[2019] UKFTT 0642 (TC)

TC07418

INCOME TAX – penalties for the late filing of individual tax returns for three tax years – permission to make late appeals – permission granted – appellant has reasonable excuse for one year – HMRC fail to establish that valid notices to file were given to the appellant for the other two years – not saved by Section 12D TMA 1970 – appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01939

BETWEEN

MARK KNEWSTUBB — **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
SONIA GABLE

Sitting in public at Swansea on 26 September 2019

The Appellant in person

Mrs Darshimi Shakespeare, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the late filing of individual tax returns for the three tax years 2008/2009, 2009/2010 and 2010/2011. The respondents (or "**HMRC**") claim to have visited penalties for this late filing on the appellant. These penalties (the "**penalties**") amount in total to £335.80. These break down into two £100 late filing penalties for 2008/2009, a single late filing penalty of £35.80 for 2009/2010 and a £100 late filing penalty for 2010/2011.

2. The appellant appealed against the penalties for 2008/2009 in or around 17 October 2010 (the "**2010 appeal**"). He appealed against the 2009/2010 and 2010/2011 penalties in December 2018 (the "**2018 appeal**"). HMRC say that both appeals are late. So, as a preliminary issue, we need to decide whether we should give the appellant permission to make them out of time.

3. The appellant has also been assessed to interest. Part of his appeal is that HMRC should waive this given the time that it has taken for them to wake up to his liability. It seems to us that HMRC have tried to contact the appellant on a number of occasions during the last few years, but have failed to make contact. This is no one's fault. We do not have jurisdiction to consider the appellant's contention that he should not be liable to interest. This is something that he must take up with the appropriate HMRC department following release of this decision.

BACKGROUND AND FACTS

4. We were provided with a bundle of documents. The appellant gave oral evidence. He struck us as a thoroughly truthful and honest witness who was making a genuine effort to assist us, and to recollect things that happened more than 10 years ago. We accept his evidence unreservedly. From this evidence we make the following findings (findings of fact concerning the giving of notices to file and the issue of penalty notices are set out later in this decision; at this stage we simply set out HMRC's position on the latter);

(1) The appellant moved from the UK to the Philippines in July 2008. HMRC's system was updated to show his new address in Manila in June 2008.

(2) His individual tax return for 2008/2009 was the first self assessment tax return that the appellant had ever had to submit. It was due for submission to HMRC in paper form on 31 October 2009 and in electronic form on 31 January 2010. It was not received by HMRC in a satisfactory form until 18 February 2011. This was a paper return.

(3) The due date for submission of his individual tax return for 2009/2010 was 31 October 2010 for a paper return and 31 January 2011 for an online return. The return was not finally received by HMRC in satisfactory form until 18 February 2011. Once again, this was a paper return.

(4) HMRC's contact notes show that the appellant had contacted HMRC on a number of occasions in 2010 and 2011. This seemed to be in response to HMRC rejecting versions of the paper returns that the appellant has submitted. HMRC had explained had explained to the appellant why they had rejected those returns. The appellant then tried to remedy the defects. He had two attempts to get his 2008/2009 return right, and three attempts to get his 2009/2010 return right, before he finally did get them right.

(5) The due date for filing his return for 2010/2011 was 31 October 2011 for a paper return and 31 January 2012 for an online return. His paper return for this year was received by HMRC on 5 January 2012.

(6) HMRC claim to have assessed and notified the appellant of his first fixed penalty for £100 for the late filing of his 2008/2009 return on 23 March 2010. They also say that they issued a penalty notice for the second £100 fixed penalty for that tax year on 7 September 2010.

(7) The appellant received the second of these, but not the first. These notices were sent to his address in the Philippines.

(8) The appellant appealed against the 7 September notice on 17 October 2010. Due to the passage of time the original appeal is no longer in existence. Evidence of this appeal comes from the self assessment notes kept by HMRC.

(9) HMRC say that they issued a fixed penalty notice to the appellant for the late filing of the 2009/2010 return on 22 March 2011. This was also sent to his Philippines address. This penalty was initially for the sum of £100 but was subsequently adjusted down to £35.80 as it was capped at the amount of UK tax due.

(10) The appellant says that he was not aware of this penalty notice until December 2018. We accept this.

(11) HMRC say that they sent a fixed penalty notice to the appellant for the late filing of his 2010/2011 return on 21 February 2012. By that date the appellant had moved to Italy and had notified his new address to HMRC. HMRC had sent this fixed penalty notice to that Italian address. The appellant says that he was not aware of this penalty notice until December 2018. We accept this.

(12) In a letter dated 3 December 2018, addressed to the appellant at his address at 18 Victoria Avenue, Swansea, HMRC's debt management unit informed the appellant that he owed HMRC £516.83 and that he needed to pay it, failing which HMRC would take appropriate debt enforcement action. This letter included a statement of liabilities.

(13) Following receipt of that letter, the appellant appealed against the penalties by way of a formal notice of appeal dated 7 December 2018 which he sent to HMRC along with a letter which HMRC say that they received on 11 December 2018. HMRC were not prepared to accept the appellant's appeal since in their view it was out of time. The appellant therefore notified his appeal to the tribunal.

THE RELEVANT LAW

Late appeal

5. 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.

(1) 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)."

6. The notice of appeal includes an application for this appeal to be made out of time. HMRC oppose that application. I have jurisdiction and discretion to grant the appellant that permission. The principles I should adopt when considering the exercise of that discretion are set out in the Upper Tribunal decision in *Martland v HMRC* [2018] UKUT 178. In that case 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

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. In *Hysaj*, Moore-Bick LJ said this at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them."

Hysaj was in fact three cases, all concerned with compliance with time limits laid down by rules of the court in the context of existing proceedings. It was therefore different in an important respect from the present appeal, which concerns an application for permission to notify an appeal out of time – permission which, if granted, founds the very jurisdiction of the FTT to consider the appeal (see [18] above). It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances.

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the

reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in *Hysaj* referred to at [15(2)] above. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that "being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules"; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person."

7. In addition, 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, emphasised the importance of 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."

The penalties

8. The penalties have been assessed on the appellant under two separate provisions. The penalties for 2008/2009 and 2009/2010 have been assessed under section 93 Taxes Management Act 1970 ("**TMA**"). The penalties for 2010/2011 have been assessed under Schedule 55 Finance Act 2009. The two regimes are very similar, save that special circumstances do not apply to penalties assessed under section 93 TMA. Given that there is no dispute about the legislation, we set out a summary below:

> (1) Under Section 8 TMA a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).
>
> (2) Failure to file the return on time engages the relevant penalty regime.
>
> (3) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer.
>
> (4) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty.
>
> (5) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make.

Special circumstances

9. If HMRC think it is right to reduce a penalty for the period 2010/2011 because of special

circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay.

10. On an appeal we can give effect to the same percentage reduction as HMRC have given for special circumstances. We can only change that reduction if we think HMRC's original percentage reduction was flawed in the judicial review sense.

Reasonable excuse

11. A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return. Where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Burden of proof

12. It is for the appellant to show why we should give him permission to make his appeal to HMRC out of time.

13. If we do give him permission, then the burden shifts to HMRC to establish the two essential prerequisites for the imposition of the penalties. These are that valid notices to file under section 8 TMA have been given to the appellant for each of the three tax years. And that valid penalty determinations have been given to the appellant for each of the three tax years.

14. If HMRC can establish both of these, then the burden once again shifts, in this case back to the appellant, to show that the assessments are incorrect or that he has a reasonable excuse (and in the case of the penalties for 2010/11, special circumstances) which may reduce or completely extinguish the penalties.

DISCUSSION

Further findings of fact

15. We have found as a fact that the appellant did not receive the penalty notices for the years 2009/2010 and 2010/2011. Nor did he receive the first fixed penalty notice for 2008/2009. These are important findings and require an explanation.

16. These findings are based on two things.

> (1) Firstly the oral evidence of the appellant supported by his documented attitude towards HMRC and his tax returns. The appellant told us that he did not receive the notices and we believe him. As far as the notices for 2008/2009 and 2009/2010 are concerned, he explained that, at that time, the Postal Service in the Philippines was chaotic verging on the dishonest. Letters commonly went astray and any official looking envelope ran the risk of being stolen in transit. He and his friends had stopped using the Postal Service in light of this. This has a ring of authenticity and was not seriously challenged by Mrs Shakespeare. As for the notices for 2010/2011, when the appellant had moved to Italy, the appellant could give no explanation as to why he had not received the penalty notice for that year. The vagaries of the Italian postal system were not as pronounced as those of the Philippines postal system. There has been no suggestion that the addresses held by HMRC in the Philippines and subsequently in Italy were not the addresses at which the appellant actually resided. So it is unlikely that if the notices had been delivered, they would not have come to his attention. The appellant gave his

evidence clearly. We judged him to be telling the truth. But his demeanour in court is supported by his attitude, evidenced by the self assessment contact notes, towards his tax obligations. Having submitted paper returns for 2008/2009 and 2009/2010 which were rejected, he then contacted HMRC in an effort to sort them out. He then resubmitted the returns. This behaviour supports our view of his integrity.

(2) Secondly, the appellant did respond to any notice that he actually received. He says that he received the second penalty notice for 2008/2009 and in response, he made the 2010 appeal. He received HMRC's debt management letter dated 3 December 2018 in early December 2018 and made the December 2018 appeal on 7 December 2018. We have no doubt that if the appellant had received penalty notices for 2009/2010 and 2010/2011 (and indeed the first penalty notice for 2008/2009) he would have responded to these. His failure to do so is, in our view, evidence that he did not receive them in the first place.

17. It is worth mentioning here that although and section 7 Interpretation Act 1978 deems service to have been properly effected if a notice is sent to the appellant's address that HMRC have on record (and we think it is highly likely that such notices were actually sent by HMRC to the relevant addresses), that deeming can be displaced if the "contrary is proved". The contrary has been so proved in this case.

18. As regards section 8 TMA notices to file, we have come to the same conclusion as regards the tax years 2009/2010 and 2010/2011. The appellant says that he did not receive these and we accept this and find that non receipt as a fact. The reasons for this are the same as set out above regarding the penalty notices. No such notices to file were served on the appellant for those two tax years.

Late appeal

19. We now turn to the appellant's application for permission to make his late appeals. We apply the principles set out in *Martland*.

20. Firstly, both the 2010 appeal and the 2018 appeal were made late. The 2010 appeal is only some 11 days late as regards the second 2009/2010 penalty, but is about 179 days late in relation to the first penalty notice for that year. The former delay is neither serious nor significant. The latter certainly is.

21. The 2018 appeal is very late indeed. It is about 7 ½ years after an in time appeal should have been made against the 2009/2010 penalty notice and nearly 7 years after an in time appeal should have been made against the 2010/2011 penalty notice. This delay is clearly extremely serious and significant.

22. However, as regards the second test, the reason that these appeals were made late is that the appellant did not receive the penalty notices against which he needed to bring an appeal. It would have been impossible for him to appeal against them given his ignorance of their existence. This is an extremely good reason for the late appeals.

23. We now come to an evaluation of all the circumstances. This involves a balancing exercise in which we must consider the merits of the reasons given for the delay and the prejudice which might be caused to either party in giving or declining permission. When undertaking this exercise we can consider any obvious strengths or weaknesses of the appellant's case. We are also conscious that we need to pay particular importance to the need

for litigation to be conducted efficiently and at proportionate cost and for statutory time limits to be respected.

24. Mrs Shakespeare submitted that the balance of prejudice came down in favour of HMRC. If we were to deny the appellant permission to appeal late, he would be deprived of his opportunity to make further points in his appeal. However, by allowing him to appeal out of time, taxpayers who make timely appeals would be prejudiced.

25. It is our view the balance of prejudice favours the giving of permission. We say this because, for the reasons given earlier in this decision, we have found that an essential prerequisite for HMRC's successful defence of this appeal is that they must establish, on the evidence, that valid section 8 notices to file and valid penalty notices were actually served on the appellant. And they have failed to establish this. So for the years 2009/2010 and 2010/2011, the appellant has very cogent grounds of appeal. To deny him the opportunity of running these would prejudice him considerably.

26. One of the problems faced by HMRC in this appeal is the time that has passed since the tax years in question. Because of the passage of time, it is not been possible for HMRC to adduce any (in the case of the notices to file) or any cogent (in the case of the penalty notices) primary evidence of the service of these documents on the appellant. And this of course is a reason why we should consider denying the appellant permission. This difficulty has been incurred by the appellant's delay in bringing the appeals. But even if HMRC had been able to conjure up such evidence, they would still have been faced with the evidential difficulty which they currently face, namely that the appellant did not actually receive either the notices to file, or the penalty notices, for the tax years 2009/2010, and 2010/2011, nor did he receive the first fixed penalty notice for 2008/2009. And that evidential difficulty is not a consequence of the delay in the appellant bringing his appeals.

27. As regards 2008/2009, the position is somewhat different. The appellant accepted that he had received a notice to file a return for this year and, self-evidently, received the second fixed penalty notice dated 7 September 2010 since it was that notice which caused him to bring the 2010 appeal. But this appeal is, in our view, brought only slightly late when tested against the receipt of that second penalty notice, and we have no doubt whatsoever that HMRC would not, in normal circumstances, oppose an application for permission to bring a late appeal if that appeal is only 11 days late.

28. We are conscious that litigation needs to be conducted efficiently and at proportionate cost and for time limits to be respected. But the delay in bringing these appeals has not increased cost to HMRC to any unreasonable degree. There would have needed to be a hearing of the appellant's appeals if they had been brought in time albeit that the production of evidence now has probably been more costly in terms of time than would have been the case for in time appeals. Whilst statutory time limits should be respected, it is our view that where an appellant has not received the document against which he needs to appeal, then time should effectively start running not from when the document was allegedly served on him, but when he actually received it. As regards the notices for 2009/2010 and 2010/2011, the appellant acted with considerable alacrity on learning of the penalty notices. His 2010 appeal dated 17 October 2010 is only a little over six weeks after the date of the second fixed penalty notice for that year. Given the vagaries of the Philippines postal service, it seems to us highly likely that he did not receive that notice until some considerable time after 7 September 2010. He had, in any event, 30 days from the date of the notice to bring an in time appeal. We suspect, therefore, that the appellant acted promptly following actual receipt of that notice in bringing the 2010 appeal.

29. It is our view, therefore, taking into account all of these factors, that the appellant should be granted permission to make his appeals against all of the penalty notices, late.

30. This means, of course, that the appellant's notification of those appeals to the tribunal is also late. But the rules of the tribunal allow us sufficient lassitude to permit an informal notification of the appeal and for us to grant permission to the appellant to make that notification outside the relevant time limits. We exercise our discretion in his favour.

The substantive appeal

31. In light of what we have said above, we can deal with the substantive appeal against the penalties for 2009/2010 and 2010/2011 with some dispatch. As we have said, it is an essential prerequisite for HMRC to successfully defend this appeal for them to have established, on the balance of probabilities, that valid notices to file under section 8 TMA 1970, and valid penalty notices under the appropriate statutory provisions were served on the appellant. Notwithstanding Mrs Shakespeare's valiant efforts to unearth evidence to show that section 8 notices to file were served on the appellant, she has been unable to do so. So this essential prerequisite has not been successfully established by HMRC.

32. As regards the penalty notices for these two years, the only evidence we have seen that they were issued and sent to the appellant is a computer record setting out the dates on which HMRC consider that the notices were issued. This is information culled from the very depths of HMRC's IT system, and was not available to Mrs Shakespeare. We think that it is likely that penalty notices were issued and sent to the appellant on the dates in question. We say this because it is clear that for the year 2008/2009, the appellant received a fixed penalty notice. In our view it is likely that the other three penalty notices which HMRC claimed to have been sent to the appellant were so sent.

33. But, as we have said above, HMRC must show that the notices were actually served on the appellant and the deeming provision under the Interpretation Act has, in this case, been displaced by the appellant's evidence that he did not receive those notices.

34. And so we find, too, that the second essential prerequisite for successfully defending the appellant's appeal for these years has not been met.

35. We have also considered (although this was not raised by the parties) whether the provisions of section 12D TMA, which was introduced by section 87 Finance Act 2019 and which, having received Royal assent on 12 February 2019, deems section 12D to always have been in force, "cures" this defect in the notice to file. Our view is that even if this section applies to notices which HMRC cannot establish were properly served on the appellant, it simply treats the due date for filing a return as the date on which it was actually received by HMRC. In other words for the return 2009/2010, on 18 February 2011. And for 2010/2011, on 5 January 2012. Given that the returns are deemed to have been made on those dates, they cannot be late. And so no penalties can accrue. So this does not assist HMRC as regards the notices to file issue. And in any event, they also fall at the penalty notices hurdle.

36. In these circumstances we allow the appellant's appeal against the penalties for the years 2009/2010 and 2010/2011.

37. The situation for the tax year 2008/2009 is, however, somewhat different. The appellant's evidence is that he tried to submit his tax return, online, for this year around December 2009 but was unable to do this. The reason is that, at that time, in order to register on HMRC's

website and thus submit a return online, the appellant required a pin code which had to be included in the online application. However, this pin code had to be included within 28 days of its issue, and, for perfectly understandable security reasons, HMRC issued such pin codes through the postal system. Due to the problems with the Philippines postal service, the appellant did not receive his pin code until after the due date for filing an online tax return for the tax year 2008/2009, i.e. 31 January 2010. He therefore completed a paper tax return for this tax year and submitted it to HMRC. This was rejected by HMRC on one occasion before it was corrected by the appellant and accepted by HMRC, as a valid return, on 18 February 2011.

38. In answer to a question from the tribunal as to why he had sought to complete an online return in December 2009, the appellant indicated that everyone knew that a taxpayer had a duty to complete a tax return. When pressed as to how he found this out, he surmised that he had found out by looking online, but could not, frankly, remember the details after all this time. We believe him. However the appellant went on to say that he thought that he had received from HMRC a paper return during the summer of 2009. In light of this admission, we find as a fact that HMRC did serve a valid section 8 notice to file on the appellant for the tax year 2008/2009.

39. However, we have found that the appellant did not receive the first fixed penalty notice issued by HMRC on 23 March 2010 in respect of this tax year. And so we allow his appeal against this penalty.

40. But we have found as a fact that the appellant received the second fixed penalty notice for this year, issued by HMRC on 7 September 2010. So as regards this penalty, we find that HMRC have established the two essential prerequisites for successfully defending the appellant's appeal for the period 2008/2009.

41. And so the pendulum swings back to the appellant to establish that he has a reasonable excuse for having failed to submit his return, for this period, on time.

42. The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

43. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

44. Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

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

45. As we have said already, we consider the appellant was conscious of and intended to

comply with his obligations regarding tax. We put ourselves in his position, living in the Philippines in 2009. He had discovered through his researches that he needed to submit a tax return. He had not submitted one before. He had been sent paper return by HMRC but his research had shown that he could file online. He needed to do this before 31 January 2010. He started the process of filing online in good time, in December 2009, by trying to register with HMRC. He discovered, then, that he needed a pin code and that HMRC would send this by post. He requested a pin code from HMRC and, despite the vagaries of the Philippines postal system, hoped that it would reach him before the due filing date. It did not. By then of course it was far too late to submit a paper return, on time. However he then sought to ensure that HMRC did receive a return for this period. He did this by filing a paper return.

46. In our view this is the behaviour of a reasonable taxpayer. The only thing which the appellant might have done to better his position was to start the registration process earlier than he did. But it is not unreasonable that he gave himself at least a month to register for online filing, nor is it unreasonable that it was only then that he discovered that he needed a pin code. An earlier application to register might have revealed this requirement and thus given the Philippines postal service a better chance of ensuring that the pin code dispatched through the post by HMRC, arrived with him in good time. But given that documents disappeared in the Philippines postal service, there is no guarantee that even if he had started the registration process earlier, the pin code would have arrived within the 28 day period necessary to ensure that it could be validly incorporated into his registration. The guilty party in this saga is the Philippines postal service. HMRC have behaved perfectly properly by sending the pin code through the post. So no blame can be attached to them.

47. But whilst the foregoing might be a counsel of perfection, the appellant only has to establish that he has acted objectively reasonably. And we find this to be the case. We do consider that the appellant has a reasonable excuse for having failed to file his 2008/2009 tax return on time. And so we allow his appeal against the second fixed penalty for 2008/2009 too.

DECISION

48. For the foregoing reasons we allow this appeal**.**

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 23 OCTOBER 2019