[2019] UKFTT 83 (TC)

TC06967

Appeal number: TC/2017/07899

INCOME TAX – penalties for the late filing of return – Schedule 55 to the Finance Act 2009 – taxpayer brought into self-assessment due to PAYE underpayment – whether 8 TMA notice to file valid in law – whether service of the relevant notices for penalties to be imposable can be deemed – whether erroneous belief gave rise to a reasonable excuse – whether special circumstances – whether penalties proportionate – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL McMURRAY **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
JANET WILKINS

Sitting in public at Eagle Building, Glasgow on 18 January 2019

Mr McMurray in person for the Appellant

Mr Gregory Morran, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr McMurray ('the appellant') appeals against the penalties imposed by the respondents ('HMRC') under Schedule 55 to the Finance Act 2009 ('Sch 55') in relation to his failure to file the 2014-15 return by the due date.

2. The Notice to file a 2014-15 return was served on Mr McMurray on 21 April 2016, outwith the normal return cycle, and was required to be filed by 28 July 2016.

3. The return was eventually filed on 16 May 2017, which was over nine months late. Consequently, the following penalties totalling £1,300 have been imposed:

(1) a £100 late filing penalty under para 3 of Sch 55;

(2) 'Daily' penalties totalling £900 under para 4 of Sch 55;

(3) a £300 'six month' penalty under para 5 of Sch 55.

Relevant legislation

4. Section 8 of the Taxes Management Act 1970 ('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.

5. 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. Where a notice to file a return is issued outwith the normal return cycle, then the filing due date for the said return is 3 months after the date of issue. In practice, HMRC always allow an extra week in setting the filing due date, making it 3 months and 7 days from the date of issue of the notice to file.

6. The right to appeal against penalty determinations is provided under s 100B of the Taxes Management Act ('TMA'), and the Tribunal is given jurisdiction to decide whether a 'penalty has been incurred', to set aside the determination, to confirm, to increase or to reduce the penalty to the correct amount.

7. In terms of reducing the penalty amount, para 22 of Sch 55 provides as follows under sub-paras (3) and (4):

> '(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16 –
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings of judicial review.'

8. Paragraph 23 of Sch 55 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on an appeal, the Tribunal) that they had a reasonable excuse for the failure, and the failure was remedied without unreasonable delay after the excuse had ceased.

9. Where there is a doubt as to whether a document has been effectively served by post, the Tribunal 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.'

The Facts

Background to the service of the Notice to file

10. Mr McMurray was employed as an English language teacher, and his employers' details are as follows:

(1) the University of Stirling from date unspecified (but pre-dating 6 April 2014) until 11 July 2014;

(2) Kaplan International College UK Ltd (via the University of Glasgow), starting 20 January 2014 and ending 5 April 2016.

11. In the year 2013-14, Mr McMurray's dual employment position led to an overpayment of tax under PAYE of £394.80, which was repaid by HMRC at the time.

12. For the year 2014-15, there was an underpayment of £360.40, as both employers had operated PAYE on Mr McMurray's earnings by using the tax code of 1000L, which meant the full personal allowance was being utilised twice against the overall employment income, albeit it for just three months of the tax year in the case of the University of Stirling.

13. On 27 October 2015, HMRC issued a tax calculation on form P800, giving details of Mr McMurray's overall earnings for 2014-15, and the PAYE returned by his employers, which had resulted in an underpayment for the year.

14. On 29 October 2015, the standard letter known as 'Voluntary Payment Letter' ('VPL1') was issued to Mr McMurray. A pay-slip accompanied the letter to facilitate the settlement of the underpayment.

15. By a letter received by HMRC on 10 November 2015, Mr McMurray disputed the total earnings figure used in the calculation. On 24 November 2015, HMRC

replied by giving a breakdown of his earnings from the two employments as recorded by HMRC and advising him to contact his employers if he disagreed.

16. On 21 January 2016, the standard letter VPL2 was sent in the absence of any response to HMRC's reply or payment from Mr McMurray. The second VPL alerted Mr McMurray to the fact that if the underpayment was not settled, it could result in him being brought into self-assessment for the outstanding tax to be collected.

17. On 21 April 2016 Mr McMurray was served a Notice to file a Self-Assessment return ('SA return) for the year 2014-15, since no reply or payment had been received.

18. As the Notice to file was served outwith the normal return cycle, the due date for the return was stated to be 28 July 2016, being 3 months and 7 days after the date of issue of the notice.

19. From HMRC's Address Records, there were two changes of address:

(1) in June 2013, Mr McMurray moved from Stirling to Glasgow (G63);

(2) on 14 April 2014, Mr McMurray moved to a G4 postcode area, which has remained his address since to the present.

Communications after the filing due date of 28 July 2016

20. On 22 August 2016, Mr McMurray telephoned HMRC regarding the late filing penalty of £100, and a paper return for 2014-15 was issued for completion.

21. On 15 September 2016, a Self-Assessment Account Statement was sent to Mr McMurray, stating the balance owing as £100 in relation to the late filing penalty. In an undated letter to HMRC (received on 3 October 2016), Mr McMurray enclosed the SA account statement, and stated the following:

> 'I believe that we previously discussed this matter and that it had been understood that I need <u>not</u> fill out a personal tax statement for the period as I was being taxed at source.' (emphasis original)

22. Treating Mr McMurray's letter as an appeal against the £100 filing penalty, HMRC replied by letter dated 26 October 2016, stating that:

> 'We cannot consider your appeal because we have not received your tax return so I am returning it with this letter. Please send us your 2014 to 2015 return and your appeal (sic) immediately or as soon as the reason that prevented you from filing on time has ended.'

23. HMRC's letter of 26 October 2016 also warned of Daily Penalties and of interest charge on penalties as follows:

> 'If your tax return is more than 3 months late, we will charge you a penalty of £10 for each day it remains overdue. …
>
> We charge you interest for each day that penalties are not paid. …'

The Self-Assessment Notes

24. From the SA Notes maintained by HMRC, Mr McMurray was registered for Self-Assessment on 17 February 2006 when a form CWF1 was received by HMRC. The cessation of his self-employment was recorded in the SA Notes as follows:

(1) 12 April 2011: taxpayer telephoned in to request P46 as he is starting PAYE employment and does not have a P45; advised that employer should supply him with this but issued him one as requested.

(2) 7 March 2013: 'Trade/partnership source(s) ceased on receipt of Class 2 NIC cessation information.'

(3) 6 March 2013: 'Cancelling SA return Referral form worked. No longer self-employed. Nil CRC made for 11/12 and 12/13. Late filing penalty 11/12 cancelled. SA789 [to cancel a return] to customer.'

25. Mr McMurray's SA records became dormant until the underpayment of £360.60 arose in relation to the tax year 2014-15. The relevant entries in the SA Notes for present purposes are:

(1) 29 November 2016: 30-day daily penalty reminder letter issued.

(2) 6 December 2016: Letter from taxpayer, received on 15 November 2016, to book an appointment for Child Tax Credit payments; that HMRC owe him money; letter from HMRC issued on 7 December 2016 explaining that the National PAYE system (NPS) deals with his PAYE underpayment; letter to request appointment forwarded to the relevant department (CTC) to deal with.

(3) 7 December 2016: taxpayer phoned in; HMRC explained why he has to complete 14/15 return due to underpayment in PAYE; advised him to complete return, then he can appeal the penalties; *a paper return was issued* as requested.

(4) 3 January 2017: 60-day daily penalty reminder letter issued for 2014-15.

(5) 9 January 2017: taxpayer unable to go online; *requested paper form*.

Appeal and review

26. By 28 January 2017, the return remained outstanding, and the maximum daily penalties of £900 and 6-month late filing penalty of £300 had been imposed. Mr McMurray completed the standard appeal form (SA370) against the £1,200 penalties on 6 March 2017, giving his grounds of appeal as follows:

> 'I called HMRC and was advised that self-assessment did <u>not</u> apply to me. I therefore did not concern myself with the matter as I believed I was being taxed at source by my employer. …' (emphasis original)

27. On 4 April 2017, HMRC replied to Mr McMurray in relation to the appeal, explaining that he was brought into self-assessment in the absence of any response to the P800 letter. HMRC also confirmed that the figures used in the P800 calculation are the same as those on the P60s submitted by Mr McMurray. Furthermore, the PAYE underpayment was a separate matter from the Child Tax Credit claim.

28. On 5 April 2017, (coterminous with the 4 April 2017 letter) a different HMRC officer wrote to Mr McMurray refusing his appeal against the £1,200 penalties, having considered his stated grounds in the light of reasonable excuse and special circumstances. At this juncture, the 2014-15 return remained outstanding. The timing of this reply is therefore at odds with HMRC's standard practice that no appeal against a late filing penalty will be considered until the late return has been submitted. The refusal letter advised Mr Murray that he could either request an independent review or appeal to the Tribunal if he did not agree with the decision.

29. On 3 May 2017, Mr McMurray telephoned HMRC to give authority for a Citizens Advice Bureau ('CAB') officer to speak to HMRC on his behalf about his appeal. On the telephone, Mr McMurray was advised that the 2014-15 return needed to be filed before the penalties could be appealed. At the same (and for the third) time, Mr McMurray requested a paper return.

30. On 9 May 2017, Mr McMurray telephoned HMRC to advise that he still had not received the tax return, but had 'printed off' the return for completion.

31. On 16 May 2017, HMRC received Mr McMurray's 2014-15 paper return.

32. On 19 July 2017, HMRC issued the review conclusion, which upheld the penalties of £1,300 that have been imposed for the late filing of the 2014-15 return.

Appellant's case

33. In an undated letter to HMRC, which was received on 19 September 2017, Mr McMurray provided the substantive grounds of his appeal. At the hearing, he elaborated upon these grounds, which are summarised as follows:

(1) Mr McMurray became a full-time student in September 2015; he had been informed that a PAYE underpayment would normally have been collected via PAYE from earnings in the following year but that did not happen as he had returned to full-time education.

(2) His family moved house in April 2014 and he did not receive mail for a period as well as being very busy with preparing for his course of study and settling into his new home. Consequently, he was unaware of the penalties 'mounting up'.

(3) His belief that his employer was solely responsible for deducting the correct tax explained his confusion surrounding the matter, and his failure to understand and respond to any correspondence concerning this matter.

34. On the Notice of Appeal lodged on 16 October 2017, Mr McMurray's stated grounds are summarised as follows:

(1) Mr McMurray was under the impression that he was being taxed at source and wanted to question whether he was indeed liable for the underpayment as he thought this would be the employers' responsibility.

(2) He 'moved house twice during the period referred to. This meant that communication from HMRC was not received or delayed.'

(3) The penalties are excessive and unfair.

35. At the hearing, Mr McMurray informed the Tribunal that he had been involved in a legal process since August 2007 to prevent his son being taken abroad by his ex-partner, and the verdict was only finally reached in the summer of 2015.

36. Mr McMurray gave details of the postal delivery situation at his address. He lives in a tenement of six flats, and stated that 'letters go astray routinely' due to the postman not always getting access into the block.

HMRC's case

37. The notice to file the 2014-15 return was served under s 8 TMA, and the return was received on 16 May 2017, more than nine months after the due date of 27 July 2015. A *prime facie* case for the late filing penalties is therefore established by reference to the filing due date.

38. The Review Officer had considered reasonable excuse and special circumstances, and concluded there was no ground to cancel any of the penalties or allow special reduction.

Discussion

39. Whilst we have no issue with Mr McMurray's credibility, what may be the facts, and what may be his beliefs to be the facts, are often confounded in his account. Having heard his representations at the hearing, and having regard to what he put forward in writing at various junctures to HMRC and to the Tribunal, we consider his grounds of appeal under the following headings:

(1) Whether the notice to file was validly issued;

(2) Whether the effective service of the relevant notices can be deemed;

(3) Whether the belief that Self-Assessment was only for the self-employed gave rise to a reasonable excuse;

(4) Whether special reductions should be allowed;

(5) Whether the penalties are excessive and unfair.

Whether the notice to file was validly served

40. Mr McMurray reiterated that he did not believe that he was the person liable for the underpayment; that he believed it was his employers' responsibility to pay the correct amount of tax for him as he was taxed at source. At one point, Mr McMurray also disputed the quantum of the P800 calculation.

41. We are conscious that an appeal against a penalty for non-compliance (as in the present appeal) is distinct from the substantive matter concerning the quantum of tax,

or who the liable person is for the underpayment. To what extent then is this ground of appeal concerning the identity of the liable person for the underpayment relevant to an appeal relating to the penalties for the late filing of a return?

42. On one interpretation, this ground of appeal is to argue that if Mr McMurray was not the person liable to pay the underpayment, then there should be no requirement for him to file a return. In other words, for this to be a relevant ground against the late filing penalties, we consider the ground as a challenge that the notice to file was invalidly served, if Mr McMurray was not liable for the underpayment.

43. Does the Tribunal's jurisdiction in a penalty appeal extend to consider whether the notice to file was valid in law? In this respect, we agree with Judge Mosedale's observations in *Stuart Kirk Crawford v HMRC* [2018] UKFTT 392 (TC) ('*Crawford*'):

> '[43] In giving the Tribunal jurisdiction to consider the appellant's liability to the penalty for late filing, it seems implicit that the Tribunal can consider whether a notice to file (on which liability to the penalty depends) was validly served on the taxpayer. …
>
> [45] It seems to me that where there is a right to appeal against a penalty, it is implicit that it is a right to appeal whether that penalty is payable in law; and a penalty for non-compliance is not validly imposed where there is no non-compliance. There is no non-compliance where there is no underlying obligation: if the notice to file was invalid, it was not a notice to file and there was no obligation to comply with it.'

44. In the present case, there are two limbs to the argument as regards the validity of the notice to file. The first limb concerns whether the notice to file was valid in law with reference to its purpose. The second limb concerns whether the notice, even if valid in law as regards its purpose, was served on the correct person.

45. Section 8(1) of TMA provides that a person can be required to make a self-assessment tax return '[f]or the purpose of establishing the amounts in which [he] is chargeable to income tax' for a year of assessment, and 'the amount payable by him by way of income tax for that year'. It has been observed that a notice to file issued to a taxpayer for any other purposes is not a notice to file under s 8(1), (see *David Goldsmith* [2018] UKFTT 5 at [138], and *Crawford* at [46]).

46. Procedurally, there is no right of appeal in relation to the PAYE underpayment as stated on the P800. As a matter of fact, Mr McMurray had disputed the amount assessed in the first instance, before he went on to argue that his employers, instead of him, should be the liable person.

47. Against the background of the disputed quantum following the issue of the P800, and in the absence of any agreement by way of settlement as invited by the Voluntary Payment Letters, HMRC issued the notice to file. Had Mr McMurray wanted to challenge the quantum of tax assessed to be underpaid for 2014-15, he

could only have done so by making an appeal against HMRC's assessment that would have been issued following the filing of his 2014-15 return.

48. We conclude therefore that the notice to file was valid in law under the terms of s 8(1) of TMA, and it served the purpose of establishing the amount payable by Mr McMurray by way of income tax for the year 2014-15.

49. As to the second limb to this ground, that is to argue that Mr McMurray was not the person liable for the PAYE underpayment, and that he should not have been served a notice to file.

50. The PAYE regime places a statutory duty on an employer to deduct tax at source from the earnings of an employee by applying the relevant tax code in any one tax year. In this respect, the employer acts as a 'tax collector' for HMRC in relation to the tax liability of an employee. But the income tax payable is ultimately the liability of the individual employee, albeit being returned by the employer on his behalf.

51. In some instances, where the employer has purportedly collected the tax from the employee, but failed to pay it over to HMRC to be credited as the employee's PAYE, then the employer is liable for the shortfall. If this had been such a case, then the PAYE shortfall should have been recovered from the employer. However, it is clear to us that this is not a case of a defaulting employer.

52. The underpayment arose in case by the operation of PAYE code 1000L on Mr McMurray's earnings from the University of Stirling in the first three months of the tax year 2014-15. The tax deducted from his earnings in April 2014 was refunded in May and June 2014 before his employment ended on 11 July 2014; these details are evidenced by his payslips from the University of Stirling.

53. Mr McMurray had commenced his employment with Kaplan on 20 January 2014, so was already employed by Kaplan at the start of 2014-15. Unless Kaplan was made aware of his income from the University of Stirling, the PAYE code 1000L was also operated correctly. Mr McMurray was the person best placed to notify Kaplan of the existence of a secondary employment by providing Kaplan with the details of his final payslip from the University of Stirling. The PAYE shortfall was directly correlated to the tax refunds from the University of Stirling, and remained as Mr McMurray's income tax liability to be made good by him, since he had received the benefit of those refunds.

54. For these reasons, we find the notice to file was valid in law in both respects. The notice sought to establish the amount of tax payable by Mr McMurray in 2014-15 under s 8(1) of TMA, and was served correctly on Mr McMurray as the person liable in relation to the PAYE underpayment.

Whether effective service of post can be deemed

55. The second main ground of appeal concerns the postal delivery of HMRC's correspondence. It is Mr McMurray's case that he had moved twice 'in the period

referred to', that postal delivery was not always guaranteed at his address, and that there had been delay or non-delivery of post from HMRC.

56. Where the delivery of post is in question, s 7 of the Interpretation Act 1978 provides that the service of the post is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document unless the contrary is proved.

57. The interpretation 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*').

58. 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; thereafter the onus reverts to the recipient to prove the contrary.

59. The central issue for HMRC to prove is whether the post had been 'properly addressed', given Mr McMurray's claim that he had moved twice 'in the period referred to'. Whilst this statement, on the face of it, does not appear to be wrong, it needs to be qualified.

60. Mr Murray's first move was from Stirling to Glasgow in June 2013, and the second move was from one Glasgow address to another on 14 April 2014. However, these two moves happened prior to the relevant period. For present purposes, the relevant period began with the service by post of the P800 on 27 October 2015, which was 18 months *after* the second move in April 2014.

61. HMRC held the correct address for Mr Murray on 14 April 2014, which is the same address that has continued to the present. Indeed, there was no suggestion that the address held by HMRC at any one time was out of date.

62. We therefore reject the premise that the two moves were in the relevant period, or that HMRC did not hold the correct address for correspondence purposes in this period. We conclude that HMRC have met the burden of proof to enable the Tribunal to deem that the service of the post to have been effected by properly addressing, pre-paying and posting a letter containing the document.

63. We now turn to the evidential aspect as to whether the sender (HMRC) has met the burden of proof for the service of these key documents to be 'deemed to be effected by properly addressing, pre-paying and posting a letter containing the document'.

64. For the purposes of this appeal, the significant documents are:

(1) The s 8 TMA Notice to file issued on 21 April 2016 – since the liability to the penalties depends on establishing such an obligation through the service of the notice. In the absence of a notice to file having been effectively served, there

would be no underlying obligation to file a return for any late-filing penalties to be imposable.

(2) Any advance notice that the daily penalties would accrue from a specified date – for the daily penalties to be imposable, three conditions are stipulated under para 4 of Sch 55, the third of which is that HMRC 'give notice to [the taxpayer] specifying the date from which the penalty is payable' (sub-para 4(1)(c)). The legislation is emphatic that a taxpayer is liable to a penalty under paragraph 4 '*if (and only if)*' the required notice has been given.

65. From the chronology of communications between Mr McMurray and HMRC, there was positive evidence of prompt delivery of correspondence, of which the following are some examples:

(1) The P800 of 27 October 2015, and VPL1 of 29 October 2015 were replied to by Mr McMurray in an undated letter received on 10 November 2015 (see §§17-19).

(2) On 22 August 2016, Mr McMurray telephoned HMRC regarding the late filing penalty notice of £100 (§24); the penalty notice would have been issued after the filing date of 28 July 2016.

(3) In an undated letter received by HMRC on 3 October 2016, Mr McMurray appealed to HMRC against the £100 penalty, enclosing with his letter was the received Statement of Account dated 15 September 2016 (§25).

66. From 6 March 2017 onwards when Mr McMurray lodged his appeal against the penalties with HMRC, there was evidence that the chain of communications in relation to the service of the penalty notices and the appeal thereof had proceeded without obvious delay from either side.

67. Given the circumstantial evidence of the positive proof of mail delivery, and in relation to the service of the s 8 TMA notice to file, we are satisfied that on the balance of probabilities, HMRC have met the burden of proof for the service of the notice to file to be deemed as having been effected.

68. As to the requisite notice under para 4(1)(c) of Sch 55 for a daily penalty to be imposable, there is positive proof that Mr McMurray had received the £100 fixed penalty notice in his telephone communication with HMRC on 22 August 2016 (§24).

69. The Court of Appeal decision of *Donaldson v HMRC* [2016] EWCA Civ 761 confirms that the SA Reminder and the SA 326 Notice (the £100 fixed late filing penalty notice) are effective legal instruments for the purposes of meeting para 4(1)(c) condition for a daily penalty to be imposable, even if these notices are given in advance of a daily penalty being incurred. The notices both stated in terms that the taxpayer *would* be liable to a £10 daily penalty for every day after 31 January of the year following the year of assessment: 'a daily penalty will be charged' (SA Reminder); and 'if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding' (SA 326 Notice).

70. The £100 late filing penalty in the form of SA 326 Notice is therefore sufficient to establish that the requisite notice under para 4(1)(c) has been met for the daily penalties to be imposable.

71. We note also that HMRC warned of the daily penalties accruing in their reply to Mr McMurray dated 26 October 2016 (§26), and in the 30-day penalty reminder letter issued on 29 November 2016, and in the 60-day penalty reminder letter sent on 3 January 2017 (§29).

72. Section 7 of the 1978 Act provides that the burden of proof reverses to the recipient to establish that the service of a said document cannot be deemed to be effected. We turn to consider whether Mr Murray has met the burden in proving the contrary, so that the service by post of the material documents cannot be deemed to have been effected.

73. Apart from the apparent non-receipt of the paper return, which was requested three times on 22 August 2016 (§24), 7 December 2016 (§29 (3)), and 3 May 2017 (§33), there was no immediately discernible evidence that post from HMRC had failed to deliver to the correspondence address as kept on the system. Nor was any post having been recorded as undelivered and returned to HMRC.

74. The 'receipt' of a document, however, is not the same as the 'service' of a document. In other words, the claim of a document not having been received is not sufficient proof to the contrary as to set aside the effect of the deeming provision.

75. The non-receipt of the paper return on three occasions is not a conclusive proof that the paper copy of the return had not been delivered to the designated address, or sufficient in proving that other documents sent by HMRC have gone astray. We are of the view that other factors could have come to play to obstruct the receipt of the document, such as the alleged delivery issues at Mr Murray's tenement.

76. In any event, the paper return was not a material document for the purposes of imposing the late-filing penalties. Even if the paper return had failed to be delivered on three separate occasions, it does not detract from our conclusion that the service of the key documents for the purposes of the late filing penalties can be deemed as having been effected in the ordinary course of post.

Whether erroneous belief gave rise to a reasonable excuse

77. Mr McMurray asserted that it was due to his strong belief that *only* the self-employed are concerned with self-assessment that he failed to file the 2014-15 return as requested. In support of his belief, Mr McMurray claimed that HMRC's officers had advised him over the phone to that effect.

78. We consider this ground of appeal in the light of whether Mr McMurray's belief gave rise to a reasonable excuse for his failure to file the return by 28 July 2016. It is necessary at this juncture to make the following findings of fact in relation to the alleged advice that Mr McMurray was given by HMRC's officer over the phone:

(1) It is evident from the SA Notes that Mr McMurray had been in self-assessment from February 2006 to March 2013; that was a period of 7 years.

(2) In March 2013, HMRC withdrew the notice to file in relation to 2011-12 and 2012-13, following the cessation of self-employment.

(3) The late filing penalties in relation to 2011-12 that had been imposed were cancelled accordingly.

79. Having made the relevant findings of fact, we turn to the case law on reasonable excuse. 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]).

80. In *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC)) where there was a *bona fide* mistake made, Judge Hellier states at [12] that while the mistake 'was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable excuse.'

81. Similarly, in *Coales v HMRC* [2012] UKFTT 477 (TC), Judge Brannan states at [32]: 'The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.'

82. An honest and mistaken belief cannot, of itself, amount to a reasonable excuse. The reasonableness of a belief still needs to be subject to the same objective test for reasonable excuse as set out by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239:

> '… can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. … 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?'

83. In similar terms, the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) stated the test for reasonable excuse 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 …'

84. 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 no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The *Clean Car Co* itself provides an example of such a situation.'

85. The taxpayer in *Clean Car* was a VAT trader, but the same principle applies to all taxpayers. It is accepted that Mr McMurray had held a mistaken belief that he was not due to file a return for 2014-15. However, the legislation does not provide for a mistake to become a reasonable excuse. It remains for us to find whether there were circumstances for there to be a reasonable excuse associated with the late filing.

86. We now consider whether what Mr McMurray did was the actions of a reasonable taxpayer, having regard to the following facts:

(1) Mr McMurray might have sincerely believed that he was not required to complete a tax return as he was taxed at source under PAYE. However, he was fully warned of the possibility of being brought into self-assessment in the absence of a settlement following the issue of the P800 and Voluntary Payment letters.

(2) The warning that he would be brought into self-assessment materialised when Mr McMurray was sent a s 8 TMA notice to file a return for 2014-15 on 21 April 2016. However, it would seem that he held on to his belief that he was not due to file a return. He appeared to have taken no action to enquire about his requirement to file under s 8 TMA, nor did he seek to clarify his position with HMRC during the filing period from 21 April to 28 July 2016.

(3) On 22 August 2016, Mr McMurray telephoned HMRC concerning the late filing penalty of £100 and requested a paper return to be sent to him. This penalty notice would have carried the warning of the daily penalties accruing from 28 October 2016. Mr McMurray could have readily averted the imposition of the daily penalties and the £300 penalty by taking timely action. However, it would seem that he held on to his belief that he was not due to file and took no action.

(4) In September 2016, Mr McMurray appealed to HMRC against the £100 penalty, reiterating that he 'need <u>not</u> fill out a personal tax statement' as his ground of appeal.

(5) In HMRC's reply dated 26 October 2016, it was stated in no uncertain terms that he was required to file a return for 2014-15 and should do so 'immediately'; he was also warned of the daily penalties which would accrue from 28 October 2016.

87. Had Mr McMurray acted promptly on the advice of HMRC's letter dated 26 October 2016, he could have averted the worst of the daily penalties. It seems to us,

instead of doing the one necessary thing, which was to file the 2014-15 return as soon as possible, Mr McMurray was preoccupied with appealing against the penalties.

88. As HMRC kept pointing out to Mr McMurray, the preoccupation with the appeal against the penalties was the wrong priority, and that no appeal could be considered until the return was filed. Even with that repeated advice, it was not sufficient for Mr McMurray to suspend his belief and do the necessary thing.

89. The test of reasonableness is essentially an objective test, and applying the test to the facts of the case, taking into account the attributes and experience of Mr McMurray as a taxpayer, we cannot find any reasonable excuse for his initial failure to file the return, nor his continual failure to do so after more than 6 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.

90. Whilst Mr McMurray kept referring to HMRC's advice on the phone that only the self-employed are in self-assessment, this would appear to be *his interpretation* of what might have been said when he ceased self-employment and contacted HMRC in March 2013. There is no evidence to suggest that such advice was given over the filing of the 2014-15 return. To the contrary, there would appear to be consistent advice from HMRC, by phone and by letter, that Mr McMurray should file his 2014-15 as a matter of priority.

91. Mr McMurray was not new to self-assessment; he had previously filed SA returns from 2006-07 to 2010-11. He knew or ought to have known what it meant to be served a s 8 TMA notice to file. Even if he had held fervently the belief that he was not required to file as an employee, a reasonable taxpayer with his experience in his position would have checked his belief against the repeated notices and HMRC's communications, by letter and over the phone, all consistently advising him to file his 2014-15 return. A responsible taxpayer, conscious of and intending to comply with his obligations regarding tax, would not have waited until 16 May 2017 to take action.

92. If Mr McMurray decided to hold on to his erroneous belief to the contrary, despite having been advised on numerous occasions of his outstanding return for 2014-15, he cannot be held to have a reasonable excuse for his continual failure to file his return until May 2017, more than nine months after the due date on 28 July 2016.

Whether special circumstances

93. Paragraph 16 of Sch 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none.

94. Mr McMurray made representations of his special circumstances at the hearing, which we summarise as follows: (a) the post-graduate course he was undertaking as a full-time student from September 2016, which required of him intensive study; (b) the weekly commuting to bring his son home on a Friday for his weekend stay with Mr

McMurray, and the journey to return his son to his mother on Sunday coterminous to doing the full-time course; (c) the 'verdict' of legal custodian proceedings in the summer of 2015; (d) the confusion caused by the Child Tax Credit claim on the one hand with the PAYE underpayment on the other; (e) non-receipt of the paper return.

95. 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).

96. For the following reasons, we do not consider there were any 'special circumstances' that accord with the case law definition:

(a) Mr McMurray would have enrolled for the postgraduate course after some deliberation, including the time commitment. Besides, if he had filed the 2014-15 return by its due date of 28 July 2016, he would not have been concerned by the matter when the course commenced in September 2016.

(b) The weekly commuting was an aspect of Mr McMurray's life that had become a routine even if a time-consuming undertaking.

(c) The conclusion of the 'custodian battle' as Mr McMurray called it should have brought resolution and clarity to a situation that had remained unresolved since the summer of 2007. Mr McMurray was unable to specify the timing of the event, which he said was 'stressful', or what was involved. In any event, the verdict was given in the summer and well before the daily penalties started to accrue.

(d) The penalties concern the late filing of the 2014-15 return; it is a compliance matter. It serves no good purpose if Mr McMurray was intent to conjoin, conflate and confuse a compliance matter with the tax payment issue, and to cause and prolong the delay in meeting a compliance requirement.

(e) The non-receipt of the paper copy of return is not an impediment to return filing, as has been demonstrated by how Mr McMurray eventually printed off the return from HMRC's website to complete.

97. HMRC have confirmed that they did consider whether there were any special circumstances in this case, and concluded that there were none. Even with the further representations from Mr McMurray, we find no reason to disagree. HMRC's decision in this regard does not appear to be flawed, and the Tribunal confirms the decision.

Whether penalties excessive and unfair

98. Lastly, the decision of the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 is binding on us, and it has made explicit at [58] that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition is excessive or unfair.

99. Parliament has laid down a relevant due date for the submission of a return and has provided for penalties in the event of a default. Although those penalties have been described by some as harsh, nevertheless they are held to be proportionate by the courts, and within the bounds of proportionality.

Decision

100. For the reasons stated, the appeal is dismissed.

101. The penalties in the total sum of £1,300 in relation the late filing of the 2014-15 return are confirmed.

102. 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: 07 FEBRUARY 2019