[2018] UKFTT 23 (TC)

TC06302

Appeal number: TC/2016/03477

INCOME TAX – self-assessment return served outwith the normal cycle – late filing penalties – paragraphs 3 to 5 of Schedule 55 FA 2009 – whether return and penalty notices correctly addressed – whether sender can rely on the deeming provision under s 7 of the Interpretation Act 1978 – whether the 'contrary' is proved by the addressee –* Callidine-Smith *applied – whether reasonable excuse nevertheless – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASAF GABAY **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

The Tribunal determined the appeal on 18 December 2017 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 21 June 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 29 March 2017.

DECISION

Introduction

1. Mr Asaf Gabay appeals against the penalties imposed for the late filing of his self-assessment return ('SA return') for the year ended 5 April 2014.

2. The penalties are charged under paragraphs 3 to 5 of Schedule 55 to the Finance Act 2009 ('FA 2009'), and consist of:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on or around 14 July 2015;

(2) Daily penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 12 January 2016;

(3) a £300 six-month penalty under paragraph 5 of Schedule 55 imposed on or around 12 January 2016.

3. Whilst the total penalties of £1,300 have been imposed, the appellant is appealing against £1,200, and not the initial late filing penalty of £100. This is a matter which is addressed later in the decision.

Factual background

4. On 24 March 2015, HMRC set up a self-assessment record for Mr Gabay after receiving information from their Debt Management and Banking Unit that Mr Gabay held several company directorships.

5. Mr Gabay was issued a paper return for 2013-14 on 2 April 2015, almost a whole year after the end of the tax year. As such, the return was issued out of the normal cycle for the related tax year. The due date for such a return is statutorily set as 3 months after the date of issue of the return. In practice, HMRC allow an extra week for filing, and the return for 2013-14 issued to Mr Gabay was therefore due to be filed by 9 July 2015, whether as an electronic or a paper return.

6. The paper return was sent to Flat [No.], Vincent Court, (the rest of address omitted deliberately) at postcode […]4 2AN, which has been the address held on HMRC's system since 8 August 2010. There was no record of any correspondence having been returned as undelivered to this address.

7. The SA Notes for Mr Gabay include the two entries which are pertinent to this appeal. The first one entry is dated 24 March 2015, and states the following:

> 'DOR Info recd from DMB to advise t/p dir of 8 companies. SA record set up 13-14 & 14-15 TRs issued Batch 846/01/2015/1.'

8. The 24 March 2015 entry ties in with the reason given in HMRC's Statement of Case for issuing Mr Gabay with self-assessment returns for the two years 2013-14 and 2014-15; that it was due to the directorships Mr Gabay was reported to be holding in eight companies at the time.

9. The next entry in the SA notes provided to the Tribunal is a note of the telephone call made by Mr Gabay on 16 April 2015. The entry states the following:

> **'16/04/2015**: Telin/TP/asking why he has to fill return & angry he has been on line for 23 mins/ apologised for the wait & explained he has to fill return as he is a Director / 12.44/ Leicester.'

10. An entry on the SA notes is either 'AUTO' or 'Process'. Every 'Process' entry on the SA notes also registers the 'User ID' (of the HMRC officer who makes the entry), and the Office ID (of the HMRC office which carries out the action). The entry on 16 April 2015 has '4589858' as the user ID and '226701' as the office ID.

11. On 27 January 2016, Mr Gabay's electronic return for 2013-14 was received.

Notices of penalty and reminders

12. According to HMRC's correspondence records, no fewer than five penalty notices were issued. The first one was on or around 14 July 2015, a notice of penalty assessment for £100 was issued.

13. The second notice was issued on 10 November 2015, and was a daily penalty reminder advising that daily penalties for 30 days had accrued.

14. The third notice was issued on 15 December 2015, and was another daily penalty reminder, advising that daily penalties for 60 days had accrued.

15. The fourth and fifth notices were both issued on 12 January 2016, being a notice of daily penalty assessment for £900, and a notice for the 6-month late filing penalty of £300.

Appeal and review

16. It would appear that a sixth notice was also issued on 12 January 2016, summarising the total penalties due at the time. A copy of this notice of penalty assessment dated 12 January 2016 has been provided by Mr Gabay to his agent, who in turn attached the notice when making an appeal to HMRC on 26 January 2016. The issuing office address on this penalty notice is stated as 'HMRC Self Assessment' at postcode BX9 1AS.

17. On the copy of the penalty notice dated 12 January 2016, Mr Gabay's address is clearly and correctly stated. It has also been annotated with Mr Gabay's NI number and an asterisk against his Unique Tax Reference ('UTR'). The annotation includes a curved arrow linking Mr Gabay's name as the addressee on this notice, to the handwritten note which states: '**NI NUMBER: NY -- -- -- D**' (capital original, number deliberately withheld). The NI number is inserted in the space before the body of text, which states in bold: 'Late filing penalties for the year ended 5 April 2014', followed by 'You have been charged additional penalties as shown overleaf'. The next sentence is in bold again, and states: 'These penalties total £1200'.

18. By letter dated 26 January 2016, Mr Gabay's agent S Bose & Co appealed against the penalties. The grounds of appeal are summarised as follows:

(1) That Mr Gabay had not received any letter, paper return for 2013-14, or any reminders or correspondence at his address at Vincent Court, etc.

(2) That Mr Gabay cannot recall when or how he received his UTR or which accountant organised the UTR.

(3) That Mr Gabay received on 15 December 2015 his first penalty demand for £600, followed by the second penalty demand for £1,200 dated 12 January 2016. As it was Christmas, Mr Gabay could not take immediate action, and the earliest available date S Bose & Co could give Mr Gabay was 21 January 2016.

(4) That Mr Gabay is 'an honest man of high moral integrity. He struggles very hard in order to look after his family'.

19. The 26 January 2016 letter was sent to HMRC Self Assessment, BX9 1AS. The agent must have been advised to write to HMRC 'Appeals & Review Unit' in Nottingham instead, as indicated by the next letter by Bose & Co of 22 March 2016.

20. The letter from Bose & Co of 22 March 2016 starts by stating: 'We are requesting you to make a Review with respect to the above Penalty Demand made by HMRC, Pay as You Earn and Self Assessment, BX9 1AS'.

21. HMRC's review conclusion letter to Mr Gabay dated 25 April 2016 has made two address references which become the bone of contention in the subsequent course of this appeal. The two contentious references are as follows:

> '1. HMRC records show you needed to complete a self-assessment return as you were a company director. A 2013-14 self-assessment return was issued for your completion on 2 April 2015 and was issued to your address at Flat [No.], Vincent Court [etc] **BX9 1AS** marked for your attention.
>
> […]
>
> [Sub-paragraph 4] On the 10th November 2015 HMRC sent you a 30 day daily penalties reminder for your 2013-14 late return and on the 15 December 2015 you were sent a 60 day penalty reminder for your 2013-14 late return. Both these penalty ***reminders*** were sent to the above address.' (emphasis added)
>
> '2. HMRC's records show your address as Flat [No.], Vincent **Close** [etc] since 29 July 2010, therefore any correspondence issued by HMRC would automatically be sent for your attention to this address.' (emphasis added)

22. By letter dated 17 May 2016, Mr Shankar Bose, of Bose & Co, wrote in reply pointing out the two errors in HMRC's review letter of the address as highlighted above. The first error in the letter concerns the postcode BX9 1AS, and Mr Bose stated the following in relation thereto:

> '**That is a wrong address.** No wonder our client did not receive that self assessment return. He has made a point all along that if he had received such return he would have taken appropriate action. … our local Post Office … has informed us that the letters are delivered or directed by **Post Code**. If the number of a property is wrong but the Post Code is right then they may be able to make a right delivery. However, if the Post Code is wrong then that letter will not probably reach its destination.' (emphasis original)

23. In respect of the second error, where Vincent Court appears as Vincent 'Close' in the review letter, Mr Bose stated the following:

> 'In your paragraph 4 you state that "both these penalty demands [sic] were sent to the above address." Again our opinion is that they were sent to the **wrong address**.' (emphasis original)

24. Mr Bose submitted that '[t]he whole argument whether the penalty should be paid or not is based on a key factor whether or not the return was sent to his rightful [sic] address.' Mr Bose then concluded that:

> 'It is very clear to us that the self assessment return issued by HMRC was sent to a wrong address. Our client is a god fearing man. There is no reason for him to make an untruthful statement.'

> 'It is very clear to us that our client never ever received a return in 2015 as it was sent to [sic] wrong address or to an address which does not exist.'

25. Mr Bose seemed to be anticipating HMRC's response when he repeatedly stated that they would not accept the wrong address references as typing errors. At the start of the letter, Mr Bose wrote: 'we must strongly emphasise that you cannot anymore detract from any of the information submitted in your letter dated 25 April 16 by claiming typing error or any error of omission. Any alteration of your letter will not be acceptable to us.' Towards the end of the letter, Mr Bose stated the following:

> '… you cannot say as you will be apparently be [sic] trying to say that the wrong post code given by you was a typing error. That argument will not be acceptable to us. Even if that was a typing error on your part then is it not possible that all the papers which were sent in 2015 were sent to a wrong address due to a typing error?'

26. By letter dated 6 June 2016, HMRC wrote to Mr Gabay and offered an apology for the errors in the review letter, but confirmed that the decision still stands and the penalties have been correctly imposed.

The Appellant's Case

27. On 21 June 2016, Mr Gabay lodged an appeal with the Tribunal, and the grounds of appeal as stated on the Notice of Appeal are as follows:

> (1) 'The review unit stated that the return was sent to the correct address. However their letter states an address which was wrong or does not exist.'

(2) 'That probably all letters were sent to a wrong address as a wrong address was for a long time in their system, resulting in typing error.'

HMRC's case

28. A printout of HMRC's records of Mr Gabay's address history held on the computer system is attached to the Statement of Case. HMRC submit that the printout clearly shows that HMRC's system held the correct address for Mr Gabay.

29. The SA notes also record that Mr Gabay contacted HMRC by phone on 16 April 2015 to query why he had been sent the tax return, which was a clear indication that he did indeed receive the paper return for 2013-14.

Discussion

The issue for determination

30. The appeal, as pleaded, concerns the following documents and whether they have been effectively served in the ordinary course of post:

(1) The delivery of the notice to file a self-assessment return for 2013-14, by way of a paper return being served on 2 April 2015.

(2) The penalty notices and reminders sent after the due date of 9 July 2015 in relation to the late filing of the 2013-14 self-assessment return.

31. The central issue for determination in this appeal is whether there had been effective service by post of the initial notice to file the 2013-14 return, and of the notices that penalties had been imposed in consequence of the return not having been filed until 27 January 2016.

The law in respect of a document served by post

32. Where there is a dispute as to whether a document has been effectively served by post, the court is to apply s 7 of the Interpretation Act 1978 ('the 1978 Act') to the facts of the case to resolve the matter. Section 7 of the Act provides as follows:

> 'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

33. Key authorities on the interpretation of and the application of s 7 of the 1978 Act are discussed by Morgan J in the High Court decision of *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 (Ch) ('*Calladine-Smith*'). Morgan J's review of

authorities in this area of the law, and especially in respect of the interpretation of '*unless the contrary is proved*', is particularly helpful.[1]

34. The authorities on s 7 establish that 'service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document'. The burden of proof for the deeming provision to apply is on the sender, and what is required to be proved is that the document has been properly addressed, prepaid and posted. If the sender can prove that, then he can rely on the deeming provision under s 7, and if he cannot prove that, then s 7 cannot be relied on (*Callidine-Smith* at [25]).

35. If the first part of s 7 is proved by the sender for the deeming provision to apply, then the second part of s 7 is engaged, whereby the addressee can prove the contrary.

36. Two aspects concerning the interpretation of 'unless the contrary is proved' are addressed in *Callidine-Smith*. The first concerns the meaning of 'contrary': whether it refers to the contrary of the allegation that the letter was properly addressed, prepaid and posted, and no other matter (the first part of s 7), or the contrary of the deeming provision that the document in question was delivered in the ordinary course of post (the second part). The reasoning set out at [25] in *Callidine-Smith* leads to the conclusion that '[t]he reference to proving the contrary clearly goes with the second part of s 7 and not with the first part'. In other words, the 'contrary' that needs to be proved is the contrary that delivery of the document in question can be deemed.

37. The second aspect concerns the standard of proof to be met by the addressee in proving the contrary: whether an addressee of the document is required only to show, on the balance of probability, that the letter was not delivered or served or received by him, or whether positive evidence is required to be led as to what happened to the document by taking the standard of proof beyond that of the balance of probability.

38. Following the Court of Appeal authorities in *Chiswell* v *Griffon* [1975] 2 All ER 665 ('*Chiswell*') and *R v County of London Quarter Sessions Appeal Committee, ex p Rossi* ('*ex p Rossi*') [1965] 1 All ER 670, Morgan J concludes at [33]:

> '… my interpretation of s 7 when it uses the phrase "unless the contrary is proved" is that this requires a court to make findings of act on the balance of probabilities on all of the evidence before it.'

39. More detailed comments on how a court goes about making findings of fact in relation to 'unless the contrary is proved' are at [26] of *Callidine-Smith*:

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[1] It is highlighted that the authority of *Lex Service plc v Johns* [1990] 1 EGLR 92 has been 'the subject of adverse comment', and 'had caused real difficulty for other courts in other cases' (see [30] and [31] of *Callidine-Smith*). Referring to the judgment of Peter Gibson LJ in *CA Webber Transport Ltd v Railtrack Ltd* [2003] EWCA Civ 1167, in which it is stated that 'the *Lex Services* case should be treated as decided *per incuriam'*, Morgan J considers that the reasoning in *Les Services* which seems to suggest that the second part of s 7 of the 1978 Act requires a higher standard of proof (than that of the balance of probability) is not binding as a precedent, (see [32]).

> 'Accordingly, if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses.'

The fact in issue and the respective burden of proof

40. In this appeal, the fact in issue can be narrowed down to whether the relevant documents have been properly *addressed*. Although the timely delivery of the said documents is important for the purpose of reckoning the due date for the filing of the return, no grounds of appeal are advanced in relation to the timing of the delivery. It is common ground that if the documents were not properly addressed, there could be no timely delivery of the documents.

41. For service of the documents by post to be deemed, the burden of proof for the first part of s 7 is on the sender, namely, HMRC in this case.

42. If HMRC have met the burden of proof for the first part, then the onus to prove the contrary of deemed service under the second part of s 7 reverses to the address, namely Mr Gabay in this case.

43. The standard or proof in either case is on the balance of probabilities.

Findings of fact: whether there was deemed service of documents

44. The law is reasonable and does not require the impossible. It is inherently impossible for one party (the sender) to prove what concerns the other party (the addressee). The deeming provision under the first part of s 7 of the 1978 Act means that the sender is not required to prove that the addressee has indeed received the documents. The deeming provision of effective postal delivery can still apply even if the addressee has categorically denied receipt.

45. From the documents made available to the Tribunal by the parties, I make findings of primary fact and factual inferences therefrom as follows:

(1) HMRC's computer record of Mr Gabay's address is accurate in all respects and has the correct postcode. The address held on HMRC's computer system is the address that is used to 'populate' the template forms, whether it is a self-assessment return or a penalty notice.

(2) In the agent's first letter to HMRC dated 26 January 2016, express statements were made concerning Mr Gabay's receipt of the £600 and £1200 penalty notices. These statements are as follows:

> 'On 15.12.15 [Mr Gabay] received his first Penalty Demand for £600 followed by the second Penalty Demand for £1200 dated 12.01.16. As it was Christmas, he could not take immediate action.'

(3) The agent's January 2016 letter attached a copy of the penalty notice dated 12 January 2016.

(4) The copy of the penalty notice dated 12 January 2016 is annotated (see details under §17) and is positive evidence that the notice had been delivered to the address as held in HMRC's system. The annotation is evidence that the notice had most probably been in the hands of the addressee of the notice, namely Mr Gabay.

(5) The SA notes are records maintained by HMRC for each taxpayer, and in Mr Gabay's SA notes, a clear entry has been made to register his phone call to HMRC on 16 April 2015.

(6) The SA notes are maintained for every taxpayer, and Mr Gabay's notes are no exception. The particularity of details of the 16 April 2015 entry (see §9-10), for example, at *12.44* hour, and that Mr Gabay 'has been on line for *23mins*', together with the User ID and Office ID, lends credence to the entry as not only contemporaneous but a faithful record of the event. The timing of the call (16 April 2015) was 2 weeks after the date on the self-assessment return (2 April 2015). The reason of the call was consistent with the timing of the call, and lends support to the fact that Mr Gabay had received the paper return for 2013-14 served on him by post. I find as a fact that the entry of 16 April 2015 of Mr Gabay's call is an accurate record, both of its timing and its substance.

(7) HMRC's operational control maintains a record of any returned mail, as I have seen in other cases where service of post is disputed. There has been no record of any post to Mr Gabay having been returned as undelivered.

46. On the basis of the above findings of fact and factual inferences, I do not need to determine the first half of s 7 by burden of proof; that is, on a finding based on the balance of probabilities. I find as a fact that the 2013-14 return and the penalty notices related to its late filing had been correctly addressed. HMRC can rely on the first part of s 7 of the 1978 Act: the returns and notices can be deemed to have been effectively served in the ordinary course of post.

47. Furthermore, I also find as a fact that there had been timely delivery of the said documents in the ordinary course of post. Mr Gabay's phone call on 16 April 2015 to HMRC, and the express acknowledgement of the receipt of the £600 and £1,200 penalty notices in Mr Bose's letter of 26 January 2016 testify to the timeliness of the receipt of the said documents.

Findings of fact: whether the 'contrary' is proved

48. Given the aforesaid, especially in view of my findings of fact as respects the service of the documents having been effected and within the expected time, it is not strictly necessary to consider whether the 'contrary' is proved. However, since the appellant's grounds of appeal are effectively his attempt to prove the contrary, I will consider the grounds of the appeal in the light of the second part of s 7.

49. The rationale behind the second part of s 7 of the 1978 Act is succinctly expressed in the Upper Tribunal decision of *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) at [33]:

> '... the second half of s 7 1A expressly recognises that the actual state of affairs may be different from what is deemed to be the case. It admits the possibility of it being proved that, despite the requirements of s 7 1A having been met, service or notification has not in fact been effected, or not effected in the usual course of postal delivery. In the event that the intended recipient proves, according to the evidence and on the balance of probability, that he did not receive the relevant document, service or notification of it will not be deemed under s 7 1A to have been effected ...'

50. It is worth noting that there had in fact been express acknowledgement of receipt (at least initially) of both the £600 and the £1,200 penalty notices in the letter by Mr Gabay's agent dated 26 January 2016. There is also positive evidence of receipt in the form of the annotated copy of the £1,200 penalty notice dated 12 January 2016, which most probably had been annotated by Mr Gabay, and passed on to Mr Bose as his newly appointed agent.

51. It was only after the two erroneous address references in HMRC's review letter of 25 April 2016 that the line of argument started to develop whereby:

(1) Mr Bose stated that '[i]t is very clear to us that the self assessment return issued by HMRC was sent to a wrong address' and therefore Mr Gabay 'never ever received a return in 2015' (§24);

(2) That when HMRC referred to '[b]oth these penalty demands [sic] were sent to the above address', 'they were sent to the wrong address' (§23).

(3) 'That probably all letters were sent to a wrong address as a wrong address was for a long time in their system, resulting in typing error' (§27).

52. For the following reasons, this line of argument subsequently developed does not meet the proof required to establish the contrary:

(1) HMRC's internal process uses the central data base to populate the details (such as name of the taxpayer, correspondence address, UTR) on a standard document such as a self-assessment return. The address on these documents would not have been keyed in manually, and the computer records provided by HMRC show the correct address at all relevant times.

(2) As noted earlier, the annotated copy of penalty assessment dated 12 January 2016, which shows the correct address for Mr Gabay, is positive evidence that HMRC's computer system has held the correct address for the purposes of serving standard documents such as returns and penalty notices.

(3) The chronology of events would suggest that this line of argument has been developed consequent to the erroneous address references in HMRC's review letter. Whilst it was unfortunate that the review conclusion letter should have noted the address incorrectly in two places, it is extraneous to imply from

these two mistakes in the review letter that all previous correspondence from HMRC was incorrectly addressed.

(4) The 'wrong' postcode (ie BX9 1AS) in the review conclusion letter is in fact the postcode of HMRC's issuing office of the penalty notice dated 12 January 2016. Mr Bose's letter of 26 January 2016 was sent to HMRC's office at BX9 1AS. The review officer would appear to have use this postcode in error at one place, and mistyped 'Court' as 'Close in another place in the letter, (other references of Mr Gabay's postcode are correct in the letter). Furthermore, if indeed the postcode BX9 1AS had been erroneously used, it would have been returned to HMRC Self-Assessment unit at the postcode BX9 1AS.

(5) Typographical errors are not uncommon, as illustrated by Mr Bose's letter of 17 May, where he referred to 'paragraph 4' of HMRC's review letter, misquoting the term 'penalty reminders' used by HMRC as 'penalty demands'. While Mr Bose has insisted upon the 'wrong' address references cannot be explained away as typographical errors, the Tribunal is unable to make a finding of fact other than that these are typographical errors in the review letter, just as Mr Bose having typed 'demands' instead of 'reminders' in his letter.

(6) The line of argument subsequently advanced by Mr Gabay is inconsistent with the receipt of the two penalty notices (for £600 and then £1,200) that was expressly acknowledged in January 2016.

(7) The argument that Mr Gabay 'never ever received a return in 2015' as it was sent to a wrong address or to an address that does not exist would seem to contradict the telephone call recorded to have been made by Mr Gabay to HMRC on 16 April 2015. For reasons already stated, the log of the telephone call bears the essential features of a contemporaneous record made at the time, and is in accordance with HMRC's internal procedure and standards of practice.

53. Having considered the facts relied on by Mr Gabay, I conclude that the appellant has failed to prove the contrary. It follows that his appeal fails on those grounds as pleaded.

54. There is no dispute as regards the date of the filing of the return being 27 January 2016. The penalties have therefore been correctly imposed in terms of the legislative provisions under Schedule 55 of FA 2009.

Whether reasonable excuse

55. Having dismissed the appeal on the grounds as pleaded, for completeness, I also consider if Mr Gabay had a reasonable excuse for the late filing of the 2013-14 return.

56. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse is 'a matter to be considered in the light of all the circumstances of the particular case' (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]). The test of reasonable excuse as articulated by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239 ('*The Clean* Car') is as follows:

> 'One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

57. The taxpayer in *The Clean Car* was a VAT trader, but the same principle applies to all taxpayers. The test of reasonableness is essentially an objective test. In applying the test, I have regard to the following facts.

58. First, it would seem that in or before 2015, Mr Gabay had become a Director of various companies. Consequently, Mr Gabay had a statutory obligation to notify HMRC within a time limit of his requirement to complete SA returns by the provision of s 7 of the Taxes Management Act 1970 ('TMA'), as amended by Schedule 41 to the Finance Act 2008. There was a failure to notify his liability to file SA returns in the first place, and it would seem that HMRC are not pursuing any potential penalty imposable for such a failure.

59. Secondly, it would appear that Mr Gabay had been given the reason why he was served SA returns to file when he called HMRC on 16 April 2015. In this respect, he had taken prompt action in making the enquiry, and with the explanation given, he knew or ought to have known that the 2013-14 return was due for filing.

60. Thirdly, whilst neither party has made any reference to the £100 fixed penalty, it would appear that this penalty has been paid. The annotated copy of the penalty notice of 12 January 2016 refers to charging *additional* penalties, and that the additional penalties total £1,200. HMRC's records clearly show that the initial fixed penalty notice of £100 was issued on 14 July 2015. If the £100 penalty had not been paid, the total penalties would have stood at £1,300. The factual inference from the primary facts in front of me is that the penalty of £100 has been settled.

61. The payment of the £100 penalty would seem to indicate that the related penalty notice was received. The fixed penalty notice of £100 should have alerted Mr Gabay to the fact that the 2013-14 return was overdue, and that further penalties would accrue until the return was filed.

62. There is a grace period of three months after the initial fixed penalty of £100 before the daily penalties accrue. In other words, had Mr Gabay filed his return by 9 October 2015, (ie 6 months after the return had been issued), the £100 penalty would have been the total penalty imposable.

63. Fourthly, Mr Gabay and his agent have referred to financial difficulty in meeting the £1,200 penalty, and that Mr Gabay 'struggles very hard in order to look after his family'. The statute, however, specially excludes insufficiency of funds as giving rise to a reasonable excuse.

64. Fifthly, Mr Bose has variously referred to Mr Gabay as 'an honest man of high moral integrity', 'a god fearing man' and that there 'is no reason for him to make an untruthful statement'. Mr Bose's assertions in this regard remain his opinion of Mr

Gabay. It is not open to the Tribunal to make any finding of fact in this respect, nor in relation to Mr Gabay's credibility, since he has not been called as a witness.

65. In any event, I do not need to rely on the evidence of Mr Gabay as a witness to make the relevant findings of fact to determine the appeal. Apart from the evidence from HMRC's records, there is positive documentary evidence in the form of the annotated copy of the penalty notice dated 12 January 2016, the significance of which has already been related.

66. Finally, the Christmas period that delayed Mr Gabay's appointment with Mr Bose could not be a reasonable excuse, since by December 2015, the return had been overdue by some 5 months. The legislation provides that a reasonable excuse has to continue for the duration of the failure, and the failure has to be remedied without unreasonable delay.

67. Based on the facts in front of me, I cannot find any reasonable excuse, for Mr Gabay's initial failure to file the 2013-14 return, or for his continual failure to do so after more than 6 months.

Whether special reduction

68. Paragraph 16 of Schedule 55 FA 2009 provides that if HMRC think it right because of special circumstances, they may reduce a penalty. Under paragraph 22 of Schedule 55 FA 2009, the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

69. The legislation does not define 'special circumstances'. From case law, it is accepted that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152).

70. HMRC confirm that they have considered whether there were any special circumstances in this case and concluded that there are none. I find no reason to disagree, and HMRC's decision in this regard does not appear to be flawed.

Decision

71. The penalties totalling £1,200 imposed under Schedule 55 of FA 2009 in relation to the late filing of the 2013-14 self-assessment return are confirmed.

72. The appeal is accordingly dismissed.

73. 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.

DR H POON

TRIBUNAL JUDGE
RELEASE DATE: 18 January 2018