[2018] UKFTT 5 (TC)

TC06284

Appeal number: TC/2014/06578

INCOME TAX – penalties for failure to file returns for 2 years – appellant would not or could not pay underpayment shown on P800s and said by HMRC not to be capable of being coded out – notice to file returns given to establish enforceable debt arising from self-assessment – whether Tribunal has jurisdiction to take into account whether returns issued for purpose in s 8(1) TMA* – PML *and* Birkett *considered - held penalties invalid as not issued for s 8(1) purpose – in alternative whether reasonable excuse for failure to file on time: held no – in alternative whether HMRC decision on special circumstances flawed: held yes – there were unusual or out of the ordinary circumstances that justified reduction in penalties, and that the imposition of the penalties was not in accordance with the clear compliance intention of the legislation – penalties cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID GOLDSMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House, London EC1 on 20 October 2017 with post hearing submissions made by HMRC on 3 November 2017

The Appellant did not appear and was not represented

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

Introduction

1. This is my decision on appeals by Mr David Goldsmith ("the appellant") against penalties imposed on him by the Respondents ("HMRC") for his failure to deliver income tax returns for the tax years 2011-12 and 2012-13 by the due date.

2. Although the appeals were made in 2014, the case was stayed behind the appeal of Mr Keith Donaldson from the decision of this Tribunal in *Morgan & another v HMRC* [2013] UKFTT 317 (TC). Mr Donaldson's appeal was ultimately decided in 2016 by the Court of Appeal on appeal from the Upper Tribunal (Tax and Chancery Chamber). As that decision of the Court of Appeal, under the name of *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*"), is now final, leave to appeal to the Supreme Court having been denied, the stayed appeal now falls to be dealt with.

3. On 24 May 2017 I considered the appeal without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 30 November 2014 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 March 2017.

4. Because this appeal was treated as a default paper case so that there was no opportunity to raise points with the parties, I decided that I should ask for the parties' views on a point of law that had occurred to me. Accordingly I issued directions to which I attached my provisional decision on this point and asked for submissions. HMRC replied, not surprisingly as my provisional view was against them, and said that if I was not minded to change my decision they wished to make oral submissions.

5. An oral hearing was therefore arranged for 20 October 2017. The appellant had indicated that he would not be attending or making representations. I obviously already had his grounds of appeal from the bundle of papers sent to me for my consideration of the appeal on paper. Accordingly I decided that it was in the interests of justice to proceed with the hearing without the appellant being present.

6. Following the hearing I made directions that HMRC could make further submissions on a question that would arise if they were successful on the point I had raised of my own motion. I have received those submissions and taken them into account.

The issues

The "usual" issues

7. As presented in its Statement of Case by HMRC, the issues here were the same as they are in all of the many "post-*Donaldson*" cases that I, and the other judges in this Chamber, have been dealing with on paper over the last few months. They include whether the appellant had a reasonable excuse for failing to deliver his returns

on time, whether HMRC's decision on the question of special circumstances was flawed, whether in the particular case the daily penalties fell within the requirements for notification laid down by the Court of Appeal in *Donaldson* and, an all too common question, what appeals and permissions to make or notify appeals late were actually before the Tribunal.

The unusual issue & the dual system of taxation

8. As I said in §4 there is another issue which I raised of my own motion. This issue arises because this appeal is unusual. The appellant is one of the substantial majority of taxpayers in the UK whose contact with HMRC was, until the events described later, minimal.

9. This is an unusual case in that the appellant was not registered on HMRC's self-assessment computer system in the years to which the penalties relate. Some explanation is required, and this explanation needs to consider the historical development of the current income tax system (the system know to HMRC[1] as the SA or self-assessment system) both as regards those within it and, more importantly for this case, those who are not within it[2].

10. In relation to income tax, this Tribunal deals, and can only potentially deal, with the minority[3] of the people in the United Kingdom who are within what is now known as the self-assessment regime[4]. The same was true of its predecessors, in particular the General Commissioners, or to give them their original title, the Commissioners for the general purposes of the income tax.

11. In the nineteenth century there was a much smaller minority than now of people who might have had dealings with the Inland Revenue. This was because income tax applied only above a threshold which excluded from its application the working and much of the middle classes[5].

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[1] The term SA has become so synonymous with the income tax system that many of HMRC's publications and most officers of HMRC use it as a synonym for "income tax".

[2] There have been one or two cases involving those outside the self-assessment system such as *Robert E Clark v HMRC* [2011] UKFTT 302 (TC) and *Prince & others v HMRC* [2012] UKFTT 157 (TC), and in the latter Judge Colin Bishopp held that a P800 tax calculation was not an assessment against which there were any appeal rights. A P800 is in my view nonetheless an assessment within the long established trinity of liability, assessment and enforcement in *Whitney v CIR* 10 TC 88, just as an amendment to a self-assessment is also a species of assessment (see *Archer, R (on the application of) v HM Revenue and Customs* [2017] EWCA Civ 1962 at [26]). As to P800s see §19.

[3] Recent figures on HMRC's website suggest that just under one-third of all taxpayers are issued with a notice to file a tax return. This figure is undoubtedly larger than it was 10 or 20 years ago, as a result primarily of the increase in self-employment (and disguised employment).

[4] One minor exception to this is that anyone within PAYE, whether they are issued with a return or not, can appeal to the Tribunal against a refusal by HMRC to alter a coding notice.

[5] Many of the middle classes had dealings with the Inland Revenue not so that they could pay tax but so that they could reclaim tax suffered on income which was in excess of their liability ("claims cases"). This category, what the French would call rentiers, still exists, thought it is much smaller than it used to be.

12. The increase in wages and lowering of thresholds for tax liability that accompanied both the First and Second World Wars brought large numbers of employees into the tax system. Until 1944 income tax on earnings from employment (Schedule E) was returned and assessed in much the same way as that on the income from trades and professions (Schedule D), that is with the issue of a notice to file a tax return followed by an assessment[6], estimated if necessary and with the tax shown on the assessment collected in instalments. This led to a great deal of non-payment by, in particular, industrial workers who had never before had to be involved in the tax system.

13. Enter Pay As You Earn ("PAYE"). This system was designed to take employees out of the usual return and assessment system applying to the self-employed and others (then including companies). The genius of the PAYE system was in the use of a code number applied cumulatively throughout the year. The code number represented the "tax free" pay, ie the amount of income that was exempt because of entitlement to allowances, notably the personal allowance. Every weekly payday, by reference to tax tables, an amount would be deducted from gross pay which was 1/52 of the tax free amount in the code number[7]. The cumulative nature of the deductions enabled gaps in earnings (eg through unemployment or strikes), changes of job etc to be accommodated all with the object of the deductions from pay at the end of the tax year being equal to the tax liability. This object is currently set out in law in in s 685 Income Tax (Earnings and Pensions) Act 2003:

> "(1) The Board of Inland Revenue must construct tax tables with a view to securing that so far as possible—
>
> (a) the total income tax payable in respect of PAYE income for any tax year is deducted from PAYE income paid during that year …"[8]

and in regulation 14 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("the PAYE Regulations"):

> (1) If the Inland Revenue determine a code under this regulation, they must have regard to the following matters so far as known to them—
>
> (a) the reliefs from income tax to which the employee is entitled for the tax year in which the code is determined, so far as the employee's title to those reliefs has been established at the time of the determination;
>
> (b) any PAYE income of the employee (other than the relevant payments in relation to which the code is being determined);

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[6] In 1944 there was an immaterial, and now abolished, difference. Assessments under Schedule D were made by the Additional Commissioners, whereas assessments under Schedule E were made by an Inspector of Taxes.

[7] And similarly for those few who then had monthly paydays it was 1/12.

[8] This is also the formulation, though in the passive voice, in s 2(2) Income Tax (Employments) Act 1943 ("the 1943 Act"), the founding legislation for PAYE.

(c) any tax overpaid for any previous tax year which has not been repaid;

(d) any tax remaining unpaid for any previous tax year which is not otherwise recovered;

(e) any tax repaid to the employee in excess of the amount properly due to the employee which may be recovered as if it were unpaid tax under section 30(1) of TMA (recovery of overpayment of tax etc) and which is not otherwise recovered;

(f) unless the employee objects, any other income of the employee which is not PAYE income; and

(g) such other adjustments as may be necessary to secure that, so far as possible, the tax in respect of the employee's income in relation to which the code is determined will be deducted from the relevant payments made during that tax year.[9] [My emphasis]

14. Obviously complete agreement between the tax deducted and tax liability was not always possible. From 1945 to the computerisation of PAYE ("COP") in the 1980s, from about June onwards a physical reconciliation would be carried out by Inland Revenue staff. They would have two items to reconcile. For each employee there would be a paper card called a control card or "concard"[10] with seven yearly columns for details of an employee's tax affairs such as allowances and other matters which affected tax liability. They would also have the Forms P14 delivered by the employer which showed the pay details for the employee and the tax deducted under PAYE.

15. The reconciliation was between these two items and the result could be one of four outcomes. The first was no action, because the two things – liability and tax suffered – reconciled exactly or within laid down margins. The second was a repayment (because the tax suffered exceeded the liability). The third (as indicated in regulation 14(1)(d) of the PAYE Regulations) was that an underpayment[11] arising (because the liability exceeded the tax suffered) was coded out, by reducing the code number that would otherwise apply in the year of the reconciliation or the next or if that was insufficient, by using a K code[12].

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[9] This is also the formulation, in almost identical terms, in regulation 8(1)(e) of the Income Tax (Employments) Regulations, 1944 (SR & O 1944/251), the first regulations made under s 2 of the 1943 Act.

[10] Under COP concards were replaced by electronic records with details input manually. But the reconciliation described in §14 was not done automatically by a computer, and in the noughties a vast backlog of unreconciled cases grew up, leading to the writing off of underpayments or their collection over many years one the automatic computer reconciliation in the NPS system which replaced COP got up and running.

[11] The word "underpayment" is somewhat odd in this context (as is the word "unpaid" in regulation 14(1)(d) of the PAYE Regulations) because, as this case shows, there is no enforceable liability to pay established by the reconciliation process.

[12] A K code operates on the basis that an amount is added to the payment actually received by the taxpayer because the otherwise untaxed income exceeds the allowances available to be set against it.

16. The fourth outcome was an assessment. This would be made where an underpayment might be too large to code out, or coding out was not possible for other reasons. Such an assessment was a Schedule E assessment made under s 29 Taxes Management Act 1970 ("TMA") with the authority of, latterly, s 203(2)(e) and s 205 Income and Corporation Tax Act 1988 (read with regulation 99 of the Income Tax (Pay As You Earn) Regulations 1993 (SI 1993/744)).

17. This then was the PAYE tax system for the then very large majority. It involved no tax return and (with minor exceptions) no assessment within the meaning of the Taxes Acts (one that was appealable). But not all employees were included in this system. Certain persons such as directors or those with complex affairs would be sent a tax return, but they would not necessarily have an assessment made, if the tax deducted was as near as made no difference to the liability.

18. This dual approach, by which I mean on the one hand the return and assessment system (the minority position) and on the other hand the PAYE tax system with no returns and no assessments (the majority position), was the system still when self-assessment ("SA") was introduced with effect from 1996-97.[13]

19. Little changed for the vast majority of those on PAYE. For the minority, those in the return and assessment system, the change to a self-assessment system meant that a tax return had in theory not only to contain information about income and claims for reliefs but also to contain a self-assessment ie a computation by the taxpayer of the tax they owed. I say "in theory" because in practice self-assessments are and were mostly produced by the Inland Revenue/HMRC from the return figures. The tax payable (after deduction of tax withheld and payments on account) disclosed by a self-assessment had to be paid by a deadline or penalties could arise as well as interest. For employees within SA the default position was that an "underpayment"[14] of tax revealed by the self-assessment computation would be coded out in future years, if the underpayment was below a limit set out in the PAYE Regulations[15], and the amount of tax due to be paid would be correspondingly reduced or eliminated[16].

20. For the majority, self-assessment made no difference at all. The PAYE system continued to operate as it had always done outside the minority system of returns and (now self-)assessments. New PAYE computer systems in HMRC eventually started

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[13] There remained in 1996 a much smaller number of claims cases. Those that remained would need to make a return, but not a s 8 TMA return. Theirs was a return under s 42(5)(b) TMA (later paragraph 2 Schedule 1A TMA) designed to establish that their income and chargeable gains liability was such as to allow for a claim to be made for repayment of income tax deducted at source. This claim and return was made on Form R40 – see *Henke & Anor v Revenue & Customs* [2006] SpC550 (Special Commissioner John Clark).

[14] See fn 9. Even were there is a return with a self-assessment which reveals that tax payable within the meaning in s 59B(1) TMA that tax payable is not necessarily "unpaid" at the time the return is made.

[15] Regulation 186 of the PAYE Regulations. A box could be ticked so that the underpayment would instead be payable at the usual time, ie on 31 January in the tax year in which the return was due.

[16] See s 59B(8) TMA and regulation 185 of the PAYE Regulations.

carrying out reconciliations automatically[17], reconciling the details about income and reliefs on the individual employee's computer record with the P14 information on the employer system and that computer produced a tax calculation on Form P800 which explained how any over- or underpayment would be dealt with, the overwhelming majority of the latter being handled by coding out.

21. There were and are inevitably cases where coding out is not possible. These include a case where a person is no longer in receipt of earnings or pensions from which PAYE is deductible so that a code number reflecting the underpayment cannot be used to collect the underpayment. There is also a statutory limitation: regulation 23(3) of the PAYE Regulations prevents a deduction of more than 50% of the payment made in a case where a K code is used. There was in the tax years concerned in this case no other limitation[18] on the amount of any underpayment which may be coded out in a case such as this where no return has been issued and self-assessment made (this contrasts with the position under self-assessment – see §19 and regulations 14(3) and 186 of the PAYE Regulations)

22. HMRC's first approach in these P800 cases is to seek a voluntary payment. But in these cases HMRC clearly also have the option of doing what they did before the arrival of the SA system and making an assessment under s 29(1) TMA 1970. This would be an assessment to which the limiting conditions in subsections (4) and (5) of TMA (introduced in relation to self-assessment) do not apply, as there will have been no return.

23. Some further points about PAYE need to be made in this outline of the background to the current case, because they may be relevant to the appellant's circumstances.

24. Underpayments of tax may and do arise because of a failure by an employer to operate PAYE properly, for example by failing to use a new code number which would increase deductions, by failing to use the correct code number or by failing to operate PAYE at all on some or all payments.

25. Errors of this sort should be picked up in the reconciliation, as the P14 will indicate the last code number used. Where such an error is picked up by HMRC they should approach the employer to see if it is the employer who should account for the under-deduction of PAYE, and, if it is, then the employee is entitled to a credit for that under-deducted tax, irrespective of whether it is recovered from the employer or not. The existence of such a credit would be a ground of appeal against a s 29 TMA assessment on the underpayment or against the determination of a code number.

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[17] See fn 10

[18] A limitation by reference to a percentage of earnings was applied to codes other than K codes by the Income Tax (Pay As You Earn) (Amendment No 4) Regulations (SI 2015/170) with effect from 6 April 2015.

26. Other underpayments arise because of HMRC error. This can arise for a number of reasons. But unless Extra-Statutory Concession A19 applies, such errors do not reduce or extinguish liability for the tax underpaid.

27. PAYE is also sophisticated enough to cater for cases where there is more than one employment (and from now on in this decision "employment" includes a pension). In such a case one source of payment will be the primary source (usually the one with the largest expected amount) and it is to this source that a code which represents the personal allowance will (or at least should) be allocated. For secondary employments there are a variety of special codes that can be used such as BR (basic rate of tax only), 0T (no allowances) and codes starting with a D (eg D0) which collect tax at rates higher than the basic rate.

28. With this rather lengthy preamble I can state that the unusual issue in this case is whether HMRC's actions taken in an effort to collect an underpayment of tax from the appellant were lawful.

The facts

29. From the documents in the bundle of papers I find the following facts.

2011-12

30. In the tax year 2011-12 the appellant had earned income of £10,598. This consisted of two amounts (as disclosed on the P14 record exhibited by HMRC).

31. The first amount is pay of £6,897.38 from an employment with an unnamed employer and where the final tax code used was 747L. This code represents the personal allowance due to the appellant (£7,475). Thus no tax was deducted under PAYE from this employment, because the allowance exceeded the pay.

32. The second amount is Employment and Support Allowance ("ESA") paid by the Department of Work and Pensions ("DWP"). The amount is £3,701.06. No tax was deducted from this payment. It seems that the code attributed to the ESA by DWP was also 747L. There is no evidence in the papers to show if the ESA was taxable or not, or, if taxable, to what extent.

33. On 16 September 2012 a tax calculation (Form P800) was sent to the appellant showing an underpayment of £624.60. This was not coded out (ie reflected in a code number in a later year by reducing the personal allowance).

34. On 1 October 2012 the appellant wrote to HMRC about the underpayment. No copy of the letter is in the file, but the contact history note relates that the "Actions" were "L[e]t[te]r issued to t[ax]p[ayer] informing him about dup[licated] allowances.

35. On 13 May 2013 HMRC sent the appellant an "unpaid income tax letter" which is not in the bundle. HMRC say this would have told him that HMRC were unable to collect the underpayment through his tax code and that if a repayment plan was not agreed a "return would be issued".

36. On 12 July 2013 HMRC agreed a repayment plan to pay the underpayment in 33 instalments the last being due on 1 April 2016. After the third payment the appellant made no more payments under this plan.

37. No notice of liability was given by the appellant under s 7 TMA before 31 October 2012, or at all.

2012-13

38. In the tax year 2012-13 the appellant had earned income of £9,554. This consisted of two amounts (as disclosed on the P14 record exhibited by HMRC).

39. The first amount is pay of £4,574.52 from the same employment as in 2011-12 where the final tax code used was 810L. This code represents the personal allowance due to the appellant. Thus no tax was deducted under PAYE from this employment.

40. The second amount is ESA paid by DWP. The amount is £4,979.70. No tax was deducted under PAYE from this income. It seems that the code attributed to the ESA by DWP was also 810L. There is no evidence in the papers to show if the ESA was taxable or not.

41. On 1 August 2013 a tax calculation (Form P800) for 2012-13 was sent to the appellant showing an underpayment of £289.80. This was not coded out.

42. On 4 August 2013 HMRC sent the appellant an "unpaid income tax letter" which is also not in the bundle. HMRC say this would have told him that HMRC were unable to collect the underpayment through his tax code.

43. On 13 August 2013 the appellant told HMRC he did not have two employments (as they must have stated on the 4 August letter) but one employment and also a right to benefits - ESA. On 12 September HMRC corrected their earlier misstatement.

44. No notice of liability was given by the appellant under s 7 TMA before 31 October 2013, or at all.

Enforcement action: both years

45. Several more letters were sent by HMRC about the unpaid tax until 20 March 2014 when HMRC issued a notice to file a 2012-13 return, with a filing date of 27 June 2014[19]. This is evidenced by an entry on the Return Summary for that year in the bundle.

[19] Under s 8(1G) TMA the due date in this situation is 20 June 2014 not 27 June. It does not matter in practice as the appellant did not file before either date. It is nevertheless strange, even though I am aware that in the normal case where a return is due by a certain date HMRC allow a 7 day period of grace before they initiate penalty proceedings. The period of grace does not however allow them to vary the statutory deadline

46. On 2 May 2014 HMRC entered the appellant's details on their self-assessment computer system. A paper return for 2011-12 (containing a notice to file) was issued on that date to the appellant, and the filing date given was 9 August 2014[20].

47. On 1 July 2014 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the 2012-13 return by the due date.

48. On 19 August 2014 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the 2011-12 return by the due date.

49. On 10 November 2014 the 2011-12 and 2012-13 returns were filed in paper form.

50. On 16 December 2014 HMRC issued a notice informing the appellant that a penalty of £10 had been assessed for failure to file the 2011-12 return by a date 3 months after the due date[21].

51. On 16 December 2014 HMRC also issued a notice informing the appellant that a penalty of £440 had been assessed for failure to file the 2012-13 return by a date 3 months after the due date[22].

Appeals

52. On 28 August 2014 the appellant gave notice to HMRC using Form SA 370 of his appeal against the 2011-12 initial penalty of £100.

53. On 3 September 2014 HMRC wrote to the appellant to say he did not have a reasonable excuse, and then "I have treated your appeal as settled under S54(1) Taxes Management Act 1970[23]".

54. However HMRC *also* said in this letter that the appellant had three options: to supply HMRC with further information for consideration; to ask for an independent review; or to send his appeal to the Tribunal. In large, bold type the appellant was told he must do whichever he chose by 4 October 2014[24].

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[20] See fn 19.

[21] A relaxation from the statutory position – see fn 19.

[22] Ditto – see fn 19.

[23] This cannot possibly be correct in law, as a s 54 TMA agreement requires the agreement of both parties. It is a statement I have seen made in this context in other cases, and here and in those others it may arise from the use of a template response which allows this phrase to be deleted where it is not applicable and it is not being deleted when it should be.

[24] This seems somewhat dubious as a statement of law. In direct tax cases governed by sections 49A to 49I TMA a deadline only arises where HMRC have offered a review. The wording in the letter is not that of an offer but of a statement that the taxpayer may request a review. That it is not an offer seems to be confirmed by HMRC's willingness to enter into further correspondence. If a taxpayer had been *offered* a review *or* the opportunity to enter into correspondence, and they chose the latter course, they

55. On 9 September 2014 the appellant completed Form SA 634 asking for a review.

56. On 28 October 2014 the conclusion of the review was sent to the appellant. (There does not seem to have been any intervening contact). The conclusion was to uphold the penalty of £100 for 2011-12.

57. There is also in the file a "Self Assessment: late Tax Return Daily Penalty Reminder" addressed to the appellant dated 28 October 2014.

58. On 30 November 2014 the appellant notified his appeal to the Tribunal. The item "The amount of tax or penalty or surcharge" says "£100 for two years."

59. On 16 December 2014 the Tribunal wrote to the appellant to say they had received the notification of the appeal on 8 December 2014 which was more than 30 days from the date of the appealed decision, and asking him if he wished to apply for permission to appeal out of time.

60. On 21 December 2014 the appellant replied to say that he had had to await a reply from HMRC and had to find out from them how to appeal.

What appeals are before the Tribunal?

61. From the papers it appears that the only appeal to HMRC explicitly made was against the £100 penalty for 2011-12. The appeal was notified to the Tribunal following HMRC's non-acceptance of it.

62. HMRC say in the Statement of Case that no appeals have been made to them against the initial and daily penalties for 2012-13, but they are aware that the Tribunal has a wider discretion when considering late appeal applications. The 2012-13 initial penalty is referred to in the notification to the Tribunal.

63. HMRC also say in that Statement of Case that this is an appeal against daily penalties for 2011-12, and against the initial and daily penalties for 2012-13. By so stating it seems to me that HMRC are waiving the need for the appellant to explicitly make an appeal to them in relation to those penalties and are leaving it to the Tribunal to decide whether to accept the appeals as properly notified.

64. It is clear to me from the papers that the appellant objects to all the penalties. It is also the case that the daily penalties were issued after the notification to the Tribunal of appeals against both initial penalties. HMRC do not say anything about any contact after November 2014 from the appellant about appeals.

65. In the circumstances I consider that the appellant has notified an appeal against both initial penalties as that is apparent from the face of the Tribunal form. HMRC do not object to the 2012-13 initial penalty being considered, and so I consider it.

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would have been out of time to accept the offer of a review (s 49C(3) and (8)) or notify the appeal to the Tribunal if the correspondence did not lead to settlement of the appeal (s 49H(2) and (5)).

66. In the absence of any information from HMRC about post-November 2014 contacts I am also prepared to treat as before the Tribunal appeals against the daily penalties. This is partly because on 5 February 2015 the Tribunal told the appellant "your appeal appears to relate to daily penalties …" and so the appeals were stayed behind *Donaldson*. It would be unjust now to resile from that notification.

67. There remains the question of the late notification raised by the Tribunal. Section 49G TMA says that an appeal must be notified to the Tribunal in the period of 30 days starting with the date of the review conclusion letter "in accordance with s 49E(6)". The date of that letter was 28 October. The appellant sent his appeal on 30 November and the Tribunal received it on 8 December. Whichever is correctly regarded as the date of notification, the notification was late, by at least two days.

68. In view of the appellant's explanation letter of 16 December 2014 I would give permission for the appeals to be notified after the "post-review period" if I were required to. I am not required to because there is no "post-review period".

69. HMRC informed the appellant of his right to ask for a review. He asked for one. Section 49B(2) requires HMRC to notify the appellant of their view of the matter within the "relevant period". That period is the period of 30 days from the day on which HMRC received notification of the request for a review (s 49B(5)(a)) or such longer period as is reasonable. No notification of HMRC's view of the matter was given in the period between the request for the review and the purported conclusions.

70. Section 49D gives a person who has made an appeal to HMRC an unlimited time to notify the Tribunal. The only relevant exception is where "HMRC have given a notification of their view of the matter in question under section 49B".

71. It is undeniable that HMRC have given their view of the matter. But it was given before the relevant period. The HMRC Manual on Appeals, Reviews & Tribunals (ARTG) at paragraph 2213 confirms that it is also HMRC's view that a "view of the matter" letter must be sent *after* the request for a review even if it simply confirms a view already given on receipt of the appeal.

72. Thus there is in fact no time limit which the appellant had failed to adhere to.

Law

73. In an appendix to this decision I set out the relevant parts of Schedule 55 FA 2009.

74. I should also set out here the unusual legal position where taxable (contribution based) ESA is paid as it seems to have been done here.

75. Taxable ESA is paid under what is somewhat oddly called a modified version of PAYE in the regulations inserting a Chapter 5 into Part 8 of the PAYE Regulations. Regulation 184B(1) shows that a limited number only of those regulations do apply to ESA but that limited number includes regulation 21 which requires an employer to

deduct tax by reference to a code number and regulation 185 which modifies the total net tax deducted for the purposes of among others s 59B TMA (payment of tax). Regulation 184B(3) then says that in regulation 21 as it applies to ESA the references to deduction of tax are read as references to the tax calculation the DWP is required to make, in certain cases only, at the year end or on cessation of a claim to ESA under regulation 184I or 184K. Thus there is no requirement on DWP to deduct tax, as distinct from the treatment by DWP under Chapter 3 of Part 8 of the PAYE Regulations of payments of incapacity benefit.

76. What DWP must do though in *all* cases is to issue a certificate to the claimant at the end of the year (or the end of the claim for ESA) which includes the total amount of ESA paid and the taxable amount included in that total, and that certificate includes the claimant's code. The reference to a code is capable of being misleading: DWP is required to record a code which will depend on whether a P45 was given to them when the claim started. If no employment ceases before the claim starts so that no P45 is given, the emergency code will be used (regulation 184F(b)). This code gives the personal allowance but no other tax free amounts, and is not reduced for amounts falling to be coded out. The code recorded by HMRC for ESA in both relevant years is the emergency code so this seems to be what had happened.

77. Under regulation 184J DWP is required to make return to HMRC of the information is has to give the claimant.

78. Because DWP does not operate any form of withholding, HMRC's PAYE Manual makes it clear that where there is another PAYE source such as an employment the code number relevant to this employment should be reduced so as to tax the ESA on a monthly basis.

79. It can be seen then that the contact history note in §34 is wrong. The underpayment did not arise from the use of duplicated allowances when seeking to deduct tax: it arose from the fact that DWP does not deduct tax from ESA. If the earnings from the employment and the ESA were contemporaneous HMRC should have ensured that the code number of the employment was reduced to collect the ESA, although that might not have collected all the tax due on the ESA because of the use in these circumstances of a Week 1 or Month 1 non-cumulative code.

Submissions for the decision on the papers

80. The grounds of appeal as set out in the notification of the appeals to the Tribunal, the original appeal and the review request are that:

(1) The appellant had not received notice to file the 2011-12 return

(2) He had not received tax returns to complete until June 2014.

81. HMRC's response is:

(1) Their records show the issue of the 2011-12 return on 2 May 2014.

(2) Their records show the issue of a notice to file the 2012-13 return on 20 March 2014.

(3) No correspondence was returned to them by Royal Mail, thus it is reasonable to expect that all correspondence was received by the appellant.

(4) The appellant was required to complete returns for both years within 3 months of the date of issue of the notice to file (although they actually say they gave 3 months and 7 days).

82. As HMRC specified the dates on which he did file the returns and that was after 3 months from that date of issue of the notice to file, I *infer* that HMRC contend that there was a failure to file by the due date so as to bring Schedule 55 FA 2009 into play. They don't actually say so.

83. They further submit that:

(1) They made every effort to avoid the appellant having to complete returns

(2) The appellant did not take sufficient care in relation to his statutory obligations when made aware that the returns were required.

(3) He did not have a reasonable excuse for his failure to file within the time allowed.

(4) There are no special circumstances that would permit a special reduction.

Draft decision and request for an oral hearing

84. When I considered the appeals on the basis of the bundle of papers I noted that unusually HMRC had said nothing about the burden of proof. But from other cases of this type I know that they accept that it is for them to show from the evidence that they put forward in their Statement of Case and the exhibits attached to it that the penalties have been validly imposed.

85. In particular they have to show that the penalties were incurred for a failure that is listed in paragraph 1 Schedule 55 FA 2009. The relevant failure here is a failure to deliver by the due date a "[r]eturn under section 8(1)(a) of TMA 1970" (Item 1 Table in paragraph 1). Section 8(1)(a) says:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

86. Where a notice to file a return is issued on the day after the tax year to which they relate (as they usually are) to someone already in the self-assessment system, then obviously the return is required for the purpose set out in s 8(1). Under the criteria in force in the tax years concerned HMRC did not give a notice to file to a

person who is neither a director of a company nor would fall, in the absence of a notice to file, within the scope of s 7 TMA so as to be required to notify chargeability to tax.

87. If it is issued later in the year because the person, not previously within the SA system, has notified liability under s 7 TMA, then the return is also required for the purpose set out in s 8(1).

88. In both these cases, the annual notice to file on 6 April or thereabouts and the failure to notify case, the return will give to HMRC information that they do not know, the total amount of income from a trade or profession, the amount of investment and savings income and the amount of chargeable gains.

89. But in this particular case HMRC already know the amounts in which the appellant is chargeable and they know the lesser amount paid by him by way of income tax through PAYE deductions, because they have issued a P800 showing both, and have asked him to pay the balance.

90. It seems to me that HMRC's purpose in serving the notice to file in this case is not to give HMRC information that they do not know about the person's income and tax liability. HMRC's purpose in serving the notice in these circumstances is to create an enforceable debt to the Crown. This is because one of the three[25] circumstances where HMRC can enforce payment of the tax to which a person is chargeable is when tax shown in a self-assessment becomes due and payable by virtue of s 59B TMA, and that is the way they have sought to collect the tax here, as can be seen from HMRC's statement of the facts and the exhibits attached to the statement.

91. It seemed to me then in looking at this particular case on the papers that it was arguable that where a return is issued in the circumstances of this case it is not issued for the purpose set out in s 8(1) TMA and consequently failure to deliver it by the due date is not a failure within paragraph 1 Schedule 55 FA 2009, and the penalties in this case are not properly imposed.

92. As this argument had not been suggested by the appellant, I considered it right to find out from HMRC whether they agreed with my view or if they wished to make submissions to show why it was not correct.

93. Accordingly on 27 October 2017 I sent a draft of part of my decision to HMRC and asked if they wished to make submissions. I had a response from HMRC Solicitor's Office to the effect that I was questioning the exercise of HMRC's discretion in issuing returns, something which I did not have jurisdiction to do. They also made a "floodgates" argument.

94. I agree with them that if I were in fact suggesting that HMRC's right to decide who they issue a notice to file to was justiciable before this Tribunal, I would be exceeding my jurisdiction. HMRC have an unfettered discretion to decide who to

[25] The other two are by assessing under s 29 TMA and making a determination under s 28C TMA.

issue a notice to file to and they exercise it by following criteria which they set out and which in general follow the provisions of s 7 TMA (notifying chargeability). But that discretion is to issue or not to issue a notice to file that meets the statutory requirements of s 8(1) TMA.

95. When I informed HMRC's Solicitor's Office that my view had not been changed by their arguments on discretion and jurisdiction, they asked for an oral hearing. This hearing was held on 20 October when HMRC was represented by Ms Nathan, who had provided a skeleton argument. The appellant, although notified of the hearing, did not attend. Given that he had requested a paper decision and had given his arguments to the Tribunal for the purpose of such a decision and given that the issues raised with HMRC were purely ones of law which he could not be expected to deal with, it was no surprise that he indicated he would not be attending.

96. As a result of the appellant's non-attendance I am conscious that I have only heard one side of the arguments. I sought to raise with Ms Nathan points which the appellant, had he been professionally advised, might have raised.

HMRC's submissions for the oral hearing

97. In her skeleton Ms Nathan submitted that it is clear that the appellant failed to file within the time allowed the notices sent to him. The only matter that the Tribunal may consider in these circumstances is whether the notices that were issued answered to the description in s 8 TMA. For this proposition she cited *Nijjar v HMRC* [2017] UKFTT 175 at [25] and *Kieran O'Donnell v HMRC* [2016] UKFTT 743 at [37] fn 2.

98. She submitted further that, as a matter of statutory language, paragraph 1 Schedule 55 FA 2009 cannot warrant an enquiry into whether it was appropriate for a s 8 TMA return to be submitted because:

(1) all that paragraph 1 requires is that no s 8 TMA return has been submitted

(2) paragraph 1 does not require an enquiry into whether there were circumstances which merited the submission of a s 8 TMA return

(3) such a question strays into an assessment of the Respondents' conduct in issuing a notice requiring the submission of a s 8 notice: since paragraph 1 looks only at whether a s 8 return was submitted on time and not whether it was appropriate for a s 8 return to be submitted at all, such an enquiry is inappropriate.

99. Further, it is inappropriate for the Tribunal, in the context of penalty proceedings, to question the conduct of HMRC given the scope of the Tribunal's powers under paragraphs 20 to 22 Schedule 55 as established by Parliament.

100. She cited the decision of the Upper Tribunal in *Birkett & others v HMRC* [2017] UKUT 0089 ("*Birkett*") to the effect that it was not appropriate for the First-tier Tribunal to consider the validity of notices when considering "the matter in issue" (see s 49D(3) TMA which applies in this case as a result of paragraph 21(1) Schedule 55) namely whether a penalty was payable under paragraph 40 Schedule 36 FA 2008

(information notices). She also cited *PML Accounting Ltd v HMRC* [2017] EWHC 733 (Admin) ("*PML*").

101. The decisions in these two cases, said to be binding on me, led to the following submissions by HMRC:

(1) paragraph 21 Schedule 55 treats appeals against penalties issued under paragraph 1 Schedule 55 as if they were appeals against assessments so that the provisions of Part 5 TMA, including s 49D TMA, are engaged

(2) in a penalty appeal, the Tribunal is limited to deciding the "matter in issue" - namely the issue of whether the penalties are payable by the Appellant

(3) the penalty is due if no s 8 return has been submitted on time: that consequence is mandatory not discretionary. There is no doubt that no s 8 TMA return has been submitted on time. A penalty is therefore due

(4) nothing in paragraphs 1, 3 or 20 to 22 Schedule 55 FA 2009 permits the Tribunal to consider or determine whether the Appellant should have been required to complete a s 8 TMA notice

(5) in the absence of clear statutory authority granting it the right to determine that issue, the First-tier Tribunal, being a creature of statute cannot assume a jurisdiction to consider whether the Appellant should have been issued with a notice to complete a s 8 TMA return.

(6) further, again in the absence of clear statutory authority, the Tribunal is not empowered to look behind the return which on its face is a s 8 TMA return to determine whether it achieves the purpose of "establishing the amounts in which a person is chargeable to income tax". This is because

(a) that is not the "matter in issue"

(b) that looks behind the document which is, on its face, a s 8 TMA return, to see if it achieves the purpose of establishing the amounts in which a person is chargeable to income tax.

102. But:

(1) there is no warrant in the legislation to look behind the notice

(2) there is no right of appeal against the giving of a notice to make and deliver a return under s 8 TMA

(3) by analogy with the APN and PPN penalty cases, it is not possible in the context of a penalty appeal for the Tribunal to determine the validity of the underlying document i.e. the APN or PPN and, in this case, the s 8 TMA return; and

(4) the decision to give a notice to make and deliver a s 8 TMA return is a matter within HMRC' discretion in carrying out their duty of collection and management.

Further it is trite law that the Tribunal has no supervisory jurisdiction nor can it consider whether the Respondents acted reasonably in giving the notice to make and deliver a s 8 TMA return.

103. There are some further arguments which I set out and deal with later.

Discussion

Can I examine the validity of the notices?

104. HMRC submits that on the basis of the binding decisions in *Birkett* and *PML* I cannot consider whether the s 8 notice was given for the purpose there set out or not.

105. In *PML* the First-tier Tribunal's decision (cited as [2015] UKFTT 40 (Judge Alexander and Ms Newns)) was, relevantly, that penalty assessments under paragraph 40 Schedule 36 FA 2008 were invalid, despite a finding that the information notice concerned had not been complied with by the date allowed, as the information notice itself did not relate to tax position of the recipient.

106. Following this decision that the notice was invalid, which was not appealed by HMRC to the Upper Tribunal, the appellant sought judicial review of HMRC's decision to retain substantial information and work product derived from the material supplied in eventual compliance with the notice and HMRC's refusal to confirm that it would not make use of this material in the future. The appellant also argued that:

> "… even if it was wrong, and there were errors in the Tribunal's determination, the validity of the notice was conclusively determined by the Tribunal. Absent any appeal by HMRC to the Upper Tribunal its decision is final. In its submission HMRC are barred from raising the issue of the validity of the notice by virtue of the doctrine of issue estoppel or res judicata. In any event, the claimant submitted, HMRC is now estopped from challenging the validity of the Tribunal's decision because it previously represented that it accepted the decision."

107. In the Administrative Court Sir Ross Cranston did consider the validity of the notice and the First-tier Tribunal's decision. I set out this part of his decision in full:

> "55. Given HMRC's defence, however, the judicial review involves a critical consideration of the Tribunal's conclusion that the information notice was invalid. HMRC argued that the Tribunal lacked jurisdiction to determine the validity of the information notice, and that its decision on this point was wrong. By contrast, in the claimant's submission not only was the Tribunal correct but HMRC was barred from challenging the decision in the present proceeding. A major focus of the parties' submissions concerned the jurisdiction of the Tribunal to consider the validity of the information notice in the penalties appeal. There were various aspects to this.
>
> *Section 54 TMA 1970*

56. HMRC submitted that section 54 TMA 1970 provided a complete answer regarding the status of the Tribunal's conclusion regarding the validity of the information notice. Its case was that there was an appeal against the information notice and as a result of section 54 TMA 1970 the settlement of that appeal meant that the issue of its validity was res judicata and/or the Tribunal was estopped from determining the same issue again as it purported to do in the penalties appeal.

57. The appeal against the information notice occurred when, in December 2013, the claimant appealed against the time HMRC had given it to comply with it. That appeal was compromised because HMRC agreed to extend the time. HMRC contended that section 54 applied and for all purposes its consequences were the same as if, at the time when the agreement was reached, the claimant had come to the Tribunal itself and it had determined the appeal. In HMRC's submission, although the Tribunal recognised that section 54 applied to that compromise agreement it did not appreciate that it precluded it from determining the validity of the information notice.

58. In response to HMRC's case, the claimant accepted that a section 54 agreement would be treated as if the Tribunal had decided the issues raised and would give rise to issue estoppel/res judicata in the same way as a decision of the Tribunal. But, it contended, that only applied where there was an identity between the issue determined in the earlier appeal and the issue raised in any subsequent appeal. In its submission, there are two separate categories of appeal which can be made in respect of an information notice under paragraph 29 of Schedule 36 of [*sic*] the 2008 Act, an appeal against the notice and an appeal against any requirement in the notice. In its submission the December 2013 appeal was not against the notice or its validity but against a requirement in the notice, namely, the requirement to provide the requested material by 11 January 2013.

59. The claimant added that even if the appeal had been an appeal against the information notice, issue estoppel applied only in respect of issues which the unsuccessful party raised and had determined against them in the earlier litigation. It cited *Caffoor and Others, the Trustees of the Abdul Gaffoor Trust* v. *Commissioner of Income Tax, Colombo* [1961] AC 584, where the Privy Council held that the Commissioners were not estopped by the decision of the Board of Review for the year 1949-50 from challenging the trustees' claim to an exemption as a charity for the subsequent years. In the present judicial review, the claimant added, HMRC could have raised the section 54 argument it advanced before me in the penalties appeal in the Tribunal or by appealing to the Upper Tribunal. It did not do so and cannot do so now.

60. In my view the statutory regime which applies to information notices precludes the claimant from arguing that the 2013 appeal left unresolved the validity of the information notice. There was never any appeal on that issue. As a result paragraph 32(5) of Schedule 36 of the 2008 Act, and section 54 TMA 1970, meant that the compromise agreement was final as regards any issue concerning the information

notice. When it came to the penalties appeal, what the Tribunal did in addressing on its own initiative the validity of the information notice was to reopen a final decision.

61. The only possible basis for the Tribunal to do this was by granting the claimant an out of time appeal, albeit that the claimant had never challenged the validity of the information notice in the penalties appeal or otherwise. Late appeals are possible where no in-time appeal has been made, but under section 49 TMA 1970 they turn on HMRC being notified and satisfied as to reasonable excuse and that there has been no unreasonable delay. No attempt was ever made to address these preconditions for a late appeal as regards the notice's validity. In the penalties appeal HMRC's representative was wrong to concede before the Tribunal that a late appeal was possible. He should never have done so because the statutory preconditions did not exist.

62. In my respectful judgment therefore, the Tribunal was wrong in assuming that it had jurisdiction to consider the validity of the information notice.

Issues in a penalties appeal

63. There is another reason that in my judgment the Tribunal had no jurisdiction to consider the validity of the information notice in the penalties appeal. That is the narrow scope of the issues in a penalties appeal as a result of the relevant statutory provisions. That narrow scope was correctly identified, in my view, in *Birkett* v. *Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 89 (TCC).

64. The claimant contended that in this case the issue was whether the claimant was liable for a penalty under paragraphs 39 or 40 of Schedule 36 of the 2008 Act. That included whether Mr Dootson's decision was correct that the pre-conditions for imposing them had been met. The pre-conditions in this case included whether there was a valid information notice which had not been complied with. In the claimant's submission the Tribunal was correct to conclude that the validity of the information notice was "fundamental to the question of the lawfulness of the penalties under appeal".

65. The claimant sought to distinguish *Birkett* on the basis that the specific issue being considered there was whether the taxpayer could raise the public law ground of legitimate expectation in support of its appeal against penalties, in that case against those imposed under paragraph 40. Under the statutory provisions an argument of legitimate expectation was not an issue which went to the "matter in question", whether a penalty was payable, so clearly in that case the Tribunal had no jurisdiction to consider that issue.

66. In my view these submissions and the Tribunal's decision misunderstand the statutory framework and are inconsistent with *Birkett*. The Tribunal's jurisdiction is statutory. Section 49D TMA 1970 provides that the Tribunal's overall jurisdiction is to decide "the matter in question". The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, 40.." or

> against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties appeal paragraph 39(1) of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. Paragraph 40(1) for daily default applies "if the failure or obstruction" continues.
>
> 67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1) and 40(1) is the narrow one of whether, in the former case, the person has failed to comply with the notice, and with the latter, whether the failure or obstruction has continued. The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. As the Upper Tribunal in *Birkett* held at paragraph [42], the right of appeal against the officer's decision to impose a penalty "is simply a question of whether the requirements in para 40" – and by extension paragraph 39 – "have been satisfied".
>
> 68. In my view all this makes sense within the statutory scheme since any appeal against the validity of an information notice is decided at an earlier stage than the penalty appeal, and under separate statutory provisions. In this case if on the penalty appeal the Tribunal was to consider the validity of the information notice it would have had to be by way of a late appeal. The Tribunal rejected that course and, as explained earlier, a late appeal against the information notice was not possible in the circumstances of this case."

108. In my view it is clear from this decision that the question of the validity of a Schedule 36 notice may be determined by the First-tier Tribunal, but only on an appeal under paragraph 29 Schedule 36, that is an appeal against the notice and an appeal against any requirement in the notice. That was also HMRC's position (see [56]).

109. The point was not considered in *Birkett* because there was no appeal against the notice. In *Birkett* the Upper Tribunal was considering an appeal against a penalty for non-compliance with a notice by the time limit. It held that the question whether the appellant there had a legitimate expectation that daily penalties would be deferred was not one which was justiciable in the tribunals on an appal against the penalties.

110. The decision in *PML* (and *Birkett*) is in contrast with that of the Chancery Division in *B & S Displays Ltd & Others v Special Commissioners of Income Tax and CIR* 52 TC 318 (1978) ("*B&S*"). In that case the Commissioners of Inland Revenue took penalty proceedings against the appellant companies before the Special Commissioners. In those proceedings the appellants argued that certain notices issued by the Commissioners under s 20 TMA 1970 (as it stood following substitution by Schedule 6 FA 1976) were in part invalid because the period covered was not one for which a return had been issued.

111. The Special Commissioners (Mr J B Hodgson and Mr A K Tavaré) held that indeed certain notices were invalid for certain periods for the reasons submitted by the appellants, but they upheld the valid parts of those notices (in other words they severed the invalid parts) and also upheld all the other notices.

112. On appeal to the High Court, Goulding J dismissed all the grounds of appeal except that against the decision of the Special Commissioners to sever parts of the notices.

113. In *Kempton v Special Commissioners of Income Tax and CIR* 66 TC 249 (1992) ("*Kempton*") the Special Commissioner, Judge Patrick Medd QC, was faced with a challenge to the validity of a notice under s 20 TMA. In his decision Judge Medd sets out the rival contentions:

> "It was accepted by Mr. Koenigsberger that the notice, under s 20(1) Taxes Management Act 1970, had been issued to Mrs. Kempton as alleged in the summons, and that Mrs. Kempton had not complied with the notice within the period specified in the notice.
>
> Mr. Koenigsberger indicated, however, that it was his contention that the notice issued by the Inspector was invalid and that, therefore, Mrs. Kempton had a good defence and was not liable to a penalty. In answer to this submission, Mr. Baron asserted that it was not open to Mrs. Kempton to take this point in these penalty proceedings and that the point could only be raised in an application for judicial review."

114. Judge Medd held:

> "It is clear from the Coombs case [*R v Inland Revenue Commissioners, Ex p T C Coombs &* Co [1991] 2 AC 283] that the Inspector's decision to issue a notice under s 20(3) can be challenged by way of judicial review, and I have no doubt that the same must apply if the notice is issued under s 20(1). The question is, therefore, whether, in addition to being able to challenge the Inspector's decision by way of judicial review, the taxpayer is entitled alternatively to challenge it by way of a defence to penalty proceedings.
>
> The answer to this question was not given by the House of Lords in the Coombs case but Bingham L.J., in the Court of Appeal in the case of *Regina v. Inland Revenue Commissioners ex parte Taylor (No. 2)* 1990 STC 379 which was a case where a notice was issued to a solicitor under s 20(2) (which gives similar powers to the Board of Inland Revenue as are given to an inspector by s 20(1)), said, at page 384j
>
> > 'Strictly, however, the taxpayers' remedy is, in the event of non compliance followed by penalty proceedings, to resist the penalty proceedings and then attack the giving of the notice.'
>
> A similar view was expressed by Brightman L.J. in *Essex and Others v. Commissioners of Inland Revenue and Grugan* 53 TC 720, which was an action for a declaration that certain notices were invalid, when he said, at page 743:
>
> > 'I should mention at this stage that ss 98 and 100 of the Taxes Management Act 1970 impose penalties on a person who fails to comply with the requirements of a notice served under s 490 of the other Act. It would therefore have been open to the Plaintiffs to challenge the validity of the notices in any proceedings which might have been brought under ss 98 and 100 of the Taxes Management

> Act instead of claiming a declaratory judgment, as had been done in the present action.'
>
> Those two dicta in the Court of Appeal which were both directed to the situation where notices of a similar nature to the one with which I am concerned were served are, of course, strong persuasive authority for the proposition that a person on whom a notice under s 20(1) is served may raise the question of the validity of the notice as a defence in penalty proceedings brought against him for failure to comply with the notice. However, the question seems to me to have been answered even more authoritatively by the reasoning in the decision of the House of Lords in the case of Wandsworth London Borough Council v. Winder [1984] 3 All ER 976. …
>
> …
>
> I, therefore, hold that it is open to Mrs. Kempton to challenge the validity of the Inspector's decision to serve a notice on her under s 20(1) by way of defence in these proceedings for a penalty." [*My insertion of the full case name and citation for* Coombs]

115. Judge Medd's decision as to validity was not challenged on appeal by the Commissioners of Inland Revenue, and there Mummery J did consider and decide on the question of validity.

116. As decisions of the High Court *B&S* and *Kempton* are as binding on me as much as is *PML*. The major difference it seems to me between *B&S* and *Kempton* on the one hand and *PML* on the other is that in s 20 TMA there was no appeal possible against the issue of, or the requirements in, the notice such as there is in Schedule 36 FA 2008. The scheme of Schedule 36 that Sir Ross refers to at [68] in *PML* is not present in s 20 TMA read with s 98 TMA (the relevant penalty provision).

117. I also note that in *Sharkey v HMRC* [2006] EWHC 300 (Ch) ("*Sharkey*") an appeal against a penalty for failure to comply with a notice issued by HMRC under s 19A TMA (a provision similar to Schedule 36 FA 2008 and which was in fact repealed by paragraph 66 of that Schedule) was considered as being within his jurisdiction by Etherton J, as he then was, in the High Court (on appeal by HMRC from the decision of Special Commissioner Theodore Wallace) where the relevant grounds were that the penalty violated the appellant's human rights. Section 19A TMA did contain a provision allowing an appeal against the notice as well as against a penalty for non-compliance, so is closer to Schedule 36 than is s 20 TMA.

118. I should interpolate at this point that I fail to understand the submission Ms Nathan makes about what is to be derived from *Nijjar* and *O'Donnell*. She refers me to footnote 2 of Judge Richards' decision in the latter case. That footnote reads:

> "In recording that the parties were agreed on this issue [*that the PPNs were validly issued*], I am not suggesting that the Tribunal necessarily has jurisdiction as to the "validity" of PPNs generally. However, it does seem to me that, in order for a penalty to be payable, the Tribunal must be satisfied that the taxpayer has received a PPN (as opposed to some other document). Therefore, if a taxpayer were arguing that a

> document is not a PPN (for example because it does not contain some or all of the information specified in paragraph 4 of Schedule 32) I believe that the Tribunal may well have jurisdiction to consider that argument."

119. This is not saying that the Tribunal does not have any jurisdiction to consider the validity of a PPN. Even if it was saying that, the view expressed is obiter, is not binding on me and is dealing with a very different scheme from either that in Schedule 36 or that in this case.

120. On the basis of this discussion I reject Ms Nathan's argument that *PML* and *Birkett* have the effect that she says they do, to prevent me examining whether the notice to file in this case was validly issued, that is whether it was issued for the statutory purpose of establishing the appellant's liability to tax. *B&S* and *Kempton* and do not support that notion. Because there is no appeal against an HMRC decision to issue a notice to file it seems to me that *B&S* and *Kempton* are cases where the scheme of the legislation is closer to that in Schedule 55 than Schedule 36 FA 2008 is.

121. Ms Nathan also considers that I do not have jurisdiction to consider the validity of the notice to file because of the narrowness of the "matter in question"[26] and the terms of paragraph 20 Schedule 55. I have to say I am slightly surprised that Ms Nathan refers to s 49D TMA as providing the Tribunal's role in the context of this case, as it is HMRC's case that the appellant sought a review, so that I would have expected the reference to be to s 49G. Perhaps HMRC realised that they had not complied with the obligation on them in s 49B to give their view of the matter in question, so that they accept that it is s 49D that is the correct reference in this case.

122. The "matter in question" is defined in s 49I(1)(a) TMA as "the matter to which an appeal relates". In *Birkett* the matter in question was said to be "whether a penalty is payable" where the appeal was under paragraph 47(a) Schedule 36. The Upper Tribunal (Nugee J and Judge Greenbank) went on to say:

> "38. … In other words, the FTT's jurisdiction on an appeal under para 47(a) is in our view confined to asking whether the statutory requirements under para 40(1) are met.
>
> 39. That means that the FTT cannot on an appeal under para 47(a) review the decision of the HMRC officer on any other grounds. In the present case the appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. That does not seem to us to be an issue which goes to the matter in question on an appeal under para 47(a)."

123. In *PML* Sir Ross Cranston held at [65] to [67] that the matter in question was a narrow one and in an appeal under paragraph 47(a) Schedule 36 was limited to the question whether the recipient had failed to comply with the notice.

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[26] Ms Nathan's skeleton refers to the "matter in issue" (in quotation marks so as if a quotation from *Birkett*, but in *Birkett* the Upper Tribunal calls it the matter in question, the statutory phrase).

124. But in my view this passage has to be seen in the context of the next paragraph, [68], where he says that the view he has expressed makes sense within the scheme of Schedule 36 where a challenge to the validity of the notice could be and had to be made in an appeal against the notice itself. That appeal is made under paragraph 29(1) Schedule 36:

> "Where a taxpayer is given a taxpayer notice, the taxpayer may appeal to the First-tier Tribunal against the notice or any requirement in the notice."

125. It is also not obvious to me however that the narrow view of the matter in question stated by Sir Ross Cranston, that the First-tier Tribunal could only consider whether the recipient had failed to comply with the notice, is what the Upper Tribunal in *Birkett* was intending to say was a correct characterisation of this Tribunal's jurisdiction. *Birkett* clearly and unambiguously held that this Tribunal could not treat legitimate expectation of fair treatment as a ground of appeal or a matter in question.

126. I do not read *Birkett* as seeking to say that, for example, the validity of the penalty notice itself (as distinct from the validity of the information notice) could not be challenged on an appeal under paragraph 47(a), as was done in a very similar context in *Sharkey* and in *Sokoya v HMRC* [2009] UKFTT 163 (TC). There Judge Roger Berner considered and decided on the validity of a penalty determination made under s 100 TMA for the failure by the appellant to comply with a notice for information under s 19A TMA. I acknowledge again though that in Part 9 TMA (or Part 4 for that matter) there is no apparent circumscription of the grounds of appeal as there is in paragraph 47 Schedule 36.

127. But the validity of a penalty notice was the very thing that was in issue in a Schedule 55 FA 2009 case, not a Schedule 36 FA 2008 one. In *Donaldson* the Court considered, as the Upper Tribunal also had, the validity of the penalty notice so far as it related to a penalty under the unique and obscure provisions in paragraph 4 of that Schedule. In Schedule 55 the only grounds of appeal permitted (in paragraph 20) are the same as those in paragraph 47 Schedule 36, which suggests that the matter in question in a penalty appeal are not as narrow as suggested by *PML*.

128. The terms "the matter in question" is a new addition to the corpus of tax administration law, as of the start of the Tribunal system on 1 April 2009. *B&S* was decided under the law as it applied in 1978. At that time penalty proceedings were started by an Inspector of Taxes or the Board of Inland Revenue making an application to the General or Special Commissioners who then determined the penalty. An appeal could be made under s 100(6) TMA "on a question of law".

129. In 1989 the relevant administrative provisions for penalties were changed to be like those for income tax. An appeal against a determination of a penalty could now be made to the Inspector who made it, in the same way as an appeal against an assessment to the tax concerned. This change applied to appeals against a s 20 TMA notice and a s 19A notice as was shown in *Sharkey* and *Sokoya*.

130. Section 100B(1) provides that:

> "An appeal may be brought against the determination of a penalty under section 100 above .."

131. This rule also applied in the same terms to appeals against penalties determined under s 93 and 93A TMA (failure to make and deliver by the due date income tax returns when required to do so) and to s 94 TMA (failure to make and deliver by the due date corporation tax ("CT") returns when required to do so) and still applies to CT returns required by paragraph 3 Schedule 18 FA 1998.

132. Nothing in section 100B limits the grounds on which an appeal may be brought against a penalty including a penalty for failure to file a return.

133. It would to my mind be surprising if the appeal provisions newly introduced in the Finance Acts of 2007, 2008 and 2009 following the HMRC Review of its penalty powers were the result of a conscious decision to limit the grounds on which an appeal against a penalty may be made, at least on the grounds of invalidity. There seems to me to be no reason to think that Parliament when it provided for "an appeal against a decision of HMRC that a penalty is payable", should be taken to have intended to interpret that phrase to be construed as narrowly as Sir Ross Cranston seems to have done in *PML*.[27]

134. A drastic change would be all the more surprising given the continued use of widely expressed appeal provisions in penalty cases such as those in s 100B TMA applying to CT returns and those in s 83(1)(q) Value Added Tax Act 1994 in relation to surcharges for defaults in making timely returns.

135. And it is clear from *Donaldson* that the First-tier Tribunal's questioning of the validity of a paragraph 4 Schedule 55 penalty notice was not thought by either the Upper Tribunal or the Court of Appeal to involve an impermissibly wide construction of paragraph 20(1) of that Schedule.

136. Sir Ross Cranston's view, taken to its logical conclusion, would also seem to mean that a penalty notice could not be contested on the basis that it was issued out of time, as that would not relate to the matter in question he identified.

137. I therefore reject Ms Nathan's argument that Sir Ross Cranston's view of the only permitted matter in question is binding on me, at least when deciding an appeal against an assessment under Schedule 55, whatever may be the position under Schedule 36 FA 2008.

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[27] A parallel can be drawn between the grounds of appeal and the powers of the tribunal to deal with the appeal. In numerous cases tribunals have held that the width or narrowness of the powers set out in s 50 TMA does not prevent a tribunal from considering the validity of an assessment to tax. See eg *Khan v Director of the Assets Recovery Agency* (2006) SpC 523 (Stephen Oliver QC and Theodore Wallace) at [14] & [15].

Are the notices valid?

138. As a result of the foregoing discussion I consider that I am entitled to question whether in the somewhat unusual circumstances of this case, the statutory requirements of s 8(1) TMA are met. And in my view they are not.

139. I have no doubt that HMRC have shown that they issued a notice to file to the appellant on two occasions. The crucial question is whether the notices were issued "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year"?

140. HMRC do not in their submission address the reason those words are in s 8(1) TMA following its substitution by s 178(1) FA 1994, but were not in s 8 as originally enacted. They must, under the rule of construction that Parliament should not be assumed to legislate for no reason, have a role to play. One possible reason is that Parliament thought that in a system where s 29 TMA (as it stood before amendment by FA 1994 for self-assessment) was no longer the only way of assessing a liability to tax and establishing a debt to the Crown, both for those getting returns and those within the PAYE system who had never been required to file, it was necessary to say something about the purposes of the return and the role of the self-assessment in replacing the s 29 TMA assessment and in itself leading to the establishment of a tax debt under s 59B TMA.

141. But, whatever the reason, the appellant's circumstances do not fit the words. HMRC did not need a return to establish the appellant's income or the amount of tax payable, as the PAYE system had done that, and the P800 had "assessed" it in the ordinary sense of that word. They said they needed a return to collect the tax that the appellant had started to pay off but then stopped doing so.

142. There is a clear indication in legislation enacted in FA 1994 as part of the changes needed for self-assessment that Parliament intended to maintain and indeed strengthen the dual system of on the one hand "SA" taxpayers subject to the full panoply of Parts 2 to 5A of TMA and the majority who were subject only to the PAYE Regulations, and that accordingly a person in the appellant's position, as someone in the majority system was not to be regarded as within the SA system for any purpose. This legislation is in paragraph 1 Schedule 19 FA 1994 which substituted a completely new s 7 TMA for the version as originally enacted.

143. As originally enacted s 7(1) simply provided that:

> "Every person who is chargeable to income tax for any year of assessment and who has not delivered a return of his profits or gains or his total income for that year in accordance with the provisions of the Income Tax Acts shall, not later than one year after the end of the that year of assessment, give notice that he is so chargeable."

144. The substituted section 7(1) said:

> "Every person who—

> (a) is chargeable to income tax … for any year of assessment, and
>
> (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income …,
>
> shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable."

145. Thus no change apart from a shortening of the time limit to fit in with the self-assessment system. The new subsection (3) for the first time provided for exceptions to the obligation to notify if a person's total income consisted of sources as falling within subsections (4) to (7). The two relevant exceptions here are in subsections (4) and (5):

> "(4) A source of income falls within this subsection in relation to a year of assessment if—
>
> (a) all payments of, or on account of, income from it during that year, and
>
> (b) all income from it for that year which does not consist of payments,
>
> have or has been taken into account in the making of deductions or repayments of tax under section 203 of the principal Act [*PAYE*].
>
> (5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—
>
> (a) in determining that person's liability to tax, or
>
> (b) in the making of deductions or repayments of tax under section 203 of the principal Act [*PAYE*]."

146. This excludes from being required to notify all those whose income is subject to PAYE or is taken into account in determining a code number. The exclusion covers all those who are intended to be within the majority part of the dual system. Those who must notify liability are taken into the minority SA system – see eg s 59B(3) TMA.

Further points raised by HMRC

147. HMRC had some further arguments (see §103).

148. First they say that the fact that information relating to the taxpayer's tax liability may be acquired from other sources does not affect or remove the obligation to submit a correct and complete s 8 TMA return.

149. I agree, but that is not the issue here. And in any case the category of people whose income cannot be fully known by HMRC until a return is filed does not include the non-SA PAYE population.

150. Second, they say that nothing in *Stableford v General Commissioners for the division of Liverpool & Others* [1983] STC 162 ("*Stableford*") undermines the arguments HMRC put forward eg on *PML*.

151. In *Stableford* Vinelott J was considering an appeal from the decision of the General Commissioners to impose the maximum daily penalties, not far short of £2,000, on Mr Stableford for his failure to make returns under s 8 TMA for two years. The notices to file were given in one case 26 months in and the other 14 months after the end of the year of assessment, and it appears that Mr Stableford had not filed returns for 15 years.

152. Vinelott J, a very experienced judge[28] in tax matters, reduced the penalties to £50 for each year, stressing in particular that the Commissioners were not told of Mr Stableford's bankruptcy or that his Inspector had agreed that he did not need to file the returns, and he considered that had the Commissioners been told these things, that would have dispelled any suspicion the Commissioners had that he was concealing great wealth and income. In fact all his income was taxed under PAYE and so there was unlikely to be tax owing.

153. Having read the decision more than once I am unable to work out what it is about *Stableford* that HMRC are warning me not to follow. Vinelott J was in that case exercising a first instance appeal jurisdiction[29], as it was the General Commissioners who had awarded the penalty having summonsed the appellant on the basis of an information laid by the Inspector. Under s 100(6) TMA as originally enacted:

> "Where any proceedings under this section are brought before any Commissioners, an appeal shall lie to the High Court … from their decision—
>
> (a) by any party, on a question of law, and
>
> (b) by the defendant… against the amount of any penalty awarded,
>
> and on any appeal under paragraph (b) above the court may either confirm the decision or reduce or increase the sum awarded."

154. Clearly Vinelott J was using the power in paragraph (b) to reduce the penalty. He did not hold, nor was he asked to find, that there was anything wrong with the validity of the notices to file. Had he been asked to make a decision on that question I have no doubt that he would have done, just as the court in *B&S* did in relation to s 100(6) TMA. It is true that there was agreement by the Inspector that he need not file returns, but it was not said that this agreement invalidated the s 8 notices. Instead it was taken into account by Vinelott J in exercising his unfettered power to vary the amount of the penalty. In this case there is no suggestion that the appellant was explicitly told by any officer of HMRC that he need not file a return, so I remain at a loss to see what relevance *Stableford* has.

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[28] Second only to Rowlatt J in the number of cases he decided as reported in the HMSO Tax Cases.

[29] The decision on appeal was not made by the General Commissioners as Ms Nathan's skeleton says.

155. Third, in their further arguments HMRC noted that the draft decision of the Tribunal in this case sought to rely on the fact that income tax is collected through the PAYE system in relation to the appellant as a basis for saying that the s 8 return is not required for the purpose of establishing the amounts in which the appellant is taxable.

156. HMRC say that this is flawed for the following reasons:

> (1) PAYE does not establish the amounts in which a person is taxable to income tax or capital gains tax (*Prince & Ors v HMRC* [2012] UKFTT 157 TC at [26] to [32]): it is simply a collection mechanism for collecting income tax from employment income. As such, an employee`s income tax liability is not finalised through PAYE: a P800 calculation is an administrative notice which does not have the status in law as an assessment and does not, therefore, impose a final liability on an employee which can be appealed.

My answer to this is that the reconciliation process followed in many cases by a P800 is a finalisation of a non-SA taxpayer's tax liability. As explained in §§20 to 22 the result of a reconciliation is that either the correct amount of tax has been deducted under PAYE (in which case no action is required) or tax is overpaid (in which case a repayment is made) or tax is underpaid, which in the vast majority of cases is collected by coding out, and in the very small minority in which this is not possible, some other means of collection must be found. What I say is that HMRC have chosen a mechanism to collect which is not open to them and ignored the one which is.

> (2) It is conceivable that a taxpayer, such as the appellant, in respect of whom PAYE is operated may well have other taxable income and gains which will need to be included on a s 8 TMA return;

There is nothing in the papers to suggest that the appellant did have any such income or gains. If he did it could be coded out and any tax collected through PAYE, and if he failed to notify under s 7 TMA a penalty would be exigible under Schedule 41 FA 2008 for that failure.

> (3) Nothing in s 8 TMA suggests that the requirement to make and deliver a s 8 return (or to require such a return to be made and delivered) is displaced by the fact that tax in relation to employment income is collected through PAYE

I do not suggest it is. There are very many people (me included) who have income within PAYE and also are required to make a return because they have other income that is not taken into account through PAYE.

> (4) The fact that there may be alternative ways to collect underpaid tax eg through a different PAYE coding or through discovery assessment does not affect the obligation to render a s 8 TMA return - such a return is required in order to establish the tax amounts in which a person is chargeable to income tax and capital gains tax and to determine the amounts of income tax payable. PAYE, being a collection mechanism is not appropriate for the purpose of establishing such amounts. Further, the fact that underpayments could be addressed through discovery assessments fails to recognise that under the self

assessment system the onus is on the taxpayer to make a complete and accurate return (*Langham (HM Inspector of Taxes) v Veltema* [2004] EWCA Civ 193).

Again I do not suggest that the existence of alternative methods of collection affects the obligation to make a return. What I say is that the existence of those alternative methods shows not only that it is not necessary to issue a return to those whose tax can be collected by one of the alternative methods, but also that it is not possible to use a notice to file a return in place of the alternative methods.

157. I have deal with the point about the non-SA PAYE system not being suitable for establishing the amount of tax payable in relation to point (1). For the avoidance of doubt (as it is not entirely clear from the skeleton that HMRC fully appreciate it) the reconciliation/P800 mechanism is not used for those people who are required annually to make a return and self-assessment before the due date and who have income to which PAYE is applied[30].

158. I therefore hold that the returns that appellant was issued with were not returns under s 8 TMA, and so there was no failure to file as set out in paragraph 1 of Schedule 55 having regard to item 1 in the Table in that paragraph.

159. I have not found it an easy matter to decide this appeal. At one stage I was close to accepting HMRC's submissions. But when, in a different context, I considered a decision of the Supreme Court, *R (on the application of De Silva and another) (Appellants) v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 74, I was struck by the prominence given to the "purpose" words in s 8(1) TMA in the judgment of Lord Hodge JSC (with which the other justices agreed). Lord Hodge said this:

> "12. The provisions of the TMA in so far as they concern income tax are dealing with an annual tax and this court has held in *Cotter* that a tax "return" in the context of sections 8(1), 9, 9A and 42(11)(a) refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" (section 8(1) TMA). I will return to section 8(1) when I address the provisions mentioned in (ii) in para 11 above."

160. And particularly:

> "23. Section 8 sets out what a person must produce when given a notice to make and deliver a tax return. So far as relevant the section provides:
>
> [*text of s 8(1) and (1AA)*]
>
> (The tax credits to which section 231 of ICTA referred were tax credits for advance corporation tax which the recipient of qualifying distributions from a UK-resident company could claim.) It is noteworthy that under subsection (1)(a) the information which is

[30] Because the reconciliation is made by the taxpayer in their self-assessment.

required is not simply the amounts in which the person is chargeable to income tax and the amounts payable by him for the year of assessment but information "for the purpose of establishing" those amounts.

…

28. If a taxpayer wished to carry back part of the losses incurred in Year 2 to set off against his income of Year 1 by invoking section 380(1)(b) of ICTA, he would also have to make the claim in his return for Year 2. This is the combined effect of section 8(1AA)(a) and Schedule 1B paragraphs 2(3) and (6). As shown in para 18 above, those paragraphs provide that the claim for relief relates to Year 2 and effect is to be given to that claim in relation to Year 2. If HMRC had already given effect to part of the claim under Schedule 1A in Year 1 by giving relief, for example by repayment, the return for Year 2 would still have to state the loss, the claim and the relief already given in order to establish the amounts in which the taxpayer is chargeable to income tax in Year 2. Similarly, if the taxpayer had already received full relief under Schedule 1A in Year 1, he would have to state the same information as to the loss, the claim and the relief already given. By so doing he enables the return to "take into account", as section 8(1AA)(a) requires, both the relief which is claimed in the return and that which he has already received. In each case that information is a necessary part of his return for Year 2 as it is information required "for the purpose of establishing the amounts" in which the taxpayer is chargeable to income tax for that year of assessment: section 8(1).

29. In summary, section 8(1AA)(a) defines the amounts in which a person is chargeable to income tax in a year of assessment as net amounts taking account of any relief, a claim for which has been included in the return. The claims to carry back losses relate to Year 2 and effect is given to them in relation to that year: Schedule 1B paragraph 2(3) and (6). It follows, therefore, that the taxpayer must make a claim in his tax return in respect of Year 2 and state the extent to which the relief claimed has already been given in order to establish the amounts in which he is chargeable to income tax for that year of assessment. If too much has already been given as relief, the self-assessment can take that into account by adjusting the amount in which the taxpayer is chargeable to income tax for Year 2: section 9(1)(a)."

161. In *Cotter v HMRC* [2013] UKSC 69, the case referred to by Lord Hodge at [12], he said (also giving the only judgment with which all the other justices agreed):

"24. Where, as in this case, the taxpayer has included information in his tax return but has left it to the Revenue to calculate the tax which he is due to pay, I think that the Revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear from sections 8(1) and 8(1AA) of TMA that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The Revenue's calculation of the tax due is made on behalf of the taxpayer and is

> treated as the taxpayer's self assessment (section 9(3) and (3A) of TMA).
>
> 25. The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within TMA. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) of the TMA, a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year" (section 8(1) TMA)."

162. I do not say that anything that Lord Hodge says in these two cases is decisive in this case. But he does put stress on more than one occasion on the "purpose" words. And that reinforced my view that they must be given some meaning and that the meaning I have given them is the right one.

163. One other matter which is not a deciding factor has also reinforced my view. It is the prejudice which HMRC put on a taxpayer by going down the s 8(1) route in circumstances such as these. It is another reason why I consider that using the SA system of returns and self-assessments to collect tax underpaid from a person within the PAYE system is inappropriate. That aspect is the treatment of late payments of tax under each of the systems.

164. Under the PAYE system a P800 may well show, as it did in this case, that there is a liability to tax. If the underpayment is coded out and so collected in a later period in instalments then no interest is charged – this is because s 103(1) FA 2009 (headed "Late payment interest on sums due to HMRC") provides:

> "(1) This section applies to any amount that is payable by a person to HMRC under or by virtue of an enactment."

165. Underpayments coded out are collected through the deduction of tax by an employer on making payments to an employee: they are not payable under any enactment.

166. If an underpayment is assessed, as it always was before SA, under s 29 TMA, the due date for payment is 30 days from the date on which the notice of assessment is given – s 59B(6) TMA.

167. Interest then falls to be paid if the tax is unpaid after that due date – s 101(3) FA 2009. If tax is not paid 30 days after the due date then a penalty will be payable under Schedule 56 FA 2009 – item 19 in the Table in paragraph 1 of that Schedule.

168. In the SA system, the date on which tax shown by the return and self-assessment is due is, in all but circumstances which do not apply here, 31 January in the tax year after the year covered by the return ("Year 2"). Interest then runs from

that date if the tax is not paid – s 101(3) FA 2009 – and late payment penalties are due if the tax is not paid by 1 or 2 March (depending on whether there is a leap year). These date are unaffected by the fact that, as here, the filing date was long after 31 January in Year 2.

169. The difference in the effect of this can be seen if it is assumed that in this case HMRC had not issued a notice to file, but had issued a s 29 TMA assessment for the year 2011-12 on 31 March 2014. This would have established a tax debt and if it is also assumed that the appellant had paid the tax on 31 May 2014 the result would have been that he would have paid interest on the outstanding tax for 61 days and would have been liable to a late payment penalty of 5% of the late paid tax.

170. If however it is assumed that on 31 May 2014 the appellant made a return in response to a notice to file and had paid the tax, the result would be that interest would run from 31 January 2013 to 31 May 2014 (16 months) and the late payment penalties would be 15% of the late paid tax.

171. On these assumptions then, the appellant would be charged interest on an amount which had not been assessed or quantified and was not enforceable on the date from which that interest runs. He would also be penalised for not paying tax which was also not self-assessed or enforceable on that date.

172. The inappropriateness of using the SA system to not only enforce the debt but to retrospectively charge interest and penalties seems obvious. The inappropriateness does not of itself make it unlawful. The inappropriate results do however illustrate why the "purpose" words in s 8(1) TMA ought to bear the meaning I have put on them, that they mean what they say and that using a notification to file a return to enforce a known debt arising from a known tax liability is to use it for a different purpose, one not within the scope of the section.

Discussion – other issues which arise if I am wrong

173. After the oral hearing of the appeal I made directions permitting HMRC to put forward further arguments or to amplify those in the statement of case provided for consideration of the appeal on the papers. I received those submissions on 3 November. These further arguments were in relation to the two issues I set out below.

In the alternative, was there a reasonable excuse?

174. If I am wrong in my decision on s 8(1) TMA, two further issues arise. The first is: did the appellant have a reasonable excuse for failing to deliver his returns on time?

175. The appellant says he did not receive the notices to file. HMRC's records show that a "full return" (ie a paper return that contains a notice to file on page 1) and a "notice to file" were respectively issued for the two years and, as there is no dispute about addresses, s 7 Interpretation Act 1978 sets up a presumption that the notices were served. The presumption is rebuttable by proving the contrary but the appellant has not done so: he has merely asserted that these two documents did not reach him even though others from HMRC admittedly did.

176. His statement that he did not receive the returns until June 2014 is at odds with his claim not to have received them in a letter of 28 August 2014. But even if he did not receive the returns (or notice to file – he was never issued with a return as such for 2012-13) until June 2014 the returns he did submit would still have been late.

177. I would therefore hold, in agreement with HMRC, that the appellant did not have a reasonable excuse for his failure to file either return.

In the alternative, was HMRC's decision about a special reduction flawed, and if so should there be such a reduction?

178. The second issue I need to consider if I am wrong is whether HMRC's decision about the existence of special circumstances that would justify a reduction is flawed in judicial review terms. HMRC say in their statement of case that they had considered the appellant's complaint that he phoned HMRC asking for paper returns but was refused them. They could find no phone records of any such conversations and so I cannot say that in relation to this point they did not take into account something they should have done, especially as it would seem from the papers that the appellant says the requests were made before he received the returns in June 2014.

179. In their further submissions HMRC say that none of the grounds of appeal disclose any unusual or out of the ordinary circumstances. In the direction that led to those submissions I asked HMRC to address two point in relation to the special reduction. One was whether any analogy could be drawn with the situation in *Stableford* (the reneging by HMRC on its undertaking not to require returns): the other was whether HMRC's expressed object in issuing the notice (to collect the tax) was a relevant factor in deciding whether there are special circumstances.

180. HMRC's reply was that neither was and I agree.

181. But HMRC did not, either at the initial appeal stage or the review stage give any consideration to the circumstances in which the underpayments arose, and whether the circumstances were unusual or out of the ordinary (these being the criteria adopted by HMRC themselves). They explained to the appellant why he had an underpayment, because, they said, both employers had used a code which gives the full personal allowance, something which should not happen if the PAYE system is properly operated.

182. That is not a correct statement of the law. It is true that if DWP had been required to operate PAYE on payments of taxable ESA and had for that purpose when applying the tax tables used the emergency code number they attributed to the appellant no tax would have been deducted[31] so as to make the payment of ESA not subject to deduction of tax. But DWP are not required to operate PAYE.

183. If the case officer or reviewing officer in HMRC had applied their minds to the PAYE issues in this case, they would, or should, have realised that something had gone wrong. Where taxable ESA is paid to a person who (unusually) continues in

[31] Taxable ESA can only be paid at a weekly rate which is lower than 1/52 of the personal allowance.

employment, as here, the HMRC PAYE Manual at paragraph 77260 requires the DWP to be treated as the primary employer and any actual employment as secondary, and a review of codes is required. Such a review would ensure that tax on the ESA is collected by reducing the code number used by the employer, so that less than the full personal allowance is given. That DWP is treated as the primary employer in this situation follows from regulation 184F(b) of the PAYE Regulations.

184. Thus it is, it seems to me, HMRC error that has given rise to the underpayment, the failure to ensure coding out of the taxable ESA. This is possibly a situation that falls within Extra-statutory Concession ("ESC") A19 but no consideration has been given by HMRC to the applicability of the ESC. I should add that the employer was not at fault, as regulation 21 of the PAYE regulations requires them to operate the code they have been given. Nor was DWP: they operated the system of non-PAYE required of them by Chapter 5 Part 8 of the PAYE Regulations.

185. Nor do HMRC seem to have the considered why the underpayment could not be coded out (possibly over a period of more than a year – they were after all prepared to allow the underpayment to be paid voluntarily over 33 months) or explained why to the appellant.

186. Failure to consider whether the underpayments arose from HMRC error or to question whether an underpayment should have been coded out or whether ESC A14 applied is in my view something out of the ordinary which makes the decision by HMRC on special circumstances flawed, because they have failed to take relevant matters into account.

187. I can therefore consider the issue afresh. In my view if HMRC had taken into account the failures described in §§182 to 186 that should have led them to conclude that in this case no penalties were payable because of these circumstances which are clearly out of the ordinary. I would therefore, were it a live issue, have made a special reduction of all the penalties to nil under paragraph 16 Schedule 55 FA 2009.

188. There is another matter in relation to a special reduction. HMRC accept, and this Tribunal has agreed, that a penalty may be reduced on account of special circumstances where imposing the penalties would be contrary to the clear compliance intention of the legislation applying to the penalty in question.

189. The clear compliance intention of paragraphs 1 to 6 of Schedule 55 FA 2009 is to deter late delivery of returns and to put HMRC in a position so that it knows as soon as it can that the correct amount of tax has been paid or is payable, or that there is a case for further enquiry or investigation. This was not HMRC's intention behind issuing notices to file to the appellant. Even if HMRC is correct that the "purpose" wording in s 8(1) does not invalidate the returns in this case, the mere issue of the notice to file would be enough to enable them to establish a non-appealable enforceable debt. They could, as soon as the filing date had passed, have made a determination under s 28C TMA in the exact amount of the underpayment, and so achieved their object.

190. HMRC also failed to consider this question. Their decision is thus flawed and I consider it anew. In my view had HMRC considered it, the matters described in §189 should have led HMRC to conclude that in the circumstances of this case it is not within the clear compliance intention of Schedule 55 to seek penalties for failure to deliver the return by the filing date, so that again in this case no penalties were payable. I would therefore, were it a live issue, for this reason have made a special reduction of all the penalties to nil under paragraph 16 Schedule 55 FA 2009.

Have the conditions in paragraph 4(1)(c) been met in relation to daily penalties?

191. I add that had I not found that there special circumstances then I would have had to consider whether the condition in paragraph 4(1)(c) Schedule 55 FA 2009 had been met in either year.

192. The only relevant document which might fall within sub-paragraph (1)(c) that has been produced by HMRC is the "Daily penalty reminder" (SA 372-30) of 28 October 2014. This relates to 2012-13, so for 2011-12 I have no evidence of any purported paragraph 4(1)(c) document issued to the appellant.

193. The SA 327-30 declares that the tax return for the tax year is "now" more than three months late. The due date according to HMRC was 27 June 2014 so the 3 months expired on 27 September. The reminder says that *after 28* September daily penalties accrue for a maximum of 90 days and that they are already stacking up so that the penalty is at least £300.

194. The question is: does this notice specify the date from which the penalty is payable. It says "after 28 September a … penalty is payable". The specified date is therefore not 28 September itself. Any date that is later than 28 September 2014 is "after 28 September 2014" and the notice does not, for example, specify 29 September. This contrasts with the notices (not a SA 372-30) that were held to justify a finding that the condition that paragraph 4(1)(c) had been met in *Donaldson* (see [4] and [5]).

195. The notice does go on to say that "this means that the minimum you will have to pay is already over £300". To be over £300 it must have been a minimum of £310, ie 31 days of penalties at £10 a day). On 28 October, the date of issue of the SA372-30, there had been 31 days from *27* September, but not from 28 or 29 September or any later date. HMRC were perhaps relying on the fact that the date of receipt of the notice by any defaulting taxpayer would then be over 30 days after 29 September, but that hardly amounts to 29 September being "specified".

196. I am fortified in my view that there has not been the necessary specification by [29] in *Donaldson*. The appellant here could not know with precision what the start date was. And as I have not been supplied with any notice of assessment of the penalty I cannot know if the relevant period can be ascertained by the appellant.

197. It does not of course matter that the starting date for the daily penalties is one, two or many days after the end of the three month period starting with the day after

the due date (see paragraph 4(3)(b) Schedule 55) so long as it is after that period. The crucial thing, according to *Donaldson*, is that that date must be specified. In this case the due date was said by HMRC to be 27 June 2014. Yet the notice to file was issued on 20 March 2014, and on that basis the due date was 20 June (s 8(1G) TMA). The three month period in paragraph 4(1)(c) therefore ended on 20 September, so a notice specifying a starting date of that day or any later date would have been valid.

198. I am not therefore satisfied in this case that the daily penalties for 2012-13 are validly imposed, because HMRC have not established on the balance of probabilities that the condition in paragraph 4(1)(c) is met, despite the SA372-30 in the bundle.

199. And as to 2011-12 there is no evidence at all that the conditions have been met.

200. If I am wrong about special circumstances as well as about the purpose of requiring the returns, I would cancel the daily penalties but not the initial penalties.

Summary of decision

201. The penalties are invalid because the returns did not fall within s 8(1) TMA.

202. Irrespective of the previous point, the decision about special circumstances was flawed, and I substitute a decision that the penalties are specially reduced to nil

203. The paragraph 4 Schedule 55 penalties are invalid anyway because notification under paragraph 4(1)(c) was not given.

204. But the appellant did not have a reasonable excuse for his failure to file by the due date (assuming the penalties were otherwise valid).

Postscript

205. A few weeks before the hearing in this case, HMRC published an Issue Briefing: "Simple Assessment – ending the tax return". Under the heading 'Details' it said merely:

> "Simple Assessment is a new way of collecting tax which will make life easier for millions of customers who have had to do Self Assessment tax returns in the past."

206. The part which isn't called 'Details', but which contains all (or at least some) of the details, informs readers that:

> "From September 2017 HMRC will remove the need for some customers to complete a tax return, starting with two groups:
>
> - …
> - PAYE customers[ ] who have underpaid tax and who cannot have that tax collected through their tax code."

207. The issue briefing implies that those within the two groups will receive a simple assessment letter PA302[32], and it purports to explain what is meant to happen. What, naturally, it does not explain is what the legal basis for the simple assessment is.

208. The answer to that is found in s 167 and Schedule 23 FA 2016. That Schedule inserted, with effect for the tax year 2016-17, a number of sections into TMA, chiefly s 28H.

209. A simple assessment under s 28H TMA contains the same details as a self-assessment under s 9 TMA, or a s 29(1) assessment. The only significant difference in procedure is that no appeal can be made unless and until the simple assessment is queried with HMRC and a final response has been given, whereupon the time limit of 30 days to appeal starts to run from the date of issue of that response. A query may be made within the period of 60 days from the date of issue of the simple assessment, or such longer period as HMRC may allow. There is no referral to the Tribunal if HMRC refuse to entertain a query after 60 days. Nor are HMRC under any obligation to deal with a query within a time limit, although they are under a non-enforceable obligation to consider the query and give a final response.

210. By s 59BA TMA the due date for payment of the tax liability shown on a simple assessment is 31 January in the year of assessment following that to which the assessment relates or 3 months from the day after he notice of assessment is given if it is given after 31 October in that year.

211. The advantages of this system over that used in this case are obvious. For HMRC they do not have to send increasingly beseeching letters asking for voluntary payment and they do not, if those requests are unsuccessful, have to set up an SA record and police the filing of returns to establish a liability to pay. Hence the over-dramatic (and somewhat misleading) title for the Issue Briefing.

212. For the taxpayer the advantages are also that they do not have to get involved with SA and making returns, and thus will not face penalties under Schedule 55 FA 2009 as this appellant has, nor will they be faced with retrospective interest and late payment penalties.

213. There are also advantages over the s 29 assessment procedure in that there are 60 days to query the assessment and a further 30 days for making an appeal if the response is not sufficient.

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[32] SA 302 is the self-assessment calculation. Forms in the 300 series have, not quite since time immemorial, been the forms on which Schedule D assessments were made and notified. The SA 302 is the calculation of tax which is made by HMRC following the receipt of a tax return and which in most cases pretends to be the self-assessment of the taxpayer. So why PA 302? Forms for use in the PAYE tax system have always been prefixed with the letter P, of which the P45 is the most famous (rivalling the UB40 in folklore). The P70 was a form on which a Schedule E assessment was made, so I assume that PA 302 is a form of tax calculation and assessment for a person within the PAYE tax system.

214. The decision I have reached in this case is then fully in line with the philosophy behind the simple assessment rules. This decision is not of course influenced by those rules.

215. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 3 JANUARY 2018

APPENDIX

SCHEDULE 55 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 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

2--(1) Paragraphs 3 to 6 apply in the case of—

(a) a return falling within any of items 1 to 5, 7 and 8 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).

…

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

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

(a) ability to pay, or

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

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

(a) staying a penalty, and

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

APPEAL

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.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

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.

27(1) This paragraph applies for the construction of this Schedule.

…

(3) "HMRC" means Her Majesty's Revenue and Customs.