[2018] UKUT 156 (TC)

Appeal number: UT/2017/0128

INCOME TAX – late filing of returns – reasonable excuse-whether excuse must not only be genuine but also objectively reasonable taking into account circumstances and attributes of the taxpayer – yes – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHRISTINE PERRIN **Appellant**

-and-

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

TRIBUNAL: **JUDGE TIM HERRINGTON**
JUDGE KEVIN POOLE

Sitting in public at the Royal Courts of Justice, London on 27 March 2018

The Appellant appeared in person

Joshua Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the appeal of the appellant, Christine Perrin, from the decision of the First-tier Tribunal ("FTT") (Judge Anne Redston and Lesley Stalker), neutral citation [2017] UKFTT 0315 (TC), by which the FTT dismissed her appeal against daily penalties of £900 for late filing of her self-assessment tax returns for 2010-11.

2. The appellant had also incurred fixed late filing and late payment penalties for the same year, and late payment penalties for the year 2011-12. Her appeals against those penalties had been heard by the FTT on 10 April 2014 and largely dismissed (see *Perrin v HMRC* [2014] UKFTT 0488 (TC) ("the 2014 Decision"). At that time, as various significant points of principle in relation to daily penalties were under appeal in a lead case *Donaldson v HMRC*, HMRC asked the FTT to defer making a decision on the daily penalties pending the outcome of that lead case, and the FTT agreed. They indicated that in making their ultimate decision on the daily penalties, they would rely on the findings of fact set out in the 2014 Decision. The appellant did not appeal against the 2014 Decision.

3. Following the finalisation of *Donaldson v HMRC* by the Court of Appeal in 2016 (at [2016] EWCA Civ 761), the FTT issued a further decision on the daily penalties on 19 April 2017 ("the 2017 Decision").

4. Put briefly, the FTT decided:

> (1) The points decided in *Donaldson* meant that the only remaining arguments available to the appellant in appealing against the daily penalties were (a) that she had a reasonable excuse for the failure and (b) that there were special circumstances justifying a reduction or cancellation of the penalty;
>
> (2) For the reasons which they had given in the 2014 Decision, neither of these arguments could succeed and accordingly the daily penalties should be confirmed.

5. The appellant sought permission to appeal against the 2017 Decision. Permission was granted by Judge Redston, limited to one ground, namely that the FTT had "wrongly rejected the view expressed by some First-tier Tribunals that a genuine belief is sufficient for there to be a reasonable excuse."

6. By way of explanation of her decision to give permission to appeal on that ground, Judge Redston said this:

> "The Tribunal found as a fact that Mrs Perrin honestly believed that she had submitted her return, but found that honest belief taken alone does not provide a reasonable excuse; instead, the Tribunal applied the approach set out by Judge Medd QC in *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 and by Judge Brannan in *Coales v R&C Commrs* [2012] UKFTT.

> Mrs Perrin's second ground is that in taking this approach the Tribunal wrongly rejected the view of some other Tribunals that an honest belief is enough for a person to have a 'reasonable excuse'.
>
> I accept this is an issue on which different Tribunals have come to contrary conclusions and that it is appropriate for permission to appeal to be granted."

The facts

7. The detailed facts are quite extensive, and are set out in full in the 2014 Decision. It is not necessary to repeat them here. A short summary will suffice.

8. The appellant had filed her return online for the previous tax year, 2009-10. In doing so, well before the deadline, it appears she had unwittingly omitted to complete the final stage of submission. HMRC issued a penalty to her, which she appealed. HMRC wrote to her to advise that her return had not in fact been submitted and that "this may be because you did not complete the final stage of online submission". They later wrote to her again to say that the penalty had been cancelled, and "to avoid penalties being charged in the future, please make sure you submit your tax returns on time."

9. The appellant went online on 2 January 2012 to file her 2010-11 return. She printed out a copy and received a submission receipt with a reference number. However, she did not complete the final step in the submission process and as a result the return was not filed.

10. The filing deadline was 31 January 2012. On 15 February 2012 HMRC issued a £100 penalty notice to the appellant, warning her to submit her return to avoid further penalties, and warning of the possibility of daily penalties.

11. On 28 February 2012 the appellant appealed the £100 penalty, saying "this is the second year that I have submitted online within the timescales and the second time that you have incorrectly stated that I have not complied with the timescales."

12. HMRC received this appeal but mislaid it. They sent a further letter dated 26 March 2012 to the appellant, reminding her that she had still not submitted her return, and warning her of the impending possibility of daily penalties. A similar letter was sent on 2 April 2012.

13. On 11 April 2012 the appellant called HMRC and was told she needed to send a copy of her appeal to their Liverpool office. She did so. They replied by letter dated 18 April 2012 saying they could not consider her appeal until she had filed her return. On 17 May 2012 the appellant called HMRC and told them she had already filed it.

14. On 24 May 2012 HMRC wrote to the appellant, confirming to her that there was another step to follow after receiving her submission reference number, and that she appeared to have had a similar problem the previous year. They said she had not signed her appeal letter, and she should submit a further, signed, copy.

15. On 19 June 2012 the appellant submitted a signed copy of her previous appeal, with a covering letter explaining she had now gone online and submitted her return "again", and providing a copy of the submission receipt, which unfortunately showed that she had in fact submitted a return for the year 2011-12 (i.e. the year following the year under appeal).

16. On 3 July 2012 HMRC issued a "60 day daily penalties reminder" to the appellant, telling her that penalties had been accruing at £10 a day since 1 May 2012, and therefore already totalled more than £600.

17. On 13 July 2012 HMRC wrote again to the appellant, setting out their view of reasonable excuse and re-iterating that they could not consider her appeal until the return had been filed. They also gave her a further warning about the daily penalties building up.

18. Towards the end of this letter, under the heading "interest" in bold type, HMRC said that the submission receipt she had provided was "not, in isolation, proof of submission. If a submission is successful you will receive an onscreen message that includes the reference number to confirm receipt. A confirmation email will also be sent if your email address was provided on the return." The letter went on to inform the appellant that she had used the 2011-12 return form to file her 2010-11 return information. It said "we cannot accept this as your 2010-11 return, which must be filed to the correct tax year."

19. On 7 August 2012 HMRC issued a penalty notice for the cumulative daily penalties of £900. This arrived while the appellant was on holiday.

20. On 31 August 2012 HMRC wrote again, saying they had still not received the appellant's 2010-11 return. This letter confirmed that "it would appear you have filed your 2010/11 tax return but to the 2011/12 tax year. You still therefore need to file a 2010/11 tax return to the correct year and submit an amendment to the 2011/12 tax year with the correct information."

21. On 20 September 2012 the appellant called HMRC and insisted she had filed the 2010-11 return. However, after that conversation she re-entered the online system and correctly filed her 2010-11 return the same day.

The FTT's decision

22. The FTT found at [119] of the 2014 Decision that HMRC had not provided any evidence that a person filing online is told that an on-screen confirmation is always received at the end of the transaction, and/or that its absence means the transaction is incomplete. It said at [120] of the 2014 Decision that without evidence that an advance warning that an on-screen confirmation is given following completion of an online return it did not accept that a reasonable taxpayer should have realised that she had not completed the filing process and that it was reasonable for a person who receives a submission receipt to think that this means the return has been submitted. The FTT therefore accepted (at [123] of the 2014 Decision) that the appellant had a reasonable excuse for her initial failure to file her 2010-11 return on time. However, they held (at

[125] of the 2014 Decision) that this reasonable excuse "came to an end when HMRC told her in their letter dated 14 May 2012 that she had not completed the filing process." They went on to say that "other evidence shows that there can be a gap of over two weeks between the date on HMRC's letters and the date they are received. In our judgment, amending the return on 19 June 2012 would not have constituted undue delay" (the point here being that if a reasonable excuse ceases, but the failure is then remedied "without unreasonable delay" after that time, the taxpayer still has the benefit of that reasonable excuse).

23. The FTT went on to say this:

> "126. However, Mrs Perrin did not remedy the failure: she mistakenly completed the 2011-12 tax form instead of that for 2010-11. She did not seek to argue that this return was in fact that for 2010-11, and we agree: TMA s 113(1) states that "any returns under the Taxes Acts shall be in such form as the Board prescribe" and thus what Mrs Perrin completed was the 2011-12 return and not the 2010-11 return.
>
> 127. Mrs Perrin argued that this was a reasonable mistake. Neither party has put forward any evidence about the format of the online return page so as to support or contradict that submission. The only evidence we have is the submission receipt. This clearly shows that the return was that for 2011-12 and not for 2010-11: the date is in both the body of the text and in the heading. We find it difficult to accept that the reasonable taxpayer would not have read the submission receipt, and having done so, would not have noticed that the wrong year's return had been completed.
>
> 128. Even were we to agree with Mrs Perrin that it was reasonable not to have noticed she had completed the wrong year's return, there is a further difficulty. HMRC told Mrs Perrin of her mistake on 13 July 2012, but she did not read the key paragraphs. She is right that these came at the end of a long letter, and under a section headed "interest", but we nevertheless find that the reasonable taxpayer would have read the whole letter, and having done so, would have realised she had filled in the wrong tax return form.
>
> 129. Therefore, even were we to accept that Mrs Perrin's failure to realise she had completed the wrong return form was itself reasonable, that excuse came to an end soon after she received HMRC's letter dated 13 July 2013[1].
>
> 130. A penalty cannot be cancelled on the basis of a reasonable excuse unless "the failure is remedied without unreasonable delay after the excuse ceased." Mrs Perrin did not remedy her mistake until 20 September 2012, about two months after she received the letter dated 13 July 2012."

24. Accordingly, the FTT held that although the appellant had initially had a reasonable excuse for her failure to file her 2010-11 tax return on time, that excuse had

[1] This should be 2012, not 2013.

ended either (a) at the time when she received the submission receipt on 19 June 2012 which showed she had submitted the wrong year's return or (b) shortly after her receipt of HMRC's letter dated 13 July 2012. In either case, as she had not remedied the failure until 20 September 2012, that represented an "unreasonable delay" and accordingly the protection of her original reasonable excuse had fallen away, so that she was liable for the penalties.

The legislation

25. So far as relevant, Schedule 55 to the Finance Act 2009 provided at the relevant time as follows:

> "PENALTY FOR FAILURE TO MAKE RETURNS ETC
>
> 1—
>
> (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.
>
> (3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).
>
> (4) In this Schedule—
>
> "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;
>
> "penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).
>
> (5) In the provisions of this Schedule which follow the Table—
>
> (a) any reference to a return includes a reference to any other document specified in the Table, and
>
> (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	Return or other document

1.	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970
	…	…

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

2—

Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table.

3—

P is liable to a penalty under this paragraph of £100.

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

…

APPEAL

20—

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

…

22—

(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.

…

REASONABLE EXCUSE

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

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

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

The Arguments

26. The appellant argued that the approach of the FTT in cases such as *Chichester v HMRC* [2012] UKFTT 397 (TC) and *Gray Publishing v HMRC* [2014] UKFTT 113 (TC) should be followed, so that a genuine and honestly held belief on the part of a taxpayer that she had done what was required should afford a reasonable excuse even if she had not done so, and (most crucially) this was the case whether or not it was objectively reasonable for her to have held such a belief. Whilst the FTT had accepted that initially it was reasonable for her to believe that she had submitted her return on

time, it should also have also found that her continuing and honestly held belief that she had done all that was necessary should continue to afford her the shelter of a reasonable excuse, right up to the time when she finally realised the true position as a result of her telephone conversation with HMRC on 20 September 2012 (and submitted her return later the same day).

27. The appellant's skeleton argument also submitted that, based on *Jussila v Finland* [2009] STC 29, [2006] ECHR 73053/01, HMRC were only entitled to impose a penalty if they could prove, to the criminal standard, that she had wilfully failed to submit a return. She did not persist with this argument at the hearing, rightly in our view. Even if permission to appeal had been granted to permit her to argue this ground (which it had not), it would have been bound to fail, not least because none of the "procedural fairness" provisions in Article 6 in fact lay down requirements as to the standard of proof.

28. Mr Carey, on behalf of HMRC, argued in broad terms that the phrase "reasonable excuse" implied, akin to such legal concepts as "the reasonable man", an objective test. To hold otherwise would cause absurd results. As long as a taxpayer could convince a tribunal that he or she honestly believed something which excused the failure (for example, that the law did not require a return to be filed, or that it had actually been filed on behalf of the taxpayer by divine intervention), they would be exonerated from any penalty, regardless of how unreasonable that belief had been.

29. More specifically, he submitted that the FTT in *Chichester* and *Gray* had misunderstood and misapplied the Court of Appeal's decision in *R v Unah* [2011] EWCA Crim 1837.

30. In summary, he submitted that the approach set out in *The Clean Car Co* and *Coales* was to be preferred, importing as it did a necessary objective reality check for the reasonableness of the excuse being put forward by a taxpayer.

31. We deal in detail with the cases relied on by the parties, as mentioned above, later in this Decision.

32. In addition, both parties cited a number of FTT decisions which supported their respective approaches, and Mr Carey delivered a lengthy schedule of such cases which he said demonstrated that the vast majority of FTTs adopted the objective test. None of those cases are of course binding on this Tribunal, and we did not find anything of assistance in them.

Discussion

The Upper Tribunal's jurisdiction on an appeal

33. The Upper Tribunal's jurisdiction on an appeal from the FTT is conferred by section 11 of the Tribunals, Courts and Enforcement Act 2007, which provides that any party has a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal …". Thus appeals to the Upper Tribunal are limited to questions of law only, that is to say, whether the FTT made an error of law in its decision which needs to be corrected.

34. Errors of law can take a number of forms. The most obvious is where a tribunal simply misinterprets the law and therefore reaches a wrong conclusion, even though there is no dispute about the facts upon which it based its decision. More subtle errors of law have however been recognised by the courts, which stray away from the area of pure law and into the area of findings of fact.

35. At the very extreme, it is well established that even findings of primary fact by the FTT (for example, a finding that a particular event took place) can be overturned on appeal if "the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it" (per Lord Normand in *Commissioners for Inland Revenue v Fraser* [1942] 24 T.C. 498, 501, approved by Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14). A fact-finding tribunal (such as the FTT) will often draw inferences from findings of fact that it makes, and where those inferences are themselves inferences of primary fact (for example "because we have found that events A and B happened, we infer that event C must also have happened"), they are susceptible to challenge on appeal only on the same basis.

36. A commonly cited statement of the law on this area was given by the Court of Appeal in *Georgiou v Customs and Excise Commissioners* [1996] STC 463. Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure … to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

37. Once a tribunal has made its findings of primary fact, it will generally have to decide whether those facts answer to some particular description or satisfy some particular test. So, for example, the General Commissioners in *Edwards v Bairstow*

had made findings of primary fact as to what the taxpayer had done, then reached a determination that those actions did not amount to "an adventure in the nature of trade"; the VAT and Duties Tribunal in *Proctor and Gamble UK v Revenue & Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 made findings of primary fact about the characteristics of Pringles, then decided that they were therefore "similar to potato crisps and made from the potato"; and in the present case the FTT made findings of primary fact about the history of events involving the appellant's dealings with HMRC and decided that on the basis of those facts the appellant's initial reasonable excuse came to an end and she did not remedy her failure without unreasonable delay thereafter.

38. In *Edwards v Bairstow,* Lord Radcliffe said this (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. *But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. [Emphasis added]* I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

39. He went on to say this:

> "If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade."

40. In other words, after examining the primary facts as found by the General Commissioners, he concluded that they had made an error of law in finding that those facts did not amount to "an adventure in the nature of trade".

41. In *Proctor & Gamble*, Jacob LJ in the Court of Appeal said this:

> [9] Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether

first or second) should be slow to interfere with that overall assessment—what is commonly called a value-judgment.

[10] I gathered together the authorities about this in *Rockwater v Technip* [2004] EWCA (Civ) 381, [2005] IP & T 304:

> '[71] … In *Biogen v Medeva* [1997] RPC 1 at p 45 Lord Hoffmann said when discussing the issue of obviousness:
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> > "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."
>
> [72] Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 613–614 (per Robert Walker LJ) in the context of a decision about "fair dealing" with a copyright work; by Hoffmann LJ in *Re Grayan Building Services Ltd (in liquidation)* [1995] Ch 241 at 254, [1995] 3 WLR 1 at 12 in the context of unfitness to be a company director; in *Designer Guild v Russell Williams (Textiles) Ltd* [2001] IP & T 277, [2001] 1 All ER 700 in the context of a substantial reproduction of a copyright work and, most recently in *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5 in the context of whether a particular invention was an "improvement" over an earlier one. Doubtless there are other examples of the approach.
>
> [73] It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *the Designers Guild*:
>
> > "Secondly, because the decision involves the application of a not altogether precise legal standard to

> a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle" '.
>
> [11] It is also important to bear in mind that this case is concerned with an appeal from a specialist tribunal. Particular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker; see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30], [2008] 4 All ER 190 at [30], [2008] 1 AC 678 cited by Toulson LJ."

42. Mummery LJ made similar observations:

> "[73] The tribunal's decision in favour of Her Majesty's Revenue and Customs ('HMRC') was not an absolute answer to a pure question of fact or to a pure question of law. It was a judgment of mixed fact and law on the classification of Regular Pringles for value added tax ('VAT') purposes. 'Similar to' and 'made from' are loose-textured concepts for the classification of the goods. They are not qualified by words such as 'wholly' or 'substantially' or 'partly' which have crept into the legal arguments. Those words are not in the legislation itself. The tribunal's conclusions were on matters of fact and degree linked to comparisons with other goods and related to the composition of the goods themselves. Some aspects of the similarity of Regular Pringles to potato crisps are close to the centre, others are on the fringes. This exercise in judgment is pre-eminently for the specialist tribunal entrusted by Parliament with the task of fact finding and with using its expertise to make the first level decision, subject only to appeal on points of law.
>
> [74] For such an appeal to succeed it must be established that the tribunal's decision was wrong as a matter of law. In the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the tribunal's decision that Regular Pringles are 'similar to' potato crisps and are 'made from' the potato ought not to be disturbed on appeal. I cannot emphasise too strongly that the issue on an appeal from the tribunal is not whether the appellate body agrees with its conclusions. It is this: *as a matter of law, was the tribunal entitled to reach its conclusions?* It is a misconception of the very nature of an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the tribunal."

43. In the present case, in deciding whether the appellant had a reasonable excuse for her failure to file her return on time, how long that reasonable excuse lasted, and whether she filed the return without unreasonable delay after that excuse came to an end, the FTT was carrying out its own value judgment, applying its understanding of the concepts of "reasonable excuse" and "without unreasonable delay" to the primary facts which it had found.

44. None of the relevant primary facts found by the FTT are disputed by the appellant. It is therefore clear from the above passages from *Proctor & Gamble* that the Upper Tribunal can only overturn the FTT's decision if we are satisfied that the FTT was wrong in law to interpret the statutory phrases "reasonable excuse" and "without unreasonable delay" in the way it did, or if it plainly misapplied the correct law to the facts which it found.

45. It is therefore necessary to consider how the FTT reached the decision that it did.

The basis of the FTT's decision

46. The FTT explicitly accepted (at [123] of the 2014 Decision) that the appellant initially had a reasonable excuse for the failure to file her return "at the time the £100 penalty was levied". At [125] they referred to this as her "first reasonable excuse" and found that it "came to an end when HMRC told her in their letter dated 24 May 2012 that she had not completed the filing process." Thus, the appellant would only have the benefit of that reasonable excuse if she remedied the failure "without unreasonable delay" after that time; and the FTT expressed the view that "amending the return on 19 June 2012 would not have constituted undue delay" (the FTT presumably equated "undue delay" to "unreasonable delay"). As can be seen from paragraph 23(2)(c) of Schedule 55 FA09, the effect of remedying the failure without unreasonable delay after cessation of the reasonable excuse is that the original reasonable excuse is treated as continuing, therefore on this basis the FTT was holding that the appellant would have had a reasonable excuse for her failure up to (at least) 19 June 2012.

47. The FTT made no clear finding as to whether the events of 19 June 2012 afforded the appellant a continuing reasonable excuse. It simply said (at [127]):

> "We find it difficult to accept that the reasonable taxpayer would not have read the submission receipt, and having done so, would not have noticed that the wrong year's return had been completed."

48. This clearly implies that the FTT was, at best, sceptical whether the events of that day afforded the appellant a continuing reasonable excuse. However, rather than explicitly deciding that question, it effectively avoided it by holding (a) (at [129]) that even if the events of that day did afford a continuing reasonable excuse, that reasonable excuse came to an end soon after the appellant received HMRC's letter dated 13 July 2012 and (b) (at [130]) that she did not remedy the failure for "about two months" after she received that letter; as such, she had not remedied the failure "without unreasonable delay after the excuse ceased" and accordingly was no longer entitled to the protection of the pre-existing reasonable excuse.

49. The FTT made it clear in the 2014 Decision (at [88]) that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

Examination of the case law relied on by the parties

50. In doing so, they followed the decision of the VAT Tribunal (His Honour Judge Medd QC) in *The Clean Car Co*. The facts of that case, in outline, were as follows. The taxpayer company was having some building work done. An architect's certificate was produced on 29 June 1990, showing the appellant company was required to pay £105,100 plus VAT for the work done up to that time. The company paid that amount on 6 July (having actually calculated the VAT amount itself, as it was not shown on the architect's certificate), but the VAT invoice which it received from the contractor was dated 2 July. As the work had all been completed in June, the company thought it was entitled to claim the input VAT on its VAT return for the quarter ended 30 June, and did so. The tribunal accepted that Mr Pellew-Harvey (the managing director of the appellant company, who dealt with these matters) "when he filled in the VAT return … genuinely thought that what he was doing was all right." The company was however assessed for a serious misdeclaration penalty in respect of the overclaimed input VAT, which should not have been claimed until the following VAT accounting period. The company claimed to have a reasonable excuse for the error, based upon a genuine belief that recovery of the input tax was permissible in the earlier period and the hospitalisation of the managing director's daughter over the relevant period for a very serious disease.

51. The tribunal made it clear that the managing director's belief on its own was not sufficient to afford the company a reasonable excuse for the misdeclaration, but that some objective test of reasonableness must also be applied:

> "In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it can not. It has been said before in cases arising from default surcharges that 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 in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?... It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some

> particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

52. The tribunal therefore decided that, even though the company (through its managing director) honestly and genuinely believed it had complied with its obligations, that was not enough on its own to afford it a reasonable excuse for the failure; but also that bearing in mind the managing director's unfamiliarity with the special rules applied to building contracts by the VAT legislation at the time and his daughter's serious illness, the excuse that was being put forward did satisfy the objective requirement of reasonableness that he had propounded, and did therefore amount to a reasonable excuse in law.

53. In its 2014 Decision (at [86] & [88]), the FTT also endorsed the following comments made in *Coales*, which supported the approach in *The Clean Car Co:*

> "Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. 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 some hypothetical) taxpayer."

54. The FTT also considered and dismissed a contrary view or views, for which the appellant contends, as put forward in *Chichester* and *Gray*, supposedly based on *Unah*.

55. *Unah* was a criminal case in which the defendant was charged with an offence under section 25(5) of the Identity Cards Act 2006, as follows:

> "(5) It is an offence for a person to have in his possession or under his control, without reasonable excuse –
>
> (a) an identity document that is false;
>
> (b) an identity document that was improperly obtained;
>
> (c) an identity document that relates to someone else…"

56. Elias LJ in the Court of Appeal summarised the facts of the case as follows:

> "The defendant was a Nigerian with indefinite leave to remain in the United Kingdom. She was found to have in her possession a false passport. This came to light when she attended a Job Centre in order to apply for a National Insurance number. She produced a valid current passport and an expired passport which was in fact false. The biographical section of the passport, which included the photograph, was found to be counterfeit. She claimed that she had no knowledge of that. She said that she had asked a friend who travelled regularly between the United Kingdom and Nigeria to obtain the passport for her, and it was her understanding that it was genuine. She contended that this belief

> constituted a reasonable excuse for not[2] having a passport in her possession within the meaning of subsection (5)."

57. The trial judge had compared section 25(5) with section 25(1) in the same Act, which provided as follows:

> "(1) It is an offence for a person with the requisite intention to have in his possession or under his control–
>
> > (a) an identity document that is false and that he knows or believes to be false;
> >
> > (b) an identity document that was improperly obtained and that he knows or believes to have been improperly obtained; or
> >
> > (c) an identity document that relates to someone else.
>
> (2) The requisite intention for the purposes of subsection (1) is–
>
> > (a) the intention of using the document for establishing registrable facts about himself; or
> >
> > (b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying registrable facts about himself or about any other person (with the exception, in the case of a document within paragraph (c) of that subsection, of the individual to whom it relates)."

58. In view of the contrast between subsections 25(1) and 25(5), the trial judge concluded that the defendant's lack of knowledge or belief that the passport was false could not in law constitute a "reasonable excuse" under subsection 25(5); the defendant knew that the item in question was a passport, it was in fact false, and if she had a mistaken belief that it was genuine, that could not in law amount to a "reasonable excuse" for possessing it. Elias LJ, delivering the judgment of the Court of Appeal, agreed (at [4]) that "the mere fact that a defendant does not know or believe that the document is false cannot of itself and without more amount to a reasonable excuse. To the extent that the appellant was contending that it could, we would reject that submission." In saying this, he was simply agreeing with the trial judge's interpretation of subsection 25(5) specifically in the light of subsection 25(1). However, he went on (at [5]) to say this:

> "It does not, however, follow, as the prosecution contend, that lack of knowledge or belief may not be relevant at all to a defence of reasonable excuse. In our view it may be a relevant factor for a jury to consider when determining whether or not the defendant has reasonable excuse for possessing the document. A belief that a document is genuine might, for example, explain why it has not been thrown away or handed in to the police. It is capable of providing an explanation for the possession of the document. Of course, there may be circumstances where the explanation

[2] In context, the word "not" appears to be a typographical error.

> as to why the defendant has the document in his or her possession is simply not believed by the jury, or it may be that the jury accepts the explanation advanced but does not consider that it is reasonable in all the circumstances. But the concept of reasonable excuse is potentially a broad one, and we do not see why the circumstances in which the document was obtained, and which may cause the defendant to believe that it was genuine, should be ignored when considering whether an excuse for possessing it is reasonable or not."

59. Then, at [10] – [11]:

> "… although the fact that the defendant does not know or believe that the document is false is not of itself and without more a reasonable excuse, a defendant is entitled to ask the jury to consider objectively whether he has a reasonable excuse for possessing the material and for not having destroyed it or handed it into the authorities, and the fact that he does not know or believe that it is a false document, because of the circumstances in which it has been obtained, may well have a bearing on that question.
>
> 11. It follows that we see no reason why the defendant in this case ought not to be able to rely upon the genuine belief that the document was valid as an element in her basis for contending that she had a reasonable excuse for having this document in her possession."

60. In *Chichester* at [15], the decision in *Unah* was cited by the FTT (Judge Geraint Jones QC and Derek Speller) as support for the proposition that:

> "The Court of Appeal… decided, albeit in a rather different context, that a genuine or honestly held belief can amount to a reasonable excuse for not doing something that a person is required to do."

To the extent the FTT is saying the Court of Appeal decided in *Unah* that such a belief can, without more, amount to a reasonable excuse, we disagree. Elias LJ in *Unah* only said (at [11]) that such a genuine belief could be "an element in her basis for contending that she had a reasonable excuse…", and he said so in the very particular context of subsection 25(5), which he had already held (at [4]) precluded the existence of a reasonable excuse arising solely from a genuinely held belief that the document was genuine. As the rest of the judgment of Elias LJ makes clear, there would need to be other ingredients in the recipe before a reasonable excuse could be established, though the appellant's belief in the genuineness of the document was a factor which a jury was entitled to consider as part of the overall picture (see for example at [5], where Elias LJ said "… the concept of reasonable excuse is potentially a broad one, and we do not see why the circumstances in which the document was obtained, and which may cause the defendant to believe that it was genuine, should be ignored when considering whether an excuse for possessing it is reasonable or not").

61. Furthermore, in *Unah*, Elias LJ went on to say that "a judge ought to withdraw that issue [i.e. whether a reasonable excuse had been established] from the jury *only if no reasonable jury could conclude on the facts alleged that the explanation was capable of constituting a reasonable excuse*" [emphasis added] and referred to a previous Court

of Appeal decision *R v AY* [2010] EWCA Crim 762, 1WLR 2644 in which Hughes LJ, giving the judgment of the court, said this (at [21]):

> "A defendant must be allowed to say what his purpose was in possessing the documents in order to submit for the jury's consideration his assertion that that purpose was an *objectively reasonable* one. The only exception is where his purpose, and thus his excuse, is one which no jury could find reasonable, as for example the excuse offered by the defendant G in *R v G*." *[Emphasis added.]*

62. *R v G* [2009] UKHL 13, [2010] 1AC 43 (considered in *Coales*) was a House of Lords decision which considered the application of a "reasonable excuse" defence in relation to a charge in connection with possession or collection of information of a kind likely to be useful to a person committing or preparing an act of terrorism. In doing so, they said this (per Lord Rodger of Earlsferry at [79]):

> "What he has to show is that he had an *objectively* reasonable excuse for possessing something which Parliament has made it, prima facie, a crime for him to possess because of its potential utility to a terrorist." *[Emphasis added.]*

And, at [81]:

> "Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case. Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide."

63. From this, it is clear that in the criminal sphere there is a long line of the highest authority to the effect that the concept of "reasonable excuse" includes a requirement that the excuse in question should be *objectively* reasonable. We see no reason why different rules should apply when considering the same concept in a tax context.

64. The FTT in *Chichester* went on to say this (at [16]):

> "If the claimant's (honest) belief is, when viewed objectively, irrational or apparently unreasonable, that is a factor that might weigh in the forensic exercise of deciding whether the person claiming to hold the stated (honest) belief did in fact hold the stated (honest) belief. It is not a separate test to be applied in deciding whether an honest belief amounts to a reasonable excuse. If it was, it would inject an impermissible element of objectivity into an enquiry which is solely subjective, in the sense that it turns solely upon the state of mind or subjective belief of the relevant person. Accordingly, it is wrong in law to proceed on the basis that an honestly held belief would not amount to a reasonable excuse if, from an objective standpoint, it was considered that that belief was irrational or unreasonable. The objective analysis goes solely to the issue of credibility. If a Tribunal finds that a person, as a matter of fact, held a particular honest and genuine belief, that may amount to a reasonable

> excuse (on appropriate facts) regardless of whether that belief would be characterised as irrational or unreasonable when viewed objectively."

65. This argument proceeds from the premise that *Unah* established a general proposition that a genuine or honestly held belief can (impliedly on its own) amount to a reasonable excuse. As identified above, that is a false premise. It is inconsistent with the other authorities cited above and in our view incorrectly states the law.

66. In *Gray*, the FTT (Judge Geraint Jones QC and Duncan McBride) revisited the issue. Its view appears to have been slightly different from that expounded in *Chichester*. It first said this:

> "8. A "reasonable excuse" can be established where a person puts forward an excuse which, when judged objectively, amounts to a reasonable excuse. There can be no doubt that at that stage of the enquiry, an objective test applies.
>
> 9. If a person holds an honest belief in a state of fact which, when viewed objectively, provides that person with a reasonable excuse for not doing a particular act, the sole enquiry by the Tribunal is then to consider whether the person asserting that honest belief did in fact honestly hold the asserted belief."

67. On its face, this would appear to be consistent with what was said in *The Clean Car Co* and *Coales* and the other authorities cited above. However, the FTT went on to say this:

> "The more surprising, outlandish or unreasonable the belief being asserted, the less likely it is that, as a matter of the necessary forensic exercise, the Tribunal will accept that any such belief was honestly held. *Nonetheless, if, once that forensic exercise has been undertaken, the Tribunal accepts that a person honestly believed that an asserted (relevant) fact did exist, there is then no room for going on to consider whether a reasonable person would have held that belief. That is to confuse two separate and distinct stages of the enquiry.*" *[Emphasis added]*

68. Unless, by "(relevant) fact", the FTT meant to refer to a fact or facts which, judged objectively, give rise to a reasonable excuse for the default, then we consider the italicised words to be inconsistent with the clear line of authority summarised above and, accordingly, to be an incorrect statement of the law.

The correct test for "reasonable excuse"

69. 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.

70. Assuming that hurdle to have been overcome by HMRC, 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. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

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.

74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

75. It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

76. The FTT therefore identified the correct legal test for deciding whether the facts that it had found amounted to a reasonable excuse.

"Without unreasonable delay"

77. Whilst neither party focused on this element of the FTT's decision in any great detail, and it was not raised in the appellant's grounds of appeal, we should mention it in the interests of certainty. It seems to us that the concept of "unreasonable delay" is just as much an objective concept as that of "reasonable excuse", mainly because both concepts are explicitly based on the common underlying concept of "reasonableness". It would also be extremely odd if the legislation required an objective test in relation to the existence of the initial reasonable excuse but then abandoned any requirement of objective reasonableness in relation to the deemed continuation of the initial reasonable excuse where there is a subsequent delay in remedying the failure after the initial reasonable excuse in fact ceases.

Summary

78. There was no argument by the appellant that the FTT had made any finding of primary fact for which there was no evidence or which was inconsistent with the evidence and contradictory of it.

79. The FTT purported to apply the correct legal test to primary facts which it had been entitled (on the evidence) to find. Therefore its decision (that the appellant's initial reasonable excuse for her failure ceased and the failure was not remedied without unreasonable delay after such cessation) could only be overturned by this Tribunal if we were satisfied that the FTT had plainly misapplied the correct test to the facts in reaching its conclusion.

80. It does not matter whether we would have reached a different conclusion from the FTT, the only question for this Tribunal is whether the FTT was, as a matter of law, entitled to reach the conclusion that it did. In deciding that question, we are considering a classic example of Lord Hoffmann's "application of a not altogether precise legal standard to a combination of features of varying importance" (see the *Designer's Guild* case referred to at [41] above). We bear in mind also Lord Hoffmann's warning in *Biogen v Medeva* (also referred to at [41] above); the standard of "reasonableness", just as much as "negligence" or "obviousness" involves no question of principle but is simply a matter of degree and accordingly we approach with great caution the matter of differing from the FTT in its evaluation of that standard. It is clear to us that the FTT did not err in principle and its decision fell well within the range of justifiable decisions on the basis of the facts. Accordingly we cannot interfere with its decision.

Final comments

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.

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, and for how long. *The Clean Car Co* itself provides an example of such a situation.

83. It is regrettably still the case that HMRC sometimes continue to argue that the law requires any reasonable excuse to be based on some "unforeseeable or inescapable" event, echoing the dissenting remarks of Scott LJ in *Commissioners for Customs and Excise v Steptoe* [1992] STC 757. It is quite clear that the concept of "reasonable excuse" is far wider than those remarks implied might be the case. In an appropriate case where HMRC base their argument on this unsustainable position, the FTT may well consider it appropriate to exercise their jurisdiction to award costs against HMRC for unreasonable conduct of the appeal. Similar observations apply to the HMRC "mantra" referred to at [109] of the 2014 Decision, to the effect that an "unexpected or

unusual event" is required before there can be a reasonable excuse. The statutory phrase is "reasonable excuse", and those are the words that are to be applied by HMRC and the FTT, interpreted as set out above; the addition or substitution of other words beyond those used in the statute can very easily obscure rather than clarify the value judgment as to whether or not a taxpayer has a reasonable excuse, and should be avoided.

84. We expressed concern at the hearing that Mrs Perrin's experience in believing that her return had been filed simply because she had received a submission receipt number whereas there were still further steps in the process to be completed might be a trap that other taxpayers might unwittingly fall into, particularly those whose experience with technology is limited.

85. Accordingly, at our request, after the hearing HMRC provided further detail as to how the process now operates. It would appear from HMRC's explanation, and the sample screenshots that they provided, that when the taxpayer has populated his or her return with all the required details but has not yet carried out the final steps to submit the return, the phrase "not submitted" appears in bold at the top of the return and a reference number appears at the end, but this is no longer referred to as a submission receipt reference number when this document is printed out. If the taxpayer is ready to send their return, they can reach the "submit your return" page from "save your return" and other pages through the "file a return" menu that appears on these pages, or in the case of "save your return" through clicking "next". The "submit your return" page will say in bold at the top "you have not yet submitted your return" if that is the case. Once the taxpayer confirms that the information given is correct and complete through ticking the checkbox on that page the return can be submitted and when it has been submitted the taxpayer at that point will receive a notice stating that the return was successfully submitted with a submission receipt number. The system, including the submission receipt, will continue to show that the return is in progress after the taxpayer has submitted it until the return passes HMRC's validation process and is accepted on the system.

86. We were told that HMRC provides support for self-assessment through the gov.uk website and the screens that a customer will use to submit a return are shown in videos. At present, these do not show the return submission receipt, but they are regularly added to and updated, and it may be prudent in future updates to emphasise the point at which, and how, the taxpayer can be sure that his or her return has been submitted and accepted by HMRC.

Disposition

87. For the reasons set out above, the appeal is DISMISSED.

Costs

88. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

UPPER TRIBUNAL JUDGE TIM HERRINGTON

UPPER TRIBUNAL JUDGE KEVIN POOLE

RELEASE DATE: 14 MAY 2018