TC07685

CAPITAL GAINS TAX – discovery assessment – concept of staleness – whether stale – whether SA return issued – whether quantum correct – whether late filing penalties issued/notified – whether correctly calculated – whether payments on account reduce the base on which penalties calculated – whether special circumstances – appeal refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05611

BETWEEN

PETER MARANO **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON
MR CHARLES BAKER

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 21 and 22 January 2020

Mr Keith Gordon of Counsel, instructed by RSM UK, for the Appellant

Mr Christopher Vallis, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Peter Marano is a US citizen who is resident in the UK. At all relevant times he was on the remittance basis for UK tax purposes, and as a US citizen he also had to file and pay taxes in the USA.

2. On 28 December 2012, Mr Marano's accountant, RSM, informed HMRC that Mr Marano had remitted a chargeable gain, and that the capital gains tax ("CGT") on that gain was an estimated £5,744,219. On the same day, Mr Marano paid that tax so it could be claimed as a credit against his US tax liabilities. As this was part way through the 2012-13 tax year, HMRC had not yet issued any self-assessment ("SA") returns for that year.

3. The due date for submitting 2012-13 returns was 31 January 2014. Mr Marano did not submit an SA return by that date. HMRC issued fixed and daily penalties. On 20 November 2014, HMRC issued a determination charging tax of £118,199. This amount was based on Mr Marano's earlier returns, and did not include the tax on the remitted gain, which had been overlooked by HMRC. The determination was followed by tax-geared 5% penalties, based on the amount of the determination.

4. In November 2015, responsibility for the case moved to a different HMRC officer, Mrs Louise McGovern. She reviewed Mr Marano's file and found RSM's letter. She contacted Mr Matthews of RSM, who told her that the return had been prepared but not yet approved, and that it included the remitted gain. Subsequent calls received the same response. However, on 25 October 2016, Mrs McGovern had a further conversation with Mr Matthews. Her file note recorded that Mr Matthews believed it was "highly unlikely" that Mr Marano would ever approve the return.

5. Mrs McGovern was aware that the four year ordinary time limit for issuing assessments would expire on 5 April 2017. On 8 March 2017, she issued a discovery assessment for £5,744,219, the figure in RSM's letter. This was followed on 14 March 2017 by a late filing penalty notice for £574,422, being two 5% tax-geared penalties based on the amount charged by the discovery assessment.

6. Mr Marano finally approved his 2012-13 return, and on 29 June 2017 Mr Matthews sent it to HMRC. However, that was after the ordinary time limit for filing a return, see Taxes Management Act 1970, ("TMA") s 34A, so it was not accepted by HMRC. According to RSM's computation, the CGT for the year was £132,429.85 less than the figure previously notified to HMRC. At the same time, RSM submitted a separate claim for Mr Marano to be given EIS deferral relief of £100,000, and asked that this be carried back so as further to reduce his 2012-13 CGT.

7. On behalf of Mr Marano, Mr Gordon raised more than ten challenges to the discovery assessment and the penalties, see §60. In relation to the assessment, Mr Gordon accepted that Mrs McGovern had made a discovery, but submitted that it was stale. For HMRC, Mr Vallis said there was no concept of staleness, although he accepted that HMRC and the Tribunal were bound by case law on this point. He also submitted that in any event the discovery was not stale. In the absence of binding authority, we too would have found that staleness is not part of the statutory framework, for the reasons we explain at §78-§85. However, we are of course bound by precedent on that point. Having accepted the concept as valid, and having applied it to the facts of the case, we found that the discovery was not stale.

8. Mr Gordon also challenged the 2012-13 Notice to File and the issuance and/or delivery of certain penalty notices. We found that HMRC succeeded on each of these points. In addition, Mr Gordon submitted that tax-geared penalty notice for £574,422 should have been based on a tax figure reduced by payments on account. For the reasons set out at §181ff, we found that penalties for late filing are not reduced by payments on account. He also submitted that the penalties should have been based on a lower tax figure, because of (a) the lower CGT shown in RSM's computation and (b) the EIS claim. For the reasons set out at §199ff and §205ff we disagreed. We also found that the tax-geared penalties were not disproportionate and that there were no other special circumstances which would allow them to be reduced, see Issue 9. Finally, we considered and rejected Mr Gordon's submission that TMA s 50 required us to reduce the assessment and/or the penalties.

9. As a result, we confirmed the discovery assessment of £5,744,219 and the following penalties, all of which were issued under Finance Act 2009, Schedule 55 ("Sch 55") for late filing of the 2012-13 SA return:

(1) under para 3, the initial penalty of £100 issued on 18 February 2014;

(2) under para 4, the daily penalty of £900 issued on 18 August 2014;

(3) under para 5, a six month penalty of £300 also issued on 18 August 2014;

(4) under paras 5 and 6, two initial tax-geared penalties issued on 25 November 2014 and 3 March 2015, each of £5,609; and

(5) also under paras 5 and 6, the two tax-geared penalties issued on 14 March 2017 totalling £574,422.

10. In this decision, all legislation is cited only so far as relevant to the issue being considered.

THE EVIDENCE

11. The Tribunal was provided with a main hearing bundle prepared by RSM on behalf of Mr Marano, and two supplementary bundles, one prepared by HMRC and one by RSM. The supplementary bundles were filed and served late, but neither party objected to them being provided and we decided it was in the interests of justice to allow them to be admitted into evidence. In this decision, we have referred to all three as "the Bundle".

12. The Bundle included the following documents:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) microfiche data relating to Mr Marano, provided by HMRC;

(3) extracts from HMRC's debt management notes recording system ("IDMS"); and

(4) information from the Companies House website about Mr Marano and about Bucentaure LLP, of which Mr Marano was a member.

13. Mr Marano provided a witness statement, gave oral evidence led by Mr Gordon, was cross-examined by Mr Vallis, and answered questions from the Tribunal. We found him to be an honest witness. Although his evidence was often vague, we accepted that this was because of the passage of time.

14. Mrs McGovern provided three witness statements, gave oral evidence led by Mr Vallis, was cross-examined by Mr Gordon, and answered questions from the Tribunal. We found her to be a straightforward and credible witness.

15. Mr Stephen Matthews is an associate director of RSM. He provided a witness statement, gave oral evidence led by Mr Gordon and was cross-examined by Mr Vallis. The main issue about which he gave evidence was whether Mrs McGovern had accurately recorded the conversation which had taken place on 14 August 2016, see §39. However, Mr Matthews freely admitted that he could not recall that conversation, although he said he "did not believe" he would have used the words recorded by Mrs McGovern. We found Mrs McGovern's contemporaneous file note to be entirely reliable evidence and accepted it.

16. Based on the evidence provided, we make the findings of fact set out below. Some of the facts were in dispute, and we also make further findings later in our decision.

THE FACTS

17. Mr Marano was and remains a citizen of the USA. At all relevant times, he was tax resident in the UK but domiciled in the USA. He was entitled to claim the remittance basis of taxation under the Income Tax Act 2007, s 809B, and for all dates relevant to this decision, he did so.

Home life

18. Mr Marano was and remains a property developer who operates through a number of companies. Until around February 2007, he lived with his family in a significant property on a London square. In February 2007, he separated from his wife, and moved into a nearby mews property ("the Mews") which he already owned, and which had previously been used as guest accommodation and office space.

19. On 19 August 2011, Mr Marano was appointed an "LLP member" of Bucentaure LLP. The LLP was managed by Palatium Capital Partners ("PCP"), who used a firm of accountants called Berley, based at 76 New Cavendish Street, London. The Companies House record for Mr Marano as a member of that LLP gives his correspondence address as 76 New Cavendish Street.

20. In January 2013, Mr Marano purchased a property in Miami which he decided to refurbish and use as a home. He began to spend significant amounts of time there. However, he remained the owner of the Mews, which he had also decided to refurbish. The refurbishment took three months. Mr Marano told us that this occurred either between November 2014 to February 2015, or between November 2015 to February 2016: he could not be sure which was correct. However, HMRC's contemporaneous IDMS notes record that on 22 December 2014, Mr Marano told HMRC that he was intending to let the Mews from January 2015, and we therefore find that the renovation took place between November 2014 to February 2015. In the same call, Mr Marano told HMRC that the Mews was empty at that time, but that he "uses it as a communication address", and "has no fixed abode and moves around to various hotels". He did not inform HMRC that he had a property in Miami which he was using as a home.

21. For about two months of that refurbishment period, Mr Marano was not at the Mews at all: his evidence to the Tribunal was there were "maybe only two solid months [of] not being there". When the renovation was finished, Mr Marano tried to sell or let the Mews, but was unable to do either. The Mews was never rented out and it remained in his ownership at the date of the hearing. .

The period up to November 2015

22. Meanwhile, on 28 September 2012, RSM (under its previous name of Baker Tilly) had arranged for Mr Marano to register with HMRC under what was called the "late return

initiative". We understand this to have been an opportunity offered to higher rate taxpayers to disclose earlier tax liabilities without suffering the normal level or extent of penalties. On 1 October 2012, RSM filed Mr Marano's tax returns for the years ended 2009, 2010, and 2011**.** On 4 October 2012, RSM sent HMRC a schedule of Mr Marano's UK tax liabilities for the years ended 2006, 2007 and 2008.

23. On 20 November 2012, Mrs Louise Gallagher, a compliance officer in HMRC's Nottingham office, opened enquiries into the returns for 2009, 2010 and 2011. On 28 December 2012, RSM wrote to Mrs Gallagher, asking for more time to deal with her enquiries, and also saying:

> "pending our detailed reply we would inform you that our client has realised a capital gain outside the UK and part of the proceeds have been remitted to the UK in the year to April 2013. This remittance will result in an estimated capital gains tax liability in the UK of £5,744,219, and our client, a US citizen, has been advised that the tax paid may be claimed as a credit against his US tax liabilities, providing payment is made to HMRC on or before 31 December 2012. Therefore our client has today arranged for a direct transfer to be made today to his self-assessment account with HMRC of £5,744,219 and as such we are providing notice of the payment so as to avoid a subsequent enquiry regarding this large payment on account."

24. The remitted gain referred to in this letter was for £20,515,066 and related to a company called Laurel Brook Limited (Jersey). The estimated tax on that gain had been calculated using a 28% tax rate.

25. RSM's letter was sent during the 2012-13 tax year, so before HMRC had sent out any Notices to File, whether as freestanding Notices to File, or as Full Returns which include the Notice to File on the frontsheet. HMRC's case is that on 6 April 2013, Mr Marano was issued with a Full Return; this is disputed and we return to it at §103ff. It is common ground that HMRC did not receive a 2012-13 return from Mr Marano by the filing date of 31 January 2014.
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26. HMRC also say that following Mr Marano's failure to submit his 2012-13 return, they issued the following penalty notices:

(1) a £100 late filing penalty under Sch 55, para 3, on 18 February 2014. This remains in dispute and we return to it at §150ff;

(2) a daily penalty of £900 and a six month penalty of £300 under Sch 55, paras 4 and 5 on 18 August 2014, sent to the Mews; these penalties are no longer in dispute, and we find as facts that they were both issued and served.

27. On 20 November 2014, HMRC issued Mr Marano with a determination under TMA s 28A. The tax charged by the determination was £118,199; this figure was based on the returns submitted for earlier years. Mr Marano's notified taxable gain of £5,744,219 was overlooked by HMRC at the time the determination was made.

28. On 25 November 2014, HMRC issued Mr Marano with a late filing penalty of £9,549, However, the quantum should have been £5,609, being 5% of the £118,199 on the determination, less the £300 already charged on 18 August 2014. At some point the figure was corrected. We were not taken to any related correspondence, and neither party raised this in their submissions. It was common ground that this penalty had been correctly served on Mr Marano at the Mews address.

29. By mid-December 2014, HMRC had still not received a 2012-13 SA return from Mr Marano and neither had they received replies to their enquiries into the earlier years. On 22 December 2014, an officer within HMRC's debt management team had the conversation with Mr Marano referred to above, during which Mr Marano confirmed he owned the Mews but that it was empty and he was of no fixed abode, instead living in "various hotels". The HMRC officer who made the call referred the case to a manager who carried out an Equifax check. This showed that the Mews was on record as Mr Marano's address for two current accounts and a credit card. The manager sent a letter to Mr Marano at the Mews, warning of county court proceedings. The IDMS notes show that at this time HMRC were concerned about the need to establish a valid address for service of the county court papers. They called the mobile number on which they had previously reached Mr Marano, but there was no reply. On 2 March 2015, HMRC called RSM, and was told that they had had "no recent contact" with Mr Marano but would try and contact him.

30. On 3 March 2015, HMRC issued the second late filing penalty based on the determination. It was common ground that the correct figure was £5,609, although the copy document with which we were provided showed £7,879. We were told that this had been corrected, but we were not taken to any related correspondence. Neither party raised this in their submissions. We find as a fact that this second penalty, like the first, was for £5,609.

31. There was some confusion in the evidence as to the address to which this penalty notice had been sent:

(1) the contemporaneous IDMS notes show that on 5 March 2015, HMRC decided to use the address for Mr Marano on the Companies House website in relation to Bucentaure LLP, namely 76 New Cavendish Street, London;

(2) HMRC's screen prints of Mr Maranon's address history show, consistently with the above evidence, that the address for Mr Marano changed to "c/o 76 New Cavendish Street" on 6 March 2015;

(3) the penalty notice was issued on 3 March 2015, and on that date Mr Marano's address within HMRC's systems was the Mews;

(4) however, HMRC also normally retain microfiche records of post being sent out, and the address to which the post is sent. The microfiche record for this penalty states that the it was issued on 3 March 2015 and was sent to 76 New Cavendish Street, London.

32. Both parties accepted, in reliance on the microfiche evidence, that the penalty had been sent to New Cavendish St. That can only be the position if it was not sent out on the day it was issued, but on or after 6 March, when the address field was changed in HMRC's system. In the experience of the Tribunal, it is relatively common for there to be a delay between issuance and posting where there are very large numbers of similar items to be despatched. In the context of sending out SA returns by post, the UT made a similar comment in *Barry Edwards v HMRC* [2019] UKUT 131 TCC ("*Edwards*") at [12]. We find as a fact that although the penalty was issued on 3 March 2015, it was sent on or after 6 March 2015 to 76, New Cavendish St. Under cross-examination, Mr Marano said he was "not sure" if he received this notice, but accepted it was likely that Berley, the accountancy firm based at that address, had followed the same procedure as with the second notice, see §46 below.

33. On 19 March 2013, an HMRC officer made a distraint call on 76 New Cavendish Street, and was told by the receptionist that Mr Marano "no longer uses this office as his registered address and that his mail is forwarded to ["PCP"]". Mr Marano said in his witness statement

that he had "never used 76 New Cavendish Street as [his] personal or business address", and in oral evidence that he had never visited that premises. We accept that Mr Marano had never been to 76 New Cavendish Street. We return to the issues around this address later in our decision, see §153ff.

34. Copies of all of the late filing penalties were sent to RSM. In reliance on Mr Matthews' oral evidence we find that on receiving those copies, RSM informed Mr Marano.

35. On 1 September 2015, RSM provided a response to HMRC's queries about the earlier years which were under enquiry.

Mrs McGovern takes over the case.

36. In November 2015, responsibility for Mr Marano's case was transferred to Mrs McGovern. On 4 November 2015, she called RSM to confirm receipt of their 1 September 2015 letter, and said she would be reviewing Mr Marano's file. She carried out that review the same day, and found RSM's letter of 28 December 2012 informing HMRC that Mr Marano had remitted a capital gain and that the liability was estimated as £5,744,219. Her witness statement says "at the point where I took over the enquiry in November 2015, this is the first point that I discovered a loss of tax which had not been self-assessed".

37. On 3 March 2016, a conference call took place between Mrs McGovern and RSM. Mr Mathews and Mr Beddingfield participated on behalf of RSM. Most of the call concerned the earlier years, but Mrs McGovern also asked RSM to file the 2012-13 SA return as soon as possible, in order for the capital gain to be brought into charge**.** The contemporaneous meeting notes say that "SM [Mr Matthews] confirmed that tax returns for 2011/12 and 2012/13 are currently waiting to be signed, with 2013/14 waiting to be finalised". This evidence was not in dispute and we accept it.

38. On 24 August 2016, Mrs McGovern had a telephone conversation with Mr Matthews. Her contemporaneous note of that call says that she asked about the outstanding tax returns, and Mr Matthews said that Mr Marano "has outstanding fees with RSM and they are currently not acting – he has found it extremely difficult to get in touch with his client", but that "he will try to contact his client again". He told Mrs McGovern that the returns for 2011-12 and 2012-13 "have been completed and approved by Mr Marano but he is yet to sign the documents". Mrs McGovern said she would like to agree a date for a telephone conference, during which she would ask for "an update in respect of the returns". Mr Matthews said he "would look at dates and review nearer the time". Again, none of that evidence is in dispute and we accept it.

39. On 25 October 2016 Mrs McGovern called Mr Matthews for an update and made a note of that call. Mr Matthews said RSM "have made no further progress" in trying to contact Mr Marano. He confirmed that the 2011-12 and 2012-13 returns remained unsigned, and that he was unable to submit them without Mr Marano's authorisation. Her file note continues:

> "Stephen Matthews advised that currently his client has outstanding fees with RSM and they are currently not acting – he has found it extremely difficult to get in touch with his client. The agent advised that he believes it will be highly unlikely that his client will provide authorisation for the outstanding returns."

40. In evidence, Mr Matthews said he did not have any "specific recollection" of this call but that he did not believe he would have used the words "highly unlikely". Mrs McGovern gave oral evidence that she made this note after the call had taken place, so it was contemporaneous. We find as a fact that she accurately recorded what Mr Matthews had said.

41. Mrs McGovern said that this call with Mr Matthews made her believe for the first time that the outstanding returns would not be submitted. She stated that "at this point I believe I had discovered a loss of tax that was not going to be self-assessed".

42. The following day, Mrs McGovern issued closure notices for the returns which had been under enquiry. These were sent to Mr Marano's Miami address, and copied to RSM. Mrs McGovern's covering letter reminded Mr Marano that his 2011-12 and 2012-13 returns were still outstanding.

43. In relation to the 2012-13 return, Mrs McGovern took technical advice from within HMRC, and she also knew that the ordinary four year time limit for issuing a discovery assessment for 2012-13 would expire on 5 April 2017. Her unchallenged evidence was that she held off issuing the assessment because she "would have preferred to have the correct figures for Mr Marano's full UK tax liability for the year 2012-13".

44. However, nothing was filed. Mrs McGovern's witness statement says that on 8 March 2017 she "raised" a discovery assessment for £5,744,219, but that this was not "issued" until 21 March 2017, "due to an incorrect effective date of payment being applied to the self-assessment statement which resulted in an incorrect charge of interest". The case law is clear that there are three stages involved in making and communicating an assessment: deciding to assess, issuing the assessment (an internal matter for HMRC) and notifying the assessment to the taxpayer, see *Aria Technology v HMRC* [2020] EWCA Civ and *Courts plc v Customs and Excise Comrs* [2004] EWCA Civ 1527. We were provided with evidence that an assessment for £5,744,219 was recorded on HMRC's system on 8 March 2017, and that evidence was not challenged. It was also common ground that the assessment was sent to Mr Marano's Miami address, and that a copy was sent to RSM.

45. The £5,744,219 charged by the assessment was the figure previously given to HMRC by RSM as being the tax on the remitted gain. Mrs McGovern took the view that Mr Marano's employment income for that year was likely to be covered by the determination, as that had been based on his earlier year's returns.

46. On 14 March 2017, HMRC issued a late filing penalty notice for £574,422. This was made up of a six month 5% tax-geared late filing penalty of £287,211 and a twelve month late filing penalty of the same amount. The notice was sent to 76 New Cavendish Street; Berley forwarded it to PCP, and PCP forwarded it to Mr Marano. Mr Marano accepted that he had received the penalty notice by that route. It was again common ground that RSM were sent and received a copy of that notice.

Finalising the return

47. At some point on or before 29 June 2017, Mr Marano finally approved the draft 2011-12 and 2012-13 returns. He said under cross-examination that he had previously been "afraid" to finalise the returns, but then added that "afraid" was "not the correct term", but provided no further explanation. We are therefore unable to make a finding as to why Mr Marano did not file his returns sooner. In relation to the penalties, he said he "had no idea they would be on this scale".

48. On 29 June 2017, RSM sought to file both returns. For 2012-13, the total tax shown as due was £5,662,617.05. This was £250,629 less than the tax included on the determination and the discovery assessment taken together. That total was further reduced by "interim payments" of £29,993.69, which we understand to be payments on account made under TMA s 59A.

49. The return included employment income of £4,139.50 and interest of £5,590.18. The net tax due on that income was £827.90, to which was added a remittance basis charge of £50,000, making a total of £50,827.90. The Tribunal noted during the hearing that (a) this appears to be very much lower than the income for previous years, which had formed the basis for the tax charged under the determination of £118,199, and (b) we had no evidence as to the reasons for this reduction in Mr Marano's income, and are therefore unable to make any related findings. One of the consequences of the low income declared on the return was that part of Mr Marano's basic rate tax band remained unused, and this therefore reduced the rate of tax on his gains.

50. The CGT pages of Mr Marano's return included the remitted gain of £20,515,066. The computation provided only three figures: disposal proceeds; acquisition costs and expenses of disposal, with no further details or analysis. In addition to the remitted gain, the CGT pages included (a) a gain on shares in Laurel Brook II Ltd of £9,308, after EIS relief of £100,000, and (b) a "loss on loan to trader" of £430,000. The overall position was that the CGT shown on the return was £5,611,789.15, compared to the £5,744,219 referred to in RSM's letter of 28 December 2012, a difference of £132,429.85. The Tribunal had no further information about the gain on shares in Laurel Brook II Ltd or the loan to trader, either by being taken to documents in the Bundle, or by oral evidence. We pointed this out to the parties at the hearing, and said we would therefore unable to make any findings other than recording what was on the face of the computation.

51. The following mixed findings of fact and law were common ground:

(1) TMA s 34A, which is headed "ordinary time limit for making a self-assessment" provides that returns must be filed within four years after the end of the year of assessment to which it relates, unless one of two exceptions applies. Neither of those exceptions is applicable to Mr Marano. His 2012-13 return therefore had to be filed by 5 April 2017, but it was sent to HMRC on 29 June 2017, after the expiry of the time limit. For ease of reference in this decision, we have generally referred to this document as a "return" rather than the technically correct "purported return".

(2) The time limit for replacing the determination by a return had also expired. TMA s 28C provides that such a return has to be filed within three years of the filing date, or within one year after the date of the determination. The filing date for the 2012-13 return was 31 January 2014, and the three year period therefore expired on 31 January 2017. The determination was issued on 20 November 2014, and that period had expired on 19 November 2015.

52. The front sheet of the return had Mr Marano's name and the Mews address. Although HMRC sought to place some weight on that element of the document, we accepted Mr Matthew's evidence that the return had been generated by RSM and they had inserted the address.

EIS deferral

53. Along with the return, in the same envelope, was a certificate in respect of Mr Marano's investment of £220,000 in a company called Mofilm Ltd on 22 May 2013, and a claim for EIS deferral relief on that investment. Mr Matthew's covering letter said that Mr Marano had elected for this relief to be carried back against the CGT included in his 2012-13 return.

Other tax years

54. In relation to the three years before 2011-12, HMRC issued an information notice under FA 2008, Sch 36 on 14 January 2015. This was followed on 23 February 2015 by a reminder,

including a £300 penalty and a warning of daily penalties. No response was received, and on 28 July 2015, HMRC issued a penalty notice for £7,400, being daily penalties of £50 a day from 3 March 2015 to 28 July 2015. RSM responded on 1 September 2015. HMRC finally closed those enquiries on 26 October 2016 without making any amendments to the returns.

55. In relation to 2011-12, HMRC issued Mr Marano with Sch 55 penalties, and on 25 September 2014, with a determination. As noted above, this return was finally submitted on 29 June 2017 at the same time as that for 2012-13.

56. The tax return for 2013-14 was due to be filed on 31 January 2015, but no return was submitted by that date. HMRC issued Mr Marano with fixed and daily penalties for late filing, and on 15 October 2015, the latest date about which we have information in the Bundle, the return had still not been received.

The appeals

57. On 19 April 2017, RSM appealed to HMRC against the discovery assessment, and on 9 June 2017, they appealed against the penalties for late filing of £574,422. One of the grounds for appealing the penalties was that Mr Marano's tax payment of £5,744,219 on 28 December 2012 constituted a "special circumstance" and that no penalties were therefore due.

58. Mrs McGovern refused those appeals, and her refusals were upheld on review by Ms Powell. Both Mrs McGovern and Ms Powell considered and rejected RSM's special circumstances submissions, finding that early payment of the tax was not a special circumstance. We make findings of fact about the nature and scope of these decisions at §213-§215.

59. None of the other penalties were appealed, and on 2 May 2019 the Tribunal heard Mr Marano's applications to make late appeals against those penalties, together with a number of procedural applications. On 14 May 2019, after that preliminary hearing, Judge Gillett gave permission for the other appeals "to be notified late". Both parties have taken it that this was in fact permission for these other appeals to be made late, and that those late appeals should be treated as having been notified to the Tribunal, and we have proceeded on that basis.

THE ISSUES IN THE CASE

60. Several issues relating to the penalties were resolved in the course of the hearing, as indicated in the above findings of fact. The following issues remained to be determined by the Tribunal:

(1) Whether the discovery assessment was stale.

(2) Whether the Notice to File the 2012-13 SA return had been issued to Mr Marano.

(3) If so, whether that Notice had to be issued by an individual HMRC officer.

(4) Whether the penalty notices had to be issued by an individual HMRC officer.

(5) Whether the following penalties were properly notified to Mr Marano:

(a) the initial penalty of £100.

(b) that issued on 3 March 2015 of £5,609.

(c) the two penalties issued on 14 March 2017 totalling £574,422.

(6) If any of those penalties had been issued but not notified, whether they could be notified at a later date.

(7) Whether RSM's letter of 28 December 2012 was a "partial return" so that the penalties were not "appropriate".

(8) Whether the quantum of the 14 March 2017 penalties was correct, and in particular, whether the liability to tax used to calculate penalties was before or after payments on account.

(9) Whether special circumstances applied.

(10) Whether the Tribunal had the jurisdiction to reduce the assessment and/or the penalties under TMA s 50, and if so, whether we should exercise that jurisdiction.

61. The above list of issues are based on those agreed between the parties, but we have re-ordered and amended the list to take into account developments during the hearing, and our own view as to the most logical structure.

62. The determination was not in issue before the Tribunal. Mr Gordon accepted that it could not be appealed, see *Bartram v HMRC* [2012] UKUT 184. Mr Gordon also did not challenge HMRC's refusal to accept Mr Marano's 2012-13 return on the basis that it fell outside the ordinary time limit for filing an SA return, see TMA s 34A.

63. During the preliminary hearing Mr Marano obtained permission to appeal certain of the penalties late on the basis that he had "expressly disavowed any intention to raise new grounds of appeal that might have been arguable in relation to [the] penalties". Judge Gillet's decision includes the condition that Mr Marano's challenges against those penalties "shall be limited to" the grounds identified during that hearing. Mr Gordon accepted in his skeleton argument that "all penalties stand or fall on the grounds previously identified". All those grounds have been considered in this decision.

THE FIRST ISSUE: WHETHER THE DISCOVERY ASSESSMENT WAS STALE

64. The discovery assessment was made by Mrs McGovern on 8 March 2017 under TMA s 29. Mr Gordon accepted that Mrs McGovern had made a discovery, but submitted that the assessment was invalid because the discovery was "stale".

The legislation

65. TMA s 29 is headed "Assessment where loss of tax discovered" and it begins:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

66. The power to make an assessment under TMA s 39 is thus "subject to subsections (2) and (3)" of s 29. These apply only if a taxpayer has "made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment". As Mr Marano had not

submitted his 2012-13 return by the date of the discovery assessment (and indeed never submitted it), neither subsection is relevant.

67. All assessments, including those issued under TMA s 29, are subject to statutory time limits. The "ordinary" time limit is four years, see TMA s 34. There are longer time limits of six years and 20 years where the loss of tax has been brought about "carelessly" and "deliberately", see TMA s 36.

The threshold for a discovery

68. In *Charlton v HMRC* [2012] UKUT 770, the UT (Norris J and Judge Berner) considered the meaning of the word "discover" in TMA s 29. Mr Gordon was counsel for Mr Charlton in the case. The UT said at [28]:

> "We agree with Mr Gordon that the word 'discovers' does not connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed."

69. At [29] the UT added "The mere fact that a threshold must be crossed does not mean that something more than a change of opinion is required". At [37] they said:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

70. The UT continued in the same paragraph:

> "If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

The concept of staleness

71. In *Pattullo v HMRC* [2016] UKUT 270, Mr Gordon acted for Mr Pattullo. The second ground of appeal concerned the concept of staleness. Lord Glennie's decision reads:

> "[46] I turn now to the second ground of appeal…This is the criticism that the FTT proceeded on the basis that the staleness of a discovery is determined by the statutory time limits.
>
> [47] In support of his submissions on this point, Mr Gordon referred to the decision of the Special Commissioner in *Corbally-Stourton v Revenue and Customs Comrs* [2008] STC (SCD) 907 ["*Corbally-Stourton*"] at para 44 for the proposition that a discovery can go stale:
>
> > 'There is one other aspect of the word "discover" to which I should refer … "a discovery" is something newly arising, not something stale and old. The conclusion that it is probable that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise).'

On this basis there is a temporal element to s 29(1). Once the discovery is made or, as Mr Gordon would have it, the threshold is crossed, then HMRC must act with reasonable diligence if it is to make an assessment; otherwise the discovery becomes stale and the right to make an assessment is lost.

[48] Mr Gordon was at pains to emphasise that HMRC need not make an assessment immediately upon making a discovery in terms of s 29(1). It would be sufficient, he submitted, for HMRC to notify the taxpayer of its discovery in the expectation that matters could be resolved without the need for a formal assessment. In each case the question whether the discovery had been kept 'fresh' would turn on its particular facts. It would only be in the most exceptional of cases, he said, that the conduct of HMRC, for example their inaction, would result in the discovery losing its required 'newness' by the time that an assessment was made."

72. Lord Glennie agreed with Mr Gordon. He said:

"[52] So far as concerns the question of law, namely whether any discovery under s 29(1) has to be acted upon while it remains fresh (or before it becomes stale), I prefer the submissions for the taxpayer. Quite apart from the support given to this submission by the passages in *Charlton* and *Corbally-Stourton* to which I have referred, which are highly persuasive, the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That subsection provides that 'if' HMRC discover certain matters then they may, subject to what follows later in the section, make an assessment in the amount needed to make good the loss of tax. The word 'if', like many words in the English language, has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression 'if and when' (eg if the sun comes out we shall go to the beach). I do not regard this as stretching the meaning of 'if'. The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1).

[53] However, the word 'if', as used in this way in the subsection, does not mean 'immediately'. Mr Gordon was right, in my view, to accept that the discovery could be kept fresh for the purposes of being acted upon later. As he accepted, each case would turn on its particular facts. He gave the example of notification being given to the taxpayer of the discovery in the expectation that matters could be resolved without the need for a formal assessment to be made. No doubt there are many other examples which could be given. The UT in *Charlton* at [37] recognise that the decision in each case will be fact-sensitive. I do not think it would be helpful to try to define the possible circumstances in which a discovery would lose its freshness and be incapable of being used to justify making an assessment. But I consider that Mr Gordon was right to accept that it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

73. However, Lord Glennie did not interfere with the FTT's finding of fact that the discovery had been made sometime between July and November 2009, with the assessment having been made in January 2010, and thus was not stale.

74. *HMRC v Tooth* [2019] EWCA Civ 826 ("*Tooth*"), concerned Mr Tooth's appeal against a discovery assessment made in 2014. Floyd LJ gave the leading judgment. He first noted at [60] that both HMRC and the taxpayer had accepted that "the legal approach to whether there is a 'discovery' is correctly set out" in the passages from *Charlton* at [29] cited at §69-§70 above as to the threshold; he then added that a delay in issuing the assessment after the discovery might cause that "essential newness" to be lost. At [61], he endorsed those passages from *Charlton*, and added that "the requirement for the conclusion to have 'newly appeared' is implicit in the statutory language 'discover'".

75. He found that the officer considering Mr Tooth's return in 2009 had made a discovery that it was insufficient, and agreed with the UT that the assessment was invalid because it was stale. Both Males and Patten LJJ concurred with Floyd LJ's analysis on this issue, and Mr Tooth was successful. HMRC have obtained permission to appeal to the Supreme Court against this judgment.

The parties' submissions on the concept, and our views

76. Mr Vallis's primary submission was that:

> "there is no concept of 'staleness' within s 29(1) TMA, and that the only time limits for making a discovery assessment are those contained in sections 34 and 36 TMA."

77. However, Mr Vallis accepted that the Tribunal was "currently" bound by the decisions of higher courts on that point, and Mr Gordon echoed this.

78. In the absence of authority we would have agreed with Mr Vallis, as we explained at the hearing. We accept that the concept of discovery includes "essential newness": the Oxford English Dictionary's primary definition is:

> "The action of finding out or becoming aware of something for the first time; the action of being the first to find (a place); the action of bringing to light something (as a substance, scientific phenomenon, etc.) which was previously unknown."

79. However, a discovery does not lose that character as the result of the passage of time. William Harvey discovered how the blood circulates; Alexander Fleming discovered penicillin, and Marie Curie discovered radium. Those discoveries are no longer new, but they are still correctly described as discoveries.

80. TMA s 29 merely requires that the officer "discover" a failure to assess, an under-assessment or an excessive claim to relief. To meet that test, all that is required is that "it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment". Once this has occurred, the requirement for a "discovery" has been satisfied. No more is required and the discovery does not become subsequently become "stale".

81. In *Pattullo,* Lord Glennie placed reliance on the word "if" in the sentence "if an officer of the Board or the Board discover…" He said that the word has "a temporal aspect, as in the expression 'if and when' (eg if the sun comes out we shall go to the beach)".

82. However, the primary meaning of "if" given by the Oxford English Dictionary is "on condition that; given or granted that; in (the) case that; supposing that; on the supposition that". The OED gives "if and when" as a fifth usage, but only where the word "when" is also used, and it gives an example from George Bernard Shaw: "If and when the situation becomes grave

enough to convince America that I have no alternative, I will reoccupy your ports". The OED also says that the phrase "if and when" carries "a strong element of doubt". In the statutory phrase with which we are concerned, the word "if" is not followed by "when", and it does not carry "a strong element of doubt". Instead, it is a simple conditional conjunction, carrying its primary meaning.

83. Eliminating the concept of staleness does not of course mean that HMRC officers can issue discovery assessments at any time they choose. They are constrained by the time limits in s 34 and s 36, so they must assess within four years, unless there is carelessness or deliberate behaviour, when the longer time limits apply.

84. In our respectful opinion, the case law on TMA s 29 has taken a wrong turning, introducing a new restriction which is not present in the statute. That turning was indicated in *Corbally-Stourton* and *Charlton,* confirmed in *Pattullo* and upheld in *Tooth.* We note that in *Tooth* both parties had accepted that staleness invalidated an assessment, so the correctness of the proposition was not argued.

85. We nevertheless recognise and fully acknowledge that we are bound by *Pattullo* and by *Tooth* to set aside our views and proceed on the basis that an assessment is invalid if it was made when the discovery was "stale", as that term has been interpreted by the case law. As we confirmed to the parties at the hearing, we have taken that approach in coming to a decision on the First Issue.

When was the discovery and whether it was stale

86. Mr Gordon said he accepted Mrs McGovern had "discovered" Mr Marano had "chargeable gains which ought to have been assessed to chargeable gains tax" which had "not been assessed". There were two possible dates for the relevant discovery: on 4 November 2015, when Mrs McGovern found the letter from RSM, or on 26 October 2016, when she was told that Mr Matthew believed "it will be highly unlikely that his client will provide authorisation for the outstanding returns".

Discovery on 4 November 2015?

87. Mr Gordon submitted that Mrs McGovern made the discovery on 4 November 2015. . The assessment was issued on 8 March 2017, so the delay was "at least 16 months". He said:

> "In *Pattullo v HMRC* [2016] STC 2043 at [57], Lord Glennie considered that a delay of 18 months would "on any view" be too long. Indeed, the case law on this point suggests that, absent action taken to keep the discovery fresh, the upper limit for any acceptable delay is in the region of six to nine months."

88. Mr Vallis said that the circumstances in *Pattullo* were very different from those in Mr Marano's case. In *Pattullo*, HMRC's inaction caused the discovery to become stale. Here, Mrs McGovern was in regular contact with RSM, and was repeatedly told that the return was simply waiting for Mr Marano's authorisation.

89. Mr Vallis also pointed out that at [53] of *Pattullo,* Lord Glennie had said (Mr Vallis's emphasis):

> "But I consider that Mr Gordon was right to accept that it would only be in the **most exceptional of cases** that **inaction** on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made."

90. This was not a case where there had been inaction by HMRC, instead, the inaction was that of the taxpayer. There was no parallel with the facts of *Pattullo,* and this was not one of those "most exceptional of cases" when a discovery had become stale.

91. These obvious factual differences were also relevant because in this case Mr Gordon had submitted that, according to Lord Glennie " a delay of 18 months would 'on any view' be too long". What Lord Glennie had actually said was this (Mr Vallis's emphasis):

> "…**on any view**, if the discovery was made as early as July 2008, if not earlier, then the passage of some 18 months or more would, **in the circumstances of this case,** have made the discovery stale and incapable of justifying the assessment made in January 2010."

92. Lord Glennie was not laying down a general rule that a discovery would become stale after 18 months; he was saying that this was the position in *Pattullo,* where HMRC had failed to act.

93. In summary, if Mrs McGovern had made the discovery on 4 November 2015, it was not stale because (a) there was no inaction on her part (b) there was no parallel with the facts of *Pattullo* and (c) there was no 18 month rule.

Discovery on 26 October 2016?

94. Mr Vallis submitted that Mrs McGovern had made the relevant discovery on 26 October 2016, having been told by Mr Matthew that he believed "it will be highly unlikely that his client will provide authorisation for the outstanding returns". That statement caused her to believe for the first time that Mr Marano would not submit the return. This was a "change of view" or a "change of opinion", as the result of which it "newly appeared" to her that there was an insufficiency. Until then she had reasonably believed, based on her regular conversations with Mr Matthews, that the return would be submitted, and that it would include the capital gain which had already been disclosed. Mr Gordon accepted that if this was the relevant discovery, there was no staleness.

Discussion and conclusion

95. We find that the discovery was made on 26 October 2016. In order to make a discovery assessment, an officer has to "discover" that "chargeable gains which ought to have been assessed to capital gains tax, have not been assessed".

96. Between November 2015 and 26 October 2016, Mrs McGovern was in regular communication with Mr Matthews, who had reassured her that Mr Marano's return had been completed (including the remitted gain) and was simply awaiting authorisation. It was her reasonable belief that Mr Marano would file his self-assessment, and she had no reason to think that there was an amount of tax which "ought to have been assessed" but which "have not been assessed". Her belief was instead that there was an amount of tax "which ought to be assessed but which has not ***yet*** been assessed".

97. The position changed on 26 October 2016, when Mr Matthews told her that it was "highly unlikely" that Mr Marano would ever authorise the submission of his return. She then newly believed that there was an amount of tax which "ought to have been assessed" but which "had not been assessed". Less than five months later, she issued the discovery assessment. Mr Gordon accepted that this was not "stale" and we agree.

98. Even if we were to be wrong in that, so that the discovery happened on 4 November 2015, we would also have found that the assessment was not stale. This is because, throughout that period, Mrs McGovern was regularly liaising with Mr Marano's agent, and was being told that the return would soon be filed. This is not a case where HMRC made the discovery and then just sat on it and did nothing for a number of years, see *Pattullo* at [52]; or where HMRC had taken the wrong path and changed direction five years later, as in *Tooth.*

99. Furthermore, as Mr Vallis pointed out, Lord Glennie had accepted Mr Gordon's submission that "it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made", see [48] and [53] of that judgment. This case comes nowhere close to being in that "exceptional" category.

100. If the submissions Mr Gordon made before *this* Tribunal were to be correct, HMRC would have to make assessments as soon as, or shortly after, they were aware of any information indicating that tax was due, even though:

(1) the HMRC officer was communicating on a regular basis with the taxpayer and/or his agent;

(2) the taxpayer/agent repeatedly promised the officer that the information would be included in his tax return, that the return would be filed; and

(3) the officer had no reason to disbelieve those promises.

101. If that were to be the position, it would severely disrupt the normal operation of the tax system for both HMRC and taxpayers. That cannot be what Parliament intended and we are confident it is not correct.

Conclusion on the First Issue

102. We decide the First Issue in favour of HMRC and find that the discovery assessment was not stale.

THE SECOND ISSUE: WHETHER THE NOTICE TO FILE HAD BEEN ISSUED

103. The Second Issue was whether the Notice to File required by TMA s 8 had been issued by HMRC.

104. Mr Gordon had originally also challenged whether the Notice had been served on the correct address. However, he abandoned that argument in the course of the hearing, in the light of the microfiche evidence, and he accepted that, if the notice had been issued, it had been sent to the Mews.

The legislation

105. 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, 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."

106. Both parties accepted that it was for HMRC to prove that they had sent the Notice to Mr Marano.

107. TMA s 115 is headed "Delivery and service of documents", and so far as relevant to this case, reads:

> "(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.
>
> (2) 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 may be so served addressed to that person
>
> (a) at his usual or last known place of residence, or his place of business or employment…"

The evidence

108. HMRC provided the following evidence that the Notice had been sent to Mr Marano:

(1) HMRC's internal "return summary" which stated that a "full return" had been issued to Mr Marano on 6 April 2013; it was common ground that full returns contain a notice to file on the front sheet.

(2) HMRC's microfiche record, which stated that Mr Marano was sent the notice, and it was addressed to him at the Mews.

(3) Mr Matthews and Mr Marano had proceeded on the basis that the Notice been issued, see the communications between RSM and HMRC in relation to the filing of the return. This issue was first raised in an application to the Tribunal to amend the grounds of appeal. Judge Gillett issued directions after that hearing, which stated *inter alia* that HMRC "be required to prove" that Mr Marano had been issued with the s 8 notice.

109. Mr Marano's witness statement was silent on this issue. During cross-examination he was asked by Mr Vallis whether HMRC had sent him this return, and he initially replied "I assume so"; then "at this point I was in the US and had no recollection of taking this and sending it to Stephen [Matthews]", and finally "I accept that I received it".

110. However, when Mr Gordon was making his submissions the following day, he said that the question as to whether HMRC had issued the return to Mr Marano at the Mews was still in dispute.

Discussion

111. In *Rogers and Shaw v HMRC* [2019] UKUT 0406 (TC) ("*Rogers and Shaw*") the UT (Zacaroli J and Judge Richards) said, in the context of penalties, that HMRC were required to prove that the s 8 notice itself had been served (emphases in original):

> [50]…if HMRC fail to provide <u>any evidence at all</u> to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.

> [51] Where HMRC have given some evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems record a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so."

112. In this case, we have both the return summary and the microfiche record. The microfiche shows that it was sent to the Mews, and Mr Marano at all times owned that property, and even when he was overseas or elsewhere, it remained a communication address. TMA s 115 allows HMRC to serve documents to a person's "usual or last known place of residence", and Mr Gordon rightly accepted that the Mews met that description. Finally, Mr Marano accepted under cross-examination that he had received the Notice. The only possible conclusion is that the Notice was correctly issued and served.

Conclusion on the Second Issue

113. HMRC have proved that the Notice to File was issued, and that it was served on Mr Marano, and we find these to be facts.

THE THIRD ISSUE: NOTICE TO BE ISSUED BY AN HMRC OFFICER?

114. TMA s 8 provides that a person "may be required by a notice given to him by an officer of the Board" to file a tax return. It was common ground that no specific officer was named on the Notice issued to Mr Marano.

The judgment in *Rogers and Shaw*

115. Mr Gordon's original submissions on this Issue were modified to take into account *Rogers and Shaw,* in which the UT decided appeals against two decisions of Judge Popplewell concerning late filing penalties issued in relation to the 2015-16 tax year. Judge Popplewell allowed the appellants' appeals in part because he had found that TMA s 8 required a named officer to be identified on the Notice, and this had not happened.

116. In *Rogers and Shaw*, the UT found at [32]:

> "In our judgment, properly construed, s 8 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...the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer."

117. The UT continued at [33]:

> "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[1] 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.'"

118. At [35] the UT said:

> "'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."

119. The UT went on to remake the first-instance decisions, and before doing so heard evidence from four HMRC officers as to the process for issuing Notices to File. They summarised this evidence at [56]:

> "The witness statement of Officer Michelle McClure in particular demonstrated that a team consisting of HMRC officers (the "Operational Excellence Business Delivery SA team") 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. A small team of HMRC officers then manually checks a small sample of 200 cases (essentially to check that those cases meet the criteria as a high level check of the automated scan). The witness statements of Officer Elisa Simmonds and Officer Martin Hodge explain that HMRC themselves send notices to file in digital form and that HMRC have outsourced the function of sending out notices in hard copy form to a third party provider called 'Communisis'."

120. The UT concluded at [57]:

> "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. Nor does it matter that Communisis physically sent out hard copy s8 notices. The legislation does not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a s8 notice leaving the implementation of that decision to administrative staff and contractors."

Submissions by the parties

121. Mr Gordon submitted that HMRC could only succeed on the Third Issue if they led evidence which proved that "officers have decided the criteria to be satisfied for a taxpayer to receive a s 8 notice", and no such evidence was before this Tribunal. It was not possible for the Tribunal to rely on the evidence given in *Rogers and Shaw* because that related to different taxpayers.

122. Mr Vallis said that in *Rogers and Shaw* the UT had decided that the "substantive requirement" imposed by TMA s 8 was "that the giving of a notice must have been under the authority of an officer of HMRC". It could reasonably be inferred from the evidence in the Bundle that the Notice issued to Mr Marano had been "issued under the authority of HMRC": it was issued by HMRC's computer system and recorded as having been issued by that system, and this had only happened because the computer had been programmed by HMRC staff. The notice had therefore been issued under the authority of those HMRC staff.

123. The only alternative conclusions would be that:

(1) unknown, unauthorised persons had programmed HMRC's computer system, but there was no evidence before this Tribunal which would allow it to conclude that HMRC's computer had been hacked in order to program it to produce TMA s 8 Notices; or

(2) the computer was writing its own program. It was not possible for HMRC's systems to work out for themselves, without any human intervention, to whom to send a s 8 Notice.

124. Mr Vallis added that it would be disproportionate for HMRC to be required to produce four senior policy officers at every appeal which relates to a Notice to File, in order to prove that the processes carried out by HMRC's computer system had been authorised by HMRC staff.

Discussion

125. We agree with Mr Gordon that we cannot rely on the evidence given to the UT in *Rogers and Shaw*. It is well-established that evidence given in one case cannot be relied on in another, and facts found in one appeal are not binding on another court or tribunal. That is for many reasons: there is, for example, no opportunity to cross-examine the witnesses who gave evidence in that other hearing. We can only make findings of fact on the basis of the evidence before us. We also note that Mr Rogers' and Mr Shaw's appeals both related to Notices issued for the 2015-16 tax year, so the process described by HMRC's witnesses may not have been the same in 2012-13, the year we have to consider.

126. However, we agree with Mr Vallis that the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems.

127. As the UT held in *Rogers and Shaw* in reliance on the CRCA, an "officer" of HMRC is simply any or all members of HMRC's staff "appointed for the purposes of exercising the Commissioners' functions". Section 5 of that Act is headed "initial functions" and subsection 1(a) provides that the Commissioners shall be responsible for "the collection and management of revenue for which the Commissioners of Inland Revenue were responsible" before this provision came into force. CRCA s 7 defines "former Inland Revenue matters" as "the matters listed in Schedule 1". That Schedule lists income tax and capital gains tax among many other "matters". CRCA s 9(1) provides that:

> "The Commissioners may do anything which they think
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

128. It is clear from those provisions that a member of HMRC's staff appointed for the purposes of collecting and managing income tax and capital gains tax is "an officer" of HMRC. The term therefore includes those staff members who program HMRC's computers as part of their role in collecting and manage income tax. That programming is a necessary and/or expedient part of the exercise of their tax-collecting function.

129. We have found as facts that a full return, including a Notice to File, was issued to Mr Marano, and that its issuance and posting was recorded by HMRC's systems. The only reasonable conclusions from that evidence are that the return was issued because HMRC's system was programmed to carry out that task, and that the program was authorised by HMRC officers, as defined.

130. As Mr Vallis said, the alternative would be that HMRC's computer system had been either (a) programmed by persons other than HMRC staff, or (b) programmed without any human intervention. There is no evidence that HMRC's computer system had been hacked, and it is not reasonable or credible to find that that in 2013 HMRC's computer system was being controlled by some sort of artificial intelligence, capable of deciding its own parameters without the need for a human being to program it.

Statute is always speaking?

131. An alternative way of arriving at the same conclusion might have been to construe TMA s 8(1) with reference to the principle that the "statute is always speaking". TMA s 8 was introduced long before computers, when all actions were carried out by individuals. There is a useful discussion of the "statute is always speaking" principle in *Ryanair v HMRC* [2013] UKUT 0176 (Warren J and Judge Bishopp) at [103] to [108], when they considered how legislation introduced at the time when all tickets were issued in paper form, should be construed now that almost all tickets are issued electronically. However, we had no need to rely on that principle in order to come to our decision on this issue, and have not done so.

Conclusion on the Third Issue

132. We decide the Third Issue in favour of HMRC.

THE FOURTH ISSUE: PENALTIES TO BE ISSUED BY AN HMRC OFFICER?

133. The Fourth Issue was whether, to be valid, the penalties had to be issued by an individual officer.

The legislation

134. Sch 55, para 18 is headed "Assessment" and reads:

> "(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) …
>
> (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…"

135. CRCA, s 4 is headed "Her Majesty's Revenue & Customs", and subsection 1 reads "the Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs". That is also the meaning given to the term by the Interpretation Act, Schedule 1.

The parties' submissions

136. Mr Gordon submitted that it was "inconceivable that Parliament would have permitted financial penalties to be generated by computer without human intervention", and that the issuance of penalties by computer is not referred to in either Sch 55 or the parts of the TMA which are effective for the purposes of such a penalty. He said that the penalty had to be made "by HMRC", which was defined by the CRCA as an officer, i.e. an individual human being. He placed reliance on *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*") at [18], to which we refer below.

137. Mr Vallis relied on both *Donaldson* and *Rogers and Shaw.* One of the issues considered in *Donaldson* was the requirement in Sch 55, para 4(1) that HMRC "decide" that daily penalties should be payable. The appellants had argued that any such decision had to be on a "taxpayer-by-taxpayer" basis. HMRC's position was that the statutory requirement was satisfied if there had been a high level policy decision that penalties should be issued to all taxpayers who were more than three months late in submitting their returns. Lord Dyson MR, giving the only judgment with which Kitchen and Hamblin LJJ both agreed, upheld the following passage from the UT's decision:

> "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."

138. Mr Vallis pointed out that in *Hansard v HMRC* [2019] UKUT 0391 (TCC), the UT (Nujee J and Judge Richards) had found that these comments informed their approach to another part of Sch 55, saying at [45]:

> "the Court of Appeal in *Donaldson* set out an approach to the construction of Schedule 55, namely that Parliament recognises that the provisions contained therein are of potential application to large numbers of taxpayer and therefore that those provisions should be capable of practical application."

139. Mr Vallis added that in *Rogers and Shaw,* the UT had held at [35] that "'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", and there was no basis for Mr Gordon's submissions that an individual had to determine the penalties issued to Mr Marano.

140. On the evidential position, Mr Vallis said that the only reasonable conclusion was that HMRC's computer has first been programmed by HMRC's officers/staff before penalties can be issued. The alternative would be a finding that HMRC's computer had hacked, or had written its own programs, and neither was a reasonable conclusion.

Discussion

141. It is clear from *Rogers and Shaw* that the references to penalties being issued by HMRC do not mean that they have to be issued by an individual officer. The terms "HMRC" and "officers" are simply references to those at HMRC who are responsible for collecting tax. We reject Mr Gordon's arguments to the contrary.

142. Like Mr Vallis and the UT in *Hilton,* we place reliance on the cited passage from *Donaldson.* It provides clear guidance that it is legal for HMRC to programme its computer system to produce the Sch 55 penalties at issue (a) in that case, (b) in *Hilton* and (c) in Mr Marano's appeal.

143. In coming to that conclusion, we have not overlooked the following passage from [18] of *Donaldson,* on which Mr Gordon relied. Lord Dyson said:

> "In my judgment, a generic policy decision of the kind taken by HMRC in June 2010 is a decision which satisfies the requirement of para 4(1)(b). I do not, therefore, need to deal with Mr Vallat's alternative submission that para 4(1)(b) is satisfied by HMRC's computer, programmed in accordance with that policy decision, automatically issuing a penalty notice. I must confess to having considerable doubts as to whether it is correct."

144. The final sentence of that passage must be read in context. In *Donaldson* the key point was whether HMRC had met the specific requirement at Sch 55, para 4(1)(b), that "HMRC decide that a penalty was payable". Lord Dyson found that HMRC had made the necessary decision at a policy level. He went on to doubt that the computer could have made the decision required by para 4(1)(b). He was not making any wider point, and in particular was not doubting the validity of penalties issued by an HMRC computer in accordance with the program installed on that computer.

145. We add that (apart from the daily penalties, which require the further decision discussed in *Donaldson*) the penalties are fixed by statute, and follow from the taxpayer's failure to file. Parliament decided on the quantum and methodology of those penalties, and how they interact with particular periods of delay. There is no dispute that the penalties actually issued by HMRC's computer system accurately reflect those statutory provisions. The only reasonable conclusion is that HMRC staff designed the computer programs which implement the legislation. As Mr Vallis said, the alternative would require us to find that HMRC's computer had been hacked, or the computer was writing its own programs, but nevertheless still managed to ensure that the penalties actually issued reflect the statutory requirements.

146. We therefore find that the penalties issued by the computer in accordance with the program were authorised by the HMRC staff who had designed and implemented the computer programs.

Conclusion on the Fourth Issue

147. For the reasons set out above, we find that there is no requirement for the penalties to be issued by an individual HMRC officer.

THE FIFTH ISSUE: SERVICE OF PENALTY NOTICES

The statute and the issues

148. The statutory requirement is that, when a person is liable to a penalty, HMRC must "notify" the person, see Sch 55, para 18. It was common ground that a person would be notified if the penalty was sent to his "usual or last known place of residence" or to his "place of business or employment", see TMA s 115 set out at §107.

149. By the end of the hearing, Mr Gordon had accepted that some of the penalty notices had been sent to the Mews, which was Mr Marano's "usual or last known place of residence". The parties remained in dispute over the service of three penalties:

(1) the initial penalty of £100;

(2) that issued on 3 March 2015 of £5,609.

(3) those issued on 14 March 2017 totalling £574,422.

The initial penalty

150. The following evidence was provided to the Tribunal:

(1) HMRC's internal record of SA penalties, which shows that a £100 penalty was issued on 18 February 2014.

(2) HMRC's "taxpayer address history", which shows the Mews as being Mr Marano's address on that date.

(3) A penalty notice issued on the same date, for £100, addressed to RSM. Under the firm's address are the words "For" and "Ref". The same format is used for the other penalty notices received by RSM, which both parties accepted were copies of the originals. These other copy penalty notices had "Mr P Marano" next to the word "For", and RSM's reference for Mr Marano next to the word "Ref". In contrast, the penalty notices sent to Mr Marano (such as that for £574,422), the two lines "for" and "ref" are not present. We infer that the difference arises because there is no need for a notice sent to the taxpayer to state, in addition to the addressee, the name of the person to whom the penalty relates, or a reference number. That information is however required by an agent, who will have many different clients. We therefore find as a fact that the £100 penalty notice in the Bundle was a copy and not an original.

(4) However, this £100 copy penalty notice had an extra "For" line: it said Mr R Powles, as executor for Mr P Marano. Mr Vallis was unable to explain this, and Mr Marano said he knew of no-one by that name.

(5) Mr Marano gave oral evidence under cross-examination that he didn't know whether he had received this notice, but that he "wasn't saying it wasn't sent or that I didn't receive it".

151. Unlike the other penalty notices, HMRC had been unable to locate the microfiche data. Mr Gordon asked us to find that HMRC had failed to prove that this penalty notice had been sent to Mr Marano, because of the lack of the microfiche data.

Discussion and conclusion

152. We found that the evidence was sufficient to prove that this penalty notice had been sent to Mr Marano, despite the lack of microfiche data. The penalty was recorded as having been issued on HMRC's SA system, a copy had been sent to RSM, and HMRC only had the Mews address for Mr Marano on their system at this time. It is highly unlikely that HMRC sent out the copy penalty notice, but not the original. Mr Marano did not deny having received the notice. We therefore find as a fact that the £100 penalty notice was issued to Mr Marano and served on him at the Mews.

The penalty issued on 3 March 2015 and that issued on 14 March 2017

153. Both these penalties were sent to New Cavendish St. The issue was whether they had been served on Mr Marano.

Mr Vallis's submissions

154. Mr Vallis relied on TMA s 115, which said that "Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post… addressed to that person at… his place of business". He said that the New Cavendish St address was Mr Marano's "place of business" within the meaning of s 115 because:

(1) he was a member of the LLP;

(2) New Cavendish St was the address of the LLP's registered office as published on the Companies House website, and thus its place of business;

(3) the Limited Liability Partnerships Act 2000 ("the LLP Act"), s 9(3), requires that LLPs must inform the Registrar of Companies of the names and residential addresses of any person who has become a member, and of any changes to that person's address, and s 9(3ZA) specifically requires that this include changes to the "service address" for that member; and

(4) the New Cavendish St address was published on the Companies House website as Mr Marano's "correspondence address".

155. Mr Vallis also relied on the wording of Sch 55, para 18, which said that when a person is liable to a penalty, HMRC must "notify" the person. He said Mr Marano had clearly been notified of both penalties, not only because they had been sent to his place of business, but also because:

(1) Mr Marano accepted under cross-examination that the one issued on 14 March 2017 had been sent to him by Berley. Although he "could not remember" if this had also happened in relation to the earlier penalty, he accepted that it was likely that the firm would have followed the same procedure; and

(2) it was not in dispute that RSM had received copies of both penalties, and had informed Mr Marano of them.

Mr Gordon's submissions

156. Mr Gordon submitted as follows:

(1) Mr Marano had never been to 76, New Cavendish Street and it was not his "place of business";

(2) section 1 of the LLP Act provided that an LLP had a separate legal identity from its members;

(3) the LLP had its business address at 76 New Cavendish St, but it did not follow that it was also Mr Marano's place of business;

(4) the address on the Companies House website was a correspondence address, not Mr Marano's residential address or his business address.

157. In relation to notification, Mr Gordon referred to the decision in *Tinkler v HMRC* [2019] EWCA Civ 1392 ("*Tinkler CoA*"). He accepted that this was not on exactly the same facts, but said it was "highly persuasive" as to what was required for notification to have taken place.

Discussion

158. Although both parties relied on the LLP Act, neither referred to the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 ("the LLP Regs"), made under the *vires* given by s 17 of the LLP Act.

159. Reg 3 of the LLP Regs is headed "Interpretation", and provides as follows:

> "(1) In these Regulations 'LLP' means a limited liability partnership registered under the Limited Liability Partnerships Act 2000.
>
> (2) In these Regulations, unless the context otherwise requires—
>
> (a) any reference to a numbered Part, section or Schedule is to the Part, section or Schedule so numbered in the Companies Act 2006;
>
> (b) references in provisions applied to LLPs—
>
> (i) to provisions of the Companies Act 2006, or
>
> (ii) to provisions of instruments made under that Act,
>
> are to those provisions as applied to LLPs by these Regulations or by the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008;…"

160. The Companies Act 2006, s 1140, is headed "Service of documents on directors, secretaries and others", and it includes the following provisions:

> "(1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.
>
> (2) This section applies to—
>
> (a) a director or secretary of a company;…
>
> (3) This section applies whatever the purpose of the document in question.
>
> It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.
>
> (4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.
>
> (5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered…"

161. Reg 75 of the LLP Regs is headed "service address" and begins "sections 1139 to 1142 apply to LLPs, modified so that they read as follows". Thus, Reg 75 modifies s 1140 of the Companies Act 2006. This is the modified version:

> **"1140 Service of documents on members and others**
>
> (1) A document may be served on—
>
> (a) a member of an LLP…
>
> by leaving it at, or sending it by post to, the member's…registered address.
>
> (2) This section applies whatever the purpose of the document in question.
>
> (3) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.
>
> (4) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered…."

162. Thus, a document may be validly served on an LLP member if it is sent by post to his "registered address", and that term is defined as "any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection". That applies "whatever the purpose of the document in question", see Companies Act s 1140(2) as amended by the LLP Regs

163. TMA s 115(2) provides that a notice "may" be served addressed to a person at "his place of business". The provision is not exhaustive. Where, as in the case of the member of an LLP (or a company director) other legislation sets out how a document can validly be served, HMRC can rely on that other legislation. Thus, if HMRC sends a document by post to an LLP member at the address published for him on the Companies House website, that document is validly served. HMRC do not need to show that the address is also "his place of business".

Conclusion on the Fifth Issue

164. The penalties were sent by HMRC to 76, New Cavendish St. This was a valid address for service of any document, including a document sent by HMRC notifying Mr Marano of the penalties charged. We therefore decide the Fifth Issue in favour of HMRC.

The other submissions

165. We therefore do not need to decide whether 76 New Cavendish St was Mr Marano's "place of business", or whether the Mr Marano had been notified of the penalty as required by Sch 55, para 18 because a copy had been sent to RSM, and that firm informed Mr Marano of that penalty (see our findings of fact at §34 and §46). However, as we noted in the hearing, Judge Redston recently considered a similar issue in *Albert House v HMRC* [2019] UKFTT 0732 (TC). HMRC's counsel, Mr Ben Elliott, set out an analysis of the case law which Judge Redston accepted and followed. One of the principles derived from that case law is that "a statutory provision about the giving of notice to a taxpayer must be interpreted so as to give effect to its purpose, namely whether the taxpayer has been notified" and thus "actual notice and/or knowledge of HMRC's decision is sufficient for notice to have been given, even if the notice or information has not been given directly to the taxpayer". We also note that *Tinkler,* to which Mr Gordon made reference, concerned the scope of the authority given to an agent by Form 64-8 in the context of a different statutory provision, and so in our judgment would not have assisted us in deciding this Issue.

THE SIXTH ISSUE: WHETHER THE PENALTIES COULD BE RE-NOTIFIED

166. The Sixth Issue was whether if (a) the penalties had been validly issued but (b) had not been validly notified because they had been sent to an incorrect address, then (c) HMRC had the power to re-notify the penalties.

167. As we have found that the penalties were validly issued and served, there is no need for us to decide this Issue.

THE SEVENTH ISSUE: WHETHER A PARTIAL RETURN

168. The Seventh Issue was whether the letter from RSM dated 28 November 2012 informing HMRC of the capital gain was a "partial return" submitted on behalf of Mr Marano.

Submissions on behalf of the parties

169. In the grounds of appeal submitted with the Notice of Appeal to the Tribunal, RSM argued that:

> "it is our view that the letter constituted a partial Return which could subsequently be incorporated into a complete Return. It would be iniquitous if a taxpayer was penalised for providing full information prior to a notice to complete a Return being issued, but then failing to resubmit the same information. The issue is whether following a request to complete a Return, HMRC receive or already hold relevant information."

170. Mr Gordon did not make any similar submission, but neither did he abandon the point.

171. Mr Vallis said that the concept of a "partial return" is not recognised by the Taxes Acts. The statutory requirement is for a taxpayer to complete a return once a Notice has been issued, see TMA s 8. Moreover, s 8(2) requires that "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", and the letter contained no such declaration.

Discussion and conclusion

172. Mr Vallis is clearly correct. The law does not recognise the concept of a partial return, and the letter has no special status. There is no need for further analysis.

THE EIGHTH ISSUE: CALCULATION AND QUANTUM OF PENALTIES

173. We have grouped together three sub-issues under this heading, all of which relate to the two penalties of £287,211. In this part of our decision, we have called these "the penalties". They were charged at 5% of the discovery assessment of £5,744,219, and were issued together on 14 March 2017.

174. The sub-issues are whether the penalties should be reduced:

(1) because of payments on account made by Mr Marano;

(2) because the CGT in the computation submitted with Mr Marano's purported return was lower than the figure in RSM's letter of December 2012 which Mrs McGovern relied on to make the discovery assessment; and/or

(3) because of the EIS claim sent in with the return.

175. This part of our decision does not considers whether there were "special circumstances": we have dealt which this separately as the Ninth Issue. Mr Gordon made further submissions

on sub-issues (2) and (3) in reliance on TMA s 50, and we have discussed these under the Tenth Issue.

The legislation

176. The penalties were charged under Sch 55, paras 5 and 6. Para 5 reads (where "P") is "the Person", here Mr Marano:

> "(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."

177. Para 6 reads, so far as relevant to this appeal:

> "(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."

178. 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).
>
> (3) In calculating a liability to tax which would have been shown in a return, no account is to be taken of any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section."

179. Appeal rights are at para 20, and read:

> "(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."

180. The Tribunal's powers are at para 22, and read:

> "(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may:
>
> > (a) affirm HMRC's decision, or
> >
> > (b) substitute for HMRC's decision another decision that HMRC had power to make."

The payments on account

181. The penalties were calculated based on the tax shown in the discovery assessment. However, Mr Marano had made payments on account for 2012-13 of £29,993.69, see §48. The question was whether the penalties should have been calculated on the basis of the tax shown as payable *after* deducting the payments on account.

Mr Gordon's submissions

182. Mr Gordon submitted that the figure to be used was the tax actually payable, and so must be net of payments on account, because para 24(1) required the penalty to be based on the amount of tax which "would have been shown to be due *and payable* in that return".

183. He said that the meaning of "payable" could be seen from TMA s 59B(1). That section was entitled "Payment of income tax and capital gains tax" and at the relevant time began (his emphasis):

> "Subject to subsection (2) below, the difference between
>
> > (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
> >
> > (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act <u>or otherwise</u>) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him or (as the case may be) repayable to him…"

184. Mr Gordon added that the same phrase is used in TMA s 66, in order to establish HMRC's enforcement powers. The section is headed "County Courts" and begins:

> "Tax due and payable may…be sued for and recovered from the person charged therewith as a debt due to the Crown by proceedings in England and Wales in the county court or in Northern Ireland in a county court."

185. He also sought to rely on the previous penalty charging provision, in TMA s 93(7), which he said was "not significantly different" from that in Sch 55. The subsection read:

> "If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty…shall not exceed that amount."

Mr Vallis's submissions

186. Mr Vallis said that Sch 55, paras 5 and 6 were the charging provisions. Both stated that the penalty was 5% of the "tax which would have been shown in a return". He emphasised the words "shown" and "in a return".

187. Sch 55, para 24(1) was a definition provision, which said that "tax which would have been shown in a return" was the amount of tax which "would have been shown to be due or payable" if a complete and accurate return had been delivered on the filing date. He emphasised the words "shown to be".

188. Thus, in his submission, paras 5, 6 and 24(1) all required that the penalty be based on the tax shown in the return, not on the amount payable after deducting any payments on account. He asked the Tribunal to reject Mr Gordon's attempt to rely on TMA s 59B and/or the predecessor provision on the basis that neither was relevant.

189. He also said that the purpose of the Sch 55 penalty regime was to penalise late filing; it was not to penalise late payment. He relied on *Edwards,* where the UT had said at [84] that "the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time".

Discussion and conclusion

190. We agree with Mr Vallis's submissions for the following reasons:

(1) The natural reading of paras 5 and 6, in the light of para 24(1), is that the penalty is to be based on what is "shown in the return", not on the amount which is found to be payable after payments on account.

(2) Where a taxpayer makes a return after the issuance of a tax-geared penalty, para 24(2)(b) says that "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)". The statute therefore repeats the reference to "shown to be due and payable", and makes an explicit exception for changes to the figures in the return. There is no similar exception for payments.

(3) Sch 55 provides its own definition of what is meant by "tax which would have been shown in the return" and there is no reason or basis on which it should be construed by reference to TMA s 59B.

(4) Mr Gordon is clearly wrong to say that TMA s 93(7) was "not significantly different"; the opposite is the case. If he were correct, there would be no penalty where a late return showed that no tax was payable. Instead, the new regime brings in penalties for late filing whether or not tax is due; *Edwards* confirmed that this was not disproportionate.

191. That is enough for us to decide the point in HMRC's favour. However, we make a number of further observations. In FA 2009, Sch 55 is followed by Sch 56, which levies penalties for failure to make payments on time. Those penalties are based on "the unpaid tax", see for example Sch 56, paras 3, 4 and 9. The purpose of Schedule 56 is self-evidently to levy penalties for a failure to pay tax by the due dates, by reference to the tax which has not been paid by those dates. The purpose of Sch 55 is different. It is to penalise late filing. The 5% penalties charged by Sch 55, paras 5 and 6 are not linked to the tax shown in the return in order to penalise late payment, but in order to levy penalties which reflect the financial position of

the individual who failed to comply with the statutory obligation to file his return by the due date.

192. In *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said at [5]:

> "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have."

193. The Explanatory Notes for Sch 55 begin by saying that the Schedule created "a new penalty regime for late filing of tax returns", so supporting our conclusion that no reliance can be placed on the predecessor provision at TMA s 93(7). The Notes end by saying that the changes made by Sch 55 were "the subject of initial consultation in June 2008 and further consultation in November 2008, when draft legislation was also published. A response document together with a final impact assessment was published in April 2009".

194. In *Chrisianuyi v HMRC* [2019] EWCA Civ 474, Rose LJ (giving the only judgment with which Floyd LJ and Sir Ernest Ryder both agreed) placed significant weight on the consultation documents which preceded the final legislation at issue in that case, see [22]-[40] of that decision. She concluded by saying:

> "In my judgment the mischief at which the legislation is aimed and the dividing line which the legislation was seeking to draw between those who should and those who should not be caught is very clearly explained and set out in the 2006 Consultation and the 2007 Response."

195. The Explanatory Notes to Sch 55 explicitly state that the consultation documents underpinned the new legislation; they can therefore be relied on to construe those provisions, and in particular to identify the mischief at which the legislation is aimed.

196. Of the consultation documents referred to in the Explanatory Notes, the most informative is that entitled "Modernising Powers, Deterrents and Safeguards: Meeting the obligations to File Returns and Pay Tax on Time", published in November 2008. Little changed after the draft legislation which accompanied that document. Under the heading "Separate obligation to file returns and to pay tax due", the text of that consultation reads (our emphases):

> "4.21. The work over the summer has strengthened the view that to design coherent, effective responses to late filing of returns and late payment of tax, **the two activities have to be considered separately**. There was much time given in consultation responses to which is more important – filing the return or making the payment. Filing and payment are both crucial elements in an effective tax system. Returns provide the information to enable HMRC to check that the correct tax is being paid (among many other important roles). Payment provides the Exchequer with the requisite funds. Self assessment has been a key principle of the UK tax system for over 10 years – right across the taxes. But it does not extend to simply making a payment to the Exchequer which HMRC are unable to verify.
>
> 4.22. **So in order to encourage both filing and payment on time, the penalties for late filing and late payment must be separate from each other. This means the late filing penalties should be unrelated to whether the tax has been paid** (in the same way as incorrect return penalties do not take account of payment). But in the real world there are three scenarios: people who pay but do not file; people who file but do not pay and those that

> neither file nor pay. In considering the rates, levels and structure of the penalty regimes it is important to consider how they will impact for all three situations."

197. At para 5.10 of the same document, the text states (emphasis in original):

> "It is proposed that for very late returns there should be ***tax geared penalties*** – that is the penalty is a percentage of the tax due on the return, payable at 7 and 12 months after the due date. Analysis of current filing patterns suggests that where the initial fixed sum penalty has not been effective in reinforcing the deadline, late returns sometimes take a long time to be submitted. There are many reasons for this and a variety of different responses that HMRC can and should take. But it has to be recognised that for some the benefits of withholding information from HMRC are sufficiently great that neither fixed sum nor modest daily penalties will be effective. For others, very late returns may well be an indicator of a wider problem with compliance with tax obligations."

198. The above extracts from the consultation document thus provide support for the conclusions to which we came on the basis of Mr Vallis's submissions.

The final figures on the return

199. Mr Gordon also submitted that the penalties should be reduced because the discovery assessment was based on the £5,744,219 in RSM's letter of 28 December 2012, but the return sent to HMRC on 29 June 2017 stated that Mr Marano's CGT liability was £5,611,789.15, a difference of £132,429.85.

200. Mr Vallis submitted that the penalties could only be displaced if the taxpayer had made a subsequent return which showed a lower liability, and that had not happened in Mr Marano's case because the return had been sent to HMRC after the statutory time limit in TMA s 34A, see §51(1). Sch 55 therefore did not give either HMRC or the Tribunal the power to reduce the figure on which the penalties were based, so as to take into account the figures in that return; any reduction would be a matter of concession for HMRC.

Discussion and conclusion

201. Where penalties are issued in the absence of a return, Sch 24(2)(a) requires that they be determined to the best of HMRC's information and belief. Apart from his submissions on payments on account, which we have rejected, Mr Gordon accepted that the penalties had been made to the best of HMRC's information and belief, and we agree that this was correct: they were based on the figures in RSM's letter.

202. Once determined, penalties can only be recalculated if the taxpayer "subsequently makes a return", see para 24(2)(b). Although Mr Marano finally approved his 2012-13 return, and RSM sent it to HMRC on 29 June 2017, that was too late. As Mr Vallis said, the ordinary time limit for making a self-assessment had expired on 5 April 2017. HMRC have no power to amend the penalties by basing them on the return which Mr Marano attempted to submit in June 2017, because that was not a "return" as defined.

203. The next question is whether the *Tribunal* has the power to change the penalties, by basing them on the figures in RSM's CGT computation. However, this sub-issue is an appeal "as to the amount of a penalty payable by [Mr Marano]". It was thus made under Sch 55, para 20(2), and in that situation, the Tribunal only has the power to (a) affirm HMRC's decision or

(b) “substitute for HMRC's decision another decision that HMRC had power to make”, see para 22(2).

204. HMRC had no power to reduce the penalties because no return had been submitted, and the Tribunal is in the same position. Sch 55 therefore does not permit us to reduce the penalty so that it is based on the figures in the CGT calculation. Mr Vallis mentioned allowing a reduction by concession, but the Tribunal has a statutory jurisdiction and cannot reduce the penalties by concession.

The EIS claim

205. As we have already found at §53, when Mr Matthews sent HMRC Mr Marano’s 2012-13 return, he included with that return a certificate in respect of Mr Marano’s £220,000 investment in Mofilm Ltd, and a claim for EIS deferral relief on that investment. His covering letter said that Mr Marano had elected for the relief to be carried back against the CGT gain included in his 2012-13 return.

206. Mr Gordon submitted that because the EIS relief reduced the CGT due for 2012-13, the penalties should be reduced to take that relief into account. Mr Vallis repeated his submissions in relation to the previous sub-issue. He added that the claim was in any event not made “in” the return, and HMRC was required to treat it separately.

Discussion and conclusion

207. As with the previous sub-issue, this is an appeal “as to the amount of a penalty payable by [Mr Marano]”, and the Tribunal only has the jurisdiction to make a decision which HMRC could have made. HMRC can only amend the penalty if a return was submitted, and that did not happen. Even if a return *had* been submitted, the EIS claim was not part of that return, and HMRC has no power to amend a penalty by reference to a claim made outside the return. We thus find for HMRC on this sub-issue.

Overall conclusion on the Eighth Issue

208. The Tribunal has decided not to reduce the penalties for any of the reasons set out by Mr Gordon in the three sub-issues considered as part of the Eighth Issue.

THE NINTH ISSUE: WHETHER SPECIAL CIRCUMSTANCES

209. The Ninth Issue is whether, as Mr Gordon submitted, the penalties issued on 14 March 2017 of £574,422 should be reduced, because (a) the advance notification of the gain, and/or (b) the advance payment of the tax, constituted “special circumstances”. Again, in this part of our decision, when we refer to “the penalties”, we mean those issued on 14 March 2017.

The legislation

210. Sch 55, para 16 is headed “special reduction” and reads:

> “(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."

211. Para 22 sits within the provisions dealing with appeals. It includes the following subparagraphs:

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

HMRC's decisions

212. At §57 we found as a fact that RSM had asked Mrs McGovern to reduce the penalty issued on 14 March 2017 of £574,422 under these "special circumstances" provisions. The next three paragraphs of this decision are further findings of fact.

213. On 18 September 2017, Mrs McGovern refused. Her letter made the following points:

(1) Special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

(2) Special circumstances are "uncommon or exceptional circumstances that should be clearly recognisable as such and are completely separate from the other considerations".

(3) HMRC will not reduce penalties where to do so would be "contrary to the clear compliance intention of the penalty regime" and "in particular, we will not do so on the basis that the underlying tax liability has been paid".

(4) On its own, the size of the penalty is not a special circumstance.

(5) The facts that Mr Marano notified the liability and paid the tax in full and in advance was "not sufficient" for a special reduction.

(6) The aim of filing is to furnish HMRC with a return, and early notification and payment were not circumstances which warranted a special reduction.

214. On 2 November 2017, a meeting took place between RSM and Mrs McGovern, at which she was asked to reconsider her position on special circumstances. During that meeting Mrs McGovern repeated many of the points in her earlier letter, and she wrote again on 13 February 2018, reiterating her previous reasons for refusing to reduce the penalty. She also said that:

(1) "The Tribunal do not have powers under Sch 55 to reduce a penalty on the grounds that it is disproportionate".

(2) The penalty is 10% of the tax, and so not "plainly unfair", and in any event, the late filing penalties are there to penalise late filing, not late payment.

(3) It is relevant to take into account the length of the delay: the return was outstanding for a three year period.

215. On 25 July 2018, the Review Officer, Ms Powell, upheld Mrs McGovern's decision, and confirmed the points set out above. She added that Mr Marano had never provided a reason for the late filing.

The parties' submissions

216. In his skeleton argument, Mr Gordon submitted that HMRC had "shown no evidence as to their approach" and had simply repeated the assertion that "prior payment of tax can have no effect on a penalty". He said this was a failure "to consider afresh whether the penalties should be reduced due to special circumstances", and that the decision was therefore flawed in a judicial review sense, and the Tribunal therefore has the relevant jurisdiction.

217. In his oral submissions, Mr Gordon accepted HMRC had considered proportionality, but said that "no reasonable decision maker can have considered that [the penalties were] proportionate", and that the decision was flawed for that reason. He went on to say that, in exercising our jurisdiction, we should take into account the following:

(1) RSM had notified HMRC of the gain, and Mr Marano had paid the estimated tax, well before the due date for filing the related return; and

(2) the penalties are "extremely high and arguably disproportionate" and should be reduced to "a more appropriate sum".

218. Mr Vallis said that Mrs McGovern's decision not to apply a special reduction was not "flawed" in a judicial review sense. He relied on *Edwards,* where the UT considered whether HMRC's decision was flawed because they had failed to consider the proportionality of imposing a late filing penalty on Mr Edwards, even though when he did file the return, no tax was due. The UT accepted that HMRC had not considered proportionality, but confirmed the decision, saying:

> "[84]…the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due…
>
> [85] In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the 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.
>
> [86] In view of what we have said about the legitimate aim of the penalty scheme, 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."

219. Mr Vallis also pointed out that at the same time, and in the same Act, Parliament had introduced Sch 56, which imposes penalties for late payment. He said that the only reasonable conclusion was that the two were to be treated separately, and that payment of the tax was not relevant to the imposition of a penalty for late filing.

Whether the Tribunal has jurisdiction

220. The Tribunal only has jurisdiction if HMRC's decision to refuse to reduce the penalty for special circumstances was "flawed"; that term has to be considered "in the light of the principles applicable in proceedings for judicial review. We begin with those.

The principles applicable in judicial review proceedings

221. In *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 Lord Greene set out what has become the classic exposition of when a decision was so unreasonable as to be flawed.

> "a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

222. There is a helpful summary of the current position in Halsbury's Laws of England, Judicial Review, in the chapter "Substantive Grounds for Judicial Review" under the heading "Ultra Vires and Illegality: Errors of law". It reads:

> "A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law; frustrates the purpose of a statute or otherwise acts for an improper purpose; takes a decision on the basis of secondary legislation, or any other act or order, which is itself *ultra vires*; takes legally irrelevant considerations into account, or fails to take relevant considerations into account; admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence or on the basis of a material mistake of fact; misdirects itself as to the burden of proof; fails to follow the proper procedure required by law; fetters its discretion or improperly delegates the decision; fails to fulfil an express or implied duty to give reasons; acts arbitrarily or discriminately; or otherwise abuses its power."

Was HMRC's decision flawed?

223. Mr Gordon put forward two reasons why the decision was flawed. The first was an alleged failure to consider RSM's arguments, including those on proportionality. That submission is clearly without foundation: Mrs McGovern carefully considered what RSM had said, issuing two letters and having a conference call. Mr Gordon's second reason was that no reasonable decision maker could have decided that the penalties were proportionate. That too is unsustainable, see *Edwards* at [86], cited at §218.

224. Nevertheless, there were three flaws in HMRC's decision. Mrs McGovern fettered her discretion by approaching the question of whether there were special circumstances on the basis that:

(1) Special circumstances "must apply to the particular individual and not be general circumstances that apply to many taxpayers". However, the UT said in *Edwards* at [72]

that there was no reason to restrict the statutory wording in that way, and approved Judge Vos's analysis in *Advanced Scaffolding v HMRC* [2018] UKFTT 0744 (TC).

(2) Special circumstances had to be "uncommon or exceptional" and "should be clearly recognisable as such and are completely separate from the other considerations". In *Edwards* at [72]-[74] the UT again confirmed the approach set out in *Advanced Scaffolding.* Judge Vos said at [107]:

> "…the right approach for the Tribunal is to look at all the relevant circumstances and consider whether, in the particular case in question those circumstances are "special". I see no reason to limit this to circumstances which…operate on the particular taxpayer in question as opposed to those which could affect a larger number of taxpayers. It is up to HMRC or, where relevant, the Tribunal to decide based on all of the facts of the particular case whether the circumstances in question are, in that case, special".

(3) The Tribunal (and by implication HMRC, as the Tribunal only have jurisdiction if HMRC's decision is flawed) "do not have powers under Sch 55 to reduce a penalty on the grounds that it is disproportionate". However, in *Edwards* at [66] the UT found that the FTT had made an error of law "by determining that it had no general power to reduce a penalty on the grounds that it is disproportionate", and that factor can be considered under the heading of "special circumstances".

225. We therefore find that the decision was flawed in a judicial review sense because Mrs McGovern had made those three incorrect assumptions, and by doing so she limited the possible outcomes. In coming to that conclusion we mean no criticism of Mrs McGovern; she was making her decision before the publication of either *Advanced Scaffolding* or *Edwards,* she carefully considered all RSM's submissions in the light of HMRC's internal guidance, and she applied that guidance.

The exercise of the Tribunal's jurisdiction

226. We therefore consider afresh whether there are special circumstances in Mr Marano's case. Our starting point is that the purpose of the Sch 55 penalty provisions is "is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time" and this is "a legitimate aim in the public interest" see *Edwards* at [84].

227. As Judge Vos said in *Advanced Scaffolding,* the right approach is to look at <u>all</u> the relevant circumstances, and consider whether, in the particular case in question those circumstances are "special". One of the relevant circumstances is the size of the final penalty. On that particular point, we find as follows:

(1) For the reasons set out in *Edwards* at [85], there is a reasonable relationship of proportionality between the legitimate aim set out above, and the penalty regime which seeks to realise it.

(2) However, we also need to consider whether the particular penalty charged on Mr Marano was disproportionate, as the UT said in *HMRC v Total Technology (*[2012] UKUT 418 (TCC), discussed and applied in *Edwards* at [79]-[81]. If a particular penalty is "plainly unfair" it must be reduced, even if the regime as a whole is proportionate.

(3) The amount charged by the penalty notice issued on 14 March 2017 was not a single 10% penalty, but two 5% penalties. The first 5% was charged because Mr Marano

had not filed his return after 6 months, and the second because he had still not filed it after a year.

(4) Although each penalty of £287,211 was large in absolute terms, size alone does not make them "plainly unfair". They are large because they are linked to the tax which should have been on the return, and that relationship is part of the proportionality inherent in the design of the scheme.

228. In order to decide whether there were other reasons to reduce the penalties under this provision, we took into account the following other relevant circumstances to see whether they were "plainly unfair":

(1) Mr Marano's 2012-13 return was due to be filed by 31 January 2014. HMRC issued fixed and daily penalties, but none caused him to file the return. HMRC then issued the determination, followed by two 5% penalties each of £5,609 issued on 25 November 2014 and 3 March 2015. All of these were ignored.

(2) It was not until after HMRC issued the penalty notice of 14 March 2017 that Mr Marano finally approved his draft return. He told the Tribunal that he "had no idea they [the penalties] would be on this scale". It is reasonable to infer that it was only the size of these penalties which prompted him to approve his return, and we so find.

(3) The return was sent to HMRC on 29 June 2017, over three years late. Mr Marano has not put forward any substantive reason for this delay. Under cross-examination he initially said that he had been "afraid" to hand the return sooner, but then added that "afraid" was "not the correct term", but gave no further explanation and no alternative reason.

(4) Filing a return by the due date is a statutory obligation, and chasing late returns takes up HMRC's time and wastes public money. The long delays in this case required HMRC staff to return repeatedly to Mr Marano's case, as evidenced by the lengthy and copious SA and IDMS notes and by Mrs McGovern's correspondence and telephone notes.

(5) Mr Marano had a history of non-compliance and late filing:

(a) on 28 September 2012, he registered with HMRC's "late return initiative" and RSM provided HMRC with returns for 2009, 2010, and 2011 and with a schedule of his UK tax liabilities for the years ended 2006, 2007 and 2008.

(b) Mr Marano only responded to HMRC's enquires into the years 2009 to 2011 after HMRC issued a Sch 36 Notice, followed by a £300 penalty and a £7,400 penalty.

(c) He filed his 2011-12 return on 29 June 2017, over four years late; this was almost three years after being issued with a determination.

(d) The 2013-14 tax return was not filed by 15 October 2015, over nine months after the due date, despite the issuance of Sch 55 fixed and daily penalty notices.

(6) Those other years are not under appeal before this Tribunal, but the pattern of late filing and compliance is nevertheless relevant when considering all relevant circumstances.

(7) It is clear from the consultations which preceded the introduction of Sch 55, that tax-geared penalties were introduced precisely to deal with cases where "the initial fixed sum penalty has not been effective in reinforcing the deadline" and that such individuals

often significantly delayed the submission of their returns, and that some of these dilatory taxpayers had “a wider problem with compliance with tax obligations”, see §197

229. Mr Gordon submitted that Mr Marano’s early payment of the estimated tax on the remitted capital gain was a “special circumstance”. We disagree. The penalties imposed under Sch 55 are for late filing of the return; whether or not a person has paid the related tax is not relevant. In *Edwards* the taxpayer had no tax liability at all, and the UT found that having no liability was not a special circumstance, see [86] of that judgment, cited at §218. Furthermore, the reason Mr Marano paid before the due date was to obtain a tax reduction in the US.

230. Having considered all relevant matters, we find there were no special circumstances. On the contrary, Mr Marano was exactly the type of taxpayer for whom these penalties were designed: the initial fixed penalties were ineffective; he delayed his return until after the tax-geared penalties were issued on 14 March 2017, and he had a wider problem with compliance with his UK tax obligations. Thus, not only are there no special circumstances, but the penalties are here operating precisely as intended.

THE TENTH ISSUE: TMA S 50

231. The final issue was whether the Tribunal could exercise its powers under TMA s 50 to reduce the discovery assessment and/or the penalties issued on 14 March 2017 (“the penalties”), and if so, whether we should exercise our powers in that way.

The legislation

232. The relevant provisions of TMA s 50 reads:

> “(6) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that, the appellant is overcharged by a self-assessment;
>
> (b) …; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment6
>
> (b) …; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.
>
> (7) …
>
> (8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which
>
> (a) assesses an amount which is chargeable to tax, and
>
> (b) charges tax on the amount assessed,
>
> the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified

to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly."

The discovery assessment: submissions

233. Mr Gordon submitted that the Tribunal should use its power under TMA s 50 to reduce the discovery assessment to take into account:

(1) the fact that the return sent to HMRC on 29 June 2017 stated that Mr Marano's CGT liability was £5,611,789.15 rather than the £5,744,219 in RSM's letter of 28 December 2012, a difference of £132,429.85; and

(2) the EIS deferral relief of £220,000 in Mofilm Ltd, which Mr Marano had elected to be carried back against the CGT gain included in his 2012-13 return.

234. Mr Vallis asked the Tribunal not to reduce the assessment. He said that it had been based on the information provided to HMRC and had been made correctly; there was no subsequent valid return. The EIS claim was not part of the return and is governed by TMA Sch 1A. If HMRC decide that the claim is valid, they will apply a "free-standing credit" to Mr Marano's self-assessment statement. But that was not a matter for this Tribunal to decide as part of its consideration of TMA s 50.

The discovery assessment: discussion

235. Mrs McGovern's assessment was made because she discovered that chargeable gains which ought to have been assessed to capital gains tax, had not been assessed. The remitted gain brought into charge by the assessment was for £20,515,066. In the final computation submitted by RSM, that remitted gain remained at £20,515,066. On one analysis, nothing has changed: exactly the same gain as that assessed by Mrs McGovern remains in charge, and the Tribunal should not look beyond that.

236. However, we think this is the wrong approach. TMA s 50(7) provides that if the Tribunal decides that a taxpayer "was overcharged by an assessment other than a self-assessment" then "the assessment…shall be reduced accordingly". The subsection requires the Tribunal to consider not the gain, but the tax on the gain.

Relying on RSM's calculation?

237. RSM had calculated the tax by multiplying the gain of £20,515,066 by 28% (see §24), this gave the £5,744,219 figure notified to HMRC, and which Mrs McGovern assessed.

238. However, according to the computation included with Mr Marano's return:

(1) he had not used £26,355 of his basic rate band, and so gains of that amount were only taxed at 18%;

(2) the total gains were by reduced a "loss on loan to trader" of £430,000; and

(3) in addition to the remitted gain, there was a further gain on the disposal of shares in Laurel Brook II Ltd. This gain had been reduced to £9,308 by EIS relief of £100,000.

239. We considered whether Mr Marano had been overcharged by the discovery assessment, and whether the tax on the discovery assessment should be reduced to take into account the 18% rate and/or the loss on loan to trader. However, the following are also relevant:

(1) In order for Mr Marano to have the benefit of the 18% rate, part of his basic rate band had to remain unused. According to the computation, this was the position because

his employment income for the tax year was only £4,139.50; he also had interest of £5,590.18. As the Tribunal noted during the hearing, this was surprising, particularly given the determination of £118,119, which had been based on earlier years' returns.

(2) We had no information about the "loss on loan to trader" of £430,000.

(3) We had no information about the elements of the calculation of the remitted gain, other than three figures: the disposal proceeds, the acquisition cost, and expenses of disposal.

(4) Had Mr Marano submitted a return by the ordinary time limit set out in TMA s 34A, HMRC would have had the power to enquire into that return under TMA s 9A. The time limit for the enquiry would have extended "up to and including the quarter day next following the first anniversary of the day on which the return was delivered". However, because the return was not sent to HMRC within the ordinary time limits, HMRC could not use their section 9A enquiry powers to enquire into the amounts in the return.

(5) It is true HMRC could have:

(a) sought to investigate the figures on the return using their powers under Finance Act 2008, Sch 36; and

(b) if new information had come to light as a result, HMRC could have made a further discovery assessment

However, both information notices and discovery assessments are significantly less straightforward than the TMA s 9A enquiry powers.

240. We decided there was insufficient information as to Mr Marano's CGT liability for us to decide that he had been over-assessed. To have come to the opposite conclusion would have required us simply to accept the computation as complete and accurate, even though it had never been validly submitted, HMRC were unable to enquire into it, and in relation to which no further information had been provided to the Tribunal.

241. In coming to that conclusion, we are of course aware that the burden of proving discovery assessments rests on HMRC. But that requires HMRC to prove that chargeable gains which ought to have been assessed to capital gains tax, had not been assessed. There is no dispute that when Mrs McGovern made the assessment, the remitted gain ought to have been assessed, and had not been assessed, see TMA s 29(1)(a). Thus, HMRC have met their burden of proof. It is the *appellant* who is now arguing that the *tax* on that gain should be reduced because of other factors, and it was for the appellant to prove this was the position on the balance of probabilities. In our judgment, he has failed to do so.

The EIS claim

242. We considered whether the assessment under appeal should be reduced to take into account the EIS claim. However, the assessment was made on 8 March 2017, and the claim was sent to HMRC on 29 June 2017. The claim does not take effect to reduce *that assessment.* As Mr Vallis said, the claim is a free-standing matter. It is a matter for HMRC whether it leads to a repayment of tax, but that is not something we can decide under TMA s 50. In other words, Mr Marano has not been "overcharged" by the discovery assessment which is under appeal.

Penalties

243. Mr Gordon submitted that the Tribunal, having reduced the assessment under TMA s 50, should also reduce the tax-geared penalties. As we have decided not to reduce the assessment under para 50, this point falls away.

244. In any event, the penalties were imposed for a failure to submit the return on time. They were based on the tax "which would have been shown in the return in question". The EIS claim was not part of the return and could not have made any difference to the penalties.

245. We noted that Mr Vallis's skeleton argument made reference to Sch 55, para 18(5), which allows HMRC to amend a return if "an assessment in respect of a penalty is based on a liability to tax that would have been shown in a return, and that liability is found by HMRC to be excessive". However, that paragraph was introduced by FA 2013, and has effect only for tax years 2013-14 onwards. It is therefore not relevant to Mr Marano's appeal.

OVERALL DECISION AND APPEAL RIGHTS

246. For the reasons set out in this decision notice, we refuse Mr Marano's appeal. We confirm the discovery assessment of £5,744,219 and the following penalties issued under Sch 55:

(1) the initial penalty of £100 under para 3, issued on 18 February 2014;

(2) the daily penalty of £900 under para 4, issued on 18 August 2014;

(3) the six month penalty of £300 under para 5, also on 18 August 2014;

(4) the two initial tax-geared penalties issued under paras 5 and 6, on 25 November 2014 and 3 March 2015, each of £5,609; and

(5) the two tax-geared penalties issued under paras 5 and 6, on 14 March 2017 totalling £574,422.

Right to apply for permission to appeal

247. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are to note that this time limit is unaffected by the general stay issued by Judge Sinfield on 24 March 2020.

248. 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: 23 APRIL 2020