[2018] UKFTT 0292 (TC)

TC06522

Appeal number: TC/2013/07586

INCOME TAX –- penalties for failure to deliver returns – penalties for failure to pay income tax and Class 4 NICs – whether automatic assessments under paragraphs 5 and 6 Schedule 55 valid where return not delivered and tax liability not known at time of making – whether re-assessments under paragraphs 5 and 6 in correct figures – whether Schedules 55 and 56 FA 2009 apply to Class 4 NICs – whether certain assessments properly served – appeals allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DUNCAN HANSARD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
ELIZABETH POLLARD

Sitting in public at City Exchange, Leeds on 12 April 2018 with written submissions from the respondents on 3 May 2018.

The Appellant was neither present nor represented.

Ms Loretta McLaughlin, HMRC Solicitor's Office and Legal Services, for the Respondents

DECISION

Introduction

1. This was an appeal by Mr Duncan Hansard against assessments by the respondents ("HMRC") of penalties for the late delivery of tax returns for the tax years 2010-11 and 2011-12 and for late payment of tax for the same years. Or at least that is how the Tribunal dealt with the case – the actual position as it stood before the hearing was rather more complicated.

2. The reason the Tribunal is only now dealing with penalties for tax years that began more than 8 and 7 years ago respectively is that the appeals, like thousands of others, was stayed behind a case that was finally determined by the Court of Appeal in 2016, *Donaldson v HMRC* [2016] EWCA Civ 761, leave to appeal being refused by the Supreme Court.

3. There is a slight irony here. The only appeals that HMRC did not reject as being out of time were appeals against penalties for late payment of tax where the *Donaldson* case had no relevance.

Non-attendance by the appellant

4. When the appeals finally came before us for hearing and were due to begin, neither the appellant, nor his authorised representative, Parkins Chartered Accountants, were present. Our clerk phoned the appellant on the mobile number given but got no reply. He spoke to Mr Parkin and was told that there would be no attendance as they did not think it was worth it. A more detailed explanation was given in an email by Mr Parkin. This explained that a response had been received from HMRC about other years and that Mr Parkin had assumed that the hearing would be cancelled to enable compromise negotiations to begin about the years in question. Mr Parkin would have suggested a 50% reduction in penalties.

5. To assume that a hearing would be cancelled without having had any notification to that end or making any contact with the Tribunal was wholly unwarranted and a rash course of action. Since no application was made by either party to postpone the hearing, and since the appellant had clearly been notified of the proceedings, we had to decide whether it was in the interests of justice to proceed.

6. We had the grounds of appeal which had been elaborated in earlier correspondence by Mr Hansard, by his accountants at the time Turnerwarran and by Parkins. We noted that the burden of proof was clearly on HMRC to show that the penalties were duly incurred and that from the bundle of papers supplied by HMRC we could ask questions of HMRC. Accordingly we considered it was in the interests of justice to proceed, and we did so.

Facts

7. From the bundle of papers and from further explanations about them from HMRC we find the following undisputed facts. We find certain further facts in the discussion section of this decision.

2010-11

8. HMRC's computer records show that on 6 April 2011 Mr Duncan Hansard ("the appellant") was issued with a tax return containing a notice to make and deliver a return for the tax year 2010-11. That notice in the return would have required the appellant to deliver the return by 31 October 2011 if delivered in paper form (which the return issued was in) or by 31 January 2012 if delivered electronically. Each of those dates is capable of being the "due date", but which actually is depends on the form in which the return is delivered.

9. HMRC's computer records show that they issued a notice on 14 February 2012 informing the appellant that a penalty of £100 had been assessed for his failure to deliver the return by the due date. The actual "due date" was at that stage not yet known but could not be later than 31 January 2012.

10. HMRC's computer records show that they issued a notice on 7 August 2012 informing the appellant that a penalty of £900 had been assessed for his failure to deliver the return by a date 3 months after the due date. The actual due date was still not known, but a date 3 months after the due date could not be later than 30 April 2012.

11. HMRC's computer records show that the notice of assessment they issued on 7 August 2012 also informed the appellant that a penalty of £300 had been assessed for his failure to deliver the return by a date 6 months after the due date. The actual due date was still not known, but a date 6 months after the due date could not be later than 31 July 2012.

12. HMRC's computer records show that they issued a notice on 19 February 2013 informing the appellant that a penalty of £300 had been assessed for his failure to deliver the return by a date 12 months after the due date. The actual due date was still not known, but a date 12 months after the due date could not be later than 31 January 2013.

13. The return was delivered in paper form on 23 April 2013. The due date for delivering the return was therefore 31 October 2011.

14. HMRC's computer records show that on 28 May 2013 HMRC issued a notice informing the appellant that penalty of £1,020 had been assessed for his failure to deliver the return by a date 6 months after the due date.

15. Also on 28 May 2013 HMRC issued a notice informing the appellant that another penalty of £1,020 had been assessed for his failure to deliver the return by a date 12 months after the due date.

16. Also on 28 May 2013 HMRC issued a notice informing the appellant that a penalty of £1,002 had been assessed for his failure to pay income tax and Class 4 National Insurance Contributions ("NICs") due by a date 30 days after the due date for payment (the "penalty date"). The due date for payment of income tax was 31 January 2012.

17. Also on 28 May 2013 HMRC issued a notice informing the appellant that a penalty of £1,002 had been assessed for his failure to pay income tax and Class 4 NICs due by a date 5 months after the penalty date. The "View Penalties" screenshot showing this called the penalty a 6 month late payment penalty.

18. Also on 28 May 2013 HMRC issued a notice informing the appellant that a penalty of £1,002 had been assessed for failure to pay income tax and Class 4 NICs due by a date 11 months after the penalty date. The "View Penalties" screenshot showing this called the penalty a 12 month late payment penalty.

19. The income from "self-employment" shown on the return was £128,191, on which the tax and Class 4 NICs combined was £26,416.36.

2011-12

20. HMRC's computer records show that on 6 April 2011 the appellant was issued with a tax return containing a notice to make and deliver an income tax return for the tax year 2011-12 on 6 April 2012. That notice required the appellant to deliver the return by 31 October 2012 if delivered in paper form or by 31 January 2013 if delivered electronically ("the due date").

21. HMRC's computer records show that they issued a notice on 12 February 2013 informing the appellant that a penalty of £100 had been assessed for his failure to deliver the return by the due date.

22. The return was delivered electronically on 19 April 2013. The due date was therefore 31 January 2013.

23. The income from "self-employment" was shown as £25,747 on which the tax and Class 4 NICs combined was £2,400.38.

24. On 23 May 2013 HMRC issued a notice informing the appellant that a penalty of £120 had been assessed on him for his failure to pay income tax and Class 4 NICs due by a date 30 days after the due date for payment. The due date for payment of income tax was 31 January 2013.

25. On 14 August 2013 HMRC issued a notice informing the appellant that a penalty of £120 had been assessed for his failure to pay income tax and Class 4 NICs due by a date 5 months after the penalty date. The "View Penalties" screenshot showing this called the penalty a 6 month late payment penalty.

26. On 25 February 2014 HMRC issued a notice informing the appellant that a penalty of £120 had been assessed for failure to pay income tax and Class 4 NICs due

by a date 11 months after the penalty date. The "View Penalties" screenshot showing this called the penalty a 12 month late payment penalty.

Appeals

27. On 8 July 2013 the appellant, through Turnerwarran & Co LLP, accountants, brought an appeal to the Tribunal against "the penalties", which they notified to HMRC

28. On 30 July 2013 HMRC informed the appellant that the deadline had passed for bringing an appeal against the late *filing* penalties for 2010-11 and that he had given no reasonable excuse for the failure to give notice of the appeal to HMRC in time. HMRC informed the appellant of his right to ask the Tribunal for permission to give notice of the appeal to HMRC.

29. But also on 30 July 2013 HMRC informed the appellant that in relation to the late *payment* penalties for 2010-11 the appellant had, in their opinion, no reasonable excuse for the failure to pay. The appellant was told he could ask for a review or notify the Tribunal.

30. And also on 30 July 2013 HMRC informed the appellant that the deadline had passed for bringing an appeal against the sole late filing penalty for 2011-12. HMRC informed the appellant of his right to ask the Tribunal for permission to give notice of the appeal to HMRC.

31. On 26 August 2013 the appellant wrote to HMRC giving his excuse for the lateness of the appeals, and on 28 August his accountants sought a review using two Forms SA634.

32. On 17 September 2013 HMRC's Appeals and Reviews Unit acknowledged the review request.

33. On 7 October 2013 the appellant notified his appeals to the Tribunal.

34. On 10 October 2013 HMRC's reviewing officer gave her conclusions of her review into the appeal against the late payment penalties. She upheld them. No mention was made of any other review request.

The law

35. The law imposing the penalties for late delivery (ie filing) of income tax returns is in Schedule 55 Finance Act ("FA") 2009 ("Schedule 55"). The discussion section contains the full text of paragraphs 5, 6 and 24 (fixed or tax geared penalty after 6 and 12 months respectively). The appendix contains the rest of the text of those parts of Schedule 55 relevant to this appeal.

36. The law imposing the penalties for late filing (ie delivery) of income tax returns is in Schedule 56 FA 2009 ("Schedule 56"). The discussion section contains the full text of paragraph 3, the paragraph relevant to income tax payments. The appendix contains the rest of the text of those parts of Schedule 56 relevant to this appeal.

37. The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to deliver the return or make the payment by or before the due date or penalty date and they may only be reduced if HMRC's decision as to whether there are special circumstances was flawed and the Tribunal makes such a reduction.

What are we dealing with?

38. The correspondence in the bundle and the Notice of Appeal to the Tribunal presented us with difficulty in seeing exactly what we were supposed to be deciding.

39. The position is that HMRC *rejected* the appellant's notices of the appeals against the late *filing* penalties for both years on the grounds that they were out of time. They were, although two of them were approximately just 12 days late.

40. They *accepted* the notices of appeal against the late *payment* penalties for 2010-11 even though they were also about 12 days late. They must then have accepted that the appellant had a reasonable excuse for the lateness of these particular notices (see s 49(5) Taxes Management Act 1970).

41. HMRC did not refer to the one late payment penalty for 2012-13 which had been issued before the appellant sought to appeal to HMRC, the notice of appeal against which was about 17 days late.

42. There seemed to be no notices of appeal against the second and third late payment penalties for 2011-12.

43. The review was restricted to the 2010-11 late *payment* penalties, even though one of the SA634s said the appeals for which a review was sought were against late *filing* penalties.

44. The Notice of Appeal to the Tribunal gives the figure of penalties as £6,646 which is the exact total of the *2010-11* penalties, both late filing and late payment.

45. In view of the inconsistent position as between the late filing and late payment penalties in 2010-11, the small number of days in excess of 30 in relation to some appeals, HMRC's and the Tribunal's failure to indicate to the appellant that there were applications for permission being sought, we decided to give permission to the appellant to give late notices of appeal to HMRC in respect of the late filing penalties.

46. We also waived any formalities that might be necessary to ensure that all the appeals against late filing penalties are validly brought to the tribunal for determination, and that the first late payment penalty for 2011-12 is also before us as so validly brought.

47. As to the second and third late payment penalties, when the notices of appeal against the other penalties were given to HMRC on 8 July 2013 these late payment penalties had not been issued. There is no sign in the papers of any later appeals against them. However we said to Ms McLaughlin that should the appellant succeed in overturning the first late payment penalty for 2011-12 we would expect, but had no

power to force, HMRC to waive collection of the later penalties. Ms McLaughlin said she understood what we were suggesting.

The grounds of appeal

48. In the Notice of Appeal the accountant said:

(1) The appellant was suffering from depression following marital difficulties.

(2) He was working in mines and in remote parts of the world where there was no phone signal.

49. This was explained further in the appeal letter of 8 July 2013. That said that "during the period involved" their client was getting divorced which led to depression and his not being able to deal with his business affairs..

50. The appellant's letter of 26 August 2013 explained that after 22 years of marriage he discovered his wife was being unfaithful and that led to separation with consequential cost and distress. He was unable to cope with day to day issues in the normal way, and was unable to work, concentrate and to socialise.

51. He asked his accountant to carry out "these works" (preparing tax returns we have assumed) in 2010 but he did not follow this up. His accountants had now finalised his accounts, but he had been in Africa since "the above events".

HMRC's response

52. HMRC sympathise with the appellant's problems but say that the evidence that depression affected the appellant's ability to deliver his returns or pay his tax on the due dates was simply too vague as to dates and times, and unsupported by medical evidence, to count as a reasonable excuse.

53. While it was possible for reliance on a third party such as an accountant to be a reasonable excuse, it could only be one if the appellant took reasonable care to ensure that there was no failure by him. By his own admission he failed to "follow up" once he had asked his accountants to do the necessary work for him.

Burden of proof

54. HMRC say, as they always and correctly do in their SoCs in these penalty cases, that the burden is on them to show that the penalties were validly assessed, but that it is on the appellant to show they had a reasonable excuse.

55. In relation to HMRC's burden, we note and agree with the decision of this Tribunal (Judge Anne Redston and Toby Simon) in *Halfaoui v HMRC* [2018] UKFTT 13 (TC) where at [27] they said:

> "As this is a penalty appeal, the burden of proof is on HMRC. It is therefore for HMRC to prove that a Notice was provided to Mr Halfaoui specifying the date from which the daily penalty was payable. This would be the case, even had Mr Halfaoui not raised that issue in his grounds of appeal, see *Burgess and Brimheath Limited* v

> HMRC [2015] UKUT 0578 (TCC) and *Islam v HMRC* [2017] UKFTT 337 (TC)."

56. The appellant did not raise any issues as to validity, but nonetheless we consider them.

Discussion – late filing penalties – Schedule 55 FA 2009

Reasonable excuse

57. If we were to find for the appellant on this basis, then we need go no further. But in our view HMRC are quite correct. The grounds of appeal and other information given do not disclose any reasonable excuse for the failure to deliver a return on time. Reliance on a third party is not a reasonable excuse because of the appellant's failure to follow up once any possible excuse had ceased, which amounted to a lack of care, as to which see paragraph 23(2)(b) and (c) Schedule 55.

Procedural matters: notices to file

58. Recent decisions of this Tribunal have considered whether a notice to file is a vital prerequisite to a penalty for failure to deliver a return, and have concluded that it is – see *Patel & anor* v HMRC [2018] UKFTT 185 (Judge Brannan) and *Wood v HMRC* [2018] UKFTT 74 (Judge Popplewell and Will Silsby). We therefore need to consider if HMRC have shown that a notice to file was properly served on the appellant for both years.

59. HMRC's computer record shows that a "full return" was issued for the relevant tax years on 6 April 2010 and 6 April 2011. The significance of this was discussed in *Wood*. There the Tribunal said:

> "42. We speculate that a notice to file is the same as a tax return. HMRC have not said so in this appeal. But the judge has downloaded a return from HMRC's website as part of his review of this case to see whether it could assist. The return contains the words "This notice requires you by law to make a return of your taxable income….". So it does not seem too much of a leap of faith that a notice to file is indeed an integral part of a tax return.
>
> 43. But we do not think that simply using the words "This notice requires…." fulfils the requirements of Section 8(1)."

and

> "47. HMRC have not in this case suggested that this "notice" on a tax return is a notice to file. Nor have they suggested that there is no need to prove service of a specific notice to file served on this particular taxpayer because of the notice in the return which the taxpayer must have seen by dint of the fact that, ultimately, his returns for the relevant periods have been submitted. They have (see below) adduced to what they consider to be evidence that notice to file was given on a certain date to this particular taxpayer. Clearly, there would be no need for them to adduce this evidence if they considered that the notification on

> the front of a tax return is sufficient to discharge the officer of the Board's obligation to give a notice to file to a particular taxpayer.
>
> 48. Furthermore, it is often the case (and it is certainly true in this case), that HMRC have included in the bundle what they say is evidence that a notice to file was given to the taxpayer. They do this by way of extracts from their computer records entitled Self-Assessment "Return Summary" where against the words "Return Issued Type" the words "Notice to File" are included. Then follow the dates on which the return issued was given, and was due (both in paper and electronic form) below which there is a Date of Receipt.
>
> 49. Whilst evidence of date of receipt is important as regards the particular case, it is our view that the details regarding the notice to file and the date the return is issued, would be largely irrelevant if HMRC considers they were not a necessary pre-requisite to visiting a penalty on the appellant under Schedule 55."

60. With this decision in mind we asked Ms McLaughlin about the records in this case. What she said confirmed our own experience of very many of these late filing penalty cases. We find that in the tax years concerned[1] there were two ways in which HMRC sought to meet the requirement in s 8(1) Taxes Management Act 1970 that a person from whom HMRC required a return was to be told of that requirement:

> "… by a notice given to him by an officer of the Board –
>
> (a) to make and deliver to the officer, a return …"

61. The first way, in a case where the person had not consented to the terms and conditions for online delivery of returns, was to send a tax return in paper form to the person. Where this is done, the HMRC computer record shows "Full return". Such a return contains the wording, included in part in *Wood* at [42]:

> "Your tax return
>
> This notice requires you, by law, to make a return of your taxable income and capital gains, and any documents requested, for the year from 6 April 201[X] to 5 April 201[X+1]".

62. The second way, which is used where online filing had been used in a previous year is to issue a stand alone letter. The letter in Form SA316 sent to Judge Thomas on 6 April 2012, in relation to his own tax return, says that it is a:

> "Self Assessment
> Notice to complete a tax return"

63. The heading and relevant parts of the body are:

> "**It's time to complete your tax return**
>
> We are sending you this letter as you must, by law, send us:

[1] Since about 2015 taxpayers have been able to sign up for the notice to file to be sent to a secure mailbox.

- your tax return, even if you don't owe any tax or have already paid the tax you owe
- any documents or information we ask for on the tax return"

64. This is clearly a notice to file within s 8(1) TMA, despite the less legalistic language[2].

65. In *Wood* the Tribunal seems to take the view that the first method where the wording is incorporated in a return, was insufficient to amount to a notice to file within s 8(1) TMA, and the Tribunal records HMRC's apparent agreement to this proposition (at [47]).

66. But we think, although it is not crystal clear, that the tribunal in *Wood* was in fact there considering the question whether self-downloading a return with that wording from HMRC's website, completing it and delivering it to HMRC could amount to the giving of a notice, and that the Tribunal came to the view, with which we agree, that it couldn't. See [43] to [47] in *Wood* where the thrust of the argument relates only to self-help cases.

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[2] A quibble could be made about the title of the SA316. Section 8(1)(a) TMA requires the *making* of the return, and the *delivery* of it to the officer of HMRC who gave the notice to make and deliver it. The SA316 says of itself that it is a notice to "complete", which could be taken as meaning "make" but not "deliver". It could be argued by a nit-picker that the heading of the SA316 actually reflects the provisions of Schedule 55 FA 2009, paragraph 1(1) of which makes a failure to "make *or* deliver" a return by the due date subject to penalties. It would be a bold taxpayer who objected to a Schedule 55 penalty on the grounds that he had made his return, ie completed the boxes, even though he had not delivered it in time.

But the informality of language in the text goes much further with more recent SA316s, the changes no doubt consultant-driven. That for 2016-17 sent to Judge Thomas on 6 April 2017 says:

> "Our records show that you need to send us a Self Assessment tax return to tell us about your income from 6 April 2016 to 5 April 2017. We will not be sending you a paper return so please file your tax return online.
>
> By law you must send us your tax return and any information we ask for on the return – even if you don't owe any tax or have already paid the tax you owe."

A pedant might take issue with this wording. Saying "you need to send us a return" is arguably not the requiring of a person to make and deliver a return within s 8(1)(a) TMA. "Need" like many words of modality such as "must" is what grammarians call polysemic, having more than one meaning, and so is capable of ambiguity. "Need" and "must" both have what those same grammarians call an epistemic and a deontic sense, with the epistemic sense of "need" illustrated by someone saying "you need to see a doctor" which is not requiring them to see one, just advising them that they should, and of "must" by "he's the only one in the room wearing a suit and tie: he must be the judge". The deontic sense is one of obligation. Of course in the context of the SA316 as a whole with all the warnings it gives about penalties for failures to file, then "need" is obviously being used in the same deontic sense that "must" is in statutes, expressing an obligation rather than advice as in the epistemic.

"Please file your return online" is not exactly "requiring by law" either. It suggests how grateful HMRC would be if you deigned to file a return, rather than being a legal requirement with heavy sanctions for failure, but again context is all. Somewhat strangely the notice to file that is now sent to a secure mailbox where a person consents to electronic communication of a notice to file is far more peremptory.

67. By contrast at [42] in *Wood* the Tribunal asked itself whether the "Notice to file" wording on the "Return Summary" screenshot it had refers to an actual return with the wording we have quoted or to a separate notice. Its view on this was:

> "We speculate that a notice to file is the same as a tax return. HMRC have not said so in this appeal. But the judge has downloaded a return from HMRC's website as part of his review of this case to see whether it could assist. The return contains the words "This notice requires you by law to make a return of your taxable income….". So it does not seem too much of a leap of faith that a notice to file is indeed an integral part of a tax return."

68. We agree, as we noted in §64, that a return with the wording Judge Popplewell saw on the return he downloaded, *if sent to the taxpayer by HMRC*, constitutes a valid notice to file. We stress again that we agree that simply sending to HMRC a return with that wording that has been downloaded without any prior notice from HMRC is not delivery within s 8(1) TMA.

69. But it seems to us to be the case that in *Wood* what was sent to the appellant there was the SA316, not a return incorporating the notice to file wording. See *Wood* at [48]. Unfortunately the presenting officer in that case was unable to help the tribunal, whereas Ms McLaughlin was able to confirm our suppositions based on experience as to the true meaning of the different indications about the method of giving notice on the "Return Summary" page of the SA computer system.

70. The upshot of all this for this case is that we are satisfied that in both years a valid notice under s 8(1)(a) TMA was issued to the appellant.

71. But as to notification to the taxpayer of the requirement to make and deliver a return, which is also required as well as issue, s 115(2)[3] TMA says:

> "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 ... at his usual or last known place of residence, or his place of business or employment ..."

72. The verb used in s 8(1) is "be given" and s 8(1) is part of the Taxes Acts[4], and so s 115(2) applies to permit service by post of a notice to deliver a tax return.

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[3] Section 115(1) is about personal service, which is not suggested to have happened in this case.

Before 1942 neither personal nor postal service of a notice to file was actually necessary. It sufficed if the assessor (an office holder appointed by the General Commissioners) posted a notice on the door of the parish church (or chapel or market house or cross, or if there was none in the parish, the nearest church or chapel). That notice required all persons in the parish required by law to "make out" (ie make) and deliver Lists, Declarations and Statements (ie a return) to make out and deliver the return to the assessor. See s 98 Income Tax Act 1918 (and the £20 fine in s 98(5) for "wilfully tearing, defacing or obliterating" the notice).

73. By s 7 of the Interpretation Act 1978 ("IA"):

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

74. The expression "give" is not used in s 8(1) TMA, although "be given" is, but it would be a matter of extreme pedantry to say that s 7 IA has no application here. Thus if the return is correctly addressed and was posted then it is deemed to have been served. We were shown a printout of HMRC's address record for the appellant as it appears on their Self-Assessment computer system, and that showed an address in Brigg, Lincolnshire as the last known address on record.

75. We hold on the basis of this information that the notices to file were given to the appellant. He has not suggested otherwise or proved to the contrary so as to rebut the s 7 IA presumption (assuming the second part of s 7 IA is relevant to a notice to file[5]).

Were there failures to file a return by the due date?

76. In relation to the late filing penalties HMRC exhibited their records showing that the returns were received on 23 and 19 April respectively. The record for 2010-11 shows (though rather indistinctly) that the paper return was received on 23 April 2013 and the entries were captured locally on 22 May 2013. Further evidence that the return had not been received before 31 October 2011 (the day when the first of the penalties was triggered) was the issue of 30 day and 60 day reminder notices for daily penalties. And for evidence that the return had not been received before 31 October 2012 (the day when the last of the penalties was triggered) we had an SA Note made on 18 April 2013 that the appellant's agent had asked for a paper return and another SA Note made on 22 May 2013 to the effect that the data on the return had been captured.

77. The appellant has not suggested that the return was delivered before the date recorded by HMRC. We find that the return was not delivered before or on 31 October 2011, nor had it been delivered before or on 31 October 2012. Accordingly we hold that the preconditions for the assessment of all the penalties for 2010-11 under Schedule 55 FA 2009 had been met.

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[4] At least for the purposes of s 115 and other sections of TMA. See the definition in s 118(1) TMA of the "Taxes Acts".

[5] In my view it isn't, as is shown in *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch) (Morgan J) and *Olalekan v HMRC* [2018] UKFTT 142 (Judge Anne Scott and Ian Malcolm) referring to *EK v City of Edinburgh Council* (LTS/TR/2016/30). Keith Gordon, writing in Taxation magazine 3 May 2018, considers that a passage from the judgment of Rix LJ in *Freetown Ltd v Assethold Ltd* [2012] EWCA Civ 1657 points in the other direction, but without hearing argument on the point I am not convinced. He also somewhat faintly argues that a s 8(1) notice to file is time dependent so bringing it within the second leg of s 7 IA, but again I am not convinced.

78. The record for 2011-12 shows that the return was filed electronically on 19 April 2013. By regulation 9 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) the recording of the receipt on HMRC's records sets up a presumption that the return was received on that day (and therefore no earlier). This presumption is capable of rebuttal, but there is in the bundle no suggestion of any rebuttal. We find that the return was not filed before or on 31 January 2013. Accordingly we hold that the precondition for the assessment of the penalty under paragraph 3 Schedule 55 FA 2009, which was the only penalty under that schedule for that year, was met.

Late filing penalties under paragraph 3 Schedule 55 – both years

79. We hold that penalties of £100 are payable for 2010-11 and 2011-12 for the failure to pay by 31 October 2011 and 31 January 2013 respectively, as we have found that there was no reasonable excuse for the failure. We note that the assessments were in time, being made in each case within 2 years of the filing date (see paragraph 19 Schedule 55). No issue as to valid service arises.

Late filing penalties under paragraph 4 Schedule 55 2010-11

80. In relation to the daily penalties there is no "SA reminder" or "SA 326D" for the appellant in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with - see *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards).

81. We therefore cancel the daily penalties.

Initial 6 month late filing penalties under paragraph 5 Schedule 55 2010-11

82. Paragraph 5 Schedule 55 reads:

> "(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."

83. This must be read with paragraph 24:

> "(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)."

84. In this case when the penalty under paragraph 5 was assessed, the return had not been made. HMRC's statement of case does not mention paragraph 24. We were shown no evidence that any one or more of the actual Commissioners for Her Majesty's Revenue and Customs or any officer of Revenue and Customs[6] determined, on or before 7 August 2012, what amount would have been shown to be due or payable by the appellant in respect of income tax and Class 4 NICs for 2010-11 if a complete and accurate return had been delivered on either 31 October 2011 or 31 January 2012. Accordingly we directed HMRC to tell us whether in this case any officer of HMRC did what paragraph 24(2)(a) requires. The answer was, to paraphrase and cut through the obfuscation, "no".

85. Nor was it suggested in the SoC, by HMRC at the hearing or in post-hearing submissions that the computer used by HMRC for this purpose had been programmed to consider what the amount might have been based, say, on previous returns. But in any event we do not think that any computer, however smart, let alone HMRC's one, can form a belief however much information it might have.

86. HMRC's Self Assessment Manual at paragraph 61240 in fact confirms that where the return has not been received before the issue, a £300 penalty is automatically issued, irrespective of the taxpayer's known liability to tax in previous years.

87. We asked HMRC to inform us after the hearing, assuming that the answer to the first question was indeed "no", whether in their view that made the assessment of a penalty of £300 without any such consideration as is required by paragraph 24 invalid. They said in those submissions that they did not agree that the assessment was invalid, and say that in the absence of a return or a determination of the amount of tax due from the appellant it was appropriate to make an assessment for £300.

88. We can see that had a determination under s 28C TMA been made before the penalty was issued that would be a very relevant matter, because a determination must also be made to the best of an officer's information and belief, the same test as in paragraph 24(2)(a). Had a determination been made that the tax due was £6,000 or less that would certainly have justified a penalty of no more than £300. But in fact no determination was made and we have no way of knowing if it would have been a figure of £6,000 or less or substantially more. What we do know is that the tax and NIC due in 2010-11 was over £25,000.

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[6] Paragraph 24 Schedule 55 gives "HMRC" as the determining person. Paragraph 27(3) Schedule 55 defines "HMRC" as meaning "Her Majesty's Revenue and Customs". Section 4 Commissioners for Revenue and Customs Act 2005 ("CRCA") shows that that term means the Commissioners (the persons referred to in s 1 CRCA) and the officers of Revenue and Customs (the persons referred to in s 2 CRCA). Sections 12 to 14 CRCA deal with exercise of functions by officers and delegation by the Commissioners. In practice a determination of the type contemplated by paragraph 24 will be made by an officer of HMRC.

89. We also take into account that paragraph 24 is an unusual provision. Tax-geared penalties, usually imposed for failures such as errors in returns and failures to pay tax, are invariably imposed after the amount of tax is apparent or determined. In paragraph 24 HMRC is enabled to short cut the process of establishing what the tax actually is by making an early assessment of a tax geared penalty on the basis of a belief of an officer formed from information that officer has received or acquired. In our view when HMRC seek to short cut the penalty process by assessing before the return is filed they must follow the law, even if the automatic exercise may sometimes underestimate the actual penalty that will become due and will never overestimate it.

90. We therefore find that in the absence of any exercise such as is required by paragraph 24 Schedule 55 FA 2009 the assessment of £300 is not a valid assessment made in accordance with the requirements of paragraph 24 Schedule 55. We therefore cancel it.

Initial 12 month late filing penalties under paragraph 6 Schedule 55 2010-11

91. Paragraph 6 Schedule 55 provides:

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

> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300."

92. HMRC have not suggested that in this case that the return, or information within it, was withheld deliberately. But neither have they suggested that any one or more of the actual Commissioners of HMRC or any officer of Revenue and Customs determined, on or before 19 February 2013, what amount would have been shown to be due or payable by the appellant in respect of income tax and Class 4 NICs for 2010-11 if a complete and accurate return had been delivered on 31 October 2011 or 31 January 2012 or whether the return had been deliberately withheld.

93. As with the paragraph 5 penalty, we directed HMRC to tell us whether in this case any officer of HMRC did what paragraph 24(2)(a) requires. The answer was again "no".

94. We therefore find that in the absence of any exercise such as is required by paragraph 24 Schedule 55 FA 2009 the assessment of £300 is not a valid assessment made in accordance with the requirements of paragraph 24 Schedule 55. We therefore cancel it.

The second paragraph 5 and 6 assessments

95. On 28 May 2013 HMRC issued what were shown on the "View Penalties" screenshot as further late filing penalties for 6 month and 12 month failures to file a return.

96. The penalty shown on them is £1,020 which is 5% of £20,400. And when £1,020 is added to the £300 charged under the first penalties the result, £1,320 is 5% of £26,416, the income tax and Class 4 NICs amounts shown on the return delivered on 23 May. These must then be assessments made under paragraph 24(2)(b) Schedule 55 FA 2009.

97. But paragraph 24(2)(b) Schedule 55 does not day that a further assessment is to be made but says that the penalty is to be "re-assessed". That suggests that the paragraph 24(2)(b) assessment replaces the paragraph 24(2)(a) "best of information and belief" assessment and does not add to it. Nor is the term in paragraph 24(2)(b) "supplementary assessment", a term used in paragraph 18(4) Schedule 55. Paragraph 18(4) says:

> "A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return."

98. The wording in paragraph 18(4) is not unique to Schedule 55. It appears in paragraph 11(4) Schedule 56 (late payment penalties), in paragraph 13(6) Schedule 24 FA 2007 (errors in returns) and in paragraph 16(6) Schedule 41 FA 2008 (failure to notify chargeability etc).

99. A supplementary assessment may only be made to *increase* a tax geared penalty. Schedule 24 FA 2007, Schedule 41 FA 2008 and Schedule 56 FA 2009 only impose tax-geared penalties, while in Schedule 55 the only tax geared penalties in the tax years in question were in paragraphs 5 and 6 and in paragraphs 9 and 10 (penalties under the Construction Industry Scheme equivalent to those in paragraphs 5 and 6), and these four paragraphs are the only ones which are subject to paragraph 24.

100. It is possible that when Parliament enacted paragraph 18(4) it intended the supplementary assessment rule to apply only to the cases in paragraphs 6 and 10 where the return was deliberately withheld, as these are the only paragraphs that apply a different percentage penalty by reference to the taxpayer's behaviour. But we do not think this can be the case, because the paragraph 6 and 10 behaviour-based penalties do not change the amount of tax on which the penalty is based – they simply apply increased percentages of the tax that should have been shown on the return. And we note that none of the penalties in Schedule 56 are behaviour-based.

101. There is therefore an apparent clash between paragraph 18(4) and paragraph 24(2)(b) as it seems both can apply in relation to the four paragraphs of Schedule 55 referred to above. The only sensible resolution of the conflict would seem to be that paragraph 18(4) applies where paragraph 5 or 6 (or 9 or 10) penalties are first assessed after the return has been delivered and where circumstances are such that the return and self-assessment undercharge the appellant. If that undercharge is discovered in the course of an enquiry the paragraph 18(4) allows the tax geared penalty to reflect the correct figure.

102. Paragraph 24(2)(b) then applies where a penalty was assessed before the return was delivered, and the HMRC determination of the penalty turns out to be inaccurate in the light of the return, so a reassessment is made. The re-assessment may reduce the original figure if it was more than £300 or it may increase it whether it was £300 or a higher figure originally. Because the re-assessment may result in a lower figure it cannot be regarded as a supplementary or further assessment.

103. The logical result of the distinction we have drawn is that a re-assessment is just that – the re-assessment replaces the original assessment rather than supplements or adds to it. In this case the evidence exhibited with the SoC is that the re-assessment is £1,020 which is less than 5% of the tax and Class 4 NICs shown on the return. But because the evidence consisted of a bare line in a screenshot showing a figure of £1,020 we directed HMRC to produce if they could a copy of the notice of a paragraph 24(2) re-assessment. They sent us an example showing a re-assessment of both a paragraph 5 and a paragraph 6 penalty.

104. The form (SA370 – the generic form for all Schedule 55 penalties) shows on the first page the total of the penalties charged, in this case £400. On the second page is a breakdown of this figure. There are two lines. The first says

> "**6 months late** – now you have filed your tax return you have a further penalty to pay. The revised penalty is 5% of £10000.00 (the total tax due), less the £300 penalty already charged on the tax we determined was due. £200"

The second line is identical apart from referring to the return being 12 months late.

105. We note that the wording refers to a determination by HMRC. We think that this form must have been devised and prescribed by the Commissioners for HMRC under s 113 TMA on the basis that in every case paragraph 24(2) Schedule 55 would be properly applied.

106. We can therefore confidently assume that in this case the actual Form SA370 said:

> "**6 months late** – now you have filed your tax return you have a further penalty to pay. The revised penalty is 5% of £26,416.00 (the total tax due), less the £300 penalty already charged on the tax we determined was due. £1,020"

and that it showed £2,040 on the front page.

107. In our view a re-assessment of the penalties required HMRC to assess £1,320 in relation to both the paragraph 4 failure and the paragraph 5 failure. But they have only re-assessed £1,020 on each.

108. Our powers as set out in paragraph 22(1) Schedule 55 where liability rather than amount is contested are to confirm or quash, not to vary. We would, subject to what follows, confirm the re-assessments of the penalties at £1,020 each. As £2,040 is the maximum amount of penalties that may be recovered, had we not held that the original £300 penalties were invalid, we would have held that it was necessary for HMRC to cancel any demand for the £600 charged by the initial assessments.

109. The appellant has appealed against the two penalties of £1,020 on the grounds that he had a reasonable excuse. We have held he has not. The final question then is whether these penalties were procedurally correct, including whether the notices of the assessments were validly served.

110. We do not think the notices of these re-assessed penalties were validly served. HMRC's records for the appellant show that on 23 May 2013 his address on the self-assessment computer system was changed from the address in Brigg to one described simply as "Lot 2" with nothing further. At the hearing Ms McLaughlin produced HMRC records of addresses on its PAYE system and that showed one for the appellant at this time of an address starting Lot 2 and continuing with a full address in Bunbury, Western Australia where the appellant was working in the mining industry.

111. This address was at the time of the issue of the notices of assessment of the re-assessed penalties the appellant's last known address, ie known to HMRC. But we thought it more likely than not that a notice issued by the self-assessment computer system would use the address on that system and not that on the PAYE system. "Lot 2" is not a proper address without more and so we consider that the assessments issued on that day would not have been properly addressed and would not have been served on the appellant. It is irrelevant that his accountants appealed against the assessments (with others). There are a number of ways the appellant could have got to know of the

fact that HMRC had issued the assessments, as his address on the self-assessment system had changed back to that in Brigg on 9 July 2013.

112. These penalties are therefore cancelled as not being validly served.

The effect of the inclusion of Class 4 NICs in the tax on which the penalty is based

113. Had we not cancelled the second paragraph 5 and 6 penalties for non-service and had they been for £1,320 we would have considered whether that amount was correct. This was because the figure of £26,416 included Class 4 NICs of £3,895.96.

114. Paragraph 1 Schedule 55 in the Table refers to income tax, but nowhere refers to Class 4 NICs. We therefore looked at the legislation, primary and secondary, relating to Class 4 NICs to see if anything had been done to apply Schedule 55 to them.

115. Sections 15 to 18A of, and Schedule 2 to, the Social Security (Contributions and Benefits) Act 1992 ("SSCBA") deal with Class 4 NICs. Section 16(1) provides that:

> "All the provisions of the Income Tax Acts, including in particular—
>
> (a) provisions as to assessment, collection, repayment and recovery, and
>
> (b) the provisions of Part VA (payment of tax) and Part X (penalties) of the Taxes Management Act 1970,
>
> (c) the provisions of Schedules 55 and 56 to the Finance Act 2009
>
> …
>
> shall, with the necessary modifications, apply in relation to Class 4 contributions under this Act and the Northern Ireland Contributions and Benefits Act as if those contributions were income tax chargeable under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 in respect of the profits of a trade, profession or vocation which is not carried on wholly outside the United Kingdom …"

116. Paragraph (c) was inserted into s 16(1) SSCBA with effect from 1 April 2011 by the Finance Act 2009, Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order 2011 (SI 2011/702).

117. The effect of that amendment is to treat all references to income tax in Schedule 55 as including references to Class 4 NICs. What are these references? "Income tax" is mentioned only in entries in the Table in paragraph 1 and in paragraph 6A (meaning of categories) which entry is relevant only to a paragraph 6 penalty. But income tax is a "tax" and we take it that where Schedule 55 refers to "tax" in a context which could include income tax, then s 16(1)(c) SSCBA applies to that as well. This brings in relevantly paragraphs 5, 6, 18, 19, 21 and 24. We are satisfied as a result that in paragraphs 5, 6 and 24 where "tax" is referred to that it includes Class 4 NICs.

118. But the relevant phrase in relation to the amount of the re-assessments is "tax which would have been shown in the return in question" and that is defined in paragraph

24(1) Schedule 55 to mean the amount of tax 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.

119. In relation to income tax there is no issue as to that amount in this case[7]. But in relation to Class 4 NICs the question arises whether any amount is required to be shown on a complete and accurate return for 2010-11 and 2011-12 in relation to Class 4 NICs.

120. What is to be shown on a complete and accurate return depends on two things. What the return itself requires and whether what it requires is a statutory requirement.

121. A complete and accurate return for 2010-11 and 2011-12 (SA 100) required the return of the profits of a trade. It also required a self-assessment of the amount of income tax and of the Class 4 NICs that were due on the basis of the trading profits.

122. The amount of the Class 4 NICs could be computed by the taxpayer in accordance with the SA110 Tax Calculation Summary Notes or be calculated by HMRC using their own software program which underlies the SA110.

123. For 2011-12[8] the SA103F pages for a trade had three additional boxes relating to Class 4 NICs. Two of these required a cross in a box if either the taxpayer was exempt from paying Class 4 NICs or had a deferment certificate. The third (box 101) required the figure of any adjustments that were needed to turn the income tax trading profits into Class 4 NICs profit.

124. The self-assessment calculation of Class 4 NICs as shown on pages TCSN31 and 32 starts with the figure of taxable profits from the trade on SA103F Box 75. From that adjustments as shown on box 101 are deducted. The figure remaining is the one to which the relevant percentages apply and the result is the Class 4 NICs on the self-assessment.

125. The next issue is: does that form of the return and self-assessment within it comply with the law? As to the self-assessment s 15(2) SSCBA says:

> "Class 4 contributions in respect of profits … shall be payable—
>
> (a) in the same manner as any income tax which is, or would be, chargeable in respect of those profits … (whether or not income tax in fact falls to be paid), and
>
> (b) by the person on whom the income tax is (or would be) charged,
>
> in accordance with assessments made from time to time under the Income Tax Acts."

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[7] Apart from the oddity of the apparent practical effect of the wording. The only returns which show an amount of tax when delivered would seem to be those where the taxpayer completes and delivers the so-called "Tax Calculation Summary" (SA110) which contains a self-assessment.

[8] The process was the same in 2010-11

126. Section 16(1)(a) says, as we have seen, that all the provisions of the Income Tax Acts, including in particular provisions as to assessment, apply in relation to Class 4 NICs as if those contributions were income tax chargeable under ITTOIA in respect of the profits of a trade which is not carried on wholly outside the United Kingdom.

127. Does the reference to "assessments" in s 15(2) and "assessment" in s 16(1)(a) include self-assessments? The wording predates self-assessment and was not amended following the introduction of self-assessment legislation in FA 1994 and subsequently.

128. If the provisions fell to be interpreted in relation to years before 1995-96 we would have no hesitation in saying that the provisions in the Income Tax Acts relating to assessment in s 16(1)(a) SSCBA was a reference to Part 4 of TMA. For 1995-96 onwards the making of a self-assessment is provided for in Part 2 TMA, unlike the making of assessments which are not self-assessments which remain in Part 4. Being in Part 2 though does not stop s 9 TMA being a provision as to assessment, and it should be noted that s 16(1) refers to "all the provisions of the Income Tax Acts apply, *including in particular* provisions as to assessment …". There is then no doubt in our minds that a self-assessment of Class 4 NICs is possible.

129. It also follows that s 8 TMA, being a provision of the Income Tax Acts, applies so that s 8(1) must be read as requiring information for the purposes of establishing liability to Class 4 NICs.

130. We did had a slight doubt when examining SSCBA for the answer to the questions we had posed ourselves. A contrast may be drawn between the provisions relating to Class 4 and the more recent approach to Class 2 NICs. These were payable directly to HMRC before 2015-16, but from then s 11A(1) SSCBA, inserted by paragraph 3 Schedule 1 NICA 2015, provides that:

> "The following provisions apply, with the necessary modifications, in relation to Class 2 contributions under section 11(2) as if those contributions were income tax chargeable under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 in respect of profits of a trade, profession or vocation which is not carried on wholly outside the United Kingdom—
>
> (a) **Part 2 (returns),** Part 4 (assessment and claims), Part 5 (appeals), Part 5A (payment of tax), Part 6 (collection and recovery) and Part 10 (penalties) of the Taxes Management Act 1970;
>
> …
>
> (d) Schedules 55 and 56 to that Act (penalties for failure to make returns etc or for failure to make payments on time)… [Our emphasis]

131. But the main difference in approach here is that the matters in paragraph (a) of s 11A(1) are an exhaustive list whereas in s 16(1) they are examples of what is included, no doubt the most important at the time of enactment in 1992. The wording of s 11A does not cause us to change our view of the interpretation of s 16 SSCBA.

132. Two further questions arose in our minds from the terms of s 15 SSCBA and regulation 91 of the Social Security (Contributions) Regulations 2001 (SI 2001/2004) ("SSCR") as they apply to the facts of this case. Section 15(1) says:

> "(1) Class 4 contributions shall be payable for any tax year in respect of all profits which—
>
> (a) are immediately derived from the carrying on or exercise of one or more trades, professions or vocations, ...
>
> (b) are profits chargeable to income tax under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 for the year of assessment corresponding to that tax year, and
>
> (c) *are not profits of a trade, profession or vocation carried on wholly outside the United Kingdom*." [Our emphasis].

133. Regulation 91 SSCR provides:

> "Any earner who—
>
> (a) at the beginning of a year of assessment is over pensionable age; or
>
> (b) for the purposes of income tax *is not resident in the United Kingdom in the year of assessment*;
>
> shall be excepted from liability for contributions under section 15 of the Act (Class 4 contributions). [Our emphasis].

134. Those further questions were: was either the appellant's trade carried on wholly outside the United Kingdom for 2010-11 and 2011-12 or was he resident outside the United Kingdom in either of those years?

135. Various statements have been made by the appellant and his accountants about his living and working abroad. But we do not think we can decide the non-residence issue in the appellant's favour for two reasons.

136. First we simply do not have sufficient detailed evidence from the appellant to show whether he was not resident in the UK for either or both years. There is nothing on the return, for example the use of the SA109 residence pages, to suggest that the appellant was claiming to be non-resident.

137. Second, he cannot have put a cross in the box in the SA103F pages in the return showing he was excepted, or the tax calculation would not have shown a Class 4 NICs liability. It is possible that he did have an exception certificate and that fact might have been overlooked by his accountant or the accountant might not have been told. But again we have no evidence that that was the case.

138. As to the wholly foreign trade point, while it is possible for an individual to be resident in the UK but to carry on a trade (otherwise than in partnership) wholly abroad[9] we imagine that had the appellant done this he would have suffered foreign tax but there

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[9] See eg *Ogilvie v Kitton (Surveyor of Taxes)* 5 TC 338

is no suggestion in the tax calculations that any credit or deduction for foreign tax was being claimed. We do note that there is nowhere in the tax return for a person to demonstrate that their trade is carried on wholly abroad, no doubt because of the rarity of the case, but a white space entry could have been made.

139. We therefore consider that Class 4 NICs were in principle payable. Therefore the calculation of the tax that would be shown on a complete and accurate return is correct to include those amounts.

Discussion - late payment penalties (Schedule 56 FA 2009)

Reasonable excuse

140. If we were to find for the appellant on this basis, then we need go no further. But in our view HMRC are quite correct. The grounds of appeal and other information given do not disclose any reasonable excuse for the failure to pay the tax on time. No suggestion was made by the appellant that he relied on a third party to make payment on his behalf.

The law on late payment penalties

141. By paragraph 1(1) Schedule 56 FA 2009:

> "A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4."

142. The relevant entry in Column 3 is for Item 1 (income tax) and reads:

> "Amount payable under section 59B(3) or (4) of TMA 1970".

143. Of these subsection (4) is the relevant one. That subsection reads:

> "(4) In any other case, the difference shall be payable … on or before the 31st January next following the year of assessment."

144. The "difference" referred to is that in s 59B(1):

> "(1) 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 or otherwise) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him …"

This difference is commonly called the "balancing payment".

145. The date specified in column 4 for item 1 in paragraph 1(1) Schedule 56 is:

> "The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid."

For 2010-11 that date is 2 March 2011 and for 2011-12 is 1 March 2013.

146. Paragraph 3 Schedule 56 sets out the penalties that may become payable in relation to item 1:

> "(1) This paragraph applies in the case of—
>
> (a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,
>
> …
>
> (2) P is liable to a penalty of 5% of the unpaid tax.
>
> (3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.
>
> (4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount."

147. The dates in paragraph 3(3) are 2 August 2011 and 1 August 2012, and those in paragraph 3(4) are 2 February 2012 and 1 February 2013 respectively[10].

2010-11

148. For 2010-11 the s 59(4) TMA difference is £26,416. This includes Class 4 NICs as Schedule 56 FA 2009 is included in the provision listed in s 16(1)(c) SSCBA 1992 as applying to those NICs. HMRC included in the bundle a large number of "statements of account". We do not understand why there are so many or why they are dated as they are. To take an example, the first we have is numbered 38 and in the same box on the screen shot there is a date 24 June 2013. It might be thought then that is the statement of account as at that date and indeed it shows a number of items created from dates beginning with 15 May 2013 and shows credits against those items, many on 22 May. But it also shows credits dated 2017 and shows items of charge created in August 2013 and January 2014. And there is a date printed on the page in the bundle which is 13 December 2017. Thus we have no idea of the significance of the date 24 June 2013.

149. But these documents have been put forward to show when a charge to tax was created and when payment (including credit was made) so we examined statement number 38 to see what it showed, and where we had queries or doubts we have looked at all the other pages.

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[10] We have noted (in §§17, 18, 25 & 26) that on the screenshots shown to us, the penalties are labelled 30 day, 6 month and 12 month. This is slightly inaccurate for any case where the first month of default does not have 30 days (and in the vast majority of cases the first month will be February) as the 5 and 11 month periods run from the 30th day after the due date, not from the end of the first month. But it is a convenient shorthand description which cannot mislead anyone, and it seems the HMRC computer allows several days of grace before making the assessment. Thus the chances of an invalid assessment say raised on 30 July where the due date was 31 January are slim.

150. The first line of statement number 38 shows an amount of £26,416 being entered on the statement on 22 May 2013 as the balancing payment due and payable for 2010-11, and after that entry it shows credits reducing the amount being dated 15[11] and 22 May 2013. There is no other evidence about payment of the tax that suggests it was paid before or on 2 February 2013, the paragraph 3(4) date. We find that it had not been. The necessary precondition for the assessment of the Schedule 56 penalties is therefore met.

151. The amount of the penalty given by paragraph 3 Schedule 56 for the failure to pay by the penalty date, by 5 months from that date and by 11 months from that date is 5% of the unpaid tax. The penalty in each case was £1,002. That is 5% of £20,040 whereas the tax shown on the self-assessment, made after the last penalty date, was £26,416. The difference is £6,376. This is not the Class 4 NICs nor can we see any reference to such a figure or combination of figures that show this amount being credited against the balancing payment for 2010-11.

152. Can we then increase the penalty to what is the correct figure of £1,320? That depends on the scope of the appeal and the powers given to the Tribunal. Paragraph 13(1) Schedule 56 FA 2009 allows an appeal against liability and paragraph 13(2) an appeal against the amount. The appeal against late payment penalties put forward what was said to be a reasonable excuse, so it was an appeal against liability, not against the amount. In other cases the Tribunal has taken a relaxed attitude to appeals allowing them to be taken as an appeal under both legs of paragraph 13. But this is done where it is in the taxpayer's interests to appeal the amount. No taxpayer is going to appeal the amount of a penalty on the basis that they have been undercharged.

153. In this case therefore we say that there is no appeal against the amount and so there is nothing about the amount that we can determine. We note that had there been an appeal against the amount it would be open to the Tribunal to increase that amount – paragraph 15(2)(b) Schedule 56. HMRC have the power to make a replacement assessment under paragraph 11(4A) (as it stood before substitution by paragraph 10 Schedule 50 FA 2015), but the time allowed for making such an assessment has long since passed.

154. We have been given no reasonable excuse for the failure to pay. Even if the excuses put forward for the late filing had been acceptable they were not in terms directed to the question of late payment. We would therefore, all other things being equal, have upheld the penalties. But they were all issued on 28 May 2013, and for the reasons we have given in relation to the re-assessments of paragraph 5 and 6 Schedule 55 penalties at §§109 and 110 we cancel these penalties.

2011-12

155. For 2011-12 HMRC's Statement of Account 38 as at 24 June 2013 with the appellant shows an amount of £1,200.19 being entered on the statement on 22 May 2013 as the as the first instalment for 2011-12 (which would have due and payable on

[11] How it is possible to deduct a credit created before the balancing payment was "created" on the statement we do not know.

31 January 2012) and an amount of £1,200.19 being entered on the statement on 22 May 2013 as the tax and Class 4 NICs payable as the second instalment for 2011-12 (due and payable on 31 July 2012). No credits reducing the amount are shown. There is no evidence that anything was paid by way of tax or payment on account before or on 1 March 2013. We find that it had not been. The necessary precondition for the assessment of the Schedule 56 penalties is therefore met.

156. But nothing is shown on the statement as being a balancing payment, and we have sought to understand why, and whether that absence affects the penalty.

157. In a normal case where returns for a year ("year 1") are filed on time, payments on account for the next year ("year 2") are established from the return for year 1 and become due in the future. When year 2's return is filed the balancing payment (or repayment) for that year takes the payments on account that have been *paid* into account (s 59B(1) TMA).

158. In this case no payments on account were due in respect of 2010-11 because 2009-10 involved a repayment of deemed income tax suffered under the CIS. Had the 2010-11 return been filed on or shortly after 31 January 2012 showing as it did a liability of £26,416, two payments on account of £13,208 for 2011-12 would have become due for payment on 31 January 2012 and 31 July 2012. But the return was not filed until 23 April 2013, a few days after the 2011-12 return was filed.

159. By s 59A(4A) where a self-assessment is made for the previous year after the date for payment of the payments on account (the case here), then for the year after:

> "the amount of the payment on account shall be, and shall be deemed always to have been, equal to 50 per cent of the relevant amount as determined on the basis of the assessment."

160. Thus following the filing of the 2010-11 return the payments on account for 2011-12 are established as £13,208 each.

161. At that time however the 2011-12 return had already been filed showing an amount under s 59B(1) TMA as due and payable of £2,400.38.

162. What the statement of account seems to have done then is to ignore the payments on account that should have become due and to treat the balancing payment for 2011-12 of £2,400.38 as being formed of two payments on account of £1,200.19 each.

163. This treatment, whether right or wrong[12], cannot however determine the answer to the relevant questions for us, namely whether the amount referred to as the difference in s 59B(4) TMA had been paid at the appropriate time and what that amount was.

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[12] Although payments on account are not relevant for the purposes of Schedule 56 and the treatment of the charge to tax of £2,400.38 in the Statement of Account has no bearing on Schedule 56, the calculation of the payment on account is important for the purposes of charging interest from the correct date. Interest runs on payments of account from the "late payment interest start date", which is

164. The "difference" is the amount shown on the self-assessment as due after deducting any payments on account "made by him". "Made by him", ie the appellant, seems on the face of it to refer to amounts actually paid, and not simply amounts which fall to be treated as due as payments on account. There is no separate sanction (apart from interest) for penalising the late making of payments on account, so it is wholly understandable that the amount which must be considered at the penalty date is the total of the tax unpaid for the tax year as shown on the self-assessment and not simply the amount found after deducting the amounts allocated as payments on account but still not paid at the penalty date[13].

165. In this case then the amount is £2,400.38 and 5% is £120, the amount charged by the assessment. We have been given no reasonable excuse for the failure to pay. Even if the excuses put forward for the late filing had been acceptable they were not in terms directed to the question of late payment. The assessment of the penalty is in time, being made within the period of 2 years starting on 1 March 2013, but because the assessment was issued on 28 May 2013 the assessment was not properly addressed (see §§109 and 110) and was not validly served on the appellant, and so for the same reason as we cancelled the late payment penalties for 2010-11 we cancel this assessment.

166. As we mentioned, we asked HMRC if they would follow the treatment of this first late payment penalty for 2011-12 when considering the other penalties not appealed against, and they said they would. We note that the second and third late payment penalties seem to have been properly served, so we say that had service not been an issue with the first one, we would have upheld it. We do not therefore expect HMRC to waive the later penalties.

Special circumstances

167. HMRC have addressed the question whether there were special circumstances in relation to each of the penalties, but have found none. We cannot say that this decision was flawed.

Decisions

168. Under paragraph 22(1) Schedule 55 FA 2009 we affirm the decision of HMRC to assess a penalty of £100 for the tax year 2010-11 for the appellant's failure to deliver his tax return by the due date.

"the date on which that amount becomes due and payable" (s 101(4) FA 2009). Schedule 53 FA 2009 contains further provisions dealing with payments on account, none of which seem to be applicable to this case. HMRC's decision to treat the payments on account as equal to the tax on the self-assessment for the purposes of interest seems to be a sensible but not strictly legally correct response.

[13] HMRC's treatment of payments on account ("PoAs") seems to paper over a perhaps wider problem with s 59A TMA. If a balancing payment is the tax on the return less PoAs actually paid, what happens if the PoAs are not paid by the time the return is filed? There is nothing in s 59A or s 59B that says that the PoAs are cancelled: only a claim under s 59A(3), (4A) or (4B) can do that and they do not apply. The PoAs seem to continue to be due, as well as that part of any balancing payment that corresponds to the unpaid PoAs.

169. Under paragraph 22(1) Schedule 55 FA 2009 we cancel the decision of HMRC to assess a penalty of £900 for the tax year 2010-11 for the appellant's failure to deliver his tax return by a date three months after the due date.

170. Under paragraph 22(1) Schedule 55 FA 2009 we cancel the decision of HMRC to assess a penalty of £300 for the tax year 2010-11 for the appellant's failure to deliver his tax return by a date six months after the due date.

171. Under paragraph 22(1) Schedule 55 FA 2009 we cancel the decision of HMRC to assess a penalty of £1,020 for the tax year 2010-11 for the appellant's failure to deliver his tax return by a date six months after the due date.

172. Under paragraph 22(1) Schedule 55 FA 2009 we cancel the decision of HMRC to assess a penalty of £300 for the tax year 2010-11 for the appellant's failure to deliver his tax return by a date twelve months after the due date.

173. Under paragraph 22(1) Schedule 55 FA 2009 we cancel the decision of HMRC to assess a penalty of £1,020 for the tax year 2010-11 for the appellant's failure to deliver his tax return by a date twelve months after the due date.

174. Under paragraph 22(1) Schedule 55 FA 2009 we affirm the decision of HMRC to assess a penalty of £100 for the tax year 2011-12 for the appellant's failure to deliver his tax return by the due date.

175. Under paragraph 15(1) Schedule 56 FA 2009 we cancel the decision of HMRC to assess a penalty of £1,002 for the tax year 2010-11 for the appellant's failure to pay income tax and Class 4 NICs by a date 30 days after the due date.

176. Under paragraph 15(1) Schedule 56 FA 2009 we cancel the decision of HMRC to assess a penalty of £1,002 for the tax year 2010-11 for the appellant's failure to pay income tax and Class 4 NICs by a date 30 days and 5 months after the due date.

177. Under paragraph 15(1) Schedule 56 FA 2009 we cancel the decision of HMRC to assess a penalty of £1,002 for the tax year 2010-11 for the appellant's failure to pay income tax and Class 4 NICs by a date 30 days and 11 months after the due date.

178. Under paragraph 15(1) Schedule 56 FA 2009 we cancel the decision of HMRC to assess a penalty of £120 for the tax year 2011-12 for the appellant's failure to deliver his tax return by a date 30 days after the due date.

179. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 4 JUNE 2018

APPENDIX

SCHEDULE 55 PENALTY FOR FAILURE TO MAKE RETURNS ETC

PENALTY FOR FAILURE TO MAKE RETURNS ETC

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

(2) Paragraphs 2 to 13 set out—

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

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

…

(4) In this Schedule—

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

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

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

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

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

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

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

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

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

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

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

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

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

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

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

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

SPECIAL REDUCTION

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

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

(a) ability to pay, or

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

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

(a) staying a penalty, and

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

INTERACTION WITH OTHER PENALTIES AND LATE PAYMENT SURCHARGES

17—(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the same liability to tax.

(2) In sub-paragraph (1) the reference to "any other penalty" does not include—

(a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).

…

ASSESSMENT

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

(a) assess the penalty,

(b) notify P, and

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

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

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

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

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

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

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of the liability to tax which would have been shown in a return.

19—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) “appeal period” means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

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

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

21—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about

bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

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

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

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

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

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

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

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

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

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

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

SCHEDULE 56 PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

PENALTY FOR FAILURE TO PAY TAX

1—(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

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

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty is incurred*
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
…	…	…	…

SPECIAL REDUCTION

9—(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.

ASSESSMENT

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

(a) assess the penalty,

(b) notify P, and

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

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

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

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

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

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

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of an amount of tax which was due or payable.

(4A) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of an amount of tax which was due or payable.

…

12—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the date specified in or for the purposes of column 4 of the Table (that is to say, the last date on which payment may be made without incurring a penalty).

(3) Date B is the last day of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of the amount of tax in respect of which the penalty is assessed, or

(b) if there is no such assessment, the date on which that amount of tax is ascertained.

(4) In sub-paragraph (3)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

APPEAL

13—(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.

14—(1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

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

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

(a) affirm HMRC's decision, or

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

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

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

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

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

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

REASONABLE EXCUSE

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

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

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

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

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