notice in time, and that the appeal was lodged without unreasonable delay after the excuse ceased (ss 49(5) and (6) TMA). The second circumstance in which an appellant can lodge an appeal late is where this Tribunal 'gives permission' (s 49(2) TMA).

27. It is well established that the Tribunal must take all relevant matters into account when exercising its discretion to admit a late appeal: *Data Select*. While this means that the Tribunal might, in appropriate circumstances, grant leave to appeal out of time to a taxpayer without a reasonable excuse, it also means that the Tribunal will take all matters into account and so a taxpayer with a reasonable excuse will not necessarily be granted permission to appeal out of time. There are no fetters given in the legislation on the exercise of discretion by the Tribunal.

The length of the delay

28. The length of the delay is to be considered by reference to the time-limit for submitting an appeal. This was confirmed in *Romasave (Property Services) Ltd v R & C Comrs* [2015] UKUT 254 (TCC) ('*Romasave*'), at [96]. There, the Upper Tribunal held that:

> "In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant."

29. In *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387, at [105], the Court of Appeal has, similarly, described exceeding a time-limit of 28 days for applying to that court for permission to appeal by 24 days as "significant", and a delay of more than three months as "serious".

30. In relation to the application before us, the notice of penalty assessment was issued to the Appellant on 2 May 2023. An appeal should, therefore, have been made by 2 June 2023. Although the appeal was only successfully made on 11 July 2023, the Appellant had attempted to appeal prior to that date (on 2 May 2023) but had, inadvertently, completed the

wrong form on his online PTA. The form that the Appellant completed related to a late filing penalty. Of course, a late filing has not been charged. The penalty that was, in fact, charged was a late payment penalty. On 21 June 2023, over a month later, HMRC rejected the appeal as the wrong form had been used. The correct form was then sent to the Appellant by HMRC on 21 June 2023. On 8 July 2023, the Appellant completed the correct form that had been sent to him by HMRC and submitted the appeal. HMRC rejected the appeal as it was late.

31. Following the rejection of his appeal by HMRC on 2 October 2023, the Appellant notified his appeal to the Tribunal, without delay, on 17 October 2023.

32. In respect of the first stage, whilst we find that there was significant delay in making an application to appeal, the delay was not serious. Furthermore, the circumstances giving rise to the late appeal are highly relevant. We accept that a genuine error had been made by the Appellant in making his timely appeal on 2 May 2023. It was over a month before he was notified that he had used the wrong form and before the correct form was sent to him. This was already after the time-limit for appealing was sent to him. The Appellant did not delay in completing the correct form, which he completed in a matter of days. Once his appeal was rejected by HMRC, he almost immediately lodged an appeal with the Tribunal. This is not a finding that time limits are not relevant, or indeed that they can routinely be ignored, but is a balanced appraisal of all of the circumstances leading up to the late appeal, in light of the authorities.

The reasons why the default occurred

33. In relation to the second stage, and the reasons why the default occurred, we have considered, and accept, that the wrong form had originally been used by the Appellant. We have accepted that a genuine mistake was made in an otherwise timely initial appeal. We, therefore, find that a good reason has been provided for the default which has occurred.

Evaluating all of the circumstances

34. We turn to the third stage in the process; that of having regard to all the circumstances and the respective prejudice to the Appellant, and to HMRC. The Upper Tribunal in *Martland* made clear, as is apparent from the authorities, that the balancing exercise at this stage should take into account the particular importance of the need for litigation to be conducted efficiently, and at a proportionate cost, and for statutory time limits to be respected. The courts and tribunals have consistently emphasised the public interest in the finality of litigation, and the purpose of a time-limit being to bring finality: see, for example, *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 and *Data Select*.

35. The case of *Global Torch Ltd v Apex Global Management Ltd & Ors (No 2)* [2014] 1 WLR 4495, at [29], referred to the merits of the underlying case generally being irrelevant. As Moore-Bick LJ said in *Hysaj, R (in the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 ('*Hysaj*'), at [46], it is only where the court (or tribunal) can see without much investigation that the grounds of appeal are either very strong, or very weak, that the merits will have any significant part to play when it comes to balancing the various factors at stage-three of the process. That should not involve any detailed analysis of the underlying merits. Similarly, in *Martland* the Upper Tribunal held, at [45] to [46], that the balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently, and at a proportionate cost. The Upper Tribunal also highlighted the need for statutory time-limits to be respected. In so doing, the tribunal must have regard to any obvious strengths or weaknesses in the applicant's case

36. Having considered all of the evidence, cumulatively, we are satisfied that the balance between the prejudice to the Appellant, the prejudice to HMRC and the administration of justice through the finality of litigation falls firmly on the side of an extension of time being allowed. This is because we are satisfied that the Appellant rectified the error in respect of the wrong appeal form being used in a timely manner, and clearly intended to challenge the decision immediately upon receipt of the penalty notice. We have balanced the competing interests and the arguments presented by the parties.

37. Accordingly, therefore, we hold that the application to make a late appeal is allowed and proceed to determine the substantive appeal.

SUBSTANTIVE APPEAL - LATE PAYMENT PENALTY

38. The Appellant appeals against a penalty that HMRC have charged, under Schedule 56, in respect of the late payment of tax.

ISSUES

39. The issues under appeal are:

(1) Whether the penalty charged to the Appellant was correctly issued.

(2) If so, whether the Appellant has established a reasonable excuse.

40. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse. Two further questions arise in determining this appeal. They are: if the Appellant is in default of an obligation imposed by statute: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period?

41. The above matters are to be considered in light of all the circumstances of the case.

BACKGROUND FACTS

42. The Appellant had signed up to receive paperless communication on 7 December 2022 and he did not withdraw his consent.

43. On 5 February 2023, HMRC issued a notice to file for the tax year ending on 5 April 2022. The filing date for the tax return was 16 May 2023.

44. Prior to receiving the notice to file for the 2022 tax year, the Appellant sought assistance from HMRC's digital assistants at the online Extra Support Team ('EST') as it was his first time to complete a tax return. The Appellant also intended to discuss whether he could have extra time to complete the tax return as he was waiting for his Unique Taxpayer Reference ('UTR').

45. During his online conversation with an adviser known as Kevin, the Appellant was informed that he would not be charged a penalty if his tax return was filed on, or before, 28 February 2023 (which was the date that the Appellant had indicated he would be able to file the return by). The Appellant was also informed that penalties, and interest, would be charged if payment was received late. Unfortunately, the Appellant was disconnected when he sought to clarify what the difference was between "filing" and "payment". The Appellant was then connected to a new adviser known as Steve.

46. During his online conversation with Steve, the Appellant was informed that he had three months to complete the 2022 tax return as his Self-Assessment record was only set up on 26 January 2023. Steve proceeded to give the Appellant his UTR, having gone through security checks. The discussion concerning the difference between filing the tax return and paying tax was not repeated during the discussion with Steve (such a discussion is certainly not included in the transcripts of the webchat that are included in the Hearing Bundle).

47. The Appellant's tax return was filed, electronically, on 26 April 2023. Tax liability was paid in full on the same date.

SUBMISSIONS

48. Mr Marks submits, in summary, that:

(1) The time-limit for notifying chargeability to income tax is six months from the end of the tax year in which the liability arises. Notification for the chargeability to tax on the Appellant's income from 2022 should have been received on, or before, 5 October 2022.

(2) The Appellant was given the statutory time period of three months to complete the tax return without incurring a penalty. However, as the Appellant failed to notify HMRC of the untaxed income within the time-limit, the payment due date was 31 January 2023.

(3) The due date for payment of tax is set out in statute and it is readily ascertainable. The due date for payment is established by s 59B(4)TMA. The 'penalty date' is defined at para. 1(4) of Schedule 56. A period of 30 days is allowed before a late payment penalty is imposed to allow time to make payment, or to make arrangements to pay. The penalty date was 3 March 2023. The Appellant only paid his tax liability on 26 April 2023. The penalty has correctly been applied.

(4) HMRC publishes information and advice about taxpayers' obligations and how they can adhere to them.

(5) It was unreasonable for the Appellant to assume that he had three months to pay his outstanding tax liability following his webchat with advisers where he was told that he had to pay the tax by the payment due date.

49. The Appellant submits, in summary, that:

(1) The 2022 tax return was the first time that he had to complete a tax return.

(2) He filed his tax return and paid the outstanding tax liability in full on 26 April 2023, having received the notice to file on 5 February 2023.

(3) It was reasonable for him to interpret the statement (during the webchat) that he had three months to "complete" his tax return as being three months to both file his tax return and to pay tax.

(4) His webchat with Kevin was cut short as he was disconnected and he then spoke to Steve, who did not repeat what Kevin had said. No distinction was made between "filing" and "paying" by either adviser.

(5) He genuinely believed that he had three months to pay the tax liability.

(6) His actions were guided by a commitment to complying with his tax obligations.

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

DISCUSSION - LATE PAYMENT PENALTY

51. 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. In *Perrin v R & C Comrs* [2018] BTC 513 ('*Perrin*') (Judges Herrington and Poole), at [69], the Upper Tribunal explained the shifting burden of proof as follows:

> "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."

52. The factual prerequisite is, therefore, that HMRC have the initial burden of proof: see also *Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) (in the context of a discovery assessment).

53. The standard of proof is the civil standard; that of a balance of probabilities.

Q. Is the Appellant in default of an obligation imposed by statute?

54. The time-limit for notifying chargeability to income tax is six months from the end of the tax year in which the liability arises. Notification on the Appellant's income from the year ending 5 April 2022 should have been received from the Appellant on, or before, 5 October 2022. The six-month time-limit ensures that a taxpayer can be sent a tax return in sufficient time to complete the tax return within the normal cycle for the year. As the Appellant did not notify his chargeability to income tax by 5 October 2022, a notice to file was issued to him on 5 February 2023. If a notice to file in respect of Year 1 (i.e., 2022) is given after 31 October in Year 2 (i.e., 2023), a tax return must be delivered during the period of three months, beginning on the date of the notice. HMRC's computer system allows a concessionary period of seven days (in addition).

55. The due date for payment of income tax liability is established by s 59B TMA. Under s 59B(3), where a taxpayer notifies his chargeability to HMRC before 5 October following the end of the year of assessment to which the tax relates, but he does not receive a notice to file a tax return in respect of the relevant year of assessment until after 31 October, s/he has three months from the date that the notice to file was issued to pay tax. Under s 59B(4), if the taxpayer has not notified their chargeability to tax, the payment date is 31 January.

56. The Appellant was given the statutory time period of three months and seven days to complete the 2022 tax return without incurring a penalty. However, as the Appellant failed to notify HMRC of the untaxed income within the time-limit of 5 October 2022, the payment due date was 31 January 2023. The Appellant only paid his outstanding tax liability in relation to the 2022 tax year on 26 April 2023. This was after the statutory due date for payment.

57. The 'penalty date' is set out at para. 1(4) of Schedule 56. The penalty date was 3 March 2023.

58. Schedule 56 makes provision for the imposition by HMRC of penalties on taxpayers for the late payment of tax. Where a person fails to make payment on, or before, the penalty date, a penalty may be assessed under para. 3 of Schedule 56. Under para. 3(2) of Schedule 56, a penalty of 5% of the outstanding tax liability is chargeable if a person fails to make payment of ta by the penalty date. Under para. 3(3) of Schedule 56, a penalty of 5% of the outstanding tax liability is charged if a person fails to make payment within five months of the penalty date, and under para. 3(4), a further penalty of 5% of the outstanding tax liability is charged if a person fails to pay tax within eleven months of the penalty date.

59. It is clear that a person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable.

60. The Appellant signed up to receive paperless communications on 7 December 2022. In order to sign up for paperless contact, the Appellant is required to (i) confirm their email address; (ii) indicate that communications are to be provided electronically; (iii) agree to

terms and conditions; and (iv) set their preference and click the 'Continue' button. The "Go paperless with HMRC" screen clearly states that the communications sent electronically include statutory notices, decisions, estimates and reminders. When an online communication has been made to a taxpayer's online PTA, an email will also be sent to their verified email address, notifying them that information has been delivered to their secure mailbox. If the email is not delivered successfully, HMRC will be notified. If a second attempt to send the email fails, the taxpayer will be de-registered from paperless contact and any future correspondence will be issued on paper.

61. HMRC's Terms & Conditions in relation to paperless communications include the following:

> *"...*
>
> ***Registration***
>
> *...*
>
> *2.2 If you register on the GOV.UK website the details you provide will be passed to the Government Gateway for verification (on behalf of HMRC...*
>
> *2.3 Your email address, if provided, may be used by the Government Gateway to communicate with you and to forward messages.*
>
> *...*
>
> ***Secure mailbox***
>
> *...*
>
> *7.2 You should regularly check your mailbox and delete old messages. Read messages that have been on the system for up to three months from delivery will be archived and removed from your mailbox. Unread messages that have been on the system for up to 12 months from delivery will be archived and removed from your mailbox.*
>
> *7.3 If you opt to receive statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits, which may include a notice to file a tax return, renew your tax credits, make a payment or information about other related matters electronically then these will be delivered to a separate secure online mailbox.*
>
> *...*
>
> ***Statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits***
>
> *8.1 Some online services may be used, or may make use of the secure online mailbox, to issue statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits. You van view these securely on the GOV.UK website."*

62. Section 103 of the Finance Act 2009 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)."

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

> "…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."

64. We have also considered the principles in the case of *Ryanair v HMRC* [2013] UKUT 0176 (Warren J and Judge Bishopp), at [103] to [108]. The decision includes a discussion of the principle that *"the statute is always speaking"*. The appeal concerned air passenger duty and a judicial review claim concerning less favourable treatment. The Upper Tribunal 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 Upper Tribunal concluded 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 that appeal) 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.

65. 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] to [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."

66. In *R (on the application of Davies & Anor) v R & C Comrs* [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…"

67. 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 to the collection of taxes.

68. The use of electronic communications for these purposes is governed by the Income and Corporation Taxes (Electronic Communications) Regulations 2003 SI 2003/282 ("the E Comms Regulations"). Part 3 of those regulations sets out a number of evidential provisions which are relevant to this appeal:

69. Regulation 5 provides that:

> "**5 Effect of delivering information by means of electronic communications**
>
> (1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by
>
> (a) these Regulations,
>
> (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
>
> (c) any specific or general direction given by the Board, are satisfied or, but only in the case of the conditions mentioned in regulation 3(2A) (electronic delivery of company tax returns), are taken to be satisfied under regulation 3(8).
>
> (2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied. This is subject to paragraphs (3) and (4).
>
> (3) The Board may by a general or specific direction provide for information to be treated as delivered upon a different date (whether earlier or later) than that given by paragraph (2).
>
> (4) Information shall not be taken to have been delivered to an official computer system by means of electronic communications unless it is accepted by the system to which it is delivered.
>
> (5) For the purposes of this Part, information which is delivered by means of electronic communications includes information delivered to a secure mailbox.
>
> (6) For the purposes of paragraph (1) "the relevant Finance Acts" means the Finance Act 2007, the Finance Act 2008 or the Finance Act 2009."

70. Consequently, therefore, a penalty notice which meets the requirements set out in reg. 5 is to be treated as having been delivered for the purposes of Schedule 56.

71. Regulation 6 provides for a means by which HMRC can create a rebuttable presumption that information was delivered electronically. Regulation 6 provides that:

> "**6 Proof of content**
>
> (1) A document certified by an officer of the Board to be a printed-out version of any information delivered by means of electronic communications under these Regulations on any occasion shall be evidence, unless the contrary is proved, that that information-
>
> (a) was delivered by means of electronic communications on that occasion; and
>
> (b) constitutes the entirety of what was delivered on that occasion.
>
> (2) A document purporting to be a certificate given in accordance with paragraph (1) shall be presumed to be such a certificate unless the contrary is proved."

72. HMRC will, therefore, need to provide a certified copy of the notice in order to create a rebuttable presumption that the notice was delivered and contained the information set out in that copy.

73. Whilst not binding on us, but persuasive, in *Walker v HMRC* [2023] UKFTT 865 (TC) ('*Walker*'), the FtT said this:

> "20. …to meet the evidential burden of notification, a certified copy of the information creates a rebuttable presumption of delivery."

74. HMRC have included a certificate under reg. 6 of the E Comms Regulations to support the submission that the penalty notices were correctly issued. The Appellant does not dispute receiving the notice of penalty assessment and, indeed, attempted to immediately appeal against the penalty on 2 May 2023. The Appellant does not argue that there were any defects in the penalty notice, and in the procedure that HMRC followed when issuing the penalty notice. In any event, such arguments were considered, and rejected, by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ('*Donaldson*'). We are bound by that decision. We are satisfied that the penalty was correctly notified to the Appellant.

75. We have concluded that payment of tax for the 2022 tax year was made on 26 April 2023. It should have been made by 31 January 2023. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalty imposed is due and has been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the default?

76. There is no statutory definition of a 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 Comrs* (2006) Sp C 548 ('*Rowland*'), at [18].

77. 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?"

78. 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.

79. In *Perrin*, the Upper Tribunal set out a four-step process for the FtT to use when considering whether a person has a reasonable excuse.

> "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.

80. It is pertinent to note that HMRC are not relying on the fourth limb of *Perrin*.

81. In *Harrison v R & C Comrs* [2022] BTC 525, the Upper Tribunal viewed the four-stage approach to be guidance, rather than a set of principles to be followed.

82. 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.

83. We proceed by, firstly, determining whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, we have assessed whether the facts put forward, and any belief held, by the Appellant are sufficient to amount to a reasonable excuse.

84. The Appellant failed to pay his tax liability by the legislative due date of 31 January 2023, having failed to notify his chargeability to income tax by 5 October 2023. Whilst the notice to file was only issued in February 2023, the payment due date remained 31 January 2023. The Appellant submits that he was under the belief that he had three months from the date that the notice to file was issued to file his tax return, and pay the outstanding tax liability. In further amplification of this submission, the Appellant refers to his online webchat with HMRC advisers, where he states that he was informed that he had three months to complete his tax return. He submits that he understood the word "complete" to mean that he had three months within which to both "file" his tax return, and "pay" his outstanding tax liability. The Appellant has provided the transcript of the webchat with Steve and Kevin. We have had the benefit of considering the transcripts, which show the Appellant's attempts to get online support prior to the usual filing and payment date of 31 January.

85. Before being connected to Kevin, the Appellant had said this, on being connected to the online platform (but before Kevin joined the conversation):

> *"I would really appreciate some additional time to submit my tax return as there have been many days over the last 2 months since I set up the account on 7 December that I have been unable to work and function like a normal human being."*

86. The Appellant was subsequently connected to Kevin who advised that:

> *"We will note the date you expect to file the return (28/02/23) We will not charge a penalty if the return is filed on or before that date The due date for payment remains at 31 January We will charge penalties and interest if the payment is late."* [sic]

87. This was after the Appellant had informed Kevin that:

> *"I would expect to be able to deal with this before the end of February, as I am taking some time off work to deal with my challenges and will be able to complete it then*
>
> *latest end of feb, but more likely before the 15th February."*

88. The Appellant was, unfortunately, disconnected from the webchat before his discussions with Kevin had concluded and whilst he was seeking clarification as to the difference between filing his tax return and paying the outstanding tax liability.

89. The second adviser to be connected to the Appellant was Steve. The transcript shows that the Appellant had specifically asked Steve to read the transcript of his earlier discussion

with Kevin in order the resolve the confusion as to what was meant by completing his tax return. Following security checks, Steve said this to the Appellant:

> *"As your record was only set up on 26 January 2023 you will be allowed 3 months to complete your 2021-22 tax return. We don't expect you to complete it by 31 January."*

[Emphasis added]

90. The Appellant then said this, after Steve had provided him with his UTR and after further security questions had been asked:

> *"great if you could email me this conversation of confirmation I have 3 months from 26 jan to complete the tax return."* [sic]

91. No further discussion took place about the difference between the filing date and the payment date with Steve.

92. Having considered the situation that the Appellant had found himself in, and the contents of the webchats, we find that the Appellant genuinely believed that he had three months to both file his tax return and pay tax. His belief was, however, mistaken. In *Garnmoss Ltd. T/A Parham Builders v HMRC* [2012] UKFTT 315 (TC), the FtT held (in the context of a VAT appeal and the question of reasonable excuse) that:

> "12. What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse."

93. Whilst mistakes cannot, per se, amount to a reasonable excuse, we find that the confusion experienced by the Appellant must be considered against the background of his personal circumstances, and his actions in seeking clarification in a timely manner.

94. The standard by which a reasonable excuse 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 Taxes Acts: *Collis v HMRC* [2011] UKFTT 588 (TC) ('*Collis*'). The decision depends upon the particular circumstances in which the failure occurred. As the Upper Tribunal in *Perrin* explained, 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 further 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.

95. In *Barrett v HMRC* [2015] UKFTT 329 (TC), Judge Berner said this:

> "The test of reasonable excuse involves the application of an impersonal, objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

96. And:

> "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of

circumstances might be regarded as no unreasonable in the case of another whose circumstances are different."

97. In *Perrin*, the Upper Tribunal said this, having considered the four-stage test for a reasonable excuse to be established:

> "82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question.. The Clean Car Co itself provides an example of such a situation."

98. It is, therefore, a matter of judgment for us as to whether it is objectively reasonable for the Appellant, in the circumstances of this case, to have been ignorant of the requirement to pay his tax by 31 January 2023, having only receiving the notice to file on 5 February 2023. In this respect, we accept the truth in the Appellant's submission that despite being completely new to self-assessment, his actions in seeking assistance were guided by a commitment to complying with his tax obligations. It is clear from the Appellant's questions to Kevin and Steve that the Appellant did not want to miss any deadlines and was seeking as much guidance as possible, having given full and frank disclosure of his personal circumstances. This prompted him to contact the EST. The EST exists to tailor support to the taxpayer in question.

99. Despite the confusion as to what his obligations were, we accept that the Appellant's actions were those of a prudent taxpayer exercising reasonable foresight and due diligence. We further accept that it was objectively reasonable for the Appellant to have believed that he had three months to both file his tax return, and pay the outstanding tax liability. Having considered all of the evidence, cumulatively, we are satisfied that the facts are capable of being supported by evidence. In this regard, we have made an assessment of the credibility of the assertions put forward. We have further considered the experience, knowledge and other attributes of the Appellant. Most importantly, we have considered the situation in which the Appellant was at the relevant time.

100. Accordingly, therefore, we allow the appeal and set aside the penalty.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

101. 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: 26 July 2024