NCN: [2020] UKFTT 0288 (TC)

TC07772

Validity of surcharge notices under Section 59C TMA – notice not sent to taxpayer, was replacement valid - yes – was notice of additional first surcharge valid – yes - whether judicial review of bankruptcy threat where closure notices claimed to be invalid gave rise to reasonable excuse and if so was there unreasonable delay after excuse ceased.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07405
TC/2019/00376
TC/2019/01782

BETWEEN

WILLIAM ARCHER **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

The hearing took place on 22 May 2020. With the consent of the parties, the form of the hearing was V (video) and the Tribunal video platform was used. A face to face hearing was not held because of the measures required by the Covid-19 pandemic.

It was directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to proceed remotely.

Mr Conrad McDonnell, instructed by KPMG LLP for the Appellant

Mr Paul Shea, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. In 2016 HMRC issued closure notices to Mr Archer in respect of disputed tax liabilities relating to the tax years 2001-2002 and 2002-2003 (the "Closure Notices"), but Mr Archer considered that the closure notices were not valid and therefore made no payment and did not appeal the notices. HMRC warned that bankruptcy proceedings would be started to recover a debt resulting from the closure notices in excess of £22.5 million. Mr Archer commenced judicial review proceedings, challenging the ability of HMRC to threaten bankruptcy on the basis of what Mr Archer claimed were invalid closure notices. His application was dismissed by the High Court and his appeal of that decision was dismissed by the Court of Appeal. An application for permission to appeal to the Supreme Court was refused by it. Seven days after the Supreme Court's decision Mr Archer paid the underlying amount of tax.

2. During the judicial review proceedings HMRC issued surcharge notices under Section 59C of the Taxes Management Act 1970 ("TMA") for amounts totalling £1,403,181.78. Mr Archer contends that not all of the surcharge notices were validly issued. HMRC has conceded that is correct as regards some of the notices, but not others. HMRC sent Mr Archer a manually created set of second surcharge notices after it became apparent that Mr Archer had not received some of those originally created by the computer system. HMRC also sent Mr Archer an additional first surcharge notice in respect of an adjustment to his liability for 2001-2002. Mr Archer argues that the manually issued and additional surcharge notices were not validly issued. In relation to all of the surcharges, Mr Archer contends that he has a reasonable excuse for the late payment of the unpaid tax as a result of the judicial review proceedings, an undertaking provided by HMRC and HMRC's entries in his on-line self-assessment account.

PROCEDURAL ISSUE

3. As a result of an internet provider's broadband provision problems on the day of the hearing Mr Archer's solicitor, Ms Susie Moore, was unable to participate in the hearing. However, she asked that the hearing should continue in her absence given the presence of one of her colleagues and Mr McDonnell. In those circumstances I decided that it was just and fair to proceed in Ms Moore's absence.

THE APPEALS

4. Mr Archer appeals against:

   (1) The notices of surcharge issued by HMRC under section 59C TMA on 10 May 2016 in the amounts of £360,588.11 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003 (the "First Surcharge Notices");

   (2) The notices of surcharge dated on or about 5 October 2018 (the "Second Surcharge Notices") imposing surcharges in the amounts of £362,334.35 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003;

   (3) The notices of surcharge dated 8 February 2019 (the "February Notices") imposing surcharges in the amounts of £362,334.35 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003; and

   (4) The notice of surcharge dated 8 February 2019 in the amount of £1,746.24 on an additional amount of unpaid tax in the year 2001-2002 (the "Additional Surcharge Notice").

5. It is not disputed that the appeals have been validly made.

GROUNDS OF APPEAL

6. In summary, Mr Archer appealed on the following grounds:

(1) that he had a reasonable excuse for the non-payment of tax for the tax years 2001-2002 and 2002-2003 (the "Relevant Years") as a result of the judicial review litigation concerning the very existence of an obligation to pay and:

(a) that reasonable excuse continued from 3 February 2016 until actual payment on 22 June 2018; or

(b) if the reasonable excuse ceased prior to 22 June 2018, he made payment without unreasonable delay after the excuse had ceased; or

(c) he made payment "within such further time as the Commissioners may have allowed" within the meaning of s.118(2) TMA 1970, in light of the undertaking given by HMRC's solicitor on 7 December 2017;

(2) in addition, in relation to the Second Surcharges that:

(a) the Second Surcharge Notices were never served on Mr Archer or his agent and therefore the second surcharges were not validly imposed;

(b) the manual February Notices subsequently sent to Mr Archer had no statutory effect as notices as HMRC cannot validly issue the same notice more than once, or are otherwise not validly issued as HMRC maintained that the Second Surcharge Notices had been issued on 5 October 2018; and

(3) in relation to the Additional Surcharge, that HMRC cannot validly issue more than one surcharge notice in respect of the same period and the same matters.

7. At the hearing Mr McDonnell confirmed that it was no longer being argued that Section 118(2) had been applied to mean that the tax liability for the Relevant Years was not due and payable until after the Supreme Court refusal of permission to appeal. The amount of tax had remained due and payable, but the undertaking given by HMRC not to pursue the debt was part of the reasonable excuse for the late payment of the tax.

8. Mr McDonnell also confirmed that Mr Archer was not seeking to claim that under Section 59C(5) TMA the surcharges must be imposed by an officer of HMRC rather than by an automated process involving a computer.

EVIDENCE

9. The evidence consisted of ebundles as listed in an electronic copy of the index, as well as an email sent to me by Mr Shea on the day of the hearing. I address the admission of the evidence in the email later in this decision.

10. There was no oral evidence. Mr Archer did not attend the hearing and did not provide evidence in a Witness Statement other than the Witness Statement included in the ebundle which was dated 29 March 2016 and which had been prepared for the judicial review litigation and which was not updated or adopted at the hearing before me.

BACKGROUND AND FACTS

11. The parties have not agreed a statement of facts, although Mr McDonnell and Mr Shea agreed that the chronologies set out in the skeleton arguments were accepted. These chronologies are reflected in this section of my decision. In addition, Mr Archer is seeking to rely on statements made in the courts' decisions in his judicial review proceedings. I have decided that details of the decisions should therefore be set out by me. I start by setting out the background to the Closure Notices before addressing the judicial review proceedings. I then

set out how the surcharges have arisen and what was shown on Mr Archer's self- assessment account at relevant times.

Background to the Closure Notices

12. On 18 July 2003 HMRC opened an enquiry under section 9A TMA into Mr Archer's tax return for the tax year 2001- 2002. On 30 June 2004 HMRC opened an enquiry under section 9A TMA into Mr Archer's tax return for the tax year 2002-2003. The enquiries concerned the use of two marketed tax mitigation schemes, one known as the Relevant Discounted Securities scheme ("RDS") and the other relating to the surrender of certain second-hand life assurance policies and known as "SHIPS".

13. In 2009 the Court of Appeal decided that neither RDS nor SHIPS worked.

14. On 30 October 2015 and 15 January 2016 HMRC issued Follower Notices ("FNs") and Accelerated Payment Notices ("APNs") to Mr Archer in respect of the tax years 2001-2002 and 2002-2003 in relation to the tax schemes. The APNs did not give rise to any debt due and payable by Mr Archer, because KPMG made statutory representations in relation to them on 27 January 2016, and HMRC did not respond. Accordingly, they have been in abeyance under section 223 (5) (b) of the Finance Act 2014.

15. In December 2015 and January 2016 KPMG on behalf of Mr Archer made applications to the First-tier Tribunal ("FTT") pursuant to section 28A(4) of the TMA for directions that HMRC be required to issue Closure Notices in respect of their enquiries into both tax returns. On 2 February 2016, prior to a hearing of that application HMRC issued the Closure Notices under s28A TMA 1970 (dated 3 February 2016).

16. The time period in which Mr Archer could appeal the Closure Notices expired on 3 March 2016. On 2 March 2016, KPMG notified HMRC that the Closure Notices did not make any amendments to his self-assessments for the years in question. It is accepted by both parties that the closure notices did not state an amount of tax due. KPMG explained that in their view the closure notices did not create a payment obligation under s59B TMA70 and there was no date for payment under para 5 Sch3ZA, TMA 1970. As a result the original self-assessment stood and there was nothing to appeal as the Closure Notices did not over-charge Mr Archer. This formed the core of the argument for the judicial review proceedings which followed in relation to later threatened bankruptcy action by HMRC.

17. In a letter dated 10 March 2016 (but emailed to KPMG on 9 March) HMRC set out the basis on which it was maintained that the Closures Notices were valid. It was noted that Mr Archer had not appealed the Closure Notices and that HMRC would commence any appropriate enforcement proceedings in due course.

18. On 11 March 2016 HMRC's debt management team ("DMB") issued a letter to Mr Archer warning of bankruptcy proceedings if action to pay a debt of £22,541,746.48 of unpaid tax was not taken within seven working days. Discussions via email and telephone ensued between KPMG and HMRC. On 18 March 2016 HMRC confirmed that the DMB were instructed to issue the bankruptcy letter when the Closure Notices were not appealed. On 22 March 2016 HMRC said that there were other closure notices relating to other tax years for which some of the 30 day appeal period remained and HMRC would await the end of that period before starting proceedings if no appeals were received. On 22 March 2016 HMRC confirmed in a telephone call said that it would commence bankruptcy proceedings in respect of the Closure Notices in the week commencing 28 March 2016.

The Judicial Review

19. On 24 March 2016, KPMG sent a Pre-Action Protocol letter to HMRC, warning of Mr Archer's intention to commence judicial review proceedings in relation to the decision to

initiate bankruptcy proceedings as the debt was not due and payable to HMRC because HMRC had failed to assess Mr Archer to tax in the claimed amount, or any additional amount, in respect of the Relevant Years. It was maintained that the tax tribunal had no jurisdiction to determine the question of whether there was a debt due and payable to HMRC for the purposes of bankruptcy proceedings. The deadline for a response was stated to be 29 March 2016.

20. HMRC requested an extension to the deadline for a response to 1 April 2016 as the period fell over the Easter bank holiday weekend. KPMG agreed that the deadline could be extended if HMRC gave an undertaking not to issue a statutory demand and/ or take any further steps in the bankruptcy proceedings against Mr Archer without giving Mr Archer at least 48 hours' notice. HMRC declined to provide the undertaking.

21. On 29 March 2016, Mr Archer filed a claim commencing judicial review proceedings in the High Court applying for an order quashing HMRC's decision to bankrupt Mr Archer. At the same time application was made for an urgent interim injunction restraining HMRC from issuing a statutory demand and commencing any bankruptcy proceedings until further order.

22. On 29 March 2016, Kerr J. granted Mr Archer's application for interim relief, restraining HMRC from issuing or serving a statutory demand or taking steps towards bankruptcy against Mr Archer in respect of the Relevant Years until further order.

23. KPMG produced a note of the hearing before Kerr J. which has not been challenged by HMRC. That note shows that Mr Justice Kerr expressed some doubt whether what he described as a "procedural irregularity" with the Closure Notices would prevent HMRC pursuing the substantial amount of money involved, noting that the letter from HMRC dated 11 March 2016 told Mr Archer what money was owed. However, Mr Justice Kerr's decision was noted to be that the relevant provisions in the TMA and the decision in the case of *Hallamshire Industrial Finance Trust Ltd v Inland Revenue Commissioners* [1979] 2 All ER 433 raised a strong prima facie case, even if it may not in the end be a good point, that at the moment the tax debt of over £22 million did not in law crystallise until notice was served in proper form and it had not yet been done on the evidence.

24. On 21 September 2016, Whipple J. granted permission for Mr Archer's judicial review application to proceed and renewed the order for interim relief. A standard form order was issued stating that the claim was arguable.

The High Court judicial review decision

25. On 21 February 2017, Mr Justice Jay dismissed Mr Archer's application for judicial review. Mr Justice Jay decided that:

(1) Section 28A of the TMA requires that a closure notice itself amend the taxpayer's return by stating the amount of tax due. The Closure Notices were therefore defective;

(2) section 114 TMA did not "save the errors" in the Closure Notices to make them effective in giving rise to a debt due and payable. Although that section could cover purported assessments there was no purported assessment in Mr Archer's case;

(3) however, there was nothing to preclude Mr Archer from issuing notices of appeal under section 3l(l)(b) which sought to assail HMRC's conclusions. The FTT, on a hypothetical appeal under section 31(1)(b), would and should have deployed section 114(1) to cure the defects in the Closure Notices. He took into account these facts:

> (a) "The taxpayer is a sophisticated businessman who has the benefit of high-powered advice. The APNs and the FNs explained HMRC's position very clearly, and the taxpayer did not place any of the amounts (qua figures) in dispute. Even setting to one side the point

that I have found that the figures and sufficient of the methodology would have been visible in the "view accounts" section of the website, KPMG could have done the arithmetic for themselves. Instead, they waited until almost the last possible moment before raising their objections on the notices…[but] this was not a simple case: it had taken many years to resolve (unconscionably long, in my view), and KPMG were continuing to raise other technical arguments in their replies to the APNs";

(b) HMRC made amendments to Mr Archer's computer returns which were visible on-line.

(4) As a result Mr Archer had an effective right of appeal against the Closure Notices and the judicial review was an abuse of process.

26. In his decision Mr Justice Jay also made the following findings on the facts which were not appealed in the Court of Appeal:

(1) Mr Archer had been notified of HMRC's position, including the precise sums said to be due, by the APNs and the FNs before the date of issue of the Closure Notices.

(2) The closure notices made it clear that HMRC were rejecting the whole of Mr Archer' s claims for loss relief.

(3) Neither Mr Archer nor KPMG challenged HMRC's arithmetic and KPMG could have done the arithmetic themselves.

(4) HMRC did in fact amend Mr Archer's on-line returns and they were visible on HMRC's website.

(5) Although the conclusions in the Closure Notices were brief, they were sufficient to enable Mr Archer to understand where he stood with HMRC.

27. Mr Justice Jay commented that if his analysis about the application of section 114 TMA by the FTT was incorrect the application for judicial review would have succeeded, but HMRC would have been able to issue fresh closure notices.

28. He granted permission to appeal to the Court of Appeal stating:

> "I am persuaded by the Claimant that he has a real prospect of success in the Court of Appeal on my approach to s.114 of the TMA in relation to the hypothetical appeal the Claimant did not bring but in my view should have brought… However, the Claimant must lose one way or the other…. the Claimant will need to persuade the CoA that, even if he is right about s.114 and any hypothetical appeal, he should not be paying the entirety of the tax in dispute. The ·Claimant's argument that HMRC would be precluded from serving further closure notices is without merit… It follows that it would be inappropriate to order interim relief in this case… If the Claimant wishes to take this case further, he should nonetheless pay the tax due. In the event that (a) he wins on the s.114 point in the Court of Appeal, and (b) manages to secure a modest reduction of his tax liability on any appeal he might bring against further closure notices, HMRC would repay the balance."

Applying to the Court of Appeal

29. On 22 February 2017, KPMG asked HMRC for an undertaking that HMRC would not do anything that would have been a breach of the interim relief order granted by Mr Justice Kerr if that had continued. On the same day KPMG applied to the Court of Appeal for permission to appeal and applied to that court to renew the order for interim relief on an expedited basis. On 23 February 2017 KPMG were informed that Master Meacher had directed that no action was likely to be taken by HMRC without a warning letter and until there was evidence of enforcement action being taken by HMRC the matter would not be expedited.

30. On 27 February 2017 HMRC wrote to KPMG saying that in view of the decision of Mr Justice Jay, HMRC would proceed to bankrupt Mr Archer unless he paid the debt by 1 March 2017. On the same day KPMG notified the Court of Appeal about the contents of HMRC's letter.

31. On 7 March 2017, Lord Justice Henderson granted permission to appeal and reinstated interim relief. He stated:

> "Permission to appeal: the substantive grounds of appeal raise important questions of principle about the content of closure notices, the scope of s.114 of the Taxes Management Act 1970 ("TMA 1970"), and the application of the Autologic principle to the facts of this case. I am satisfied that the grounds have a real prospect of success.
>
> Interim relief: the interim relief granted by the Order of Kerr J dated 29 March 2016 should be reinstated and continue until determination of the appeal. I consider that it would be wrong in principle for HMRC to initiate or pursue bankruptcy proceedings against Mr Archer at a time when, according to the judge, the closure notices were ineffective for failure to specify the amount of tax due, that failure was incapable of remedy under s. 114, and there was accordingly no statutory debt due under section 59B of TMA 1970."

The Court of Appeal's judicial review decision

32. On 30 November 2017, following a hearing of 22 November, the Court of Appeal gave judgment, dismissing Mr Archer's appeal.

33. The Court of Appeal decided that:

(1) The self-assessment that Mr Archer was required to file as part of his return must state the amount of tax for which he was liable. One would naturally expect that an amendment to that assessment must likewise state the amended amount of tax for which he is liable. The formal requirements for the validity of a closure notice must be the same irrespective of the sophistication of the particular taxpayer and the skill of his professional advisers, if indeed he has any. Section 28A(2)(b) TMA requires the amendment of the return to be made by the closure notice itself; not merely by an officer of HMRC. So, unless incorporated by reference, HMRC's amendment of the on-line return cannot itself satisfy the words of the sub-section;

(2) The two conclusions reached by Mr Justice Jay regarding the application of section 114 TMA were irreconcilable in that he said on the one hand there was nothing on which section 114 could bite in the proceedings for judicial review, but on the other hand that section 114 could validate a closure notice, at least in the context of an appeal to the FTT.

(3) The approach to the application of section 114 TMA set out in *HMRC v Donaldson* [2016] EWCA Civ 761 was applied. In applying an objective test the reader of the Closure Notices must be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the enquiry and what HMRC' s conclusions were. Mr Archer's liability could have been easily worked out, and he can have been in no doubt what he owed HMRC. He had in addition been informed by the APNs as to what HMRC asserted was his liability.

(4) HMRC's omission to amend his return to accord with their conclusions was a matter of form rather than substance on the particular facts of this case. Therefore, the Closure Notices were validated by section 114; and section 114 applied irrespective of the forum in which it was relied on. Therefore Mr Archer owed HMRC a debt which exceeded the bankruptcy limit.

34. Permission to appeal to the Supreme Court was refused, the interim relief order of Lord Justice Henderson was discharged and Mr Archer's application for interim relief was refused. The Court of Appeal refused to order a continuation of the interim relief on the basis that, since an appeal did not operate as a stay, the current position (on the basis of the Court of Appeal's judgment) was that there was a debt and that HMRC were entitled to serve a statutory demand. That would remain the position even if permission to appeal was granted by the Supreme Court.

35. On 1 December 2017 HMRC wrote to KPMG saying that, if Mr Archer did not pay the outstanding debt within 14 days, enforcement action would be taken. It was noted that there was no basis for Mr Archer to make an ex parte application for interim relief as HMRC would not pursue the debt for 14 days and KPMG were asked to give HMRC notice of any application for interim relief.

36. KPMG responded on 5 December 2017 saying that it was intended to make an urgent application to the Supreme Court for permission to appeal and for interim relief, but that expedition would not be necessary if HMRC would undertake to take no further step towards bankruptcy in relation to Mr Archer pending the outcome of the application to the Supreme Court. KPMG's response was sent to HMRC with an email at 4:21p.m. on 5 December 2017 requiring a response by the next day. HMRC asked for time to consider the letter until 7 December 2017.

HMRC's agreement not to proceed to bankrupt Mr Archer

37. On 6 December 2017, HMRC agreed not to proceed to bankrupt Mr Archer for the debt due for the Relevant Years whilst the applications were being considered by the Supreme Court, provided that Mr Archer agreed in return not to ask the Supreme Court to consider the applications on an urgent basis. That offer was accepted by KPMG on 7 December 2017. It was accepted by the parties that HMRC were anxious to avoid the Supreme Court being required to consider an expedited application for interim relief and hence entered into the agreement in the letters.

38. On 7 December 2017, Mr Archer applied to the Supreme Court for permission to appeal and for interim relief. In the covering letter submitting the application for interim relief HMRC noted that a statement that HMRC could serve a statutory demand at any time needed to be read in the light of the agreement reached with HMRC. HMRC objected to both applications. HMRC served notice of its objection to the application for interim relief on KPMG on 12 December 2017 and filed the objection with the Supreme Court on 13 December 2017. In the objection to the application for interim relief HMRC submitted that the application for interim relief was an abuse of process because it side-stepped the statutory scheme of the tax legislation which required Mr Archer to pay the disputed tax in his circumstances where an APN had been issued before appealing the Closure Notices. HMRC maintained that the tax debt remained payable.

Supreme Court Decision

39. On 13 June 2018, the Supreme Court refused Mr Archer's application for permission to appeal on the basis that the application did not raise an arguable point of law.

40. On 22 June 2018, Mr Archer paid £22,541,746.78 to HMRC.

The Surcharges

The First Surcharges

41. HMRC's computer system shows the creation of the First Surcharges on 6 May 2016. The First Surcharge Notices state that they were issued on 10 May 2016. Mr Archer made an in-time appeal of the First Surcharges.

42. On 16 June 2016, the parties agreed to hold over consideration of the appeals against the surcharges until the outcome of the judicial review and any subsequent appeals. HMRC had stated in the email offering the holding over of the appeals that the surcharges would not be withdrawn, but would be stood over pending the outcome of the judicial review.

The Second Surcharges and Additional Surcharge

43. On 31 August 2018 the automated HMRC computer system generated an entry for the Second Surcharges. HMRC's online SA notes show the Second Surcharges as having been "created" on that date. HMRC say that a notice of those surcharges should have been automatically sent to Mr Archer on 5 October 2018 - the date shown as the "due date" on Mr Archer's self-assessment account. HMRC's evidence that 5 October 2018 was the date on which the Second Surcharge Notices should have been issued has not been challenged by Mr Archer. The evidence of the process is also consistent with the evidence in the SA Notes and self-assessment account for the First Surcharge Notices. The First Surcharges were shown by the SA Notes as having been "created" on 6 May 2016 and by the self-assessment account to have a due date of 10 June 2016. They were issued bearing a date of 10 June 2016.

44. HMRC emailed KPMG on 26 November 2018 noting that no appeal of the Second Surcharge Notices had been received. It was at that point that KPMG explained that no notices of the Second Surcharges had been received. HMRC have subsequently accepted that it was inherently unlikely that two separate notices to Mr Archer and KPMG would have left HMRC's building as none were received.

45. KPMG asked for a copy of the Second Surcharge Notices in order to attach them to a notice of appeal, but HMRC explained that there was no copy retained by the system and the actual notices could not be re-issued, but the appeal against them would be accepted and valid.

46. Subsequently, two notices dated 8 February 2019 ("the February Notices") were sent to KPMG with a covering letter of the same date to Mr Archer explaining that, as the notices of the charges imposed on 31 August had not been received by KPMG, the 8 February 2019 notices had been sent for Mr Archer's records. The February Notices stated that they had been issued by a named HMRC officer: Lynne Cook, whereas the First Surcharge Notices state that they were issued by "Officer in Charge".

47. In addition, on 8 February 2019, HMRC issued an additional document headed "Self Assessment – late payment Surcharge Notice" under s.59C(2) of the TMA for 2001-2002 (the "Additional Surcharge Notice") in a small further amount of £1746.24. In the accompanying letter HMRC explained that this was added following the settling of enquiries into the tax year 2006 – 2007 and the subsequent amendment of the return for that year which reduced the credit available for that year. That credit had previously been allocated to the second payment on account for the 2001 – 2002 tax year and, as a result of its reduction, the amount outstanding had been increased. The Additional Surcharge Notice states that it was issued by Lynne Cook.

48. On 28 February 2019 KPMG appealed on behalf of Mr Archer against all three notices dated 8 February 2019

Mr Archer's self-assessment account

49. A taxpayer's self-assessment account is an on-line account operating like a bank statement showing amounts due from a taxpayer and adjustments to those amounts as well as payments and claims made by a taxpayer. Mr Archer's account could be viewed online by Mr Archer and KPMG.

50. Mr Archer's online statements of account from 18 June 2017 to 17 June 2018 show credit entries in relation to the Relevant Years showing "Collection Suspended" with the result that the statements showed net balances of zero.

51. On 19 June 2018 HMRC emailed KPMG saying that the charges that were previously held over had now been released. At that point the statement showed that the amounts previously shown as credits against “Collection Suspended” were shown as £0, leaving balances due from Mr Archer shown on the statement.

THE PARTIES’ CONTENTIONS

Validity of the surcharge notices

52. It is accepted by Mr Archer that the First Surcharge Notices were validly issued. However, that is not the position regarding the Second Surcharge Notices, the February Notices or the Additional Surcharge Notice.

53. HMRC have conceded that the Second Surcharge Notices were not served on Mr Archer and his appeal of those Notices must succeed.

54. That leaves the validity of the February Notices and the Additional Surcharge Notices in dispute.

55. Mr Shea submitted that an entry was automatically created by the computer system on 31 August 2018, as shown by the evidence in the SA notes, and on that date the Second Surcharges were “imposed”. It is accepted that the notices generated by the computer did not leave HMRC’s building and the notices were not “issued”. The February Notices manually rectified the problem of the Second Surcharge Notices not leaving HMRC’s building as it was not possible to print a copy of the original computer-generated notices. Mr Shea submitted that there is no time limit in section 59C TMA and applying the case of *Kothari v Revenue and Customs Commissioners* [2019] UKFTT 423 (TC) the gap between the creation of the surcharge and the issue of the manual documents did not break the “nexus”. In *Kothari* there had been a time lapse of about three years which broke the nexus but the gap in Mr Archer’s case did not especially considering the correspondence between HMRC and KPMG.

56. Mr Shea submitted that the Second Surcharge Notices were never in fact issued. Only one set of notices regarding the Second Surcharges was issued – the manual set in the February Notices. Section 59C does not specify how the notices should be created.

57. Mr McDonnell submitted that section 59C(3) TMA only provides for one surcharge to be issued in respect of each relevant Closure Notice for each relevant tax year. Otherwise, HMRC would be able to issue multiple 5% surcharges in succession for the same default for the same year. The computer system showed surcharge entries as having been created in Mr Archer self-assessment account for 31 August 2018 and that was the date on which they were imposed, but the relevant notices of the Second Surcharges were not served on the taxpayer. As the Second Surcharges had been issued on or around 5 October 2018, although not served, the February Notices could not be notices of surcharge as a second notice could not be issued under section 59C (3) TMA. The fact that Ms Cooke was shown as the officer issuing the February Notices meant that they could not be notices of the first imposition on 31 August 2018 and she must have imposed the liability for a second time which Section 59C does not permit. It was reasonable to infer that computer-generated surcharge notices show that they are issued by an unidentified “officer in charge” as shown by the First Surcharge Notices. Therefore the fact that the February Notices stated they were issued by Ms Cooke meant that they could not be notices of the original imposition.

58. Mr Shea submitted that the self-assessment account evidence shows that the creation of the Second Surcharge would have been visible to KPMG as agent prior to HMRC’s email querying the lack of an appeal on 26 November 2018, although it was recognised that the entry may have been overlooked and it was accepted that awareness that a notice was due was not sufficient to satisfy the requirements to give notice of the surcharge.

59. Mr McDonnell submitted that HMRC's case would deny taxpayers the protection of the requirements contained in the TMA for notices with statutory effect to be served. A taxpayer could be faced with the situation that an appeal was pursued on the basis that notices were not in fact served, only for HMRC to cure the position, even years later, by issuing "manual notices".

60. Mr McDonnell made reference in his skeleton argument to cases before the FTT concerning the inability of HMRC to reissue an assessment or a PAYE determination manually. In advance of the hearing I had asked Mr McDonnell to clarify this point and identify the cases to which he alluded. Mr McDonnell prepared a supplementary submission in which it was recognised that it had not been possible to find a decided case where an assessment or PAYE determination was undelivered and nevertheless gave rise to an appeal. He submitted that in cases considering enquiry notices or notices to file a tax return the statutory time limits would typically be a complete bar to HMRC reissuing or serving notices at a later date. He recognised that the point in issue in this case must be considered an open question at present. Mr McDonnell noted that some other kinds of notices such as information notices can be reissued by HMRC subject to any relevant statutory time limits as confirmed by the FTT in *RD Utilities Ltd v HMRC* [2014] UKFTT 303 (TC).

61. In relation to the Additional Surcharge Notice, which was not a "manual" version of a notice but a notice relating to an additional small amount, Mr McDonnell submits that section 59C(2) does not permit multiple surcharge notices in respect of the same tax year and the same alleged default. Mr Shea submits that the Additional Surcharge arose later than the original First Surcharges after settlement of enquiry into Mr Archer's 2006 – 2007 self-assessment tax return and the Additional Surcharge therefore arose from a change in circumstances. It could consequently be issued under Section 59C. The SA notes aggregate it with the Second Surcharge for 2001/02 when showing the date of its creation, and an emailed screenshot of HMRC's internal system submitted on the day of the hearing separately identified the "creation" of the Additional Surcharge on 31 August 2018.

Reasonable excuse

62. The issue between the parties is whether, and if so to what extent, Mr Archer had a reasonable excuse for non-payment of the tax due for the Relevant Years as a result of his judicial review proceedings (including HMRC's agreement with KPMG on 6 and 7 December 2017) and/or HMRC statements in his self-assessment account.

63. In his skeleton argument Mr McDonnell says that HMRC broadly accept that Mr Archer had a reasonable excuse for non-payment of the tax due for the relevant years until the decision of the Court of Appeal in his judicial review action. Mr Shea's statement of case is less clear than that and simply states that HMRC accept that Mr Archer may have had a reasonable excuse for non-payment during a part of the period of the judicial review proceedings which ceased, at the latest, on 30 November 2017 with the Court of Appeal judgement. At the start of the hearing I asked for clarification of HMRC's position. Mr Shea said that HMRC do not concede that Mr Archer had a reasonable excuse until the Court of Appeal decision, but consider that his argument is stronger until that point.

64. Mr McDonnell submitted that at all times Mr Archer has fully complied with his tax obligations and acted as a diligent and responsible taxpayer. He filed his returns on time and paid the tax of some £22.5 million only seven days after the Supreme Court judgement. There was an obvious flaw with the Closure Notices and he exercised his legal right to test the validity. At no time was there any suggestion by any of the courts that it was inappropriate for him to have pursued judicial review.

65. Mr Shea submitted that Mr Archer could have appealed the Closure Notices under the appeal provisions contained in the TMA and could have then argued before the FTT that the Closure Notices were ineffective. He submitted that there are many occasions where taxpayers appeal notices, challenging their validity. Indeed, Mr Archer was doing just that in relation to the Second Surcharge Notices and the Additional Surcharge Notice. It was the conclusion of the High Court that such action should have been taken by him. No evidence had been provided as to the basis of the conclusion that Mr Archer should have proceeded by judicial review rather than by appealing the Closure Notices and therefore Mr Archer had not shown that the judicial review gave rise to a reasonable excuse. He referred to the evidence which KPMG wrote to HMRC on 2 March 2016, only one day before the expiry of the appeal period, expressing concern that there was nothing to appeal because of the claimed defects in the Closure Notices, but HMRC had responded on 10 March 2016 saying that the an appeal could be brought against the Closure Notices. He submitted that there was little doubt that a late appeal at that point would have been accepted by the FTT or HMRC.

66. Mr McDonnell explained the chronology of events leading up to the judicial review proceedings and those proceedings themselves in detail. He drew attention to the fact that the Closure Notices omitted the usual paragraphs showing the amounts of tax due from Mr Archer before and after the closure of the disputes. This had meant that Mr Archer had maintained that the Closure Notices did not amend his self-assessment returns and as a result there was no debt due to HMRC which could be enforced by them through bankruptcy proceedings. The judicial review was of the action taken by HMRC when bankruptcy action was threatened. Paying the amount claimed by HMRC in such circumstances would have rendered the judicial review proceedings nugatory.

67. HMRC rely upon the case of *Francis Chapman v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 0800 (TC). Mr Shea submits that Mr Archer has failed to provide evidence "so robust that it would have been reasonable not to pay". Mr McDonnell submitted that *Chapman* should be distinguished as it is considering the situation in the context of APNs.

68. Mr McDonnell submits that the reasonableness in this case is shown by the decisions in the High Court and Court of Appeal and he referred to the case of *Sheiling Properties v HMRC* [2018] UKFTT 0247. He relied, in particular, on the following statements and decisions in the judicial review proceedings to show that Mr Archer had a reasonable excuse:

(1) the statement of Mr Justice Kerr recorded in the notes of the hearing in which he stated that the submissions on behalf of Mr Archer seemed "to raise a strong prima facie case, even if it may not in the end be a good point, that at the moment the tax debt of over £22 million does not in law crystallise until notice is served in proper form and it has not yet been done on the evidence";

(2) the decision of Mr Justice Jay and, in particular, his decision that the Closure Notices contained a "gaping hole" which could not be remedied by the application of section 114 TMA, even though it was recognised that he concluded that Mr Archer should have proceeded by way of an appeal to the FTT rather than judicial review;

(3) the decision of Lord Justice Henderson granting permission to appeal to the Court of Appeal in which he stated that the substantive grounds of appeal raised important questions of principle and had a real prospect of success.

69. Mr McDonnell submitted that if it is accepted that Mr Archer had a reasonable excuse until the Court of Appeal decision then that excuse must logically have continued until the Court of Appeals' decision became what is referred to in other legislation as a "final ruling" when the Supreme Court decided to refuse permission to appeal. HMRC's case essentially says

that Mr Archer should pay a 10% surcharge on his tax as a result of exercising his right of appeal to the Supreme Court. The High Court and the Court of Appeal took opposite approaches to almost every issue and this was therefore not a case where the outcome of the application to the Supreme Court was a foregone conclusion. The reasonable excuse should be assessed in the context of the circumstances at the time and not with the benefit of hindsight.

70. In addition, Mr McDonnell submitted that HMRC gave an undertaking which meant that Mr Archer did not apply for interim relief and in effect by which HMRC accepted a delay until the Supreme Court decided the permission to appeal application before payment of the tax would be made. He submitted that this undertaking was provided because HMRC were anxious for the Supreme Court not to be asked to consider the matter urgently.

71. Even if it was concluded that the reasonable excuse ceased with the Court of Appeal's decision on 30 November 2017, Mr McDonnell submitted that payment was made without unreasonable delay after the excuse came to an end. In the context of judicial review proceedings the delay for the time allowed, following an adverse judgement, for an application for permission to appeal to be determined is not an "unreasonable delay".

72. Although there is no criticism of HMRC or any officer, Mr McDonnell submitted that the prolonged enquiry process leading to the Closure Notices shows there was no pressing anxiety on HMRC's part to receive the tax in question and this should be taken into account in the overall assessment of the reasonableness of Mr Archer's conduct.

73. Mr McDonnell submitted that, alternatively, the fact that Mr Archer's online statement of account stated "Collection Suspended" against the Relevant Sums for the Relevant Years while the judicial review proceedings were in progress, meant that on all relevant dates the Statement of Account did not show the relevant sums as being currently due. Consequently this shows HMRC themselves did not consider the sums to be reasonably payable while the judicial review was still proceeding. In addition, it would be a reasonable excuse for any taxpayer not to make payment of an amount which was not shown as currently due in the statement of account.

74. Mr Shea submitted that "Collection Suspended" did not mean that the tax due was postponed. The High Court and Court of Appeal had granted interim relief and therefore the system could not show that the amount was due for collection. Therefore this note on the Statement of Account was not a reasonable excuse in the circumstances for not paying the tax.

75. Mr Shea submitted that account should be taken of the fact that Mr Archer had not given evidence before this tribunal and it is relevant to determine his belief about his actions in assessing whether he had a reasonable excuse. Many marginal issues are considered by courts and therefore the admission of the application for judicial review did not in itself mean that he had a good case or that he believed he had a good case. The only witness statement provided was that provided for the judicial review proceedings and predated almost all the period of default. The mere fact that Mr Archer pursued the judicial review litigation did not mean that he had acted on the basis of robust advice that he would succeed. This is particularly the case regarding his prospects of being granted permission to appeal by the Supreme Court given the Court of Appeal's decision to refuse permission. The High Court order had stated that Mr Archer must lose one way or the other and that he should pay the tax at that point and therefore at that moment it was difficult to understand any basis for Mr Archer to conclude that he should no longer pay the amount due.

THE LAW AND BURDEN OF PROOF

76. Section 59C TMA sets out the legislation imposing surcharges. That section has been repealed by the Finance Act 2009 and the (Income Tax Self-Assessment and Pension Schemes)

(Appointed Days and Consequential and Savings Provisions) Order, SI 2011/702 with effect from 1 April 2011, but the repeal has no effect in relation to a return or other document which is required to be made or delivered to HMRC or an amount of tax which is payable in relation to the tax year 2009–10 or any previous tax year (SI 2011/702 art 20). It therefore applies to the surcharge notices and stated the following:

> "(1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.
>
> (2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.
>
> (3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.
>
> (4) Where the taxpayer has incurred a penalty under section 7, 93(5), 95 or 95A of this Act, no part of the tax by reference to which that penalty was determined shall be regarded as unpaid for the purposes of subsection (2) or (3) above.
>
> (5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge
>
> (a) shall be served on the taxpayer, and
>
> (b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.
>
> (6) A surcharge imposed under subsection (2) or (3) above shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the end of the period of 30 days beginning with the day on which the surcharge is imposed until payment.
>
> (7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.
>
> (8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.
>
> (9) On an appeal under subsection (7) above section 50(6) to (8) of this Act shall not apply but the Commissioners may-
>
> (a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or
>
> (b) if it does not so appear to them, confirm the imposition of the surcharge."

77. Where a person "had a reasonable excuse for not doing anything required to be done" section 118(2) of the TMA provides that:

> … he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

78. "Reasonable excuse" is not defined in the legislation but in *Christine Perrin v HMRC Commissioners* [2018] UKUT 0156, the Upper Tribunal issued the following guidance which both parties accept should be applied in this case:

> "81. When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

79. The burden of proof is on HMRC to show that the necessary conditions were met for the imposition of the surcharges and they were validly imposed under section 59C TMA. If that burden is discharged by HMRC, the burden of proof is then on Mr Archer to show that he had a reasonable excuse for the late payment of the tax due. In each case the standard is the usual civil standard of balance of probabilities.

DISCUSSION

Validity of the Surcharges

80. Mr Archer accepts that the First Surcharges have been validly imposed and the First Surcharge Notices have been validly issued. However, that is not the case for the Second and Additional Surcharges.

The Second Surcharges – the February Notices

81. In the case of *Whitney v IRC* [1926] AC 37 Lord Dunedin said at paragraph 52:

> there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

82. That three stage approach has been adopted in numerous contexts including the imposition of penalties and is reflected in the approach of the courts, not only in *Kothari* but also the more recent Upper Tribunal analysis in *Revenue and Customs Commissioners v Hansard* [2019] UKUT 391 (TCC).

83. *Kothari* relied on the case of *Honig* in the context of SDLT assessments to decide whether the statutory time limit applicable to assessment of the SDLT applied by reference to the date

of notification of the assessment or an earlier point of assessment. In particular, *Kothari* relied on and applied the following statement in *Honig*:

> It seems to me that the words in s 29(5) 'notice of any assessment to tax' necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of assessment until there has been actual and valid assessment….
>
> …The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provision which makes the validity of the assessment in any way conditional on the notice.
> Per Fox LJ in *Honig and another v Sarsfield* [1986] STC 246

84. The Upper Tribunal decision in *Hansard* makes clear that such questions need "to be considered in the light of the statutory provisions applicable to the specific penalties being charged. General principles (such as those in *Honig v Sarsfield* …) can certainly illuminate the meaning of those specific provisions, but are not a substitute for them."

85. In Section 59C TMA, stage 1 of Lord Dunedin's three stage approach - the declaration of liability - is set out in Section 59C(2) and (3). Stage 2 - the assessment - is set out by the provision in Section 59C(5) "An officer of the Board may impose a surcharge under subsection (2) or (3) above". Stage 3 - the method of recovery - is set out by the subsequent words in section 59C(5) providing for notice of the imposition of the surcharge to be served on the taxpayer.

86. In this case it is not disputed that stage 1 arose. For the Second Surcharges, liability arose when tax payable by Mr Archer in accordance with section 55 or section 59B TMA remained unpaid on the day following the expiry of 6 months from the due date for payment of the underlying tax for each of the relevant tax years. The concern addressed by Mr McDonnell about multiple 5% surcharges being issued cannot arise. The liability is set by Section 59C and that section sets out one liability of 5% for an amount of unpaid tax after 6 months from the due date.

87. The parties also agree that the imposition of the second surcharges took place when the entry was created on the computer system on 31 August 2018.

88. Mr McDonnell submitted that the fact that the February Notices showed Ms Cook as the person who had issued them meant that she had also imposed the Second Surcharges for a second time. I do not agree. All of the surcharge notices state who they are "issued by". They do not state who imposed the surcharge. Section 59C(5) does not state who must issue the notice or that an officer may impose a surcharge by notice. Instead, it states that an officer may impose the surcharge and notice shall be served. Mr Archer's self-assessment account shows one occasion of imposition on 31 August 2018. There was not a separate such occasion shown for the issue of the February Notices.

89. It has been accepted by HMRC that the Second Surcharge Notices did not leave HMRC's building, recognising that it was inherently unlikely that two separate notices sent to both KPMG and Mr Archer would have all gone missing if they had been posted. As a result the appeal of the Second Surcharge Notices has been conceded. I agree that it is inherently unlikely that the Second Surcharge Notices left HMRC's building, given that one set was due to go to KPMG and one set to Mr Archer and neither of them was received. I find that is sufficient basis to conclude that the Second Surcharge Notices were not issued.

90. However, even if I was to conclude that the Second Surcharge Notices were "issued" by the computer process but did not make it through the system for posting, and hence did not

leave the building, the requirements of Section 59C were not met in relation to those Notices because they were not served on Mr Archer.

91. There is no limitation in Section 59C preventing HMRC from issuing another notice even if it was concluded that the computer had "issued" the Second Surcharge Notices. McDonnell submits that to allow the February Notices to have effect would deny taxpayers the protection of section 115 TMA. He says that a taxpayer could go through many years of litigation in the tribunal to establish that in fact notices were never served only for HMRC to be able to cure the position years later by issuing "manual notices".

92. Mr McDonnell's concern regarding HMRC producing a notice some years after the imposition of the surcharge was specifically addressed in *Kothari* on which HMRC relies. Judge Mosedale addressed that concern. She said, in the context of the SDLT provisions in issue in that case, that the legislation set out a "single assessing procedure so there must be some proximity or nexus between the two steps" of assessment and notification.

93. Judge Mosedale's decision is not binding on me and she was considering a different piece of legislation, but having regard to the wording of section 59C as a whole, I respectfully agree with her approach and conclude that there should be a nexus between the imposition of the surcharge and the issue of a notice. That is because Section 59C amalgamates the imposition and notification elements into one procedure. Section 59C(7) states that an appeal may be brought within the period of 30 days beginning with the date on which the surcharge is "imposed", yet Section 59C(5)(b) requires the notice to state the date on which it is "issued" and the time period for an appeal, not the date on which the surcharge was imposed. (In other penalty provisions such as section 31 TMA it is clearly stated that the appeal period runs from the date of the notice.)

94. I am satisfied that in the circumstances of this case the February Notices were sufficiently proximate to the 31 August 2018 action and the nexus with that action had not been broken, for the following reasons.

95. HMRC prompted the identification of the fact that the Second Surcharge Notices had not been received by Mr Archer or KPMG by contacting KPMG promptly when it was realised that no appeal had been received. When it became clear that the Second Surcharge Notices had not been received by Mr Archer or KPMG and a copy of them could not be produced from the computer system, Ms Cook sent out a separate manually prepared set of notices - the February Notices – explaining that the computer system would not permit another Second Surcharge Notices to be produced. There was no multiplication of liability. This was not a situation where time limits meant that Mr Archer was prejudiced by the production of the February Notices. The February Notices each stated that Mr Archer had 30 days from the date of the notice in which to appeal and Mr Archer was able to appeal the February Notices.

96. It is not disputed that the February Notices contained the information required by Section 59C(5)(b) or that they were received by Mr Archer.

97. I therefore conclude that the February Notices were valid surcharge notices issued pursuant to section 59C TMA. HMRC has discharged the burden of proof on it by providing the evidence of the imposition of the surcharge, the correspondence regarding the Second Surcharge Notices and copies of the February Notices.

The Additional Surcharge

98. Different issues have been raised in the appeal by Mr Archer against the Additional Surcharge Notice.

99. Mr McDonnell submits in his skeleton argument that section 59C(2) does not permit HMRC to issue multiple surcharge notices in respect of the same tax year and the same alleged

default, but has not provided any further explanation or analysis supporting this position and similarly the grounds of appeal do not expand further on the assertion.

100. HMRC described the surcharge as having arisen in the following circumstances:

> This surcharge is an addition to the original 1st surcharge of £360,588.11. This has been added at a later date than the original charge following the settling of the 2006-07 enquiry and subsequent amendment of the 2006-07 tax return. This amendment reduced the credit available for that year which had previously been allocated to payment on account 2 for the 2001-02 tax year. This in turn increased the amount of tax that was still outstanding 28 days after the due date by £34,924.82 and consequently the additional surcharge at 5% (£1,746.24) is now due.

101. There is no evidence that Mr Archer has challenged the underlying increase in his liability of £34,924.82 which is stated by the Additional Surcharge Notice to give rise to the surcharge of £1746.24. Mr Archer has not challenged the evidence shown in his self-assessment account statements showing how the adjustment arose.

102. Section 59C only applies in relation to any income tax which has become payable by a person in accordance with section 55 or 59B TMA. In relation to Mr Archer, Section 59B applies to the difference between the amount of income tax and capital gains tax contained in his self-assessment for any year of assessment, and the aggregate of any payments on account made by him in respect of that year. The adjustment described by HMRC gave rise to an increase in that difference.

103. HMRC are not applying the Additional Surcharge to the same amount as the First Surcharge for 2001-2002, but to a new additional amount. I find no basis under Section 59C to limit its application in the way sought by Mr McDonnell and KPMG. As the extra amount became payable as a result of Section 59B the surcharge could be imposed under Section 59C(2) following the expiry of 28 from the due date for payment of the additional amount.

104. HMRC have provided evidence in the Additional Surcharge Notice and from Mr Archer's Self-Assessment Account to discharge the burden of proof to show how the Additional Surcharge arose and that a notice complying with section 59C was issued. At the hearing Mr Shea provided additional evidence in the form of a screen shot showing that the Additional Surcharge was created on 31 August 2018. Mr McDonnell did not object to the admission of this fresh evidence. The screenshot clarifies the evidence previously provided in the SA notes which aggregated the amounts shown for the Second Surcharge and the Additional Surcharge under the heading "Second Surcharge". Although that aggregation was wrong, given that the Additional Surcharge was an additional first rather than second surcharge, I am satisfied that the evidence from the SA notes combined with the Additional Surcharge Notice and cover letter is enough (even without the additional clarification in the screenshot evidence) to show that the Additional Surcharge was "created" by the computer system and thereby "imposed" on 31 August 2018.

105. Mr Archer does not dispute receipt of the Additional Surcharge Notice.

106. For all these reasons I therefore conclude that HMRC has discharged the burden of proof on it to show that the Additional Surcharge was imposed and notice was served on Mr Archer in accordance with Section 59C TMA.

Reasonable excuse

107. Mr Archer maintains that he had a reasonable excuse for the late payment of tax for the Relevant Years because of the judicial review litigation concerning the existence of an

obligation to pay HMRC. In the grounds of appeal it is said that the reasonable excuse consisted of:

(1) the reasonable belief that no payment was due to HMRC in consequence of the Closure Notices on the basis that it was Mr Archer's reasonable view that, as a matter of law, the Closure Notices did not make any amendments to his self-assessments for the Relevant Years and, accordingly, that the Closure Notices did not function to create any payment obligation under s.598 TMA 1970. That is to say, there was no tax debt due to HMRC as a result of the Closure Notices;

(2) the fact that the Appellant had an arguable case that no payment was due, with (in the words of Lord Justice Henderson) a real prospect of success, and Mr Archer continued to have an arguable case with a real prospect of success until the decision of the Supreme Court on 13 June 2018;

(3) the general principle - reflected in the injunctions granted by the Administrative Court and the Court of Appeal by way of interim relief and in the undertaking given by HMRC's solicitor on 7 December 2017 which had equivalent effect - that whilst the question of whether a payment is due or not is being considered by the courts in current legal proceedings with a real prospect of success, fairness requires the preservation of the status quo ante; that is to say, fairness requires that no payment of the claimed debt should be made until after the conclusion of the legal proceedings.

108. I firstly consider whether HMRC have conceded that a reasonable excuse existed until 30 November 2017.

109. In the review letter HMRC said: "I can see that you received advice, and acting on that advice you considered the closure notices gave no notice that any additional amount of tax was payable, nor specified an amount of tax. That was a reasonable position to take." The review letter then proceeds to address issues based on questions predicated on "if you did have a reasonable excuse". The officer of HMRC proceeds to state "I consider it was on 30 November 2017 that your appeal was determined, and I consider that it was at that time that any reasonable excuse you may have had for not paying the tax due ended."

110. The words of the review letter are consistent with Mr Shea's skeleton argument and clarification at the hearing. HMRC does not concede that Mr Archer had a reasonable excuse until 30 November 2017, but if he had one it did not continue after that date.

111. I therefore conclude that HMRC have not conceded that Mr Archer had a reasonable excuse until 30 November 2017.

112. Both parties have referred to different parts of the judgement of Judge Hellier in *Francis Chapman v HMRC* [2017] UKFTT 0800 (TC), Judge Hellier decided that there is no rule that prevents a belief in the likely success of judicial review proceedings from amounting to a reasonable excuse. I respectfully agree with Judge Hellier that if a taxpayer believes that an amendment to a self-assessment is wrong and fails to pay the tax when due, it is possible for the taxpayer to be found to have had a reasonable excuse if, in all the circumstances, the behaviour was reasonable.

113. HMRC have relied also on Judge Hellier's statement that "for such a belief reasonably to lead to non-payment, it must be robustly based, and the decision to act on it must be reasonable. An opinion, even from an eminent practitioner, that "you should win" may not be enough.

114. Mr McDonnell submitted that *Chapman* and other cases involving judicial review in the context of assessing whether there is a reasonable excuse for late payment have concerned the

specific regime applicable to APNs. I agree that the decisions should be read in that context. As both *Chapman* and *Sheiling Properties* make clear (and as reinforced by the Court of Appeal decision in *Beadle)* that means regard must be had to the specific regime Parliament has implemented requiring payment of the disputed tax to be made to HMRC with no right of appeal against the APN. However, in one sense that is no more than an extrapolation of the *Perrin* principle requiring consideration of all the circumstances.

115. In this case it is though similarly relevant to bear in mind the background legislative structure which Mr Archer faced. Although the APNs issued to him had not given rise to a debt, because a response from HMRC was outstanding, the effect of section 55(8B) is that the mere issuance of the APNs meant that the amounts to which they related could not be postponed on an appeal of the Closure Notices. The APN amounts accounted for nearly all of the amounts at issue under the Closure Notices. A small amount, less than £7000, relating to a benefit in kind, was not the subject of the APNs. Therefore very nearly all of the £22.5 million would have been payable on an appeal of the Closure Notices and, in just the same way as in an appeal of an APN, that amount would have been repayable by HMRC if Mr Archer had won his appeal. I will revert to this relevant circumstance again later.

116. Mr Archer did not appeal the Closure Notices. He applied for judicial review of HMRC's actions or threatened actions to initiate bankruptcy proceedings. Notably Mr Archer did not seek judicial review of the Closure Notices, albeit that in considering the lawfulness of HMRC's actions to initiate bankruptcy proceedings the courts were bound to address the validity of the Closure Notices in determining whether there was in fact a debt due and payable. This meant that payment of the tax claimed by HMRC would have rendered the judicial review nugatory and the taxpayer would not have been able to proceed. Once he had gone down the judicial review track Mr Archer therefore could not pay the tax for the Relevant Years and continue on that litigation track. In contrast, in the reported cases involving judicial review of APNs, payment of those APNs could be made without rendering the judicial review of the APNs themselves nugatory.

117. Mr Archer could not have pursued his challenge of the bankruptcy threat in the FTT, but it is clear, as a result of the Court of Appeal decision if not before, that Mr Archer could have appealed the imposition of tax resulting from the Closure Notices despite their apparent defects. However, the benefit of hindsight knowing the position as a result of the Court of Appeal decision cannot inform me about Mr Archer's knowledge and actions at the relevant times prior to that decision.

118. I respectfully agree with what Judge Berner said about the concept of "reasonable excuse" in *Barrett v HMRC* [2015] UKFTT 329 (TC):

> "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 circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

119. Therefore the mere fact that Mr Archer could have appealed the Closure Notices does not in itself mean that his conduct should be regarded as unreasonable. *Perrin* identifies a non-exclusive list of factors which can be relevant to determining whether reasonable excuse exists, including a person's belief at the relevant time as well as all other relevant circumstances. Indeed, the grounds of appeal refer to Mr Archer's "reasonable belief". However, there is a

significant evidential problem in this case. There is no evidence from Mr Archer himself about his belief at any stage. No witness statement has been provided from him save that which was prepared in 2016 for the judicial review and he did not attend the hearing.

120. Mr McDonnell urged me to recognise that the evidence in the 2016 witness statements of Mr Archer and his advisor, Ms Bews, was accepted by Mr Justice Jay who made findings relying upon them. However, Mr Justice Jay, unsurprisingly in the context of judicial review, made limited findings of fact. Those findings were limited to the chronology of events involving the Closure Notices and details of the extent to which HMRC had provided sufficient information to KPMG for the amounts covered by the Closure Notices to be known by KPMG and hence Mr Archer. They do not address Mr Archer's beliefs at any relevant time. Mr Justice Jay noted that HMRC had challenged the taxpayer's evidence and, in particular, that of another KPMG witness. Given that comment, his limited findings therefore do not lead to me conclude that all of the matters set out in the witness statements of Mr Archer and Ms Bews were found to be facts. In addition, those witness statements were not updated for this hearing or adopted in their original form as evidence in the appeals before me. There was no possibility for any evidence in them to be tested in the normal way through cross-examination.

121. In any event Mr Archers' witness statement from 2016 does not set out any evidence for this appeal about his beliefs at any relevant time about his ability or inability to appeal the Closure Notices or otherwise. He simply states in that witness statement that he did not appeal the Closure Notices. HMRC wrote to Mr Archer on 10 March 2016 telling him that he could appeal the Closure Notices but I have been provided with no evidence of Mr Archer's belief in March 2016 when that letter was received or when the threat of bankruptcy proceedings was made in the letter of 11 March 2016.

122. Mr Archer did not respond to HMRC's letter by lodging an appeal. As Mr Shea submitted, this tribunal hears numerous cases where the issue in dispute is the validity of the notice. I recognise that events moved quickly after 10 March with that letter being followed up the next day with the letter from HMRC threatening bankruptcy proceedings, but again there is no evidence why KPMG did not contact HMRC to appeal the Closure Notices.

123. The witness statement of the senior KPMG manager advising Mr Archer which was prepared for the judicial review application makes reference to the fact that HMRC would only be pursuing the bankruptcy proceedings if closure notices issued to Mr Archer were not appealed. Therefore the simple act of making the appeals would have stopped the bankruptcy proceedings. If the FTT considered no valid appeal could be made because there was nothing to appeal it is hard to understand how HMRC could then have proceeded with bankruptcy and at that stage if they had done so Mr Archer could have pursued the judicial review.

124. Ms Bews' Witness Statement for the judicial review application makes detailed reference to the perceived inadequacies of the Closure Notices, but does not engage with the assertion made by HMRC that the Closure Notices could be appealed. Ms Bews states in the same witness statement that she and Mr Archer were unaware of how much HMRC thought was due from Mr Archer for the Relevant Years as there was no amendment of the self-assessment in the Closure Notices and no accompanying calculations, yet this was found to be incorrect by Mr Justice Jay. He concluded, and this was confirmed by the Court of Appeal, that KPMG did know where Mr Archer stood with HMRC.

125. Was Mr Archer influenced, as HMRC have stated in the judicial review documents, in taking the decision that he would not or could not appeal the Closure Notices by the fact that on appeal he would have been required to pay the £22.5 million for the reasons explained earlier? I cannot make any findings about this because Mr Archer has provided no evidence about the assessment carried out by him and his advisors.

126. Mr McDonnell submitted that in this case it is not a matter of Mr Archer's beliefs. Instead, the evidence of the High Court and Court of Appeal decisions shows that Mr Archer pursued a reasonable course of action in making his application for judicial review and in the circumstances of the threatened bankruptcy it provided a reasonable excuse for non-payment of the underlying tax because payment of the tax would bring the judicial review to an end.

127. Mr Justice Jay sets out Mr Goldberg QC's arguments for Mr Archer about the validity of the Closure Notices. Correspondence between KPMG and HMRC also sets out arguments about the Closure Notices. The fact that a representative sets out the basis of an argument on behalf of their client gives no indication of the strength of that argument as understood by the client.

128. Although it is explained in the submissions of Mr Goldberg QC described by Mr Justice Jay that it was argued that Mr Archer could not appeal the Closure Notices as a result of their defects, the argument was rejected by Mr Justice Jay. The Court of Appeal overturned Mr Justice Jay's analysis, but their decision produced the same result that Mr Archer could have appealed the Closure Notices.

129. The High Court and Court of Appeal documents show that Mr Archer had a reasonable basis to challenge the threatened bankruptcy as what the Court of Appeal described as "an entirely technical" matter as to whether a debt had been created for the purposes of the Insolvency Act 1986 and that was not a question for the FTT. The Court of Appeal made clear that the fact that a tax issue arises in proceedings to collect an amount claimed to be due by HMRC does not mean that the FTT is the only place in which the dispute can be determined. It is clear that Mr Archer was entitled to seek judicial review of the bankruptcy actions of HMRC, but in much the same way as in the context of the APN cases, that does not without more mean that his action in taking that course was a reasonable excuse for not taking the alternative route of appealing the Closure Notices and paying the dispute tax to do so. If, as Mr McDonnell urges, I simply look to the decisions, there remains an evidential hole in the evidence provided by Mr Archer about the basis on which the decision was made by him not to appeal the Closure Notices as invited by HMRC and pay the tax at that time. As Lord Justice Lewinson stated "Mr Archer could have appealed against the conclusions stated in the closure notices but has chosen not to do so."

130. The reliance on the court documents alone as showing the reasonable excuse raises a further problem for Mr Archer's case. Mr Justice Jay said in his decision that it would be inappropriate to make a further order for interim relief and if Mr Archer wished to take the case further he should pay the tax due. Therefore on 21 February 2017 any reasonable excuse shown by the court documents ceased until the grant of interim relief by Lord Justice Henderson on 7 March 2017. There is no other evidence to fill the evidential gap as to why payment was not made at that time and on what basis it was considered by Mr Archer that he had a sufficiently strong case to justify not carrying out Mr Justice Jay's direction. .

131. Mr Archer has not provided any evidence of his belief or understanding about the strength of his case at any point. I consider that to show that he had a reasonable excuse for not paying the tax he should show "robust advice" or what Judge Richards in *Sheiling Properties* described as a "high degree of confidence" that he could not appeal the Closure Notices.

132. It is undoubtedly the case that Mr Justice Kerr decided that there was a strong prima facie case in the judicial review and Lord Justice Henderson decided that the case raised important points of principle and had a real prospect of success. However, even if, despite my reservations described above, I were to find the High Court and Court of Appeal decisions to be sufficient to show that Mr Archer had a reasonable excuse for not paying the tax, I would also find that the evidence of that reasonable excuse comes to an end on 30 November 2017

when the Court of Appeal made its decision and refused permission to appeal to the Supreme Court. That is because there is then a further gap in the evidence provided to me by Mr Archer. The fact that Mr Archer had the right to continue litigation is insufficient in itself to show that from that point he had a reasonable excuse without any further evidence about the prospects of success.

133. Mr Archer had lost his case in both the High Court and the Court of Appeal, albeit on differing bases and at that point, if not before, I would expect robust evidence of the likelihood of the Supreme Court overturning the Court of Appeal, in line with the approach taken in *Chapman* and *Sheiling Properties* to counteract the "evidence" from the decisions.

134. That leads to the question of whether HMRC's agreement not to pursue the bankruptcy proceedings and/or the "Collection Suspended" notes on Mr Archer's account extended any such reasonable excuse from 30 November 2017.

135. I find that the agreement not to pursue the bankruptcy proceedings was no more than that. There was no suggestion in the agreement that it meant that the underlying tax was not payable. There is no evidence from Mr Archer or his advisors at KPMG to show that they understood anything else beyond the words in the letter of 6 December 2017. Indeed, if I apply the approach of looking to the judicial review court documents for "evidence", HMRC's grounds of objection to Mr Archer's application for interim relief served on KPMG on 12 December 2017 make it abundantly clear that in HMRC's view the tax remained payable.

136. Similarly, I find little basis to give the words "Collection Suspended" more than their natural meaning. Suspended is defined in the Oxford English dictionary to mean "to cease for a time form the execution or performance of". Therefore the action of collection was ceased for a time, but it was only the collection, or enforcement, of the debt which was paused. Liability to pay was not suspended.

137. I take into account the fact that the self-assessment online statement showed a credit against each of the entries for "Collection Suspended" which resulted in the statement showing a balance of £0 and in the case of some amounts, for example that shown as relating to the balancing payment due on 31 January 2003 for the tax year 2001 – 2002, there is an entry stating "amount <u>due</u> after any adjustment - £0" (underlining added). However, the reader of the entries marked "Collection Suspended" must be taken to be equipped with the knowledge Mr Archer and KPMG had. This case involves a taxpayer benefitting from what Mr Justice Jay described as "high-powered advice". No evidence has been provided from anyone at KPMG or from Mr Archer himself to describe what was understood by the statement entries. I consequently find that there is insufficient basis to conclude in the circumstances overall that they realistically understood the entries in the self-assessment statement to mean that the underlying tax was no longer payable.

138. Mr McDonnell submits that if HMRC had considered the sums were payable at an earlier time, for example following the Court of Appeal's judgement, then HMRC would have shown the sums due in the self-assessment account, cancelling the credits against the "Collection Suspended" entries as was later done on 19 June 2018. I do not agree with the submission. Given the fact that HMRC had agreed not to pursue the money via bankruptcy proceedings, collection was in fact still suspended and the existence of the credit entries is consistent with that agreement. Again the entries must be read in the context of the information and knowledge of KPMG and Mr Archer.

139. I therefore find that neither the HMRC agreement nor the "Collection Suspended" entries (nor a combination of the two) gave rise to a reasonable excuse for Mr Archer not to pay the tax for which he was liable in the Relevant Years.

140. I have therefore concluded that at the latest Mr Archer had a reasonable excuse for non-payment of the tax until 30 November 2017. Payment was not made until 22 June 2018. Mr McDonnell submits that, having reached this point, Mr Archer should still win his appeal on the basis that he made payment without unreasonable delay after the excuse came to an end and that a delay for the time allowed, following an adverse judgement, for an application for permission to appeal is not an "unreasonable delay". He submits that by definition the time taken by the Supreme Court to determine the application must be treated as being reasonable.

141. However, I consider this to be simply another way of seeking to rely on the reasonableness of awaiting the Supreme Court's decision and for all the reasons stated above I have already concluded that Mr Archer has not provided sufficient evidence to show that was a reasonable action for him to take.

142. I therefore find that even on the basis of having a reasonable excuse until 30 November 2017, Mr Archer has not shown that he made payment without unreasonable delay after the excuse ceased.

CONCLUSION

Appeal number TC/2018/07405: The First Surcharge Notices

143. The appeal is dismissed. The imposition of surcharges of £360,588.11 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003 is confirmed.

Appeal number TC/2019/00376: The Second Surcharge Notices

144. HMRC have conceded that the Second Surcharge Notices were not issued and served and therefore Mr Archer's appeal against those notices succeeds. I therefore set aside the imposition of the surcharges of £362,334.35 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003 contained in the Second Surcharge Notices.

Appeal number TC/2019/01782: The February Notices and the Additional Surcharge Notice

145. The appeal is dismissed. The imposition of surcharges in the amounts of £362,334.35 for the tax year 2001-2002 and £339,256.54 for the tax year 2002-2003, and in the additional amount of £1,746.24 for the tax year 2001-2002, is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

146. 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.

TRACEY BOWLER

TRIBUNAL JUDGE

RELEASE DATE: 8 JULY 2020