[2019] UKFTT 551 (TC)

TC07345

PENALTIES – whether to give permission for late appeal to be made to HMRC – whether late filing penalties validly assessed by HMRC – taxpayer denies receiving penalty notices – permission given – evidence adduced by HMRC insufficient to satisfy burden of proof that penalty notices sent – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01707

BETWEEN

DANIEL AWOLESI **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
MARYVONNE HANDS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3 July 2019

Mr Ulakitan for the Appellant

Kate Murphy, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Awolesi is applying for permission to make late appeals to HMRC against penalties which have been imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit annual self-assessment returns on time. The hearing was scheduled to hear both the application for permission to make a late appeal and, if granted, to hear such substantive appeal.

2. The penalties that have been charged for the tax year 2013-2014 can be summarised as follows:

> (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 30 June 2015;
>
> (2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 29 December 2015;
>
> (3) a £300 "twelve month" penalty under paragraph 6 of Schedule 55 imposed on 28 June 2016;
>
> (4) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 29 December 2015.

3. The penalties that have been charged for the tax year 2014-2015 can be summarised as follows:

> (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 February 2016;
>
> (2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 30 August 2016; and
>
> (3) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 12 August 2016.

4. Mr Awolesi appealed against these penalties to HMRC. This appeal was made using Form SA370, the date on which is 25 August 2018 – the accuracy and significance of this is addressed in the Discussion. That appeal was rejected as late by HMRC in their letter of 22 October 2018.

5. In a letter of 17 December 2018, headed "Details of reasonable excuse", Mr Awolesi stated:

> (1) he was not experienced, he got a professional to do the job and was not aware there were penalties until he signed up to manage his taxes online in 2018;
>
> (2) as soon as he noticed there were penalties he started dealing with this straight away, in October 2018; and
>
> (3) he never received notifications about the penalties from HMRC nor the professional.

6. Mr Awolesi gave Notice of appeal to the Tribunal on 7 March 2019 which was received by the Tribunal on 12 March 2019. HMRC object to the late appeal.

7. Mr Awolesi attended the hearing together with his non-lawyer representative Mr Ulakitan. Mr Ulakitan confirmed that he would be setting out Mr Awolesi's position on his behalf. As this was expected to include both evidence and submissions, Mr Awolesi did agree to be cross-examined on this evidence.

8. At the hearing we explained that we needed to deal with two matters, namely whether to give permission for Mr Awolesi to make a late appeal and the substantive appeal against the penalties. To help us decide how to deal with these two matters, and whether we could deal with them separately, we asked Mr Ulakitan to give us a brief explanation of the lateness. Mr Ulakitan explained that, having previously had his tax affairs dealt with through PAYE, Mr Awolesi had not initially known he had to file tax returns and nor did he know about the penalties. The penalties only came to light when, having decided to stop using the accountant he had appointed, he sought to register online with HMRC in around October 2018. He then appealed to HMRC and ultimately to this Tribunal.

9. We concluded that we should hear the evidence and submissions relating to both the permission and the penalty appeal together as there did seem to be a question as to what had been sent to and received by Mr Awolesi. We explained to the parties that this should not be taken to mean that we had made any decision at the hearing as to whether to give permission for the late appeal.

BACKGROUND

10. We had before us two bundles of papers prepared by HMRC, and Mr Awolesi gave evidence (by virtue of confirming the representations which had been made by Mr Ulakitan) as to the events which had occurred and was cross-examined thereon. The papers before us included the correspondence set out at [4] to [6] above and various computer-generated records held by HMRC. We have set out below what these records state to have happened; we draw inferences from them later.

11. The "Case Summary" sets out Mr Awolesi's personal details, including the address held on record by HMRC, which we refer to in this Decision as "46B Brockley".

12. The "Return Summary" for 2013-2014 states that a notice to file was issued on 19 March 2015, with a due date for filing (online or paper) of 26 June 2015, and the return was filed online on 13 September 2016.

13. The "Return Summary" for 2014-2015 states that a notice to file was issued on 5 November 2015, with a due date for filing (online or paper) of 12 February 2016, and again the return was filed online on 13 September 2016.

14. HMRC's "SA Notes" setting out various contacts between HMRC and Mr Awolesi between 12 March 2015 and 7 February 2019 fit on one page. These state that:

(1) As at 12 March 2015, there was a non-self assessment underpayment of tax of £666.80 for the tax year 2013-2014.

(2) Mr Awolesi was registered for self-assessment on 27 October 2015.

(3) HMRC received details of the taxpayer's new agent on 14 June 2016.

(4) The agent's details were removed on 17 September 2018.

(5) Penalty reminder letters were issued on 27 October 2015, 1 December 2015, 14 June 2016 and 12 July 2017. These entries are assigned to Office Role "AUTO".

15. The records headed "View/Cancel Penalties" for each of the tax years 2013-2014 and 2014-2015 set out the dates on which HMRC state they issued the penalties (as set out at [2] and [3] above).

16. We also had a witness statement from Georgina Mitchell, an officer of HMRC, dated 11 June 2018 describing the process for printing and issue of late payment and late filing penalty notices. Ms Mitchell did not attend the hearing.

RELEVANT LEGISLATION

17. The power to impose penalties for the late filing of a tax return in respect of which a notice to file was given pursuant to s8 Taxes Management Act 1970 ("TMA 1970") is set out in paragraph 1 to Schedule 55. Paragraphs 3 to 6 of that Schedule set out the levels of the penalties. Those provisions, so far as relevant, are set out in the Appendix to this decision.

APPELLANT'S SUBMISSIONS

18. Mr Awolesi confirmed that:

(1) the address shown in the Case Summary, namely that which we refer to as 46B Brockley, was his current address and had been since (at least) 2013, and

(2) his tax returns for the tax years 2013-2014 and 2014-2015 had been filed on 13 September 2016 as shown in the Return Summary (together with the return for the tax year 2015-2016). They had been filed on his behalf by his accountant (who he referred to as "Ms Debbie" from Best Option Consult).

19. Mr Ulakitan explained the history as follows:

(1) Mr Awolesi had started his delivery and removals business during 2015. He had previously held several different employments and his tax had been dealt with through the PAYE system.

(2) He had set up a company, of which he is shareholder and director, and registered with a company secretarial service to deal with the administration of that company.

(3) The secretarial service had told him that, as a company director, he would need to register with HMRC for self-assessment. He did this. The Tribunal referred Mr Awolesi to HMRC's SA Notes, and the entry at 27 October 2015 which referred to Mr Awolesi registering for self-assessment. He confirmed that this timing sounded about right.

(4) Mr Awolesi appointed Best Option Consult to manage the book-keeping and accounts and to file tax returns for both himself and the company. This was in June 2016. During cross-examination, Mr Awolesi denied that this was prompted by any correspondence from HMRC. He appointed an accountant as this is what he had been told to do the previous year, and he had taken some time to get round to doing this.

(5) Best Option Consult prepared draft tax returns for the tax years 2013-2014 and 2014-2015 and asked if Mr Awolesi was happy for them to file these returns. They were not sent to him in draft, but were prepared using information he had forwarded to them by e-mail. He agreed that they should be filed. Once this had been done, Best Option Consult e-mailed him a copy of the tax returns as submitted.

(6) Mr Awolesi did not know that these returns were late, or that there were penalty consequences for late filing. Best Option Consult did not tell him they were late.

(7) Mr Awolesi was told by Ms Debbie that he needed to pay £300, but was not told what this was for.

(8) In September 2018 Mr Awolesi decided to stop using Best Option Consult, as he considered that they weren't sufficiently supportive of him and his business.

(9) He registered online with HMRC in October 2018 to deal with his tax affairs himself, and at that time became aware of the penalties which HMRC had issued.

20. The Tribunal drew Mr Awolesi's attention to the Return Summaries, the View/Cancel Penalties reports and the SA Notes which between them list the penalties said to have been

issued and refer to reminder letters having been issued. Mr Awolesi was not aware of any of these notifications. He confirmed that he did receive post delivered by Royal Mail at the 46B Brockley address. On being asked as to how this number of letters might not have been received over a protracted period of time, Mr Awolesi suggested that if they had been sent to him by HMRC they might have been collected by the neighbours at 46A (as 46A and 46B are part of a shared house with a shared letterbox) and not handed over, or been received at his address and dealt with by his cousin who helped him with business matters.

21. It is only since the end of 2018 that Mr Awolesi has been receiving correspondence by post from HMRC; and even since then not all letters have been received.

HMRC'S SUBMISSIONS

22. Ms Murphy referred to the decision of the Upper Tribunal in *Martland*, submitting that there was no good reason for the delay in notifying the appeals to HMRC and that permission should not be granted for late appeals to be made.

23. Similarly, Ms Murphy submitted that Mr Awolesi had no reasonable excuse for failing to file the tax returns on time or grounds for special circumstances to apply to reduce the amount of the penalties.

24. Ms Murphy referred to the SA Notes and explained that Mr Awolesi had been moved into the self-assessment regime as he had held several different PAYE employments during the tax year 2013-2014 and had received some self-employment income. This had resulted in an underpayment of tax and Mr Awolesi was set up in self-assessment for this to be collected.

25. Ms Murphy took us to HMRC's records and submitted that the notices to file and the penalty notices were sent to Mr Awolesi on the dates specified therein to 46B Brockley, which was acknowledged by Mr Awolesi to have been his address at all relevant times. HMRC have no record of any notices, letters or reminders sent by HMRC to Mr Awolesi as having been returned to sender as undelivered.

26. Ms Murphy referred us to the "View/Cancel Penalties" sheets to set out the penalties which had been imposed. HMRC do not have a copy of the penalties which were issued. Ms Murphy acknowledged that no pro forma of these notices were included in the bundles or produced at the hearing.

27. HMRC do not accept that there was a reasonable excuse for failure to file on time, and certainly not one that lasted throughout the period of the delay. Furthermore, HMRC considered that nothing in this appeal constituted special circumstances.

DISCUSSION

28. Whilst Mr Awolesi's letter to HMRC of 17 December 2018 is framed as an explanation of a reasonable excuse for late filing, it does squarely raise the question of whether HMRC issued penalty notices to Mr Awolesi. This is central to both matters before us, as failure to issue penalty notices would explain the failure to appeal to HMRC in time, as well as whether HMRC have satisfied the requirements for assessing a penalty.

Late appeal

29. The Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. (That was dealing with a different situation to that in the present appeal, namely an application by the taxpayer in each case to make a late appeal to the Tribunal (rather than HMRC). In *Martland*, the Upper Tribunal, described the statutory provisions for these different appeal rights as being very similar. Accordingly, we have concluded that we should apply the

principles explained in those decisions when deciding whether it is appropriate for us to give permission in the present appeal.) The Upper Tribunal said:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. …
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal."

30. Since that decision, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the taxpayer to make late appeals, has re-emphasised the importance of taxpayers adhering to statutory time limits at [17]:

> "We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the BPP Holdings case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed."

31. In the present case, the delay in seeking to appeal the penalties was serious and significant (at between 2 years and 3 years 3 months), and Mr Awolesi's evidence revealed a somewhat disorganised approach to paperwork and a lack of urgency in dealing with compliance matters (eg having been told in 2015 that he would need to register for self-assessment and file tax returns, he only instructed an accountant to file his tax returns in June 2016). Viewed on their own, these factors would lead us to conclude that, following the guidance set down in *Martland* and *Katib*, we should refuse permission. However, Mr Awolesi's failure to adhere to the statutory time limits for appeal would be completely explained by the failure of HMRC to send

penalty notices. We concluded that we should permit the late appeal to be made as, notwithstanding HMRC's entitlement to finality, there would be unfair prejudice to Mr Awolesi if we were to refuse permission give that this ground, if established, would be a complete answer (in his favour) to the substantive appeal as well.

32. With notice having been given to the Tribunal, we therefore proceed to consider the substantive appeal against the penalties set out at [2] and [3] above.

Validity of penalties

33. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely balance of probabilities. One of those matters is whether a notice to file has been sent, because a taxpayer cannot be in breach of the requirement to file a self-assessment return unless he has been sent a notice to file such a return in accordance with the requirements of s8 TMA 1970. Paragraph 18 of Schedule 55 similarly sets out the requirements for assessing a penalty.

34. This principle was recently restated by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TC) where it said at [69]:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

35. The evidence before us comprised the two bundles prepared by HMRC and Mr Awolesi's evidence at the hearing on which he was cross-examined. We also had the witness statement of Ms Mitchell.

Notice to File

36. Section 8(1) TMA 1970 provides that for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax in a year of assessment, and the amount payable by way of income tax, a person may be required "by a notice given to him by an officer of the Board" to prepare and deliver a tax return together with such documents relating to the information given in the return as may reasonably be required. Paragraph 1 of Schedule 55 then provides that a penalty is payable where a person fails to comply with this obligation.

37. Thus notice to file must be given before a taxpayer can be found to have filed late and become liable to penalties. This was in issue in the present appeal, as whilst the letter of 17 December 2018 only refers to not having received penalty notices, Mr Awolesi gave evidence denying having received notifications from HMRC regarding the need to file returns. Being asked what had therefore prompted him to contact HMRC to register for self-assessment or appoint an accountant to file returns, Mr Awolesi had explained this had been on the basis of being informed to do so by the company secretarial service (as he was a director).

38. Before considering the evidence before us, we had regard to the recent decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

> "49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the

> taxpayer had not received any notices requiring her to file any self-assessment tax returns.
> 50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."
> 52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.
> 53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:
> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."
> 54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

39. The only evidence which HMRC can point to regarding a notice to file having been issued for each tax year are the two Return Summaries, in which it is stated that notice to file was issued on 19 March 2015 for the tax year 2013-2014 and 5 November 2015 for 2014-2015. There was no copy of the notice to file which was submitted to have been sent (either a copy of that actually sent to Mr Awolesi or a pro forma thereof). Furthermore, the witness statement of Ms Mitchell states that it addresses the process for printing and issuing late payment and late filing penalty notices – it does not purport to address notices to file.

40. We do accept that in principle HMRC could satisfy the burden of proof to the requisite standard even in the absence of a copy of the actual notice to file sent in a particular instance. This could involve satisfying us that, on the balance of probabilities, the operation of the automatic system did result in notice to file being generated, printed and sent out to the taxpayer at the address currently held on the system by HMRC.

41. Where this was the case, s7 Interpretation Act 1978 ("IA 1978") would then be relevant, as that provides:

> "**7. References to service by post**
>
> 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."

42. Given the scarcity of evidence produced by HMRC in support of notices to file having been issued, the evidence from Mr Awolesi was particularly significant. We found him to be a credible witness but, as he himself acknowledged, he paid little attention to paperwork and was not quick to react to administrative tasks which needed dealing with. Nevertheless, the explanation he gave as to what had prompted him to register for self-assessment in 2015 was understandable and in line with the Tribunal's knowledge of the information given to individuals who become a director of a company.

43. We do, however, need to address certain points which emerge from the evidence which might cast doubt on the explanation set out at [19] above:

(1) There are two inconsistencies in Mr Awolesi's evidence relating to the penalties only coming to his attention when he sought to register online in around October 2018.

(a) The (typed) date on the forms on which he appealed to HMRC against the penalties for both tax years is "25 08 2018". This date, if correct, is before Mr Awolesi says he was aware of the penalties, which in evidence he consistently referred to as being around October 2018. However, we note that HMRC's SA Notes contain an entry dated 19 October 2018 stating that an appeal was received from the taxpayer against the penalties and that was rejected as out of time. That entry states "DOR 01/10/2018", and we infer that "DOR" stands for "date of receipt". Furthermore, we note that Ms Murphy treated this appeal as having been made in October 2018 for the purpose of her submissions on lateness. HMRC rejected these appeals by letter dated 22 October 2018, although that letter does not specify the date on which the late appeals had been made.

We find that the form was wrongly dated, and that the appeals to HMRC were made late September or early October 2018. We do not consider that this casts doubt on the overall credibility of the explanation given by Mr Awolesi. We note this would also be consistent with the entry in HMRC's SA Notes that the agent's details were removed on 17 September 2018.

(b) One of the entries in HMRC's SA Notes is for 18 May 2017 and states "DM Complaint. Staff attitude. Managers report rec. Complaint not upheld letter to tp." Ms Murphy suggested to us that "DM" was likely to be a reference to "Debt Management". Mr Awolesi had little recollection of this. This entry

does show contact between Mr Awolesi and HMRC at a time when his accountant was dealing with HMRC. If Mr Awolesi had direct contact with HMRC at around this time such that he felt he had a matter to complain about, we question whether this contact with HMRC could have led him to be informed of the penalties. However, there is no additional information before us. In particular, we note that the entry immediately preceding this in the SA Notes is dated 12 July 2016, so we have no information as to what might have been happening in the weeks (or months) leading up to 18 May 2017. We do not consider that we can infer that any debt which might have been the subject of debt management related to the penalties rather than unpaid tax liabilities.

The lack of additional information on this point is unsatisfactory. We do find that Mr Awolesi was in contact with HMRC in May 2017. However, we make no further findings as to what this might have been about.

(2) Mr Awolesi's explanation requires us to accept that many items of apparently properly-addressed post (assuming for this purpose they were sent) were not received. We do need to consider whether the timing of actions taken by Mr Awolesi might suggest he had been prompted by the receipt of some correspondence from HMRC at various stages. There are two events that stand out in this regard:

(a) The SA Notes contain two separate entries dated 27 October 2015 – one "AUTO" entry that a penalty reminder letter was issued, and one noting that "WMI KANA SA1 received record amended – taxpayer registered for self assessment Director". We did not receive any submissions to assist us with disentangling this second entry, but we infer from it that on this date HMRC received a form from Mr Awolesi and updated his record accordingly.

(b) Similarly, there are two separate entries dated 14 June 2016 – one "AUTO" entry that a penalty reminder letter was issued, and one noting that "New Agent details received…Form-648 Received: 'Y'". This second entry thus clearly confirms that a form was received by HMRC on this date – although this might have been sent by Mr Awolesi or by the agent in question.

These entries indicate that on a date on which HMRC's records indicate that a letter relating to penalties was issued to Mr Awolesi, some action was also taken by him (or on his behalf if the agent had sent the form). We find that this was a co-incidence (albeit somewhat remarkable), as the action taken by Mr Awolesi involves him having sent something to HMRC which was received by HMRC on the date in question, or him contacting HMRC by phone on that date. We do not think it is plausible that a penalty reminder letter which HMRC state was automatically sent to Mr Awolesi on a particular date could have been created, printed, put in an envelope, posted and received on a single day, still leaving time for Mr Awolesi to take action himself on that same date.

To the extent that we are questioning here how so much post can simply not have been received (in circumstances where the evidence suggests that, if posted, it would have been correctly addressed) we do also note (in Mr Awolesi's support) that the problems appear to have continued even after he was seeking to put his tax affairs in order. Having not received a response to his appeal (sent in late September 2018 or early October 2018), Mr Awolesi called HMRC on 4 December 2018 to find out the current position and at that time was told that HMRC had sent a letter to him on (what was stated by HMRC to be) 19 October 2018 which he had not received. They re-sent that letter to him that day, although the letter they enclosed was the letter dated 22 October

2018 refusing to accept his late appeal. (We assume this was the letter that had been sent in October 2018, and that the reference to 19 October should have been to 22 October.)

44. Considering all of the above, we are not satisfied that HMRC posted a letter containing the notice to file to Mr Awolesi in respect of either tax year 2013-2014 or 2014-2015. Section 7 IA 1978 cannot therefore apply to deem (subject to evidence to the contrary) such notice to have been received by Mr Awolesi. HMRC have not therefore met the required burden of proof that notices to file were properly issued. Mr Awolesi cannot therefore have been in breach of the requirement to file self-assessment returns by a specified date and cannot therefore be assessed to late filing penalties.

Assessment of penalties

45. In view of our conclusion above, it is not necessary for us to decide whether the penalties were properly assessed in that the requirements of paragraph 18 of Schedule 55 were met. However, we have considered the evidence and we are not satisfied that HMRC has demonstrated that the penalties were properly assessed.

46. Paragraph 18 requires that HMRC must (a) assess the penalty, (b) notify the taxpayer and (c) state in the notice the period in respect of which the penalty is assessed.

47. The question of the appropriate form for notices under Schedule 55 was at issue in the decision of the Court of Appeal in *Donaldson v HMRC* [2016] STC 2511. Following that decision, the Tribunal needs to consider whether:

> (1) in relation to the penalty imposed under paragraph 4 of Schedule 55, the requirement in paragraph 4(1)(c) of Schedule 55 – the obligation to specify the date from which the daily penalty was payable – has been met; and
>
> (2) in relation to all four penalties – the requirements in paragraph 18(1)(b) and (c) of Schedule 55 – the obligation to notify the taxpayer of the penalty and state in the notice the period in respect of which the penalty is assessed - have been met and, if a notice to the taxpayer does not meet the requirements in paragraph 18(1)(c) of Schedule 55, whether the failure to meet those requirements is a matter of form and not substance such that the relevant penalty notice remains valid by virtue of the saving language in s114(1) TMA 1970.

48. The computer-generated record headed "View/Cancel Penalties" does not provide us with any evidence that the penalty notices referred to were actually issued to Mr Awolesi, or as to the information they contained.

49. The bundle did include a witness statement from Ms Mitchell setting out her evidence as to the process of printing and issuing notices. It was not clear to us that the information as to process covered the time relevant in this appeal – the witness statement was dated 11 June 2018, and the introduction thereto states:

> "I visited our print provider and observed the transfer of data from HMRC and the process for printing and issuing notices. I can confirm I am familiar with the computer procedures relating to the printing and issue of Late Payment and Late Filing Penalty Notices, which remains unchanged to date."

50. The witness statement only seeks to address the process for printing and issuing penalty notices. It does not contain any information as to the information those notices contain. Ms Mitchell did not attend the hearing and given that she was not able to be cross-examined we concluded that we should place little weight on this evidence.

51. Finally, no pro formas were produced to us to show what the penalty notices which HMRC submit were issued might have looked like or the information they might have contained.

52. In the absence of any such evidence of what HMRC submit would have been sent to Mr Awolesi, we conclude that HMRC have not satisfied us, on the balance of probabilities, that penalty notices complying with the requirements of paragraph 18 of Schedule 55 were sent to Mr Awolesi.

Reasonable excuse and special circumstances

53. In view of our conclusions above, we have not addressed whether Mr Awolesi had a reasonable excuse for the late filings or whether HMRC's decision that there are no special circumstances to justify a reduction in the amount of the penalties is flawed.

CONCLUSION

54. For the reasons given above, we give permission for late notice of the appeals to be given to HMRC and we cancel the penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 29 AUGUST 2019

APPENDIX

RELEVANT STATUTORY PROVISIONS

PERMISSION TO MAKE A LATE APPEAL

1. Section 31A TMA 1970 requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date on which the notice of amendment was given.

2. Section 49 TMA 1970 then applies where a notice of appeal is given late. This provides:

> "**49 Late notice of appeal**
> (1) This section applies in a case where—
> (a) notice of appeal may be given to HMRC, but
> (b) no notice is given before the relevant time limit.
> (2) Notice may be given after the relevant time limit if—
> (a) HMRC agree, or
> (b) where HMRC do not agree, the tribunal gives permission.
> (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
> (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
> (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
> (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
> (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
> (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

PENALTIES

3. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

4. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 4—
> (1) P is liable to a penalty under this paragraph if (and only if) —
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
> (b) HMRC decide that such a penalty should be payable, and
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
> (3) The date specified in the notice under sub-paragraph (1)(c)—
> (a) may be earlier than the date on which the notice is given, but
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 5—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of —
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

> 6—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.
>
> (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
>
> (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of —
>
> (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.
>
> (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
>
> (a) for the withholding of category 1 information, 100%,
>
> (b) for the withholding of category 2 information, 150%, and
>
> (c) for the withholding of category 3 information, 200%.
>
> (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of —
>
> (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.
>
> (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
>
> (a) for the withholding of category 1 information, 70%,
>
> (b) for the withholding of category 2 information, 105%, and
>
> (c) for the withholding of category 3 information, 140%.
>
> (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of —
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

6. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

> 23—
>
> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

7. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

> 16—
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

> 22—
>
> (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.
>
> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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

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

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