[2018] UKFTT 555 (TC)

TC06729

Appeal number: TC/2018/02455

PENALTIES – late filing and late payment – Schedules 55 and 56 of FA 2009 – whether service of notice to file deemed effective – whether reliance on accountant a reasonable excuse –personal company and its director separate entities – whether reasonable care taken to avoid the failure – whether failure remedied without unreasonable delay – whether special circumstances – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

JADE CHALMERS **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunal Centre, Eagle Building, Bothwell Street, Glasgow on 11 July 2018

Mr Richard Beattie, of KPP Accountants, for the Appellant, in attendance

Mr Matthew Mason, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

1. Miss Jade Chalmers appeals against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ('Sch 55 FA 2009') for a failure to submit her self-assessment returns for the three years 2013-14, 2014-15 and 2015-16 on time.

2. Penalties under Schedule 56 FA 2009 have also been imposed in relation to the late payment of the tax liability for the said years.

Evidence

3. Miss Chalmers gave evidence concerning her employment history, the timing and reasons for her relocation to Glasgow, and on her state of knowledge as respects her personal tax affairs. Mr Beattie, of KPP Accountants ('KPP'), made representations on behalf of Miss Chalmers. HMRC provided a witness statement from an officer outlining the internal system of issuing penalty notices and updating of address and individual taxpayers' SA Notes but did not call any witnesses. The parties provided a joint bundle of documents.

The penalties under appeal

4. The following penalties have been levied on Miss Chalmers and were appealed:

Year	**FA 2009**	**Penalty**	**Amount £**	**Date penalty notice issued**
2013-14	**Sch 55**	Late filing penalty	100	18/02/15
		Daily penalty	900	21/02/17
		6-month late filing penalty	300	21/02/17
		12-month late filing penalty	300	21/02/17
	Sch 56	30-day late payment penalty	100	19/12/17
		6-month late payment penalty	100	19/12/17
		12-month late payment penalty	100	19/12/17
2014-15	**Sch 55**	*Late filing penalty*	*100*	*07/02/17*
		Daily, 6-month, 12-month penalties	*1,500*	*21/02/17*
	Sch 56	30-day late payment penalty	89	19/12/17
		6-month late payment penalty	89	19/12/17
		12-month late payment penalty	89	19/12/17
2015-16	**Sch 55**	Late filing penalty	100	06/06/17
		Daily penalty	900	05/12/17
		6-month late filing penalty	300	05/12/17
	Sch 56	30-day late payment penalty	57	19/12/17
		6-month late payment penalty	57	19/12/17

Withdrawal of 2014-15 late filing penalties

5. For the 2014-15 return, the Notice to File was issued on 6 April 2015; the due date was 31 January 2016 for electronic filing; the electronic return was filed on 15 December 2017. There was no dispute that it was late by more than 12 months. The maximum penalties of £1,600 were levied.

6. At the hearing, Mr Mason confirmed that HMRC have conceded to cancelling the Sch 55 penalties for 2014-15 (italicised in the table). According to HMRC's system, 'Returned Letter Service' (RLS) was set for the period from 16 March 2015 to 30 January 2017, which meant that no live address was held for Miss Chalmers in the RLS period. HMRC therefore conceded that the Notice to file a return for 2014-15 dated 6 April 2015 had not been effectively served, and withdrew the late filing penalties under Sch 55 in the total of £1,600.

Penalties remain in place and under appeal

7. For the 2013-14 return, the Notice to File was issued on 12 June 2014, and the due date was 31 January 2015 for electronic filing. The return was eventually filed electronically on 15 December 2017, and was late by more than 12 months. The maximum penalties totalling £1,600 under Sch 55 have been imposed.

8. For the year 2015-16, Miss Chalmers telephoned HMRC on 30 January 2017 and her address was updated, ending the RLS period. On 23 February 2017, HMRC re-issued a full return for the year for filing. As the return was issued outwith the normal cycle for self-assessment, it was due three months and a week after the date of issue on 2 June 2017. The electronic return was recorded by HMRC as 'captured' on 27 March 2018, and was more than 6 months late. Schedule 55 penalties totally £1,300 were imposed.

9. Schedule 56 penalties for the three years under appeal are: three times of £100 for 2013-14; three times of £89 for 2014-15, and two times £57 for 2015-16.

10. In summary, and after the cancellation of the Sch 55 penalties in relation to 2014-15, the penalties under appeal to which this decision relates are as follows:

(1) Year 2013-14, £1,600 for Sch 55 and £300 for Sch 56;

(2) Year 2014-15, nil for Sch 55 and £267 for Sch 56;

(3) Year 2015-16, £1,300 for Sch 55 and £114 for Sch 56.

Findings of fact

Employment history and personal circumstances

11. Miss Chalmers lived in Glasgow until April 2011, when she moved to Liverpool to be with her partner. She worked for an insurance company in Liverpool dealing with PPI claims, and was in this post until December 2012.

12. In March 2013, she started working as a contractor with an agency based in London. Her placements were mainly with banks in their retail-banking customer services department; she described her main duties as complaints handling. She continued to live in Liverpool from a property she solely owned.

13. Around May 2014, Miss Chalmers split up with her partner and moved back to Glasgow to take up a contract via the agency with the Clydesdale Bank. She moved back to live with her parents while selling her Liverpool home.

14. Miss Chalmers' partner continued to reside in her Liverpool property initially following her departure, but moved out at some point during the sale process.

15. Soon after her return to Glasgow in the summer of 2014, Miss Chalmers found herself to be in a condition that required medical treatment.

16. From May 2014 to March 2015, Miss Chalmers was living at her parents' home until she bought her own place in G69 in March 2015.

17. Miss Chalmers' Liverpool property (and former home) was sold at the end of December 2014.

18. On 30 January 2017, Miss Chalmers telephoned HMRC to obtain her UTR, and it was then that HMRC updated her base address on record to her G69 address.

Engagement of an accountant

19. When Miss Chalmers started to work as a contractor via an agency, she was advised to contact an accountant, a Mr Moon, to set up the requisite business records with the Companies House and HMRC. Miss Chalmers said it would be in March 2013 when she first contacted Mr Moon.

20. From the letter to HMRC dated 30 March 2017 on the headed paper of Mr Moon's business, based in Liverpool. The name of the firm is 'Stephen Moon & Co, Accountants & Auditors', licensed and regulated by the Association of Accounting Technicians ('ATT').

21. Mr Moon advised Miss Chalmers to set up a personal company as the trading medium for the contract work. The company was set up in April 2013.

22. Through her personal company, Miss Chalmers was paid an annual salary under PAYE, which approximated to the annual tax free allowance for each year, and the balance of her remuneration was paid by dividends from her personal company in the sum of £30,000 to £37,000 per annum.

23. The income profile for Miss Chalmers for the years concerned is as follows:

(1) 2013-14, £7,680 under PAYE and £31,100.11 as dividend.

(2) 2014-15, £9,996 under PAYE and £30,000 as dividend.

(3) 2015-16, £9,713 under PAYE and £37,000 as dividend.

Records of base address and SA Notes

24. HMRC's records hold the following details as Miss Chalmers' base address:

(1) 25 January 2011 to 7 April 2011 at a G33 address.
(2) 7 April 2011 to 2 June 2014 at Cherry Sutton in Liverpool.
(3) 2 June 2014 to 30 January 2017 at Bellflower Close in Liverpool.
(4) 30 January 2017 to date at a G69 address in Glasgow.

25. From the SA Notes, some key events are as follows:

(1) 2 June 2014: SA1 received record created NINO … taxpayer registered for self-assessment DIRECTOR – start date 06/04/3013 case archived – created for 'DIRECTOR start date 06/04/2013';

(2) 2 June 2014: base address changed from (sic [to]) Bellflower Close.

(3) 16 March 2015: RLS set.

(4) 7 April 2015: electronic PAYE RLS list 5/03/15, RLS [Individual] already set, N/T of new address in RTI, 12/13 PO [number] £1099.30 [cancelled], [authority] held to reissue when new add held …

(5) 30 January 2017: taxpayer telephoned in UTR letter issued; base address changed to G69 address in Glasgow.

(6) 31 January 2017: Base Address RLS unset.

26. The entries on the SA Notes in relation to 2015-16 are interweaved by registration of agents and Debt Management actions:

(1) 14 February 2017: WO16 reviewed. No longer RLS. Electronic 15/16 Return issued [ie a Full Return]. Work item deleted.

(2) 21 February 2017: New agent [Mr Moon's] details and 64-8 received.

(3) 15 May 2017: DMS [reference number] DOR 03/04/17. Agent appeals against 13/14 & 14/15 LFPs. No action taken re appeals as returns not yet filed (despite agent claims). AP PO 2s to TP with copies to agent.

(4) 11 September 2017: Agent details updated [to KPP]; form 64-8 received.

27. The following penalty reminders were issued

(1) 3 October 2017: 30-day penalty reminder letter issued for 2015-16.

(2) 28 October 2017: DMS received letter [dated 15/09/17] of appeal from agent against 13-14 to 15-16 Late filing penalties; unable to review penalties as returns remained outstanding

(3) 7 November 2017: 60-day penalty reminder issued for 2015-16.

28. In February and March of 2018, there were numerous entries in the SA Notes concerning the figures for 'student loan' in the submitted SA returns.

Various correspondence with agent and HMRC regarding the penalties

29. On 3 March 2017, Miss Chalmers emailed Mr Moon with attachments of the penalty notices in relation to 2014-15 (which HMRC subsequently cancelled) and asked Mr Moon to 'look into the matter', and that she assumed it was 'something to do with the VAT application', and asked Mr Moon to let her know if she should do anything in the meantime.

30. On 10 March 2017, Mr Moon replied as follows:

> 'The letters refer to penalties for not filing your personal tax return on time. However, we were unable to (sic) this as we were not in possession of your personal tax reference number at the time.
>
> I will write to HMRC on your behalf to appeal against the penalties explaining the reasons why the returns were not filed.
>
> HMRC have sent another questionnaire out regarding your VAT application and I have completed it and posted it out for you to sign and send back to them.
>
> A reminder too if (sic) would kindly send me the company bank statements for the year ended 31 August 2016, so I can complete the company accounts.'

31. By letter dated 30 March 2017, Mr Moon wrote to HMRC to appeal against the penalties for the two years 2013-14 and 2014-15. The postal barcode attached onto the face of the letter would suggest that it was sent by registered post. The content of the letter states as follows:

> 'We act for the above and have 64-8 authority in place …
>
> Miss Chalmers was not in receipt of her UTR number and had requested it on numerous occasions as she moved address during that time, (sic) once she had obtained her UTR we obtained authority *and have recently duly filed her 2014, 2015 and 2016 tax returns on line*.
>
> Miss Chalmers was not deliberately failing to file her tax returns and had no tax liability for the years in question.' (emphasis added)

32. On 3 January 2018, KPP wrote to advise that the outstanding returns had been submitted. As grounds of appeal, KPP stated that Miss Chalmers 'relied on her previous accountant for advice and to keep on top of compliance', but that she could not contact Mr Moon despite numerous attempts.

33. By letter dated 16 February 2018, similar grounds were elaborated by KPP:

> 'Miss Chalmers paid her accountant to deal with all aspects of her taxes and relied on him entirely to do so. … On one occasion, Miss Chalmers e-mailed her previous accountant with a copy of a penalty notice received and thought this was in relation to VAT, this shows Miss Chalmers' lack of knowledge …
>
> [Mr Moon said] he could not submit Miss Chalmers' personal tax return on time as he did not have the UTR and advised he would be

appealing the penalties. Miss Chalmers therefore assumed all was in hand….'

34. KPP's letter of February 2018 also stated that from HMRC's reply of 16 May 2017, it was clear that Mr Moon 'appealed the penalties by saying the return was submitted online', which was 'completely different to what [Mr Moon] told Miss Chalmers as he had advised that he could not submit the return without the UTR'; that Miss Chalmers emailed this to Mr Moon and was advised that he would get back to HMRC on her behalf. When Miss Chalmers heard nothing further on this matter, she had assumed that the appeal was successful; that Miss Chalmers 'did not receive any letters from HMRC for some time therefore this further suggested the appeal was successful'.

35. The February 2018 letter stated that Miss Chalmers began to receive letters from HMRC again regarding penalties and at that point made the decision to appoint KPP as the new agent.

Grounds of appeal

36. The main ground of appeal as stated by KPP when requesting a review by HMRC was that Miss Chalmers, 'as a lay person, cannot be reasonably expected to understand tax and the process and calculations involved and as such appointed a professional adviser who she was completely reliant on'.

37. At the hearing, it was also suggested that Mr Moon had somewhat misled Miss Chalmers in believing that the returns had been submitted online and had given false assurance that all was well and in hand.

38. The grounds of appeal stated by KPP for Miss Chalmers in notifying the appeal to the Tribunal on 12 April 2018 are summarised as follows:

(1) We are appealing the penalties as 'we find them unfair and excessive'.

(2) Miss Chalmers 'paid her previous accountant to deal with all aspects of self-assessment and relied on him solely to do so'; that she was assured 'all was in hand' when she forwarded correspondence she received to Mr Moon; that she had no reason to believe that was so as he was paid to do so.

(3) When Miss Chalmers queried one of the late filing penalties with Mr Moon, he advised that he could not have the UTR to submit her return. 'He then appealed the penalty to HMRC advising the return was submitted online therefore clearly lying.' He did not advise Miss Chalmers of the next steps and simply said he would deal with the matter and assured her that everything was in hand.

(4) If Miss Chalmers had been advised at any stage to contact HMRC herself, then she would have done so. But she was being assured by her professional accountant that he was dealing with the situation and would have no reason to doubt this.

(5) When Miss Chalmers continued to receive letters from HMRC with no real answer from Mr Moon, she appointed us as the new accountant.

HMRC's case

39. HMRC's review conclusion letter dated 16 March 2018 refused the appeal on grounds of reasonable excuse for the following reasons:

> (1) Delay or failure by an agent is not regarded as a reasonable excuse as it is ultimately your responsibility to ensure that a return is filed on time or without delay if already late.
>
> (2) If you feel your previous agent failed in his professional capacity or did not follow specific instructions, then you should seek redress direct from your previous agent.

40. In relation to special reduction, the review officer stated he had 'carefully considered all of the information', and did not think that there were any special circumstances for reduction: 'Special circumstances mean circumstances that are uncommon or exceptional'. In reaching the conclusion, the review officer stated he had considered the following:

> '(1) The responsibility for filing a return by the due date is yours. This cannot be transferred to (sic) third party. If you feel your previous agent failed in their professional capacity, you should seek redress from them.
>
> (2) The penalties for late filing of a self-assessment return are based solely because the return has been filed late, and are in no way linked to your tax position or income.'

The applicable law

Statutory provisions

41. Section 7(1) of the Taxes Management Act 1970 ('TMA') provides as follows:

> '**7 Notice of liability to income tax and capital gains tax**
>
> (1) Every person who –
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and […]
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.'

42. Section 8 of TMA places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer. Sub-section 8(1) provides:

> '(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.'

43. Section 8(1D) provides for the due dates of filing, whereby a paper return is due by 31 October, and an electronic return is due by 31 January in the following tax year.

44. The late filing penalties are imposed under paragraphs 3 to 5 of Sch 55 FA 2009. Paragraph 3 provides for a penalty of £100 if a return is not received by the filing date for a return. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable. Paragraph 5 provides for a fixed penalty of £300 (or 5% of tax if higher) if the return remains outstanding after 6 months.

45. The daily penalties are imposed under paragraph 4 of Schedule 55, and a taxpayer is liable to a penalty under paragraph 4 '*if (and only if)*' HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable'.

46. In relation to the late filing penalties, paragraph 23 of Sch 55 to FA 2009 contains a defence of 'reasonable excuse', with specific exclusions:

> '(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] 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 [the taxpayer's] control,
>
> (b) where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure.
>
> (c) where [the taxpayer] had a reasonable excuse for the failure but the excuse has ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.'

47. Section 59B of TMA provides for the payment (or repayment) of any outstanding liability (or overpayment) in relation to income tax and capital gains tax for a relevant year. Under sub-s 59B(4), the time limit for making such adjustment is 'on or before the 31st January next following the year of assessment'.

48. In relation to the late payment penalties, paragraph 16 of Sch 56 to FA 2009 provides the defence of 'reasonable excuse' on an appeal to HMRC or the Tribunal in very similar terms to those under paragraph 23 of Sch 55.

49. In the absence of a reasonable excuse, a penalty can be reduced if there are 'special circumstances' under paragraph 16 of Sch 55, and paragraph 9 of Sch 56.

50. The Tribunal's jurisdiction in under paragraph 22 of Sch 55, and paragraph 15 of Sch 56, which provide that the Tribunal has the power to:

> '(1) affirm or cancel the penalty imposed by HMRC; and
>
> (2) to substitute for HMRC's decision another decision that HMRC had power to make.'

51. Section 7 of the Interpretation Act 1978 provides for the delivery of a document by post 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.'

Case law on reasonable excuse

52. 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]).

53. In *Jeffers v HMRC* [2010] UKFTT 22 (TC) Sir Stephen Oliver QC (the then President of the Tribunal) states at [17] in respect of reliance on an agent:

> 'The obligation to make the tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with, eg the obligation to make the return on time can amount to a "reasonable excuse". To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional.'

54. The test of reasonableness as articulated by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234, while specifically refers to a VAT registered trader, is applicable to all taxpayers:

> 'The test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

55. In *Barrett v HMRC* [2015] UKFTT 329 (TC), the test of reasonable excuse applicable to a penalty is stated at [154] in the following terms:

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

56. As regards the extent any reliance on an accountant can amount to being a 'reasonable excuse' (in the context of whether 'reasonable care' has been taken by the taxpayer), Judge Berner stated in *Barrett* at [160] and [161] the following:

> '160. I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself.
>
> 161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of 40 circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.'

57. The recent Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC), the test whether there is a reasonable excuse is expressed at [71]:

> 'In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times …'

58. As to the issue whether ignorance of the law can amount to a reasonable excuse, the Upper Tribunal decision in *Perrin* gives helpful guidance at [82] as follows:

> '… It is much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see not basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The *Clean Car Co* itself provides an example of such a situation.'

59. 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).

60. In *Rodney Warren & Co v HMRC* [2012] UKFTT 57 ('*Warren*'), Judge Helier stated at [53] that the consideration of special circumstances 'must mean something different from, and wider than, reasonable excuse', for –

> '… (i) if its meaning were confined within that of reasonable excuse, paragraph 9 [of Schedule 56 FA 2009] would be otiose, and (ii) because paragraph 9 [of Schedule 56 FA 2009] envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.'

61. Judge Helier's articulation of 'special circumstances' is at [57]:

> 'The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.'

Discussion

The issues for determination

62. That the returns were filed late and that the tax payments were paid late are not matters of fact under dispute. To that extent, HMRC have established that there is a *prima facie* case for the imposition of the penalties under Schedules 55 and 56.

63. The issues for determination in this case are the following:

(1) *The validity of the Notice to file* – Given the appellant's address history and the protracted period when HMRC held no live address for the appellant on record, the fact in issue is whether letters and notices can be deemed to have been effectively served at the relevant times. After all, an essential purpose of a penalty notice and a daily penalty reminder letter is to alert the taxpayer to the status of the relevant return being late so that remedial actions can be taken. A related question is whether the Notice to File for 2013-14, which brought Miss Chalmers into self-assessment, was validly issued as a matter of law, and is an antecedent question to the fact in issue.

(2) *Whether reasonable excuse* – the grounds of appeal are in effect a plea of reliance on a third party, which the statute has specifically precluded from being a reasonable excuse unless the taxpayer '*took reasonable care to avoid the failure*'. When deciding whether Miss Chalmers had a reasonable excuse for the various penalties, the actual question to ask is therefore whether she had taken reasonable care to avoid the failure.

(3) *Whether failure remedied without unreasonable delay* – Since the length of delay was considerable for each tax year in question, it is necessary to consider whether a reasonable excuse, if existed, continued throughout the relevant period for any parts of the penalties to be cancelled.

Penalties in relation to 2013-14

Whether Notice to file validly issued as a question of law

64. The year 2013-14 was the first year for which Miss Chalmers was issued a Notice to File under s 8 TMA. The issue whether a s 8 Notice is validly served as a question of law was considered in cases such as *Melanie O'Neill v HMRC* [2016] UKFTT 866 (TC), in *David Goldsmith v HMRC* [2018] UKFTT 005, and *Stuart Kirk Crawford* [2018] UKFTT 392 (TC).

65. Miss Chalmers was brought into self-assessment on 2 June 2014 with the submission of the Form SA1, which is the form to register for self-assessment for reasons other than being self-employed.

66. From HMRC's SA Notes, the self-assessment record for Miss Chalmers was set up with reference to the fact that she became a 'Director' of her personal company; that would seem to be the stated reason for bringing her into self-assessment.

67. There have been differences in opinion as to whether the mere fact of being a director obligates the person to register for self-assessment, if the person has no further tax liability despite being a director. It has been contended among practitioners that s 7 TMA does not stipulate that a company director must register for self-assessment, contrary to HMRC's published guidance. The decision at *Kadhem v HMRC* [2017] UKFTT 466 (TC) has been variously relied on as authority for this position in other cases, though not specifically by Miss Chalmers.

68. In the recent tribunal decision *Warren Pearson v HMRC* [2018] UKFTT 358 (TC), the agent for the appellant argued that 'the requirement to register for Self-

Assessment under Section 7 TMA does not make a statutory obligation for a company director to register as a self-employed person', and that HMRC agreed (at [19]).

69. Notwithstanding HMRC's SA Notes which seemed to link being a 'Director' with Miss Chalmers' SA1 Form, I am satisfied that Miss Chalmers was not registered for self-assessment just because she became a director of her personal company.

70. I conclude that Miss Chalmers had an obligation to register for self-assessment due to her tax liability arising from her income profile. Her annual salary was restricted to her personal allowance, which meant no PAYE would have been paid on her salary. She was paid dividends by her personal company, which could result in additional tax being payable when her total income (salary plus gross-up dividends) after the year's personal allowance, exceeded the basic-rate band. She also had a student loan with an outstanding balance for the tax years in question.

71. The late payment penalties at £100 for each period of lateness in relation to 2013-14 were levied at 5% of the unpaid tax liability, namely £2,000.

72. From the primary facts, I infer that the SA1 Form was correctly submitted to notify Miss Chalmers' tax liability, and that the form would most probably have been submitted by Mr Moon on her behalf as her agent at the time of submission.

73. I conclude that the s 8 Notice was validly issued as a question of law, and is indeed not a matter of contention either by Miss Chalmers.

Whether Notice to file validly served as a question of fact

74. Co-ordinating HMRC's address history on record for Miss Chalmers with her own account of timing of relocation to Scotland, I infer that:

(1) the property at Cherry Sutton was her base address on HMRC's record from 7 April 2011 to 2 June 2014, and that Cherry Sutton was the property she owned and resided in until she moved to Glasgow in May 2014; that the property was sold in December 2014;

(2) the address at Bellflower Close would appear to be the base address for Miss Chalmers' ex-partner after he moved out of the Cherry Sutton property, and the address for mail to be forwarded.

75. From the SA Notes, the entry on 2 June 2014 registering Miss Chalmers for self-assessment was followed by an entry, also on 2 June 2014, changing her base address from Cherry Sutton to Bellflower Close. (The SA Notes record 'from Bellflower Close', which should be read as 'to' Bellflower Close to tie in with the chronology of Miss Chalmers' account.)

76. It is not clear what information prompted HMRC to reset the base address to Bellflower Close on 2 June 2014. No explanation was given or readily discernible from the papers. The coincidence in timing with the receipt of the Form SA1 suggests that it could be the address notified to HMRC on Form SA1. In the alternative, it could have been an automatic update captured by some form of mail re-direction

notification to Bellflower Close that would have been made by Miss Chalmers' ex-partner on moving out of Cherry Sutton.

77. What was clear was by the time the s 8 Notice was issued on 12 June 2014 to the 'new' address at Bellflower Close, Miss Chalmers had moved back to Glasgow for over a month.

78. The period of RLS set in relation to Bellflower Close was from 16 March 2015 to 30 January 2017 and did not cover the complete period when Bellflower Close was registered as Miss Chalmers' base address, namely 2 June 2014 to 30 January 2017.

79. I conclude that during the period from 2 June 2014 to 16 March 2015 ('the limbo period'), while HMRC appeared to have a live address at Bellflower Close for Miss Chalmers, that address was not where she was residing. It would seem, during this limbo period, Miss Chalmers' ex-partner was residing at his parents' and the Bellflower address was in fact his parents' until he moved out in March 2015, when the RLS was triggered.

80. The s 8 Notice to file her first SA return was served on 12 June 2014 to Bellflower Close during this limbo period. Whilst the Notice was not returned as undelivered, there was no certainty of the Notice having been forwarded to Miss Chalmers in Glasgow. Miss Chalmers informed the Tribunal that the re-direction of mail to her was haphazard; that she and her ex-partner were not on good terms, even though the Notice was not 'returned as undelivered' at this stage to trigger the RLS.

81. The service of the s 8 Notice was in June 2014 and would coincide with the period when Miss Chalmers was undertaking medical checks that resulted in an emergency operation in the summer of 2014. The Tribunal infers that Miss Chalmers would have been hospitalised for a short period of time due to the operation.

82. Section 7 of the Interpretation Act 1978 requires that a document can only be deemed to have been 'effected by properly addressing, pre-paying and posting a letter containing the document'. In these circumstances, the service of the s 8 Notice to file for 2013-14 cannot be deemed to have been effected.

Other factors

83. In cancelling the penalties for 2013-14, I also have regard to the fact that 2013-14 was the first year of SA return filing for Miss Chalmers. She had no pre-existing knowledge of a standing obligation to furnish an annual return which could be assumed to compensate the absence of effective delivery of the s 8 Notice.

84. The Court of Appeal decision in *Keith Donaldson v HMRC* [2016] EWCA Civ 761 concerns whether the onus has been met by HMRC in imposing the daily penalties, since the provisions under paragraph 4 are emphatic as to the conditions to be met before the daily penalties can be imposed, such as: 'if (and only if)' HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable'.

85. For 2013-14, the daily penalty reminder letters would have been sent in June, July and August of 2015. HMRC's system set the RLS from 16 March 2015. These penalty reminders were sent therefore during the RLS period. The requisite conditions under para 4 of Sch 55 are not met for the daily penalties to be imposable.

Conclusion

86. I conclude that the s 8 Notice was sent to Miss Chalmers at the Bellflower Close address in June 2014. For the same reason that the penalties for the year 2014-15 were withdrawn, the penalties for 2013-14 are to be cancelled since Bellflower Close was not the live address for Miss Chalmers at the time when the Notice was served on her.

Penalties in relation to 2015-16

The facts in relation to the issue of the 2015-16 return

87. The factual matrix in relation to the late filing penalties for 2015-16 is different from that in relation to 2013-14. The validity of the issue of the return is not a fact in issue that needs to be singled out for consideration. The sequence of events leading to the issue of a full return is documented in the SA Notes:

(1) On 30 January 2017, Miss Chalmers finally contacted HMRC directly by phone; the call seemed to have been prompted by the need to obtain her UTR.

(2) On 30 January 2017, HMRC updated the address record, and end the long period since May 2014 (when Miss Chalmers moved back to Glasgow) wherein HMRC held no live address for her; this was a period of 33 months.

(3) On 14 February 2017, HMRC issued a full return to the updated address. (Mr Mason confirmed that 'Electronic 15/16 Return issued' means a full paper return being run off and sent by post as the return was issued outside the normal self-assessment cycle.) The SA Notes recorded the action to issue on 14 February 2017, while the date of issue on the SA return was 23 February 2017.

88. For 2015-16 therefore, HMRC re-instituted the whole process of return issue. The date of issue of the full paper return was registered as 23 February 2017 for Schedule 55 purposes, and its due date was 2 June 2017, being 3 months and a week after the date of issue given that the return was outside the normal cycle.

The facts in relation to the engagement of agents

89. SA Notes recorded a telephone call from KPP entry on 20 December 2017 advising that 2014-15 and 2015-16 returns were sent in. HMRC's system registered the 2014-15 return as 'captured' on 18 December 2017, which corresponded to the timing as advised by KPP. However, for the 2015-16 return, the date the return was 'captured' was 27 March 2017.

90. I have considered the significance of the difference in the filing date for the 2015-16 return. The date of filing being 18 December 2017 would seem to accord

with: (i) KPP's notification, (ii) the fact that other years were filed in December 2017, and (iii) that the late payment penalty notices for 2015-16 were dated 19 December 2017, which indicates that the return must have been lodged to notify the outstanding tax liability for a late payment penalty to be levied.

91. I conclude that the difference in date for the filing of the return, whether on 18 December 2017 as with other years, or on 27 March 2018 as 'captured', is not material for present purposes. No further penalties were incurred in the intervening period between 18 December 2017 and 27 March 2018. The total Sch 55 penalties of £1,300 were imposed for failure to file *before* 18 December 2017.

92. For whatever reasons, there might be some delay between December 2017 (possibly an attempt to file) and 27 March 2018 (when eventually filed). For current purposes, the date of 27 March 2018 is the date when the return was captured by HMRC and the date when the return was filed.

93. Two agents were involved in the process of filing all outstanding returns. Their registrations as agent were interleaved with Debt Management actions, and the key dates are as follows:

(1) On 21 February 2017, Mr Moon registered as agent by filing form 64-8.

(2) On 15 May 2017, Debt Management actions, possibly a call to the door as denoted by 'DOR' on the SA Notes.

(3) 11 September 2017: Agent details updated to KPP; form 64-8 received.

94. While Mr Moon would most likely to have been the person submitting the SA1 form, received by HMRC on 2 June 2014, it is a fact that he was not registered as her agent in relation to her personal tax affairs until February 2017.

95. Without Mr Moon's evidence, or the terms of the Letter of Engagement for his service, nothing conclusive can be established as to the scope of engagement of Mr Moon's service.

96. From obtainable facts that Mr Moon was not a registered agent for Miss Chalmers' self-assessment until February 2017, and he had no note of her UTR, I infer that Mr Moon had only undertaken to act as agent in relation to Miss Chalmers' personal company. In other words, so far as he was concerned, his professional duties to Miss Chalmers ended with matters concerning her company as an entity, and did not extend to cover Miss Chalmers' personal tax affairs.

97. At the hearing, Miss Chalmers confirmed that her personal company's tax affairs were in order, and that there was no penalty levied on the company, either in late filing or late payment. To that end, Mr Moon would seem to have discharged his professional duties satisfactorily.

98. Whilst Miss Chalmers considered that Mr Moon was offering a comprehensive service to cover anything to do with tax, Mr Moon would seem to have only undertaken to deal with her personal company. There would seem to be a mismatch

between what happened in reality and what Miss Chalmers expected to be the scope of Mr Moon's engagement.

99. At the heart of this confusion would seem to be a failure of agent and client to clarify that the formation of her personal company created a new legal entity in terms of tax obligations, which are separate and distinct from Miss Chalmers' personal obligations as a taxpayer in her own right.

100. In March 2017, there were communications between Mr Moon and Miss Chalmers regarding the late filing penalties. Mr Moon's email reply on 10 March 2017 advised Miss Chalmers correctly of the nature of the penalties, and gave as the reason that he was unable to file this as he did not have her UTR.

101. In his letter dated 30 March 2017 to HMRC to appeal against the penalties imposed on Miss Chalmers for 2013-14 and 2014-15 (no Sch 55 penalties for 2015-16 levied at this stage), Mr Moon advised that:

> '… once [Miss Chalmers] obtained her UTR we obtained authority and have recently duly filed her 2014, 2015 and 2016 tax returns on line.'

Had reasonable care been taken in reliance on accountant

102. Mr Moon's claim in March 2017 of having filed the returns for the three years was problematic, and caused KPP to refer to this claim as 'lying'. It is not open to me to find whether Mr Moon was lying when he claimed, not only to Miss Chalmers but also to HMRC, that he had filed the three SA returns for her; nor is it a relevant question for the purpose of this appeal.

103. The relevant question for my consideration is whether Miss Chalmers had taken reasonable care in her reliance on Mr Moon to avoid the failure. In this respect, the facts relevant to my consideration are:

(1) Mr Moon is licensed and regulated by the Association of Accounting Technicians, and can reasonably be expected to deliver the professional services he holds himself out to provide.

(2) Mr Moon had acted for Miss Chalmers since March 2013. The professional client-agent relationship was four years old by the time Mr Moon made the claim of having filed the outstanding returns in March 2017.

(3) All aspects of the tax affairs in relation to Miss Chalmers' personal company would seem to have been dealt with satisfactorily; no penalty issues seemed to have arisen. The service rendered for the company would include drawing up accounts to 31 August as the year-end, filing of the company's corporation tax returns (CTSAs), and all PAYE compliance aspects for the company as an employer of Miss Chalmers.

(4) In February 2017, Mr Moon registered as Miss Chalmers' agent after she had obtained her UTR from HMRC.

(5) In March 2017, Mr Moon was also dealing with the VAT registration application for the company, when he would seem to have told Miss Chalmers that her returns were being filed.

104. Even if the scope of engagement was originally only in relation to the personal company, by February 2017, Mr Moon had contracted to act as Miss Chalmers' tax agent for her SA returns. I find that the filing of the 64-8 mandate was indicative of Mr Moon's agreement to act as Miss Chalmers' agent in relation to her personal tax affairs, which included the filing of the outstanding SA returns.

105. The four-year-long client-agent relationship did not seem to have been beleaguered by false claims or failed promises. That Miss Chalmers continued to engage Mr Moon's service even after she moved back to Scotland in May 2014 was a testimony to a level of satisfaction with the delivery of services. On the face of it, Mr Moon was holding out to cover all tax compliance services as they arose.

106. The due date for filing the 2015-16 return was reset when the return was re-issued on 23 February 2017. Mr Moon's registration as agent in fact pre-dated the issue of the said return. The steps taken by Miss Chalmers to ensure that the 2015-16 return would be filed by 2 June 2017 by Mr Moon were reasonable in the context of the ongoing client-agent relationship.

107. In these circumstances, I find Miss Chalmers' reliance on Mr Moon not unreasonable. The course of dealings between Mr Moon and Miss Chalmers would have given no reasons for Miss Chalmers to doubt Mr Moon's claim that her SA returns for the three years had been submitted by March 2018 was indeed submitted.

108. Similar to what Judge Berner observed in *Barrett*, I consider the steps taken by Miss Chalmers 'to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax', and in providing all relevant documentation to Mr Moon, were the actions of a reasonable taxpayer in the position of Miss Chalmers.

109. For these reasons, Miss Chalmers had a reasonable excuse for the late filing of the 2015-16 return by 2 June 2017. The late filing penalty of £100 is discharged.

Whether failure remedied without unreasonable delay

110. Having found that Miss Chalmers had a reasonable excuse for the failure to file her 2015-16 return by 2 June 2017, I now have to consider whether the failure was remedied without unreasonable delay.

111. The action by Debt Management on 15 May 2017 was the next activity on the SA Notes after registration of Mr Moon as the agent. It is not clear what kind of action was taken by Debt Management at this juncture, but whatever the action was, Miss Chalmers would have been alerted to the fact that the SA returns remained outstanding despite the appeal lodged by Mr Moon on 30 March 201 as per SA Notes:

> '15/05/2017 … Agent appeals against 13/14 & 14/15 LFPs. No action taken re appeals as returns not yet filed (despite agent claims). AP PO 2s to TP with copies to agent.'

112. Form the above entry in the SA Notes, it is clear that the system registered the appeal lodged on 30 March 2017 by Mr Moon, which at the same time also noted his claim that the returns had been filed. It is also clear that some kind of communication was sent to Miss Chalmers, and copies to Mr Moon as the agent.

113. By this set of correspondence around 15 May 2017, it would have been clear that the alleged submission of the three returns in March 2017 was not captured by HMRC. This was a fact that was notified to both Miss Chalmers and Mr Moon.

114. The question is no longer whether Miss Chalmers could have met the filing due date of 2 June 2017 (which is already allowed) but whether she continued to have a reasonable excuse until her 2015-16 return was captured on 27 March 2018.

115. The next obtainable facts relevant to my consideration are:

(1) Around mid-June 2017, Miss Chalmers would have received the late filing penalty notice of £100 in relation to 2015-16.

(2) On 11 September 2017, KPP was registered as agent.

(3) On 3 October 2017, 30-day daily penalty reminder was issued.

(4) On 28 October 2017, Debt Management action, restating that 'unable to review appeal' as the SA returns for 2013-14 to 2015-16 still outstanding: 'Lttr APP02 issued to agent'.

(5) On 7 November 2017, 60-day daily penalty reminder was issued.

116. For penalty purposes, it was the delay from 2 June to 2 December 2017 which led to the penalties of £1,200. As discussed earlier, the continuous delay from 2 December 2017 to 27 March 2018 did not result in any further penalty, which renders it immaterial whether the return was attempted to be filed on 18 December 2017 and was only successfully filed on 27 March 2018.

117. I have found that Miss Chalmers had taken reasonable care to avoid the failure to file the 2015-16 return by engaging the service of Mr Moon for the late filing penalty of £100 to be discharged. The question for determination now is whether the excuse continued to exist until 2 December 2017 for any part of the balance of £1,200 to be discharged.

118. In other words, the question I have to decide is when the reasonable excuse ceased to exist for Miss Chalmers during the penalty period. In this respect, I have regard to the following findings of fact or factual inferences:

(1) On the assumption that the return had been dealt with by her agent, and given the repeated 'false' assurance, there could be some time lapse before Miss Chalmers finally decided to take alternative action to rectify the situation. By 'false', it was according to the representations made by Mr Beattie.

(2) There is corroborative evidence (in Mr Moon's letter and in SA Notes) of this assurance being given to HMRC by Mr Moon in March 2017 that the SA returns for the three years had been submitted.

(3) Meanwhile, HMRC sent penalty notice and reminders, and Debt Management took enforceable actions to press home the fact that all returns were still outstanding. The dates of these communications are: 15 May 2017, mid-June 2017, 3 October 2017 and 7 November 2017.

(4) The late-filing penalty notice for the £100 would have been sent in June 2017, and would have alerted Miss Chalmers to the daily penalty imposable if the 2015-16 return remained outstanding by 2 September 2017.

(5) From 15 May 2017 when Debt Management sent letters to Miss Chalmers to KPP being registered on 11 September 2017, it was a lapse of nearly 4 months.

(6) As the incoming accountant, KPP would need some lead-in time to gather the relevant information to file the outstanding returns. It would also seem that the focus was to file the earlier years. The SA returns for 2013-14 and 2014-15 were filed by 18 December 2017, whereas the 2015-16 return was captured on 27 March 2018.

(7) From 11 September 2017 to 27 March 2018 when the return was captured, it was a further lapse of more than 6 months.

119. Taking all these factors into account, I consider Miss Chalmers had a reasonable excuse because she had been given assurance by her accountant, and that excuse ceased on 2 November 2017. In setting the date the reasonable excuse ceased as 2 November 2017, I have regard to the following facts:

(1) Miss Chalmers' professional expertise is in complaints handling for insurance and banking institutions. She must have a good awareness of time-limit issues being a core reason for dissatisfaction and basis for bringing a complaint, as well as being an essential component in gauging whether her performance in complaints handling meets the required standard of response time. She should have an awareness that as a taxpayer, similar issues regarding time-limits can have financial consequences.

(2) In setting the cessation date for her reasonable excuse at 2 November 2017, I am of the view that a reasonable taxpayer would have acted with greater diligence to remedy the situation from 15 May 2017 when she received letters from Debt Management informing her that no appeal would be entertained as all her returns were still outstanding. This was a period of five and a half months.

(3) Throughout 2017, Miss Chalmers would have become keenly aware of the penalty situation arising from earlier years; debt management actions were repeatedly enforced against her; the penalty notice (June 2017) and the 30-daily penalty reminder (October 2017) should have driven home the urgency of the situation if she were to avert further penalties.

(4) The engagement of KPP by early September 2017 should have enabled the 2015-16 SA return to be filed by 2 November 2017.

(5) The income profile of Miss Chalmers is not complex; her annual salary would be on her P60; or in the alternative ascertainable by what she drew out of her personal company on a monthly basis; the dividend payments would have been readily ascertainable. All these figures were available through her personal company's accounts, which could have been prepared in time for a professional accountant to extract the necessary figures for her 2015-16 return.

Conclusion

120. The test of reasonableness is a question of degree, having regard to all the circumstances, including the particular circumstances of the individual taxpayer. In setting the date that the reasonable excuse ceased to be 2 November 2017, it is not by reference to any specific event that happened on that date. It is a judgment by degree, that a reasonable taxpayer, endowed with Miss Chalmers' professional expertise, would have remedied the failure with greater diligence, and not later than by 2 November 2017.

121. For these reasons, the daily penalties for the first 60 days in the sum of £600 are discharged. The balance of daily penalties in the sum of £300, and the 6-month penalty of £300 are confirmed.

The late payment penalties

The underlying cause of failure to make payment on time

122. In certain cases, the discharge of any late payment penalty may be predicated on the discharge of the late filing penalty, in that if the SA return filing is late, and that there was a reasonable excuse for the lateness, then the taxpayer could not have known his or her outstanding tax liability to make payment by 31 January following the end of the relevant year.

123. However, there is no presumption in law that the discharge of a late filing penalty means that the late filing penalty relating to the relevant year should also be discharged. The reasons for the failure in filing can be different from the reasons for the failure in making a timeous payment; nor is there any inevitable causal link between two types of failures. Each case turns on its own facts.

124. In the present case, the cancellation of the late filing penalties for 2013-14 and 2014-15 is in consequence of the fact that effective service of the s 8 Notice to file could not be deemed. That, in turn, was due to the fact that no live address was held by HMRC for Miss Chalmers for a period of some 33 months. The discharge of the late filing penalties is not related to there being a reasonable excuse for the defaults.

125. The failure to notify HMRC of the change of base address was the underlying cause of the failures for filing and payment for the earlier years. No satisfactory explanation has been provided as to the failure to notify HMRC of Miss Chalmers'

change of address for 33 months, or how the address was reset to a 'new' address in Liverpool in June 2014 when Miss Chalmers had moved back to Glasgow by then, or of the continual failure to provide HMRC with a live address until 30 January 2017.

126. If any late payment penalty were to be automatically discharged on the basis that no live address was held for there to be an effective service of a s 8 Notice, there would be easy pickings to be made. It would be an inequitable 'reward' for failure to observe a most simple and fundamental obligation expected of a taxpayer: that of notifying the tax authority of any change of address.

Whether reasonable excuse for the late payments

127. The statute has made it clear that reliance on a third party to avoid a failure cannot give rise to a reasonable excuse, unless the taxpayer has taken reasonable care in avoiding the failure.

128. In allowing a reasonable excuse to exist for the late *filing* for 2015-16, I consider that it was not an unreasonable thing for a responsible taxpayer to instruct an accountant to act as her agent in filing the return, and to place reliance on that instruction that the agent would deliver. In other words, having given timely instruction to a suitably qualified professional who can reasonably be expected to fulfil the obligation in the ordinary course of event constitutes having taken reasonable care in avoiding the failure for Schedule 55 purposes.

129. However, as regards the responsibility to making tax payments on time, Miss Chalmers again relied on her agent to inform her of any tax liabilities, and since Mr Moon did not tell her that she owed any tax, no payment was therefore made. For the following reasons, I do not consider that Miss Chalmers' reliance on an agent to such an extent amounts to having taken 'reasonable care to avoid the failure':

(1) The cause of the failure to make payments on time can be traced to the prolonged failure in updating HMRC of her address. Had there been a live address, HMRC's communications would have reached Miss Chalmers at the appointed time, and actions would have been taken to file returns and to pay the outstanding tax. Even if there would still be delay in tax payments, it would not have been delay of some three years.

(2) Updating HMRC of one's change of address is a simple obligation that a responsible taxpayer, conscious of and intending to comply with her obligations regarding tax, would have done.

(3) It is significant that a Form SA1 was sent in on 2 June 2014 to bring Miss Chalmers into self-assessment. Whatever the circumstances that led to the SA1 being lodged with HMRC, Miss Chalmers would seem to fail to register the significance of the form. She seemed to have made no enquiry (to Mr Moon or to HMRC) as to what would happen next, or the possibility that she could have outstanding tax to pay.

(4) It is also significant that Miss Chalmers had a student loan. She should have been aware of the requirement to repay the loan via the tax system.

(5) Having received an annual salary without paying any PAYE, and having received dividend payments without having paying any tax thereon, and noting that her earnings were over the threshold for a student loan repayment to be made, a responsible taxpayer would have carried out some due diligence to enquire about her tax position.

130. The engagement of an accountant does not mean washing one's hands of the responsibility in relation to one's own tax affairs; it means discharging one's statutory obligations as a taxpayer with the assistance of a professional. There was an element of nonchalant disengagement in Miss Chalmers' attitude towards her own tax affairs once she had engaged the service of an agent.

131. The underlying reason for the failure to make tax payments on time, in my judgment, is generic and the same for all three years. It was this nonchalant disengagement which resulted in her base address not being updated for a prolonged period. It was this attitude of disengagement which caused no enquiry to be made as regards the significance of the submission of the form SA1, and no questions being asked as to why her student loan was not being repaid when her take-home pay had increased after 2013.

132. Whilst I find Miss Chalmers to be a credible witness, and her factual account as regards her personal circumstances to be reliable, she was vague and hazy with details concerning what she understood to be the scope of engagement of Mr Moon's service. She displayed little understanding of the statutory obligations she had as a taxpayer in relation to self-assessment, of being a director to a personal company, and of the fact that the company is a separate entity to her own person.

133. The passivity and disengagement in Miss Chalmers' overall attitude towards her own tax affairs is not commensurate with her personal attributes. Miss Chalmers holds a responsible position in handling complaints on behalf of insurance and banking institutions, and can be expected quite properly to have the awareness and intelligence to show a higher degree of engagement with her own tax affairs, which would have shortened the period of delay, and quite possibly avoided most of the failures, including those in relation to the late filing of her returns.

134. For all these reasons, and applying the objective test of reasonableness to the subjective circumstances of Miss Chalmers, I do not consider that she had taken reasonable care in avoiding her failures in paying her tax on time. A reasonable and prudent taxpayer, having regard to her duty in meeting her statutory obligations, would have made certain simple and initial enquiries, one way or another, that would have alerted her to the basic issue that HMRC could not correspond with her, which would have led to the necessary remedial actions to be taken much earlier.

Whether special circumstances for a reduction

135. Paragraph 9 of Sch 56 FA 2009 allows HMRC to reduce the penalty below the statutory minimum if there are special circumstances. In the review conclusion letter dated 16 March 2018, HMRC considered that there were no special circumstances 'that are uncommon or exceptional' to merit reduction.

136. Paragraph 9 envisages a reduction in a penalty rather than absolution. Having concluded that there was no reasonable excuse for the late payments, I now consider if HMRC's decision on special reduction was 'flawed' in the judicial review sense, in that they have failed to take account of relevant factors in their decision making.

137. In Miss Chalmers' case, I consider that the factors taken into account by the review officer (see §40) are somewhat generic, and not directly relevant to the specific circumstances of Miss Chalmers. The following factors in her circumstances can be regarded as special and specific to Miss Chalmers as the relevant taxpayer, in the sense of 'peculiar or distinctive' as described in *Warren*:

(1) Miss Chalmers was not in self-assessment before the periods of defaults. All her tax liabilities were accounted for via PAYE; she was not in the habit of having to make balancing payments on 31 January.

(2) That her personal company is a separate entity from her own person in terms of her tax position is not a fact that seemed to have been appreciated by her, or highlighted to her, resulting in the misconception that her personal company's tax affairs being in order meant that her tax position was in order.

(3) For whatever reasons, there was a disjuncture prior to February 2017 in Miss Chalmers' expectations of the scope of service offered by her agent, and the reality of what Mr Moon undertook to do.

(4) The lack of clarity of the scope of the agent's responsibility towards Miss Chalmers resulted in her own personal tax affairs being left unattended by either agent or her as the taxpayer.

(5) On behalf of Miss Chalmers, Mr Moon stated in his letter to HMRC dated 30 March 2017 that she 'had no tax liability for the years in question'. If that was his conclusion in March 2017, Miss Chalmers would most likely to have been advised that there was no outstanding tax liability for the relevant years.

138. For these reasons, I allow special reduction at 50% against all Schedule 56 penalties charged in the total sum of £681.

On fairness and proportionality

139. The Tribunal is constituted by statute and does not have any jurisdiction other than what has been specifically provided by the legislation. The Tribunal therefore has no inherent jurisdiction to consider matters concerning fairness or proportionality unless such a matter is in relation to a specific statutory provision.

140. There is no such provision within the penalty regimes under Schedules 55 and 56. The decision of the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 is binding on this Tribunal, and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

141. Parliament had laid down a deadline for submission of tax returns and payment of tax, and has provided for penalties in the event of any default. Although those

penalties have been described by some as harsh, they have been judicially held as within the bounds of proportionality.

Decision

142. The disposition of the sums of penalties under appeal is as follows:

(1) In relation to the year 2013-14, the Schedule 55 penalties in the total of £1,600 are cancelled.

(2) In relation to the year 2015-16, the late filing penalty of £100, and the daily penalties of £600 are discharged. The balance of daily penalties in the sum of £300, and the 6-month fixed penalty of £300 are confirmed. Of the total £1,300 penalties imposed, £700 is discharged, and £600 is upheld.

(3) The Schedule 56 penalties for all three years in the total of £681 are allowed special reduction at 50%, reducing the penalties to £340.50.

143. Accordingly, the appeal is allowed in part.

144. 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 HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2018