[2020] UKFTT 0002 (TC)

TC07510

INCOME TAX – penalties – appellant opting for "paperless" contact – HMRC sending emails alerting to new documents posted to appellant's online account – appellant's assumption that HMRC's emails were spam – failure to file – whether notice to file "given" to appellant in accordance with TMA s 8 – notice not given by "officer of the Board" – whether reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02684

BETWEEN

BENJAMIN LIAM SMITH **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MS JANE SHILLAKER

Sitting in public at Taylor House, Rosebery Avenue, London on 13 December 2019

The Appellant in person, appearing by video link

Ms Oliva Donovan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents, also appearing by video link

DECISION

INTRODUCTION

1. This was Mr Smith's appeal against penalties totalling £1,300 for filing his 2016-17 self-assessment ("SA") tax return on 29 October 2018, after the due date of 31 January 2018. The penalties were issued under Finance Act 2009, Schedule 55, as follows:

    (1) a £100 fixed penalty;

    (2) daily penalties of £900; and

    (3) a six month penalty of £300.

2. HM Revenue and Customs ("HMRC") have recently allowed taxpayers to consent to "paperless" communication, as a result of which instead of sending letters by post:

    (1) they post documents on the taxpayer's personal tax account ("online account") on HMRC's portal; and

    (2) send an email to the taxpayer's email address, advising that a new message has been posted to his online account, which could be viewed by logging into that account.

3. Mr Smith had consented to paperless filing. On 6 April 2017, HMRC posted a Notice to File to his online account, and sent Mr Smith an email saying that a new message had been posted to on that account.

4. However, Mr Smith did not expect to receive communications from HMRC because he had understood from a conversation with their helpline that he would not have to file a tax return. He assumed the email message received on 6 April 2017 was spam, and deleted it. He made the same assumption, and took the same action, when he received subsequent email messages from HMRC. He did not access his online account. Finally, he received a letter from HMRC informing him that he had incurred penalties of £1,300.

5. Mr Smith tried to appeal the penalties, but HMRC refused to accept the appeals because they were out of time. He applied to the Tribunal, asking for permission to make late appeals, and we gave that permission.

6. His appeal against the penalties placed significant reliance on Taxes Management Act 1970 ("TMA"), s 8, which requires that a Notice to File must be "given" to the taxpayer "by an officer of the Board". Mr Smith submitted that this requirement was not satisfied because:

    (1) the Notice had not been "given" to him; and

    (2) it had not been issued by an "officer of the Board".

7. We decided that Reg 5 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 ("the EComms Regs") applied, with the result that information delivered to a taxpayer's online account was deemed to have been "given" to him by HMRC. We also found that the Notice had been issued by an officer of the Board, on the basis set out in the recent Upper Tribunal ("UT") judgment in the joined cases of *HMRC v Rogers; HMRC v Shaw* [2019] UKUT 0406 (TCC) ("*Rogers & Shaw*"), a decision of Zacaroli J and Judge Richards.

8. Mr Smith also submitted that he had, in any event, a reasonable excuse for not filing his return by the due date. For the reasons set out at §123ff we disagreed, and we refused his appeal.

9. The legislation which applies in this case is set out in the Appendix. It is cited only so far as relevant to the issues raised by the appeal.

PERMISSION TO MAKE LATE APPEALS

10. Mr Smith asked for permission to make late appeals against the penalties. He said he had been unable to appeal against any of the penalties within the 30 day time limit because he had not realised they had been issued; this was because he had assumed HMRC's emails were spam. He pointed out that once he had realised what had happened, he acted straight away, first contacting HMRC and then appealing to the Tribunal. Ms Donovan said HMRC did not object to the late appeals.

11. In deciding whether to allow Mr Smith to make his appeals late, we applied the three stage approach set out in *Martland v HMRC* [2018] UKUT 0178 (TCC) and confirmed in *HMRC v Katib* [2019] UKUT 189 (TCC), namely:

(1) establish the length of the delay and whether it is serious and/or significant;

(2) establish the reason(s) why the delay occurred; and

(3) evaluate all the circumstances of the case, using a balancing exercise to 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. In doing so we 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", and should also "have regard to any obvious strength or weakness of the applicant's case".

The first step: the delay

12. The £100 penalty was posted to Mr Smith's online account on 13 February 2018; the daily penalty was posted on 31 July 2018 and the six month £300 penalty was posted on 10 August 2018.

13. In early November 2018, HMRC wrote to Mr Smith informing him of the penalties, and Mr Smith contacted HMRC. After various exchanges of correspondence, HMRC wrote to Mr Smith on 2 April 2018 saying that they could not accept his appeals, and adding:

> "if you do not agree that you made your appeal too late for us to consider, you can ask HM Courts and Tribunals Service to review our decision. You should write to them by 2 May 2019…if you do not send an appeal to HM Courts and Tribunals Service by 2 May 2019, we will treat your appeal as settled."

14. Mr Smith therefore thought that he had until 2 May 2019 to make his application to the Tribunal. He submitted his Notice of Appeal form, including asking for permission to make a late appeal, on 25 April 2019.

15. It was common ground, and we agree, that the length of the delay was both was serious and significant.

The second step: the reason

16. It was also common ground that the reason for the delay was that Mr Smith did not know he had received the penalties until after he received the letter from HMRC in November 2018.

The third step: all the circumstances

17. We took into account the following circumstances:

(1) the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected;

(2) HMRC did not to object to the application;

(3) Mr Smith's reasons for his late appeal were the same as his reasons for not filing his SA return by the due date, namely that he did not know about either the Notice to File or about the penalties;

(4) although we were unable to find, at this permission stage, that his case contained an "obvious strength", we were unaware of any other First-tier Tribunal ("FTT") judgment which had considered the TMA s 8 requirement that a Notice to File must be "given" to a person who had consented paperless filing, and none had been included in the Bundles provided[1]; and

(5) Mr Smith acted with alacrity once he realised what had happened.

18. Despite giving significant weight to the first factor, we decided that it was outweighed by the combination of the other factors. We thus gave Mr Smith permission to make his appeals late.

THE EVIDENCE

19. Mr Smith's appeal had been allocated to the "basic" category under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). As a result there had been no direction for either party to provide bundles for the hearing, as is normally the position with standard and complex cases. Each party therefore provided their own Bundle.

20. The Bundle provided by HMRC contained:

(1) the correspondence between Mr Smith and HMRC, and his Notice of Appeal to the Tribunal;

(2) a pro-forma Notice to File for 2016-17;

(3) an HMRC internal printout showing that:

(a) the Notice had been posted on Mr Smith's online account; and

(b) printing of the Notice had been suppressed and an email alert sent instead;

(4) similar printouts in relation to the penalties;

(5) a screenprint of an HMRC computer record showing the date on which Mr Smith had consented to "paperless" communications; the email address he had given, and the date on which that email address had been verified;

(6) a pro-forma email alert message from HMRC, notifying the recipient that a message had been posted on his online account with HMRC;

(7) a "return summary" showing the date on which Mr Smith's 2016-17 Notice to File had been posted on his online account, and the date on which Mr Smith had filed his return;

(8) a screenprint of the penalties, and pro-forma penalty letters and warning letters;

[1] As we explain at §62, we subsequently identified *Armstrong v HMRC* [2018] UKFTT 404 (TC) and *Solomon v HMRC* [2019] UKFTT 0305 (TC), both decisions of Judge Thomas. We also considered *Shaw v HMRC* [2018] UKFTT 0381, which touches on this issue, see §63.

(9) a letter from HMRC to AW Fenn & Co ("AW Fenn"), who were on the record as Mr Smith's advisers, warning that penalties had accrued; and

(10) extracts from HMRC's "SA Notes" in relation to Mr Smith.

21. The other Bundle had been made up by Mr Smith. There was some duplication with HMRC's Bundle, but it contained in addition:

(1) a screenprint of his online account;

(2) various documents about the High Income Child Benefit Charge ("HICBC");

(3) various documents about HMRC's care and management powers; and

(4) a letter to Mr Smith from AW Fenn.

22. Mr Smith told us that his Bundle also contained a copy of a spam email he had received. However, for some unknown reason this document had not been included in the copy of his Bundle provided to the Tribunal. The normal approach where a missing document is identified is for it to be copied by the clerk for the use of the Tribunal and the other party. This was, however, a video hearing, with both Mr Smith and Ms Donovan appearing by video link. It was therefore not possible for Mr Smith to provide a copy of this document to Ms Donovan and the Tribunal. However, he explained what was on the page, and both Ms Donovan and the Tribunal accepted that he had given an accurate description.

23. Ms Donovan informed us that she did not have a copy of Mr Smith's Bundle, but only of (a) his submissions and (b) a list of documents to which he had referred in those submissions ("Document List"). We noted that an earlier hearing of this appeal before a different FTT panel had been adjourned with directions, because Ms Donovan had neither Mr Smith's Bundle nor his submissions. The directions required that the Tribunals Service provide Ms Donovan with the Bundle and the submissions, but by oversight only the latter had been sent to her.

24. Mr Smith noted, correctly, that his submissions cross-referenced to the Bundle, and it was also plain from the wording of the directions that both should have been sent to Ms Donovan. We agreed that Ms Donovan should have contacted the Tribunals Service before the hearing to obtain the Bundle. However, as she was not physically present in the hearing room, it was not possible to direct a short adjournment for the extra documents in Mr Smith's Bundle to be copied and provided to her.

25. Ms Donovan said that, having considered the Document List, there was only one page about which she wanted to make submissions, and that was the screenprint of Mt Smith's online account. She said she was happy to proceed on the basis that the Tribunal would provide her with a summary of that page. In particular, she was not asking for a further adjournment.

26. We decided, taking into account all the above, that it was in the interests of justice to continue with the hearing.

27. In addition to the evidence in the Bundles, Mr Smith gave oral evidence, was cross-examined by Ms Donovan and answered questions from the Tribunal. We found him to be an entirely honest and credible witness.

28. On the basis of the evidence referred to above, we make the findings of fact set out below. We make further findings of fact at the end of our decision in the context of deciding whether Mr Smith had a reasonable excuse.

THE FACTS

The earlier years

29. Until December 2014, Mr Smith worked via a service company of which he was the only employee and director. He engaged AW Fenn to act as his agent, and HMRC had the name of that firm on record.

30. From December 2014, Mr Smith took up a full-time job as an employee of a large company. In November 2015, his service company was dissolved.

31. For years prior to 2014-15, Mr Smith (or his agent) filed an SA return, reporting his earnings and his dividends from his service company. HMRC also issued him with an SA return for 2014-15, but Mr Smith did not file that return by the due date of 31 January 2016, because his company had not paid him any salary or dividends during that year and Mr Smith thought no SA return was required.

32. As HMRC did not receive Mr Smith's 2014-15 return by the due date of 31 January 2016, they issued him with a penalty of £100. On 22 April 2016 Mr Smith called HMRC. The SA Notes, which were completed contemporaneously, record that:

> "tp [taxpayer] call advised does need to file return even if made no income as was director. Tp to file return as soon as online info."

33. After Mr Smith filed the 2014-15 SA return, he was issued with a further penalty of £300. On 28 January 2017 he called HMRC again, asking to appeal the penalties. He was told he was too late to appeal, and he paid the penalties.

34. Although Mr Smith's submission for this appeal said that he had filed the 2015-16 return late, he corrected this during the hearing, saying that this was a mistaken reference to 2014-15. He said he had in fact filed his 2015-16 return on time. Ms Donovan did not challenge this evidence and we accepted it.

Paperless contact

35. It was common ground that HMRC's system for "paperless" contact with taxpayers operates as follows:

(1) taxpayers have to consent to paperless communication before it can be used;

(2) instead of HMRC sending letters to a taxpayer, they send emails to the email address provided by the taxpayer and post the related documents to the online account;

(3) each email contains a notification that a new message has been posted to that taxpayer's online account with HMRC; and

(4) that online account is part of HMRC's own computer system.

36. At the relevant time, HMRC's email messages were headed "GOV.UK" followed by the words "HM Revenue & Customs". In large, bold print, the next line read "You've got a new message from HMRC". The email continued as follows, with the text in normal type and the intermediate bold heading in slightly larger type:

> "Dear [name]
>
> You have a new message from HMRC about Self Assessment
>
> To view it, sign in to your HMRC online account.
>
> For security reasons, we have not included a link with this email.

Why you got this email

You chose to get paperless notifications instead of letters by post.

This means we send you an email to let you know you have a new message in your account.

From HMRC Self Assessment."

37. We find as a fact that all the emails relevant to this appeal used the above wording.

38. The screenshot of HMRC's record in relation to Mr Smith's paperless filing had ticked the box next to the statement "opted in to paperless for generic terms and conditions"; the record also stated that this had happened on 9 June 2016, and it recorded Mr Smith's current email address.

39. Mr Smith accepted that on 9 June 2016 he had consented to paperless contact and had provided HMRC with his email address. However, in his written submission he said that "HMRC have offered no evidence of any terms of agreement for paperless communication". He expanded this point during the hearing, saying that he had no recollection of agreeing that he would have to go into his online account in order to find out what HMRC wanted to communicate.

40. We noted from the screenprint that that HMRC had recorded not only that Mr Smith had "opted in to paperless" but also that he had done so "for generic terms and conditions". Although no copy of any terms and conditions ("T&C") was provided by HMRC for this appeal, we found in reliance on the screenprint that Mr Smith's consent had been given by reference to generic terms and conditions, and we also found on the balance of probabilities that those terms and conditions explained the basis on which the paperless system operated.

41. We also find that, even if the T&C had not explained that HMRC would email a taxpayer when they had posted a statutory notices on his online account, the machinery for operating the paperless system was clearly set out on every email received by Mr Smith, see §36 above.

42. Although we did not rely on it when coming to those conclusions, we noted that a version of the T&C had been set out in an earlier FTT decision, *Hannah Armstrong v HMRC* [2018] UKFTT 404 (TC) ("*Armstrong*") (Judge Thomas), a decision about penalties charged under Sch 55 in relation to Mrs Armstrong's failure to file her SA return for 2015-16. The text so far as relevant is set out below.

"**Secure mailbox**

7.1 When you register for the first time, a secure online mailbox will be set up for you on the Government Gateway. Some online services may make use of the secure mailbox to send you communications and replies to email questions. For these services, you can view the contents of your secure mailbox on the GOV.UK website.

7.2 You should regularly check your mailbox and delete old messages. Read messages that have been on the system for up to three months from delivery will be archived and removed from your mailbox. Unread messages that have been on the system for up to 12 months from delivery will be archived and removed from your mailbox.

7.3 If you opt to receive statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits, which may include notice to file a tax return, renew your tax credits, make a payment or information about other

related matters electronically then these will be delivered to a separate dedicated secure online mailbox. This mailbox is different to the secure mailbox set up for you on the Government Gateway.

Statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits

8.1 Some online services may be used, or may make use of the secure online mailbox, to issue statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits. You can view these securely on the GOV.UK website. You may also print or save them to your own computer. Statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits made available in this way by HMRC will have the same legal effect as paper statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits sent to you by post.

8.2 You will be asked to provide your consent before HMRC issues statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits to you using the secure online mailbox referred to in paragraph 7.3. Where this is the case you will be asked to provide this on screen. If you give your consent you will be required to register an email address with HMRC and HMRC will verify these details with you. When statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits are issued to you using your secure online mailbox, a notification email will also be sent to your registered email address to inform you of this. You should keep the details of your registered email address up-to-date and notify HMRC of any changes….

Information relating to your statutory obligations

13.1 You can access legal information and guidance concerning your statutory obligations in respect of the various online services by going to the 'Your account' area. You should make sure you are familiar with this information as it will tell you what the statutory requirements for the use of online services are.

13.2 Updates to this information will be placed in the Legal conditions area which can be accessed via the 'Your account' area. You should ensure that you keep yourself updated as to your legal obligations by checking this area regularly."

43. These T&C clearly state that "When statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits are issued to you using your secure online mailbox, a notification email will also be sent to your registered email address to inform you of this".

44. In the period between 9 June 2016 and 6 April 2017, HMRC sent three emails to Mr Smith alerting him that they had posted messages to his online account. The documents attached to those messages were Mr Smith's annual tax summary for 2015-16; a new tax statement, and late filing penalties for 2014-15.

45. Mr Smith accesses his emails using a smartphone, and the screen does not allow him to see the whole text of an email without scrolling down. Only the first few lines are immediately visible. Mr Smith had also received a number of spam emails, purporting to be from HMRC. The first few lines of those spam emails were identical to the first few lines of HMRC's genuine emails. Mr Smith assumed that HMRC's emails were spam, and he deleted them after looking at the part of the message which could be seen without scrolling down. He did not access his online account.

The 2016-17 tax year

46. On 6 April 2017, HMRC sent Mr Smith an email in the form set out at §36, advising that a new document had been posted to his online account. On the same day, they posted Mr Smith's 2016-17 SA Notice to File on that account.

47. HMRC provided an internal printout showing that the Notice to File had been posted on Mr Smith's online account, that printing of that Notice had been suppressed and an email alert sent instead. We accepted (and it was not in dispute) that HMRC had proved that the paperless process had been followed.

48. Mr Smith again looked at the part of the message which could be seen without scrolling down; he assumed that the email was spam, and deleted it. He did not access his online account. He then received a further six emails alerting him to messages about the same return; these were sent because the following documents had been posted to his online account:

(1) on 15 February 2018, a notice informing him that he had been issued with a £100 penalty; the notice included a warning that if he filed his 2016-17 return by internet more than three months late, HMRC would charge him a penalty of £10 a day for a maximum of 90 days, starting from 1 May;

(2) on 15 March 2018, a new tax statement;

(3) on 7 June and 5 July 2018, warnings that his 2016-17 return was late;

(4) on 2 August 2018 and 14 August 2018, penalty notices of £900 and £300.

49. HMRC provided internal printouts showing that the penalty notices had been posted on Mr Smith's online account; that printing of the penalty notices had been suppressed and that email alerts had been sent instead. Again, we accepted (and it was not in dispute) that HMRC had proved that the paperless process had been followed in relation to the penalty notices.

50. On 31 July 2018, HMRC sent a letter to AW Fenn, advising that Ms Smith had been charged with late filing penalties of £900 and saying "please pay these penalties [and] send us your tax return **now** to avoid further penalties for filing late". AW Fenn have stated that they did not receive that letter, and we accepted their evidence.

51. In October 2018, Mr Smith found out, from a conversation with a colleague, that he was potentially liable to the HICBC, because his earnings had increased. He spoke to HMRC's SA helpline on 29 October 2018, and the officer confirmed that Mr Smith met the relevant criteria. Mr Smith filed his SA return online on the same day. However, there was no tax to pay; instead a small repayment was due. On 31 October 2018, AW Fenn notified HMRC that they were no longer acting for Mr Smith.

52. Mr Smith's evidence was that soon after he filed his return, he received a letter from HMRC advising that he had accrued penalties totalling £1,300. No copy of that letter was in the Bundle. However, Mr Smith's evidence was unchallenged and we find as a fact that Mr Smith received HMRC's letter in early November 2018.

WHETHER THE NOTICE TO FILE HAD BEEN GIVEN TO MR SMITH

53. TMA s 8(1) reads:

> "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount

> payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board
>
> (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

54. The section therefore requires that a Notice to File be "given" to the taxpayer. The first issue was whether this requirement had been met by posting the Notice on Mr Smith's online account with HMRC and sending him an email alert.

Mr Smith's submissions

55. Mr Smith submitted that posting the Notice on part of HMRC's own computer system, and simply alerting a taxpayer that this had occurred, did not meet the statutory condition in TMA s 8.

56. He relied on *Hayward v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] UKSC 22 ("*Hayward*"). The issue in *Hayward* was whether an employee had received notice of termination (a) when it was delivered to her address, or (b) when she had read the notice. As set out in the headnote, the Supreme Court decided, by a majority that:

> "…the notice period began when the relevant oral or written communication came to the notice of the employee who read it or had a reasonable opportunity of doing so…"

57. Lady Hale, giving the leading judgment with which Lord Wilson and Lady Black concurred, cited with approval the decision of the Employment Appeal Tribunal in *Sandle v Adecco UK Ltd* [2016] IRLR 941 at [41], see [28] of *Hayward*:

> "dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware."

58. Mr Smith said that the same rule applied to him. The Notice to File had not been communicated to him and he was not aware of it. It had therefore not been served just by being posted to his online account. Moreover, he submitted that HMRC knew he had not read the Notice, for the following reasons:

(1) The online account was part of HMRC's own computer system.

(2) Messages which had not been accessed are shown in bold print; once they had been opened and read by the taxpayer, they are displayed in normal print.

(3) At the top of the page, HMRC informed Mr Smith how many of the messages were unopened.

(4) HMRC had sent one of the penalty warning letters (that for £900) to AW Fenn, and it could therefore reasonably be inferred that HMRC had taken this alternative action because they knew none of the messages posted to his online account had been received by him.

Ms Donovan's submissions

59. Ms Donovan did not accept that *Hayward* applied to Mr Smith, saying that it was an employment case, and there was no reason to extend the principles it had established to tax law.

60. Although she did not know why the £900 penalty warning letter had been sent to AW Fenn, she agreed it was unusual and might indicate that someone within HMRC was trying to bring Mr Smith's attention to the fact that his failure to file had caused him to incur penalties, by making contact with his agent. However, even if that was the position, she said that HMRC had no duty or obligation to make contact with a taxpayer (or his agent) by post if he had failed to access his online account.

Relevant legislation and/or case law?

61. We asked the parties if they were aware of any relevant legislation which applied to paperless filing in an SA context, but neither party was able to assist. We observed that in other tax areas, such as VAT, regulations covered electronic filing and related issues. Judge Redston also informed the parties that she had recently considered the meaning of "service" in a different context, see *Albert House v HMRC* under reference TC/2017/07309 ("*Albert House*") and that HMRC's Counsel in that case, Mr Elliott, had put forward a number of helpful authorities. We told the parties that we would review the legal position after the hearing, and asked whether they wanted a further opportunity to make submissions if we identified any relevant provisions or case law. Both parties wanted the Tribunal to make its decision on the basis of the facts as found, the submissions already made, and any relevant law subsequently identified by the Tribunal.

62. Following the hearing we located the EComms Regs, the powers ("*vires*") for which are given by FA 1999, ss 132-3. We also identified two FTT cases which had considered the paperless system in the context of the EComms Regs, namely *Armstrong* referred to above, and *Solomon v HMRC* [2019] UKFTT 0305 (TC) ("*Solomon*"), both decisions of Judge Thomas. As *Solomon* simply cross-refers to *Armstrong* and contains no further analysis, in our discussion below we have referred only to *Armstrong*.

63. We also considered *Shaw v HMRC* [2018] UKFTT 0381 (TC) ("*Shaw*"), a decision of Judge Popplewell. Mr Shaw had consented to paperless communications, but did not seek to argue that there had been, as a result, no valid service of the Notice to File. Judge Popplewell decided his appeal on the basis of the "officer of the Board" point, which we consider at §105ff below. That decision was appealed to the UT, and heard with *Nigel Rogers v HMRC* [2018] UKFTT 0312 (TC) ("*Rogers*"). The UT held at [61] of *Rogers & Shaw* that:

> (1) Mr Shaw had not put forward any submissions to the FTT that the Notice to File was invalid;
>
> (2) HMRC had provided some evidence that the Notice had been served, namely an extract from their computer records. The UT described this as being "relatively weak" evidence when taken on its own; but
>
> (3) in the absence of any challenge from Mr Shaw, that evidence was sufficient to discharge HMRC's burden of proving that a Notice to File had been given.

64. Mr Smith's position is different from that of Mr Shaw: his main submission is that the Notice to File was not validly served. The UT decision in *Rogers & Shaw* therefore does not provide an answer to the question we have been asked to decide (although it does resolve the "officer of the Board" issue, see §111ff below).

The legislation

65. Finance Act 1999, s 132(1) provides:

> "Regulations may be made, in accordance with this section, for facilitating the use of electronic communications for—
>
> (a) the delivery of information the delivery of which is authorised or required by or under any legislation relating to a taxation matter
>
> (b) …"

66. Section 132(3) provides that "provision for facilitating the use of electronic communications" includes:

> "(c) provision authorising tax authorities to use electronic communications for the delivery of information to other persons…
>
> (d)-(f) …
>
> (g) provision imposing conditions that must be complied with in connection with any use of electronic communications for the delivery of information…;
>
> (h) provision, in relation to cases where use is made of electronic communications, for treating information as not having been delivered …unless conditions imposed by any such regulations are satisfied;…"

67. Section 132(4) includes a power to deem information to have been delivered, and begins:

> "(4) The power to make provision under this section for facilitating the use of electronic communications shall also include power to make such provision as the persons exercising the power think fit (including provision for the application of conclusive or other presumptions) as to the manner of proving for any purpose—
>
> (a) whether any use of electronic communications is to be taken as having resulted in the delivery of information…"

68. Section 133(2) provides that regulations made under the powers conferred by s 132:

> "shall have effect notwithstanding so much of any enactment or subordinate legislation as (apart from the provision so made) would require—
>
> (a) any information to be delivered…
>
> (b) …
>
> in a form or manner that would preclude the use of electronic communications for its delivery…, or the use in connection with its delivery…"

The regulations

69. Under the powers given by FA 1999, s 132-133, HMRC made the EComms Regs. Reg 2(1) states that these Regs apply to various statutory provisions including:

> "the delivery of information, to or by the Board, the delivery of which is authorised or required by or under—
>
> (i) any provision of section 8…"

70. Reg 3 provides that HMRC is only empowered to use electronic communications in connection with the matters referred to in Reg 2(1) if "the recipient has indicated that he consented to HMRC using electronic communications in connection with those matters" and has not withdrawn that consent.

71. Reg 5 is entitled "Effect of delivering information by means of electronic communications", and it includes the following provisions:

> "(1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by—
>
> (a) these Regulations
>
> (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
>
> (c) any specific or general direction given by the Board,
>
> are satisfied…
>
> (2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied…
>
> (3)-(4) …
>
> (5) For the purposes of this Part, information which is delivered by means of electronic communications includes information delivered to a secure mailbox."

72. Reg 1(2) defines the term "official computer system" as "a computer system maintained by or on behalf of the Board", and "a secure mailbox" as:

> "a facility or feature which—
>
> (a) forms part of an official computer system, and
>
> (b) can be accessed by an individual permitted to use electronic communications by an authorisation given by means of a direction by the Board…"

73. Reg 9 is headed "Proof of delivery of information and payments", and para 2 provides:

> "The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the delivery of information—
>
> (a) ….
>
> (b) in the case of information falling to be delivered, by the Board, if the despatch of that payment or information has not been recorded on an official computer system."

Application to the issue in this appeal

74. Mr Smith's key submission was that a notice posted on an online account operated by HMRC was not "given" to him within the meaning of TMA s 8.

The meaning of "give"

75. Although the meaning of "give" is not further defined in that section, we noted that TMA s 115(2) begins by saying (our emphases):

> "Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC be so served addressed to that person…"

76. We consider it reasonable to infer from this that the Parliamentary draftsman saw the terms "give" and "serve" as synonymous. The same approach is taken in s 7 of the Interpretation Act 1978, which is headed "References to service by post" and reads:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

77. As noted above, Judge Redston recently considered the meaning of "serve" in a different context, when she heard and decided the case of *Albert House*. She had agreed with HMRC's Counsel, Mr Elliott, that *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 provided helpful guidance on what is required for service to be effective. In *Hastie*, Woolf LJ had held (at p 1579) that the purpose of service was to ensure that the contents of the relevant document were available to the recipient. He said:

> "…in the ordinary case, in order to comply with an order such as was made by Master Hodgson in this case, what is required is that a legible copy of the document should be in the possession of the party to be served."

78. He also cited with approval the judgment of O'Connor LJ's in *Ralux N.V./S.A. v. Spencer Mason*, The Times, 18 May 1989, who had said "if a party can prove that a legible copy of the document which otherwise meets the rules is in the hands of the party to be served, that is good service".

79. Giving a concurring judgment in *Hastie,* Glidewell LJ held (at p 1585):

> "I emphasise that if a document is served by a means for which neither the rule nor statute provides, there will only be good service if it be proved that the document, in a complete and legible state, has indeed been received by the intended recipient."

80. That formulation is not dissimilar to the Supreme Court's decision in *Hayward*, on which Mr Smith relied. We therefore agree with him that the meaning of "give" in TMA s 8 does not extend to simply providing a signpost (such as by way of an email) as to where information can be found on part of HMRC's computer system to which a taxpayer is given access.

81. However, statute takes priority over case law. As Glidewell LJ said, case law only provides an answer "if a document is served by a means for which neither the rule nor statute provides". We therefore next considered whether the EComms Regs changed the meaning of "give" in the context of paperless filing.

The effect of the EComms Regs

82. The EComms Regs apply where a taxpayer has given (and not subsequently withdrawn) his consent. It was not in dispute that this was the position in relation to Mr Smith.

83. Reg 2(1) expressly states that the EComms Regs apply to the delivery of information required by TMA s 8, and Reg 5 provides that where information is delivered "by means of electronic communications" (including by being posted to a secure mailbox on HMRC's computer system), it is "treated as having been delivered" in "the manner or form required by any provision of the Taxes Act".

84. Reg 5 is therefore what is known as a "deeming provision". Deeming provisions require that "one must treat as real that which is only deemed to be so and "one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so", see *Marshall v Kerr* [1993] STC 360 at 366 *per* Gibson J, later approved by the House of Lords.

85. Regulations are what is known as "secondary legislation". They have legal force only if they come within the *vires* (powers) given by statute. We find that Reg 5 is within the *vires* given by the statute in this case because:

(1) section 132(4) says that regulations can set out "whether any use of electronic communications is to be taken as having resulted in the delivery of information", including by using "presumptions" in order to achieve that result. It thus allows the inclusion of a deeming provision in Reg 5; and

(2) section 133(2) provides that regulations made under the powers given by s 132 apply "notwithstanding" that the relevant statutory provision requires delivery in a form which would otherwise "preclude the use of electronic communications for its delivery…,or the use in connection with its delivery". This makes it clear that the regulation can override the TMA s 8 requirement that a Notice to File be "given to" (ie received by) the intended recipient.

Whether the online account is a "secure mailbox"

86. However, as noted above, that deeming provision only applies if the information has been delivered "by means of electronic communications" (including by being posted to a secure mailbox on HMRC's computer system). We considered whether the online account was a "secure mailbox" as defined in Reg 1(2).

87. The online account clearly satisfies subpara (a) of that definition, because it forms part of an official computer system, defined as "a computer system maintained by or on behalf of the Board". However, it also has to satisfy subpara (b), namely that it "can be accessed by an individual permitted to use electronic communications by an authorisation given by means of a direction by the Board".

88. The relevant direction was made on 7 April 2014 and is still in force. It reads[2]:

> "These directions apply in relation to the delivery of information by the Commissioners for Her Majesty's Revenue and Customs in relation to the matters referred to by regulation 2(1)(a)(i) and (v) - (vii) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 ("the Electronic Communications Regulations 2003").
>
> **Use of the secure mailbox to deliver information**
>
> 1. The Commissioners for Her Majesty's Revenue and Customs hereby direct that the conditions that apply in relation to information delivered to a secure mailbox are that:

[2] The direction was made under Reg 5(1) of the EComms Regs, and can be found at: https://www.gov.uk/government/collections/electronic-business-commissioners-directions--2

(a) The Commissioners have delivered information to the secure mailbox of a person who is a registered user of the Self Assessment Online service; and

(b) The Commissioners have despatched:

(i) an email message to the person's last known verified email address, or

(ii) a text message to the person's registered daytime contact phone number notifying the person that information has been delivered to their secure mailbox;

Condition 1(b) will be taken as satisfied if:

(i) the despatch of the email or text message is recorded on an official computer system, unless:

- the official computer system also records that the email or text message was not delivered to the person's email address or phone number, or
- it is proved in some other way that the email or text message was not delivered to the person's email address or phone number; or

(ii) the Commissioners can demonstrate in some other way that the email or text message was delivered to that person."

89. We therefore find that the Notice to File was delivered to a "secure mailbox" as defined because HMRC:

(1) delivered it to Mr Smith's online account (para 1(a) of the HMRC direction);

(2) despatched a notification email to his email account (para 1(b)(i)); and

(3) HMRC's computer recorded that the paper notification was supressed and an email was sent (para 1(i)); this was not in any event disputed.

Conclusion on Notice to File

90. It was therefore clear that the principles set out in *Hastie* and *Hayward* do not apply because the EComms Regs take precedence over that case law. In accordance with the legislation and regulations set out above, HMRC are therefore deemed to have satisfied the TMA s 8 requirement that a Notice to File be "given" to Mr Smith, when they posted the Notice to File on his online account and sent him the related email alert.

THE STATUTORY PROVISIONS RELATING TO THE PENALTIES

91. The parties concentrated their arguments on whether the Notice to File had been "given" to Mr Smith. However, we also consider whether the penalties were correctly served. These were issued under FA 2009, Sch 55.

Sch 55 and the EComms Regs

92. Sch 55 para 18 provides that:

"Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed."

93. Reg 2, which lists the statutory provisions covered by the EComms Regs, includes Sch 55, para 18, see Reg 2(1)(vii). As set out above, Reg 5 states that information required to be delivered by HMRC "shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act". The term "the relevant Finance Acts" is defined at Reg 5(6) to include FA 2009.

94. Thus, our analysis above in relation to TMA s 8 applies equally here: we find that the delivery by HMRC of the penalty notices to Mr Smith's online account met the necessary statutory condition that they had "notified" him of the penalty.

Our disagreement with Armstrong *on this issue*

95. By coming to that conclusion, we have disagreed with Judge Thomas's decision in *Armstrong*. He found that:

> (1) Ms Armstrong had agreed to the T&C set out at §42; para 8.1 of the T&C says that the taxpayer will receive "statutory notices, decisions, estimates and reminders relating to your tax affairs";
>
> (2) she had thereby "consented" to HMRC using the paperless system to provide her with a Notice to File; but
>
> (3) a person "would not necessarily realise" from the T&C that "not only would HMRC send any penalty notices to the secure inbox, but also that any email they sent to alert a person to that notice of penalty would be as bland and uninformative as [the email message set out at §36 above]";
>
> (4) Ms Armstrong had therefore not given "informed consent" to receive penalty notifications using the paperless system; and
>
> (5) her appeal against the penalties was allowed for that reason, see [84] of the judgment.

96. We respectfully disagree. A person who consented to the T&C has agreed to receive all "statutory notices" by the paperless route. Both a Notice to File and a penalty notice are statutory notices, for which consent has been given.

97. Judge Thomas justified the distinction by referring to the "bland and uninformative" wording of the email alert. Again, we disagree. The purpose of HMRC's email is to tell the recipient to check their online account; it is not to communicate any part of the message posted to that account. Moreover, by paras 7.3 and 8.4 of the T&C a recipient has only consented to HMRC posting notices on the online account, he has not consented to HMRC sending him any part of the *content* of those notices via email.

98. Judge Thomas also found that Ms Armstrong had not given "informed consent", and that a similar approach had been followed in *Pendergate v HMRC* [2017] UKFTT 778 (TC) (Judge Raghavan) ("*Pendergate*"). One of the issues in *Pendergate* was whether the appellant had consented to receive PAYE coding notices electronically. In *Pendergate* HMRC had submitted that consent had been given, because a person who signed up to "PAYE Online" would have seen the following Note:

> "By registering for the PAYE Online Service your organisation will automatically receive statutory notices (such as Tax Code changes, Collection of Student Loans and reminders) over the Internet."

99. Judge Raghavan said that the effect of this Note was that a person knew:

> "they will receive statutory notices over the internet but it does not tell them in sufficiently clear terms that they will be taken to have agreed to receive notices which are operative for PAYE deduction purposes by internet only."

100. In our view, the final word of the above paragraph is important: the Note did not say that paper notifications would no longer be issued. Indeed, in *Pendergate* the appellant had continued to receive some coding notices in paper form. In contrast, a person who consents to "paperless" has agreed to receive all communications via their online account. This is clear from the T&C, and also from every email alert, which include the sentence (our emphasis) "You chose to get paperless notifications instead of letters by post".

101. We have no hesitation in finding that by consenting to "paperless" communication a taxpayer has agreed to receive all statutory notices, including penalties, by that route.

Sch 55, para 4 and the "date from which the penalty is payable"

102. We also considered Sch 55, para 4, which imposes daily penalties. One of the statutory conditions for those penalties to be charged is that HMRC give notice to a taxpayer "specifying the date from which the [daily] penalty is payable". This requirement must therefore be satisfied before a daily penalty can be validly imposed. However we noted that Sch 55, para 4 is not one of the provisions referred to in the EComms Regs – in other words, the Regs do not state that the notice required under para 4 can be given by being posted to an online account.

103. The answer to this difficulty is found in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*"), where Etherton MR, giving the only judgment with which Kitchin and Hamblin LJJ both agreed, held that the Sch 55, para 4 requirement was satisfied in that case because the date from which the daily penalty was payable was set out in the £100 penalty notice received by Mr Donaldson, and that constituted the provision of "notice".

104. We have already made a finding of fact as to the wording of the £100 penalty notice posted to Mr Smith's online account, see §48(1). That wording is identical to the penalty notice given to Mr Donaldson. The "notice" required by Sch 55, para 4 was therefore contained within the £100 penalty notice, and that document is covered by the EComms Regs. As a result, there was no need for the EComms Regs to contain a reference to Sch 55, para 4.

THE "OFFICER OF THE BOARD" ISSUE

The parties' submissions

105. Mr Smith also appealed on the basis that TMA s 8 required that the Notice to File be given "by an officer of the Board". He cited *Rogers*, in which Judge Popplewell held that HMRC had failed to prove that a 2016-17 Notice to File had been given by an "officer of the Board", and had allowed the taxpayer's appeal in consequence.

106. Mr Smith said that, in relation to this issue, the evidential position in his case was the same as in *Rogers*; in other words, the two cases could not be distinguished, other that Mr Rogers had not consented to paperless filing.

107. At [8(11)] of his decision, Judge Popplewell said:

> "I would expect any such notice [to file] to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words there must be evidence that the named

> officer has signed the notice or it must be otherwise made clear that he is 'giving' it

108. At [8(14)] he held that the decision to issue a Notice must be made by:

> "…a real 'flesh and blood' officer, and not by HMRC as a collective body. Nor is it a computerised decision."

109. Ms Donovan submitted that *Rogers* had been wrongly decided and that the Tribunal should find that the decision to issue the Notice to File had been made by an officer of the Board. She relied on *Donaldson*, where the Court of Appeal had accepted HMRC's case that the statutory phrase "HMRC decide that such a penalty should be payable" was satisfied because HMRC had taken a high level policy decision as to the taxpayer behaviour which would trigger the issuance of a penalty, see [10] and [18] of the judgment. At [14] Etherton MR endorsed the following passage from the UT's judgment:

> "We do not think it could have been within the contemplation of the draftsman that HMRC should be required to make a decision on a taxpayer-by-taxpayer basis, since he must have been aware that it would be impractical to exercise a discretion (meaning a discretion exercised in respect of each taxpayer individually, rather than in relation to defaulting taxpayers as a body) in that way. Rather, we think, this provision too contemplates what HMRC have in fact done, that is decide in advance that all taxpayers who default for more than three months should suffer daily penalties. In other words, what was contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers who default for the requisite period, or none; and if that is so the purpose of the notice is to inform taxpayers who are in danger of incurring daily penalties that HMRC have decided to impose them."

110. In Reply, Mr Smith relied on the fact that in *Donaldson* the Court was considering decisions made "by HMRC", whereas the Notice to file had to be made by "an officer of the Board"; this distinction was also relied on by Judge Popplewell.

The UT judgment

111. HMRC appealed *Rogers* to the UT. As already noted, it was joined to *Shaw* and heard by the UT in November 2019. However, at the time of Mr Smith's appeal hearing on 13 December 2019, the UT had not issued their judgment. Both parties told us that they did not want the opportunity to make further submissions on this or any other issue.

112. In *Rogers and Shaw* the UT held at [32] that:

> "…properly construed, s8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC."

113. The UT further explained this at [33], saying:

> "By virtue of s2 of the Commissioners for Revenue & Customs Act 2005 ('CRCA'), the 'officers' of HMRC are those staff that the Commissioners of Revenue & Customs have appointed for the purposes of exercising the Commissioners' functions. Section 2(4) of CRCA provides that anything commenced by one officer can be continued by another. Moreover, s113(1A) of TMA provides that:

> (1A) Any notice or direction requiring any return to be made under the Taxes Acts to an inspector or other officer of the Board[3] may be issued or given in the name of that officer or, as the case may be in the name of the Board, by any officer of the Board, and so as to require the return to be made to the first-mentioned officer.
>
> Against that background, s8 cannot be construed as requiring an identified officer to give a notice requiring a return to be given to that very officer."

114. For essentially the same reason, the UT rejected the distinction made by Judge Popplewell between decisions made "by HMRC" and decisions made "by an officer of the Board", and concluded at [37]:

> "'the Commissioners' (or 'HMRC') and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax."

115. HMRC also provided unchallenged evidence setting out the process by which Notices to File were issued, see [55]-[56] of the judgment. On the basis of that evidence, the UT accepted that a particular team of HMRC officers:

> "formulates, and keeps updated, criteria for deciding which taxpayers are to be required to submit tax returns. Having formulated those criteria, HMRC's computers perform an automated scan of their database to identify taxpayers who meet the criteria."

116. The UT went on to say at [57] (emphasis in original):

> "HMRC officers decided on applicable criteria and taxpayers meeting those criteria received s8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified."

117. The UT also found that neither Mr Rogers nor Mr Shaw had a reasonable excuse, and went on to allow HMRC's appeals, upholding the penalties.

Application to this case

118. This Tribunal is bound by the UT's judgment in *Rogers & Shaw*, with which we also respectfully agree. The UT held that "HMRC" and the "officer of the board" are simply different manifestations of the same thing, and that TMA s 8 therefore does not require a named, flesh and blood individual officer to be identified as the giver of a Notice to File. Instead, the statutory test is satisfied if a Notice is given "under the authority of an officer of HMRC".

119. The UT also decided that TMA s 8 "imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC", and heard witness evidence before deciding the appeals. It is well-established that evidence given in one case cannot be relied on in another, and that facts found in one appeal are not binding on another court or tribunal. We therefore considered whether it was necessary to adjourn Mr Smith's appeal and direct that HMRC provide witness statements in relation to the process by which his Notice to File had been issued. However, we decided that this was not necessary, because:

[3] Defined by s118 of TMA as the "Commissioners of Inland Revenue" which, by s50 of CRCA is defined to include the "Commissioners of Revenue & Customs"

(1) Ms Donovan had led evidence that the Notice had been posted to Mr Smith's online account by HMRC; and

(2) Mr Smith had not challenged that evidence: in other words, he had accepted that the Notice had been posted to his online account *by HMRC*; his challenge was that no individual officer had been identified;

120. There was thus no requirement that HMRC provide witness evidence to prove that the Notice had been issued *by HMRC*, because that point was not in dispute.

121. Mr Smith had also put his case on the basis that his position in relation to the issuance of the Notice by an "officer of the Board" was evidentially identical to that of Mr Rogers. The tax year in both cases was 2016-17 and both Mr Rogers and Mr Smith received a Notice to File and penalties for late filing. It is thus reasonable for us to infer that had we directed the provision of witness evidence from HMRC about the process of issuing Notices to File, that evidence would have been identical to that given to the UT.

Decision on "officer of the Board" issue

122. We therefore rejected Mr Smith's argument that the Notice to File issued to him was invalid because it had not been issued by a specific, named HMRC officer.

REASONABLE EXCUSE

123. Sch 55, para 23 provides that liability to a penalty does not arise if the appellant satisfies the Tribunal that there is "a reasonable excuse for the failure". We are therefore required to determine is whether Mr Smith has a reasonable excuse for failing to file his 2016-17 return by the due date of 31 January 2018.

The test

124. Both parties agreed that we should follow the approach recommended in *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") at [81], which sets out the following steps:

(1) 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) Decide which of those facts are proven.

(3) 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, the FTT 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) Having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. 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.

The parties' submissions

125. Mr Smith submitted that he had a reasonable excuse for his failure to file the return by the due date, because his belief that the email messages were spam was objectively reasonable. He said that:

(1) HMRC's website advises that a person who wants to opt out of receiving an SA return should call the helpline, and he had been advised by that helpline that he did not have to file an SA return after he stopped being a director. He accepted that the conversation to which he was referring was the one which had taken place on 22 April 2016, see §32. He said that it was only much later that he realised he did have to file a return because of the HICBC; however, his reasonable belief until October 2018 was that he did not have to file a return; and

(2) HMRC's emails about the online account were very similar to spam messages and it was reasonable for him to have assumed they were spam and deleted them, particularly as the conversation with the helpline meant that he had no reason to expect to hear from HMRC.

126. At the end of the hearing, by way of Reply, Mr Smith read out the names and reference numbers of several FTT decisions. He provided no copy of these cases before the hearing, and did not refer to them either in his written submissions, or when he was putting his arguments earlier in the hearing. One of these new cases was *Hayhurst and others v HMRC* [2018] 0265 (TCC), a decision of Judge Connell and Mr Robertson in which the FTT had found that that the appellants a reasonable excuse, in part because Mrs Hayhurst had relied on guidance from HMRC. Mr Smith submitted that his position was similar and he also had a reasonable excuse.

127. Ms Donovan submitted that Mr Smith's behaviour was not objectively reasonable, because:

(1) it was clear from the contemporaneous record of the conversation between Mr Smith and the HMRC officer on 22 October 2016, that the officer had not told Mr Smith that he would never have to file an SA return in the future; instead, the officer instructed him to file his 2014-15 return;

(2) no HMRC officer would make a future promise of that type, because a person's position could change over time;

(3) although it was possible for HMRC to agree to remove a person from SA, this was always done by writing to the taxpayer;

(4) there were significant differences between spam messages and HMRC's emails; and

(5) although she was unable to respond to *Hayhurst*, given the lack of any previous reference to the case before the hearing, she pointed out that whether or not a "reasonable excuse" exists is highly fact sensitive.

128. Given the way in which the parties put their cases, we decided to apply Steps 2 and 3 of the approach in *Perrin* by taking each of Mr Smith's two "reasonable excuse" grounds separately.

Mr Smith's conversation with the HMRC helpline

Findings of fact

129. We have already found as a fact (see §32) that Mr Smith's conversation with the HMRC helpline was as follows (our emphasis):

> "tp [taxpayer] call advised does need to file return even if made no income as was director. Tp to file return as soon as online info"

130. We accept Mr Smith's evidence that he understood from this conversation that:

(1) he had to file a return in 2014-15 because he remained a director of his company; and

(2) he would not have to file a return when he was no longer a director (as was the position in 2016-17).

131. We also find that :

(1) he did not ask to be removed from SA but assumed this would happen automatically; and

(2) he did not assume, from his conversation with the helpline, that he would never in the future have an obligation to file a return. Rather, he recognised that he would have to file a return if his situation or the law changed; this is clearly demonstrated by the fact that he contacted HMRC as soon as he was aware of the HICBC. In other words, although Mr Smith understood he had been removed from SA, he did not also assume that he had no obligation to notify chargeability, were the position to change.

Mr Smith and the reasonable taxpayer

132. Mr Smith is an intelligent man who had been in the SA system for some years before 2016-17; he had used an accountant until his company was dissolved. He relied on and trusted the advice from the HMRC helpline.

133. We find that the reasonable taxpayer with Mr Smith's experience and other relevant attributes would have had a good understanding of how the SA system worked, and be aware of and rely on of the helpline, but would not have had any specialist tax knowledge.

How would that reasonable taxpayer have acted?

134. We also find that the reasonable taxpayer, who had been told by the HMRC helpline that he had to fill in an SA return "as he was a director", would have assumed that once he closed his company he would no longer have to complete a return. That reasonable taxpayer would not have appreciated that he needed to be informed in writing that he had been removed from the SA system: he would not possess that sort of technical knowledge.

Our conclusion on this point

135. We thus find that it was reasonable for Mr Smith to believe he did not have to file an SA return in 2016-17, and that this only changed when he found out about the HICBC. But it does not follow from this conclusion that Mr Smith has a reasonable excuse, because we also need to consider his other actions, or failures to act

The similarity to spam messages

Findings of fact

136. We have already set out the wording of the HMRC email, and we have accepted that the first part was similar to spam messages. We have also found as facts that Mr Smith failed to read the whole text of the emails; instead he only read the lines which were visible on his smartphone without scrolling down, and he deleted the emails believing them to be spam.

137. We agree with Ms Donovan that there are important differences between HMRC's emails and spam emails, and indeed Mr Smith accepted that this was the position during the hearing. In particular, most spam emails contain an attachment or link, and it is opening the attachment or clicking on the link which causes the damage. Others ask the recipient to provide personal information such as bank details. In contrast, HMRC's messages contain no link, instead they say "for security reasons, we have not included a link with this email". There are no attachments, and there is no request for personal details.

The reasonable taxpayer in Mr Smith's position

138. We find that the reasonable taxpayer with the same level of intelligence and background knowledge as Mr Smith, who had signed up to "paperless" communications, and who believed he was outside the SA system:

(1) would expect to receive *some* HMRC communications, perhaps coding notices and statements of account. Mr Smith himself said that HMRC should have informed him about how the HICBC operated, and submitted that they had failed in their duty by not doing so;

(2) would have read HMRC's emails in full, and not simply the first lines which were visible on the screen of his smartphone;

(3) having done so he would:

(a) have noticed the differences between HMRC's email and spam emails; and

(b) have checked his online account to see if he had received an HMRC message. Even if he was unsure about the spam/not spam status of the email, the reasonable person would know he could safely check his online account using the access codes previously provided; and

(4) would not have deleted the emails without reading them in full.

139. We find that Mr Smith did not act reasonably in deleting the email which alerted him to the Notice to File without reading it. As a result, we find that he does not have a reasonable excuse for failing to file his return by the due date.

Other FTT case law

140. We agree with Ms Donovan that FTT decisions on reasonable excuse are highly fact sensitive. In *Hayhurst*, the FTT found that it was reasonable for Mrs Hayhurst to have relied on the advice given by HMRC; the FTT also took into account other problems, including Mr Hayhurst's depressive illness. In Mr Smith's case, we have accepted that it was objectively reasonable for him to rely on the advice from the HMRC helpline, but it was not objectively reasonable to fail to read his email from HMRC, and thus to fail to check his online account.

141. We note that Mr Smith's position has some similarity with that in *Perrin*, where Judge Redston was also the presiding judge at first instance. Mrs Perrin had failed to read the whole

of a letter from HMRC, and so remained unaware that she had filed her SA return for the wrong year. The FTT found at [128]:

> "Even were we to agree with Mrs Perrin that it was reasonable not to have noticed she had completed the wrong year's return, there is a further difficulty. HMRC told Mrs Perrin of her mistake on 13 July 2012, but she did not read the key paragraphs. She is right that these came at the end of a long letter, and under a section headed 'interest,' but we nevertheless find that the reasonable taxpayer would have read the whole letter, and having done so, would have realised she had filled in the wrong tax return form."

SPECIAL CIRCUMSTANCES AND PROPORTIONALITY

142. Sch 55 para 16 provides that "if HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule". HMRC said in their Statement of Case that they had considered whether there were any special circumstances in this case, and decided there were not.

143. The FTT (and UT) is only allowed to interfere with HMRC's decision to reduce (or not reduce) a penalty for "special circumstances" if that decision was "flawed"; that term must be understood by reference to the principles applicable in proceedings for judicial review, see Sch 55, para 22(3) and (4). In *Edwards v HMRC* [2019] UKUT 131 ("*Edwards*") at [72] the UT (Nugee J and Judge Herrington) held that this "special circumstances" provision gave the FTT "a wide discretion to reduce a penalty", and at [67]-[74] that the proportionality of a penalty was an issue which could be considered under the heading of "special circumstances".

The parties' submissions

144. Mr Smith said that it was disproportionate for HMRC to charge penalties of £1,300 when he had no tax liability. Ms Donovan submitted that the penalties were unrelated to the tax; instead they were levied when a person failed to comply with his statutory obligation to file an SA return by the due date, and it was therefore wrong to consider the proportionality of the penalties by reference to the tax which was (or was not) payable.

The *Edwards* judgment

145. In *Edwards* the appellant had argued that the penalties charged under Sch 55 were disproportionate and so infringed his rights under Article 1 Protocol 1 of the European Convention on Human Rights. The UT carefully considered that issue, before deciding at [85] that the Sch 55 penalty regime:

> "establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear."

146. The UT continued at [86]:

> "a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty."

147. In reliance on *Edwards*, we therefore decide this issue against Mr Smith.

OTHER MATTERS

148. Mr Smith raised a number of other matters, which we cover briefly below.

Whether HMRC should have issued the return

149. Mr Smith submitted that as he was a PAYE employee, HMRC should not have issued him with a return. Ms Donovan relied on *Goldsmith v HMRC* [2019] UKUT 0325 (Fancourt J and Judge Brannan). Mr Goldsmith had succeeded before the FTT on the basis that TMA s 8(1)(a) stated that a Notice to File had to be "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year….". The FTT held that where a person's tax had been collected under PAYE, HMRC did not need to issue a Notice to File "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" because they already knew the amount.

150. However, the UT overturned that decision, finding that a Notice to File issued to assess a known tax liability was within the meaning of "establish", because an SA return "secures/fixes/makes permanent the liability to tax by making it an enforceable debt", see [118] of the judgment. We respectfully agree, and *Goldsmith* is in any event binding on us.

The letter to AW Fenn

151. Mr Smith criticised HMRC for sending the £900 warning letter to AW Fenn, instead of to his own address. However, AW Fenn was on the record as Mr Smith's agent until it was removed on 31 October 2018. HMRC therefore acted in accordance with Mr Smith's previous and extant instructions. It was Mr Smith's responsibility to ensure that AW Fenn were removed as his agent, either by doing so himself or by asking AW Fenn to inform HMRC.

Care and management

152. Mr Smith provided a number of documents referring to HMRC's care and management powers, and said that in dealing with his case, HMRC had not acted in accordance with their public duties. The Tribunal has no jurisdiction over how HMRC used these powers, as Mr Smith accepted during the hearing.

The HICBC

153. Mr Smith also submitted that HMRC had given a public promise that it would contact all those affected by the HICBC, and produced a screenprint from gov.uk. He said that if he had been contacted, he would have been aware that he needed to file an SA return, and thus would have acted much sooner. However, he accepted during the hearing that the promise was given after 29 October 2018, and so after the date on which he filed his SA return.

154. Mr Smith also made submissions about penalties for failure to notify which had been levied on other taxpayers because of the HICBC, but accepted during the hearing that these penalties were entirely different to those with which he had been charged.

The *Hansard* case

155. As noted at §126, at the end of the hearing, by way of Reply, Mr Smith read out the names and reference numbers of several FTT decisions. One of these was *Solomon.* Mr Smith asked us to consider whether any of the reasons Judge Thomas had given for allowing Mr Solomon's appeal applied to him. Ms Donovan was unable to respond, as Mr Smith had neither provided a copy of that case before the hearing, nor referred to it in his written submissions.

156. In *Solomon* Judge Thomas:

(1) allowed the appellant's appeal against the daily penalties because the conditions in Sch 55, para 4 had not been met;

(2) allowed the appellant's appeal against the six month penalty "as it was issued automatically before the return was received without an officer of HMRC considering to the best of their knowledge and belief what the penalty should be". Judge Thomas then cross-referred to one of his earlier decisions, *Hansard v HMRC* [2018] UKFTT 292 (TC) where he had come to the same conclusion; and

(3) in the alternative, found that the position was the same as in *Armstrong* because the necessary consent had not been given for penalties to be posted on the taxpayer's online account.

157. We considered whether these arguments were before the Tribunal for us to decide. The first issue had also been raised in HMRC's Statement of Case; we considered it at §102ff and found that the relevant statutory conditions have been met in relation to Mr Smith. The third issue was at the heart of Mr Smith's dispute. That left the second issue. In our judgment this was not properly before the Tribunal: it was only put forward by Mr Smith by way of an oblique reference at the very end of the hearing, and Ms Donovan had had no opportunity to make reasoned submissions in response. The legal arguments were not even set out in *Solomon*, but only in *Hansard.* However, if it had been before the Tribunal, we would have found that it did not assist Mr Smith, as we briefly explain below.

The relevant legal provisions

158. Sch 55, para 5 reads:

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

159. Sch 55, para 24 is headed "Determination of penalty geared to tax liability where no return made", and reads:

> "(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.
>
> (2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates:
>
> (a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and
>
> (b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return
>
> (c) …"

160. Para 20 is also relevant: it deals with appeals and reads:

> "(1) P may appeal against a decision of HMRC that a penalty is payable by P.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P."

The decision in Hansard

161. The taxpayer in *Hansard* was given a £300 penalty. There was no evidence that HMRC had determined that amount "to the best of [their] information and belief". Instead, the imposition of a £300 penalty was the default position where no tax return had been received.

162. Judge Thomas decided that HMRC's failure to carry out the exercise of deciding whether to charge £300 or whether to charge a higher amount meant that the £300 penalty was invalid, and he allowed the appeal, see [88]-[90] of the judgment

Our view

163. The charging provision here is para 4(1): this provides that a person is "liable to a penalty" if he is six months late in filing his SA return. Para 4(2), read with para 24, sets out how the quantum of that penalty is to be calculated. If the quantum of a penalty is incorrect, that does not invalidate the penalty. Para 20 provides that a person can appeal against both the imposition of a penalty (validity) and the amount of the penalty (quantum).

164. Thus, in our view, a penalty cannot be cancelled because HMRC had failed to follow the process set out in para 24(2)(a). In Mr Smith's case, the correct penalty was £300, because his return showed that he owed no tax. Thus, the quantum of the penalty charged was correct.

165. We are aware that HMRC has appealed *Hansard* to the UT. At the time of drafting this decision, the UT's judgment has not been published. As we had in any event held that the *Hansard* issue was not properly before this Tribunal, we decided not to delay issuing our decision in Mr Smith's case.

CONCLUSION

166. For the reasons set out above, Mr Smith's appeal is dismissed and the penalties confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

167. This document contains full findings of fact and reasons for the decision. If Mr Smith is dissatisfied with this decision, he has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to him. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 03 JANUARY 2020

APPENDIX: LEGISLATION

Taxes Management Act 1970

8 Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1AA)-(1C)

(1D) A return under this section for a year of assessment (Year 1) must be delivered—

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1H) The Commissioners—

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(4A)-(5) …

Finance Act 1999

132 Power to provide for use of electronic communications

(1) Regulations may be made, in accordance with this section, for facilitating the use of electronic communications for—

(a) the delivery of information the delivery of which is authorised or required by or under any legislation relating to a taxation matter;

(b) the making of payments under any such legislation.

(2) The power to make regulations under this section is conferred—

(a) on the Commissioners of Inland Revenue in relation to matters which are under their care and management; and

(b) on the Commissioners of Customs and Excise in relation to matters which are under their care and management.

(3) For the purposes of this section provision for facilitating the use of electronic communications includes any of the following—

(a)-(b)…

(c) provision authorising tax authorities to use electronic communications for the delivery of information to other persons…;

(d)-(f)…

(g) provision imposing conditions that must be complied with in connection with any use of electronic communications for the delivery of information or the making of any payment;

(h) provision, in relation to cases where use is made of electronic communications, for treating information as not having been delivered…unless conditions imposed by any such regulations are satisfied;

(i) provision, in relation to such cases, for determining the time when information is delivered…;

(j) provision, in relation to such cases, for determining the person by whom information is to be taken to have been delivered…;

(k) provision, in relation to cases where information is delivered by means of electronic communications, for authenticating whatever is delivered.

(4) The power to make provision under this section for facilitating the use of electronic communications shall also include power to make such provision as the persons exercising the power think fit (including provision for the application of conclusive or other presumptions) as to the manner of proving for any purpose—

(a) whether any use of electronic communications is to be taken as having resulted in the delivery of information…;

(b) the time of delivery of any information for the delivery of which electronic communications have been used;

(c)-(d) …

(e) the contents of anything so delivered;

(f) the contents of any records;

(g) any other matter for which provision may be made by regulations under this section.

133 Use of electronic communications under other provisions

(1) Without prejudice to section 132 above, where any power to make subordinate legislation for or in connection with the delivery of information or the making of payments is conferred in relation to any taxation matter on—

(a) the Commissioners of Inland Revenue...

(b)-(c)…

that power shall be taken (to the extent that it would not otherwise be so taken) to include power to make any such provision in relation to the delivery of that information…as could be made by any person by regulations in exercise of a power conferred by that section.

(2) Provision made in exercise of the powers conferred by section 132 above or subsection (1) above shall have effect notwithstanding so much of any enactment or subordinate legislation as (apart from the provision so made) would require—

(a) any information to be delivered, or

(b) …,

in a form or manner that would preclude the use of electronic communications for its delivery… or the use in connection with its delivery….

(3)-(4)

(4) Expressions used in this section and section 132 above have the same meanings in this section as in that section.

INCOME AND CORPORATION TAXES (ELECTRONIC COMMUNICATIONS) REGULATIONS 2003

Part 1 Introduction

1 Citation, commencement and interpretation

(1) These Regulations may be cited as the Income and Corporation Taxes (Electronic Communications) Regulations 2003 and shall come into force on 5th March 2003.

(2) In these Regulations—

"the Board" means the Commissioners of Inland Revenue;

"the Management Act" means the Taxes Management Act 1970;

"official computer system" means a computer system maintained by or on behalf of the Board—

(a) to send or receive information or payments, or

(b) to process or store information; . . .

"secure mailbox" means a facility or feature which—

(a) forms part of an official computer system, and

(b) can be accessed by an individual permitted to use electronic communications by an authorisation given by means of a direction by the Board[4]; and

"the Taxes Act" means the Income and Corporation Taxes Act 1988…

2 Scope of these Regulations

(1) These Regulations apply to—

(a) the delivery of information, to or by the Board, the delivery of which is authorised or required by or under—

(i) any provision of section 8, 8A, 8B, 9, 9ZA, 9ZB, 9A, 9B, 9C, 9D, 12AA, 12AAA, 12A, 12ABA, 12ABB, 12AC, 12AD, 12AE, 28A, 28B, 28C, 30B, 59C, 59DA, 59E or 100 of the Management Act,…

(ii)-(vi) …

(vii) paragraph…18 of Schedule 55, or paragraph 11 of Schedule 56, to the Finance Act 2009; and…

Part 2 Electronic Communications—General Provisions

3 Use of electronic communications

(1) The Board may only use electronic communications in connection with the matters referred to in regulation 2(1) if—

(a) the recipient has indicated that he consents to the Board using electronic communications in connection with those matters; and

(b) the Board have not been informed that that consent has been withdrawn.

Part 3 Electronic Communications—Evidential Provisions

5 Effect of delivering information by means of electronic communications

(1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by

[4] This definition was inserted with effect from 27 March 2014 by SI 2014/489

any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by—

(a) these Regulations,

(b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and

(c) any specific or general direction given by the Board,

are satisfied…are taken to be satisfied under regulation 3(8).

(2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied.

This is subject to paragraphs (3) and (4).

(3) The Board may by a general or specific direction provide for information to be treated as delivered upon a different date (whether earlier or later) than that given by paragraph (2).

(4) Information shall not be taken to have been delivered to an official computer system by means of electronic communications unless it is accepted by the system to which it is delivered.

(5) For the purposes of this Part, information which is delivered by means of electronic communications includes information delivered to a secure mailbox.

(6) For the purposes of paragraph (1) "the relevant Finance Acts" means the Finance Act 2007, the Finance Act 2008 or the Finance Act 2009.

9 Proof of delivery of information and payments

(1) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, to have resulted in…the delivery of information—

(a) …

(b) in the case of information falling to be delivered…by the Board, if the despatch of that payment or information has been recorded on an official computer system.

(2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the…delivery of information—

(a) …

(b) in the case of information falling to be delivered…by the Board, if the despatch of that payment or information payment has not been recorded on an official computer system.

(3) The time of receipt of any information or payment sent by an authorised means of electronic communications shall be presumed, unless the contrary is proved, to be that recorded on an official computer system.

FA 2009, SCHEDULE 55
PENALTY FOR FAILURE TO MAKE RETURNS ETC

1. Penalty for failure to make returns etc

(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which payment relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970
		(b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

Amount of penalty: occasional returns and annual returns

2. Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table.

3. P is liable to a penalty under this paragraph of £100.

4. (1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

5. (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

6. (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2)-(4a) …

(5) In any case not falling within sub-paragraph (2) the penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

16. Special reduction

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

18. Assessment

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax…

Appeal

20.

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21.

(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal)…

22.

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

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

23. Reasonable excuse

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

24. Determination of penalty geared to tax liability where no return made

(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and

(b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return)….

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