[2018] UKFTT 0404 (TC)

TC06606

Appeal number: TC/2018/01334

INCOME TAX – penalties for failure to file tax return – taxpayer signed up for paperless contact and for notices to a secure mailbox on HMRC website – Effect of Income and Corporation Taxes (Electronic Communications) Regulations 2003 and directions of HMRC made under them – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HANNAH ARMSTRONG **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 2 July 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 21 December 2017, HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 April 2018 and the Appellant's reply of 9 May 2018.

DECISION

1. This was an appeal by Ms Hannah Armstrong ("the appellant") against penalties imposed by the Respondents ("HMRC") under Schedule 55 FA 2019 for her continued failure to deliver a tax return.

Facts

2. HMRC's records indicate that a notice to make and deliver a tax return for the tax year 2015-16 was issued on 6 April 2016 by electronic communication to a secure mailbox on the self-assessment online account of the appellant. That notice required the appellant to deliver the return by 31 October 2016 if filed in paper form or by 31 January 2017 if filed electronically ("the due date").

3. HMRC's records indicate that on 7 February 2017 a penalty of £100 had been assessed for her failure to file the return by the due date. HMRC's records indicate that on 7 February 2017 HMRC issued a notice by electronic communication to a secure mailbox on the self-assessment online account of the appellant.

4. HMRC's records indicate that on 11 August 2017 [HMRC's statement of case ("SoC") says 15 August, but this is belied by the documentation] a penalty of £900 had been assessed for her failure to file the return by a date 3 months after the due date and a penalty of £300 had been assessed for her failure to file the return by a date 6 months after the due date.

5. The return was filed electronically on 13 December 2017.

6. On 21 December 2017 the appellant appealed to HMRC against the two penalties totalling £1,200 (ie excluding the initial penalty of £100).

7. On 19 January 2018 HMRC told the appellant that the appeals were out of time and, in accordance with s 49 Taxes Management Act 1970 ("TMA"), HMRC did not agree to the notices of appeal being given to them. They informed her that she could request permission from the Tribunal to give the notices to HMRC.

8. On 18 February 2018 the appellant, acting through her brother Matthew Armstrong, notified her appeals to the Tribunal.

The law

9. The law imposing these penalties is in Schedule 55 Finance Act ("FA") 2009 (and references below to "Schedule 55" without more are to that Schedule to FA 2009). In a case of this sort where the relevant item in the Table in paragraph 1 Schedule 55 is item 1, the relevant penalties are in paragraph 3 (initial penalty of £100), paragraph 4 (daily penalty) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). A penalty may only be cancelled, assuming assessment of it is procedurally correct, if the appellant had a reasonable excuse for

her failure to file the return on the due date, or if HMRC's decision as to whether there were special circumstances was flawed in the judicial review sense.

10. The text of the relevant parts of Schedule 55 is attached as an Appendix.

The appeals

11. The position is that the appeals made by the appellant were notified to HMRC after the time allowed by law. HMRC have not accepted that the appellant had a reasonable excuse for making the appeals late, and have refused to accept them. The appellant was informed of her right to seek permission from the Tribunal to require HMRC to accept them and has used the online facility to apply to be allowed to make a late appeal.

12. But the online Notice of Appeal to the Tribunal has been completed on the basis that it is the appeals that are being notified, not, as is properly the case, that an application to give a late appeal to HMRC is being made.

13. It seems to me however that, if I do give permission to allow the appeals to be given to HMRC, it would be an unnecessary waste of the appellant's and HMRC's time, not to mention the Tribunal's, to do other than go on to consider the appeals as they have been formulated by the appellant and argued in the SoC prepared by HMRC. To achieve an efficient use of the Tribunal's time and resources, as well as those of both parties and in accordance with the overriding objective of this Tribunal, I would waive any formalities that might be needed to ensure that the appeals are before the Tribunal.

14. But first I need to consider the application for permission.

Permission application

15. Although the appellant's brother, Mr Matthew Armstrong, has put forward a well argued submission with citations from statute law and from cases relating both to tax and public law issues, the only part of that submission directed to the lateness of the appeals was his contention that the appellant was unaware that the notice of assessment of the two penalties (a single notice included both penalties) had been issued and thus she had received no notice of the assessments.

16. HMRC say in their SoC that the officer of HMRC dealing with the appeal considered that the appellant did not have a reasonable excuse for the lateness of her appeals. This is wrong, as the officer did not comment at all on the point: they merely set out what HMRC regarded as not constituting a reasonable excuse and asked the appellant to provide one if she thought she had one.

17. In their decision in *Martland v HMRC* [2018] UKUT 178 (TC) ("*Martland*"), the Upper Tribunal has given guidance to this Tribunal about dealing with applications of this type. Their conclusion is that the appropriate approach to be taken (in England and Wales at least, where I am dealing with this case) is that set out in *Denton and others v T H White Ltd & others* [2014] EWCA Civ 906 ("*Denton*"), and

in particular the consideration of the matter in three stages as set out in that case. I have little to go on, but must look at the application in the three *Denton* stages.

18. *Denton* Stage 1 is to ask whether the delay is serious or significant. In *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) the Upper Tribunal found a delay of 3 months in the context of a 30 day time limit to be serious and significant. The delay here is just over 3 months which I also find is serious and significant.

19. *Denton* Stage 2 is to see what the explanation for the delay is. The explanation is that the appellant could not have been expected to know from an email to her that did not say what it was about that she had received a notice in relation to which the time to appeal is strictly time limited.

20. In *Denton* at [35] the Court of Appeal made it clear that if the failure is not serious or significant relief is likely to be given. That is not this case. But it also says that if there is good reason for a serious or significant breach, relief is likely to be granted. But at [35] the court also makes the point that it does not follow that where this a serious and significant delay for which there is no good explanation the breach of rules cannot be relieved, or in this type of case, permission cannot be granted, and that is because it is always necessary to have regard to all the circumstances as that is *Denton* stage 3.

21. That having regard, as *Martland* points out, is something the Tribunal must do in exercising its discretion, and that it must carry out a balancing exercise:

> "… which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. … The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one."

22. The circumstances I have taken into account are:

(1) That the delay while being serious and significant is not at the upper end of such delays.

(2) The explanation for the delay is clearly plausible, and in my view a good reason. It is also a reason given in the appeal against the penalties.

(3) The prejudice to HMRC should I give permission is non-existent as they have fully argued their case against the appeals.

(4) The prejudice to the appellant is severe as she would have to pay what by any standards are harsh penalties.

(5) In relation to the daily penalty the appellant has a "slam dunk"[1] case against them.

(6) In relation to the 6 month penalty there is an arguable case that not only did she not know of the assessments but she had no reason to suspect their existence. This might constitute a reasonable excuse or show that there were special circumstances not taken into account by HMRC.

(7) In relation to both penalties the appellant has put in issue whether there was valid service, and again seems to me to have an arguable case.

23. In relation to the second and the last three matters, I have as, will be obvious, to an extent considered the merits of the appellant's case in the appeals. I have done this on the basis of guidance in *Martland* at [46].

24. Balancing these matters, and bearing in mind the need for litigation to be conduced efficiently and at proportionate cost and the need to obey statutory time limits, I give permission for the appeals to be made late. The delay, while serious but not outrageously so, has not affected the conduct of the litigation and has caused no prejudice to HMRC. Coupled with the existence of a "slam dunk" case on one penalty, and the fact that it would be invidious to allow the appeal on one penalty but not on another issued on the same day, I considered the balance was clearly in favour of the appellant.

Grounds of appeal & HMRC's response

25. In her appeal form submitted to HMRC on 21 December 2017 the appellant said:

(1) She ceased self-employment in January 2016 when she became employed, and that she was unaware she was required to notify HMRC.

(2) She was unaware of electronic messages in her mailbox and HMRC would, she said, be able to check the veracity of this statement.

(3) She was not notified of her liability to penalties until they reached £1,200.

(4) Records would show she was on time in previous years

(5) The penalty is disproportionate when she earned less than the tax threshold.

26. In the notification to the tribunal Mr Armstrong on her behalf says:

(1) The appellant accepts that HMRC issued her with a notice to file a return, and wrongly assumed she had no need to declare nil liability.

[1] See *R (on the Application of Rowe and Others) v Her Majesty's Revenue And Customs* [2017] EWCA Civ 2105 at [42], [58] and [105].

(2) The notice did not satisfy the condition in paragraph 4(1)(c) Schedule 55 FA 2009.

(3) There was no reasonable notice of the penalties, as a notice of a notice is not reasonable notice.

27. HMRC's SoC says in relation to these arguments:

(1) The appellant was an experienced filer of returns.

(2) A return is properly required to cover a period up to the end of trading.

(3) When a person signs up for paperless contact as the appellant did, HMRC will deliver a statutory notice to the person's secure mailbox in their online account on HMRC's website and at the same time an email will be sent to the appellant's personal email address asking the recipient to check their online account for new messages. Delivery was effected in relation to the appellant as no emails bounced.

(4) There were a number of electronic contacts including:

(a) When the tax return was not filed by the due date, HMRC sent a notice of penalty assessment to the appellant's secure mailbox, with an email to her informing her of a new message. The notice of assessment warned about daily penalties.

(b) On 8 June 2017 a "30 day" warning message was sent in the same manner, as was (it seems, but the SoC is garbled) a "60 day" message, presumably in July.

(c) On 15 August 2017 the notice of assessment of penalties of £1,200 was sent in the same manner.

(d) On 12 September 2017 a Statement (of what was not said) was also issued in the same manner.

Thus the appellant was warned about but chose to ignore the messages.

(5) The notice of penalty assessment issued in February 2017 contained sufficient information to meet the requirements of paragraph 4(1)(c) as it was an SA326D.

(6) The First-tier Tribunal does not have any jurisdiction to judge the proportionality of penalties.

For these reasons the appellant has not shown that she had a reasonable excuse.

28. HMRC (in the person I assume of Ms Goulding, the compiler of the SoC) considered whether there were special circumstances and took into account that:

(1) The appellant had no liability.

(2) The notice did not satisfy paragraph 4(1)(c).

(3) The penalty was disproportionate.

(4) HMRC had an obligation to warn the appellant of the imposition of penalties.

29. The way I have set out the matters taken into account is quoted verbatim from the SoC. I assume that what Ms Goulding meant was that she took into account that the appellant had put forward these arguments, not that she agreed with them (except possibly the first). HMRC submit that these were not special circumstances.

30. In his reply to the SoC, Mr Armstrong makes three arguments:

(1) The decision was flawed in judicial review terms, which I take to be a claim that there were special circumstances.

(2) The notice did not satisfy the condition in paragraph 4(1)(c) Schedule 55 FA 2009.

(3) The penalty was disproportionate to the loss suffered.

Discussion

31. The appellant's arguments under the headings of paragraph 4(1)(c) Schedule 55 FA 2009 and whether HMRC decisions are flawed raise a wider issue. This is because, in the reply to the SoC, the appellant says that the email messages sent to the appellant were not notice to her: they were "notice of notice".

32. In previous cases where an appellant says that they did not get a notice that HMRC say they issued, the provisions of s 115(2) TMA and s 7 Interpretation Act 1978 are raised by HMRC. But those provisions relate to postal service: what happened here was not postal service, but electronic communication. That raises different issues entirely.

33. HMRC in their SoC have dealt with this issue not only in relation to the August 2017 notice of assessment but also the February 2017 notice and the notice to file issued by them in April 2016. The appellant has not put non-receipt of either of the latter two notices in issue: indeed the appellant has not appealed against the £100 initial penalty, but I will deal with evidence that HMRC put forward in relation to them, particularly as if the notice to file was not validly served the appellant cannot be said to have failed to deliver a return within the meaning in paragraph 1 Schedule 55 FA 2009.

The regulations on electronic communications

34. Where a notice is sent by electronic communication then the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) ("Ecomms regulations") are relevant, and in particular regulation 5 which, in relation to communications by HMRC, states:

> "*5 Effect of delivering information by means of electronic communications*
>
> (1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any

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

(a) these Regulations,

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

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

are satisfied …

…

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

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

35. Regulation 1(2) includes a definition:

""secure mailbox" means a facility or feature which--

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

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

36. The "information to which these Regulations apply" is set out in regulation 3(1) and includes information authorised or required under section 8 TMA (delivery of return when required by notice) and paragraph 18 Schedule 55 (notice of assessment of penalties)[2].

37. Thus regulation 5(1) can be rewritten to say in this case (words in italics being substituted by me):

"(1) Information to which these Regulations apply, *and which is delivered to a secure mailbox,* shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by—

(a) these Regulations,

(b) …[3], and

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

are satisfied …"

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[2] See paragraphs (i) and (vii) respectively of sub-paragraph (a) of regulation 3(1).

[3] I have omitted paragraph (1)(b) as I can find no indication in the papers or elsewhere what any other enactment there might be. There is nothing in sections 132 and 133 FA 1999 which contain the vires for the regulations.

38. For the purposes of paragraph (1)(c), the relevant direction given by the Commissioners for Her Majesty's Revenue and Customs[4] is one made "under regulations (*sic*) 5(1) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (S.I. 2003/282) on 3 April 2014 by Jim Harra and Edward Troup, two of the Commissioners for Her Majesty's Revenue and Customs". That direction says:

> "These directions (*sic)* apply in relation to the delivery of information by the Commissioners for Her Majesty's Revenue and Customs in relation to the matters referred to by regulation 2(1)(a)(i) and (v) - (vii) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 ("the Electronic Communications Regulations 2003").
>
> **Use of the secure mailbox to deliver information**
>
> 1. The Commissioners for Her Majesty's Revenue and Customs hereby direct that the conditions that apply in relation to information delivered to a secure mailbox are that:
>
> (a) The Commissioners have delivered information to the secure mailbox of a person who is a registered user of the Self Assessment Online service; and
>
> (b) The Commissioners have despatched:
>
> (i) an email message to the person's last known verified email address, or
>
> (ii) a text message to the person's registered daytime contact phone number
>
> notifying the person that information has been delivered to their secure mailbox;
>
> Condition 1(b) will be taken as satisfied if:
>
> (i) the despatch of the email or text message is recorded on an official computer system, unless:
>
> • the official computer system also records that the email or text message was not delivered to the person's email address or phone number, or
>
> • it is proved in some other way that the email or text message was not delivered to the person's email address or phone number; or
>
> (ii) the Commissioners can demonstrate in some other way that the email or text message was delivered to that person.
>
> **Commencement**
>
> 2. These Directions shall have effect from 7th April 2014."

[4] The body that s 50(1) Commissioners for Revenue and Customs Act 2005 tells us must be substituted for references, however expressed, to the Commissioners of Inland Revenue, "the Board", in legislation.

The strange formatting of this direction is theirs.

39. Regulation 5(1) can therefore be further reformulated ("modified regulation 5(1)") in this case as follows:

> "(1) Information to which these Regulations apply *and which is delivered to a secure mailbox* shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, —
>
> (a) all the conditions imposed by these Regulations are satisfied,
>
> (b) …, and
>
> *(c) the condition that the Commissioners have despatched—*
>
> *(i) an email message to the person's last known verified email address, …*
>
> *…*
>
> *notifying the person that information has been delivered to their secure mailbox is satisfied.*
>
> *(1A) The condition in paragraph (1)(c) will be taken as satisfied if—*
>
> *(a) the despatch of the email … is recorded on an official computer system, unless—*
>
> *(i) the official computer system also records that the email … was not delivered to the person's email address …, or*
>
> *(ii) it is proved in some other way that the email … was not delivered to the person's email address or phone number; or*
>
> *(b) the Commissioners can demonstrate in some other way that the email … was delivered to that person."*

40. In considering what modified regulation 5(1) provides for, it seems to me to be necessary to consider the operation of regulation 5 as it stood before the coming into force of the amendments that were made to it in 2014 by the Income and Corporation Taxes (Electronic Communications) (Amendment) Regulations 2014 (SI 2014/489) (2014 Regulations") which inserted the references to secure mailboxes and to the "relevant Finance Acts" (ie FA 2007, 2008 and 2009) and as it stood before any modifications made by the directions, and necessary to consider its purpose.

41. Regulation 5(1) as it so stood is a deeming provision. It treats some action as in fact having the legal effect of something else. For that deeming to apply it has to be shown (sub-paragraph (a)) that all the (relevant) conditions imposed by the Ecomms regulations are met, so it is necessary to identify those conditions[5].

42. Regulation 3(1) of the Ecomms regulations seems to be a condition, although not expressed as such in terms. It provides that HMRC may only use electronic communications in connection with such matters as notices to file (and from 2014

[5] I ignore conditions that relate only to CT. See in particular regulation 3(2A), (2B) and (8) to (12).

penalty assessments) if the recipient has given their consent, something I discuss later (see §§69 to 75).

43. Regulation 3(2) of the Ecomms regulations imposes conditions (set out in regulation 3(3) to (6)) about the use by persons other than HMRC of electronic communication. These it seems to me are irrelevant here where the communications in question are from HMRC to the taxpayer.

44. If the conditions are satisfied, then regulation 5(1) (as it stood before 2014) may operate to deem. But what exactly did it deem to be the case? It treated information delivered electronically as delivered "in the manner or form required by any provision of … the Management Act[6]". Thus the manner and form of delivery in regulation 5(1) is being equated to some other manner of form of delivery that is to be found in TMA.

45. There is a clue as to what that provision might be in para-statutory material. The Explanatory Notes to the Ecomms regulations simply say:

> "Regulations 5 to 10 provide evidential rules in connection with the use of electronic communications for the purposes of the specified provisions."

46. But the Ecomms regulations were made before an Explanatory Memorandum was required for secondary legislation. The 2014 Regulations amending the Ecomms regulations do have such a memorandum, and the relevant paragraphs say:

> "4.3 Regulation 5(1) of the Electronic Communications Regulations 2003 establishes a presumption of effective delivery in respect of information which is delivered electronically providing all conditions imposed by those Regulations, any other applicable enactment or by a direction of the Commissioners for HMRC are satisfied.
>
> 4.4 This instrument will amend regulation 5 of the Electronic Communications Regulations 2003 to ensure that the presumption of effective delivery will apply to information delivered to a 'secure mailbox'. This instrument introduces a definition of secure mailbox for this purpose.
>
> …
>
> 7.3 The changes made by this instrument will facilitate Paperless Self Assessment by increasing the statutory provisions in connection with which HMRC may use electronic communications to deliver information and by ensuring that information delivered to the secure mailbox will have the same legal effect as information delivered by post."

47. The reference to "delivered by post" in paragraph 7.3 is a clue. My initial assumption was that that clue pointed to s 115(2) TMA, as being the only provision in TMA that refers to "post". Since s 115(2) applies to any notice to be given etc under

[6] The "Management Act" is TMA.

the "Taxes Acts", which term is the widest possible reference to Acts dealing with income tax and corporation tax, including Schedule 24 FA 2007, Schedule 36 FA 2008 and Schedules 55 and 56 FA 2009, I did not initially think it was necessary to look further into other Finance Acts or indeed what seems to be a redundant reference to the Income and Corporation Taxes Act 1988[7].

48. But although it seems from the Explanatory Memorandum and a search of TMA and the relevant Finance Acts that it is s 115(2) TMA that regulation 5(1) is equating electronic delivery to postal delivery, there is a potential difficulty about s 115(2) performing this function. Regulation 5(1) uses the phrase "the manner or form[8] *required* by any provision" (my emphasis). It can be seen from *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) ("*Romasave*") which is about the very similar VAT provision, s 98 Value Added Tax Act 1994, that s 115(2) TMA does not *require* service by post, but *allows* service in a particular manner so as to bring s 7 Interpretation Act 1978 into play[9].

49. Regulation 5(1) then seemed to me to be based on the misunderstanding that s 115(2) requires anything to be done. As secondary legislation it might more readily be open to a rectifying construction than primary legislation, but it is necessary to consider the vires for this particular paragraph of the Ecomms regulations. That is in s 133(2) FA 1999:

> "Provision made in exercise of the powers conferred by section 132 above or subsection (1) above shall have effect notwithstanding so

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[7] The "Taxes Act" (singular) is defined in regulation 1(2) to mean the Income and Corporation Taxes Act 1988 ("ICTA"). I find it difficult to see what, if anything, this should now be treated as a reference to. The glib answer is it should be treated as a reference to Income Tax (Earnings and Pensions) Act 2003, Income Tax (Trading & Other Income) 2005, Income Tax Act 2007 and parts of TIOPA (Taxation (International and Other Provisions) Act 2010, (together "the Rewrite Acts"), each of which rewrote large parts of ICTA. But they also rewrote most of each Finance Act from FA 1989 onwards, not all of which simply inserted matter into ICTA, and in any event contained commencement and transitional provisions which did not appear in ICTA as amended but which were reproduced in the Rewrite Acts. And quite a chunk of ICTA unrepealed enactments in ICTA were not in the Rewrite Acts, not least because they related purely to Corporation Tax ("CT") or being equally valid for both income tax and CT were simply disapplied for IT purposes until CT itself was rewritten in Corporation Tax Acts 2009 and 2010 and part of TIOPA. And of course it must be pointed out that paragraph 3(1) Ecomms regulations applies to CT: sub-paragraphs (a)(iii) and (iv) and (b) are only about CT, while sub-paragraphs (iia), (iv), (v) and (vi) apply both to CT and IT. So I ignore the reference to the "Taxes Act", as it is clearly not relevant to a case involving s 8 TMA and paragraph 18 Schedule 55 FA 2009. Though I do have to ask why there is no mention of paragraph 18 Schedule 41 FA 2008 (penalties for failure to notify). It's not as if anyone who fails to notify and gets a penalty assessment will *ipso facto* not have signed up for online services: HMRC are very keen to register for self-assessment those who fail to notify at the earliest opportunity.

[8] As to the "form" of delivery, another somewhat obscure clue is to be found in regulation 3(5), second sentence, which relates only to corporation tax. "Form" could include the layout of the information and so it may be the case that the reference to "form" in regulation 5(1) is to the manner in which paper forms are prescribed by s 113 TMA. Section 113 has the widest possible ambit and includes the assessments made under the relevant Finance Acts as well as the form of returns.

[9] See *Romasave* at [30] and [31].

much of any enactment or subordinate legislation as (apart from the provision so made) would *require*—

(a) any information to be delivered, or

(b) any amount to be paid,

in a form or manner that would *preclude* the use of electronic communications for its delivery or payment …" [My emphasis]

50. As that section uses the word "require" (and "preclude"), it is difficult to see that it should nevertheless be read as "permit". There seemed to me however to be a possible solution to the problem.

51. I would argue, based on a historical analysis of s 115(2) (which dates back to at the latest 1880) that the original purpose of the predecessor of s 115(2) was to permit postal delivery in cases where the tax law would have required personal service[10]. It might be argued then that as s 115(2) TMA does not require postal delivery, the position is that the requirement that is being superseded by modified regulation 5(1) is personal service. Regulation 5(1) then can be seen as equating delivery to a secure mailbox to delivery by personal service but only if any conditions in the Ecomms regulations and the condition in the direction are met.

52. Personal service is certainly the default position. It is what was done by officers of the Inland Revenue and, more importantly in the nineteenth century, by various bodies of Commissioners. But the question here again is whether it is required by TMA. Section 115(1) TMA is about personal service, but is itself a deeming provision, extending the ability of HMRC to effect personal service in circumstances when the person to be served does not have the documents handed to them. It doesn't *require* personal service.

53. This then is not the solution to the problem of finding the requirement for service by a method other than electronically. I have considered many other provisions of TMA which involve communications between taxpayers and HMRC, whether or not they are ones to which the Ecomms regulations apply. What they require in every case is that there should be notification, delivery, giving, sending or service. None of them specifies the manner by which service etc should be performed.

54. Nor can I find anything in TMA that actually precludes service by electronic communication, something which s 133(2) FA 1999 requires.

55. My conclusion then is that regulation 5(1) as it stood before the 2014 amendments read literally achieves nothing, because it treats the transmission of electric information as the equivalent of something that does not exist.

56. The next question is: does it matter? If regulation 5(1) does not apply and there is nothing in TMA to preclude electronic communication, then the "legal effect" (to

[10] It should be remembered that modern income tax law dates back to 1803, a time when there was no universal nationwide delivery of post at a cheap rate, something that only came about in 1840.

quote the 2014 Explanatory Memorandum – see §46) of such service to a person who has consented to accept it is the same as that of service by post.

57. Moreover regulation 5(1) does not provide a presumption that electronic communication meeting the conditions results in receipt by the person it is delivered to. Regulation 9 of the Ecomms regulations does that, and provides the electronic equivalent of s 7 Interpretation Act 1978, though with differences (see §§64 to 66 below).

58. The discussion above has considered regulation 5(1) as it was before 2014. It is next necessary to consider whether it matters if regulation 5(1) as modified fails to achieve its object. Here there are undoubtedly problems. If there were no special rules, it is difficult to see that simply sending a message to a secure mailbox on HMRC's website would count as being properly served on the intended recipient, even if HMRC sent an email to the person's personal email address to tell them they had a message or even to tell them to some extent what the message was (something they do not in fact do, as the appellant points out).

59. Thus it may well matter if regulation 5(1) is meaningless. So I have first to consider whether section 133(2) FA 1999 can be given a strained construction or alternatively whether any provisions of s 132 FA 199 can be construed as empowering the making of regulation 5(1). In my view the terms of s 132, and in particular s 132(3)(c) and (g) and (5), can be read as permitting the making of such a provision as regulation 5(1).

60. The next question is whether regulation 5(1) itself can be given a strained construction. It seems to me that at least one condition for doing so is met. It would be extremely inconvenient for both taxpayers and HMRC if HMRC were not permitted to deliver information electronically to taxpayers because the only way they could do it with legal effect as to service would for example conflict with the requirements of confidentiality of taxpayer's affairs, especially given the fact that a person had received a penalty is obviously among the most sensitive type of tax information.

61. In my view the regulation must be given a strained construction and that is to read into it the words "or permitted" after "required".

62. Turning now to regulation 5(1) as it is from 2014 and as modified by the direction, it provides that information sent to a secure mailbox is treated as having been delivered (in the sense of transmitted[11]) to that secure mailbox only if and when[12] HMRC have delivered an email message to the last known verified email address of the taxpayer. This last point is also subject to a presumption, that that email was delivered if the despatch of the email is recorded by HMRC, and that record does not show that the email was bounced. This presumption may also be rebutted if it is proved in some other way that the email or text message was not delivered to the

[11] This follows from the existence of regulation 9 (see §§64 to 66).

[12] The "when" follows from regulation 5(2).

person's email address. This I assume is a reference to the taxpayer proving non-delivery. But if HMRC can prove delivery in some other way, then that may remove the non-presumption of delivery that the bouncing sets up.

63. Regulation 5(2) provides for presumptions as to the *time* of delivery. Timing is not in issue here[13].

64. But I should add that it seems to me that notwithstanding the second sentence of the first paragraph of the direction (what I have inserted into regulation 5 as paragraph (1A) in §39), regulation 9 also still applies to the situation here. That regulation is headed "Proof of delivery of information and payments" and the body of the regulation provides:

> "(1) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, to have resulted in … the delivery of information—
>
> (a) in the case of information falling to be delivered … to the Board, if … the delivery of the information has been recorded on an official computer system; and
>
> (b) in the case of information falling to be delivered …, by the Board, if the despatch of that … information has been recorded on an official computer system.
>
> (2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in … the delivery of information—
>
> (a) in the case of information falling to be delivered … to the Board, if the … delivery of the information has not been recorded on an official computer system; and
>
> (b) in the case of information falling to be delivered … by the Board, if the despatch of … information has not been recorded on an official computer system.
>
> (3) The time of receipt of any information … sent by an authorised means of electronic communications shall be presumed, unless the contrary is proved, to be that recorded on an official computer system."

65. Regulation 9 obviously applies to a case where a secure mailbox is not used. What the presumption of delivery inserted by the direction applies to is the delivery of the email to the recipient's personal email address. It does not apply to the delivery to the secure mailbox which is governed by regulation 9.

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[13] This is fortunate. The rule in regulation 5(2) is that information delivered by electronic communications is treated as having been delivered on the day on which the last of the conditions referred to in paragraph (1) is satisfied. One of the conditions, that in regulation 3(6) which applies where the communication is *to* HMRC, is that "the person maintains such records in written or electronic form as may be specified in a general or specific direction of HMRC." Does that mean that someone who is authorised to use electronic communications to file a tax return is treated as not having filed it until they have made a record of the type directed by HMRC? How would HMRC know that they haven't made a record?

66. Both regulation 9 and the direction provide for the presumptions to be capable of being rebutted. If the direction presumption is rebutted it follows that there has been no valid service of the information, even if the regulation 9 presumption cannot be rebutted. This is because (at least) a condition referred to in regulation 5(1)(c) not having been met, the information delivered to the secure mailbox will be deemed not have happened. And it would in any case be pointless for there to be a rebuttable presumption of delivery of the email if that failed to have any consequences.

Application of the Ecomms regulations to the facts

67. With the foregoing discussion in mind I turn to the facts of this case. As I see it the questions for me are:

(1) Whether the appellant consented to delivery of penalty notices to a secure mailbox.

(2) Whether modified regulation 5(1) applies in this case to establish delivery to the appellant of relevant statutory notices, and whether the condition in the direction under modified regulation 5(1) is met.

68. HMRC recognise that, given these are appeals against penalties, they have the burden of showing that the penalties are validly imposed. That includes the question whether notice to file a tax return was given, because recent decisions of this Tribunal have shown that that is a prerequisite for the imposition of penalties under Schedule 55.[14]

Did the appellant consent, and to what?

69. HMRC may not use electric communications with a taxpayer unless the taxpayer has consented. This is the effect of regulation 3(1).

70. In my opinion the burden is on HMRC to show that the appellant consented to secure mailbox delivery. In *Pendergate Ltd (t/a Ridgecrest Cleaning Services) v HMRC* [2017] UKFTT 778 (TC) (Judge Swami Raghavan) ("*Pendergate*") this tribunal (the "FTT") was considering regulation 213 of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("PAYE regulations"). Regulation 213 was made under s 132 and 133 FA 1999 and is headed "How information may be delivered by Inland Revenue".

71. A question that arose in *Pendergate* was whether the appellant in that case had consented to receive code numbers for employees online instead of by post. This was important as an employer is required to use the most recent code number it has received and is liable to pay over any tax under-deducted if it does not. At [45] the Tribunal said:

> "Contrary to HMRC's submission the means of communication of the code may well be relevant. If consent has not been given for the purposes of Regulation 213(4) then a code which has been sent via such means is not an 'employee's code' for the purposes of the

[14] See eg *Patel and another v HMRC* [2018] UKFTT 185 (Judge Guy Brannan).

regulations. Treating the code as an operative code which triggered the obligation to deduct even if consent had not been given would render the requirement for consent to be meaningless. The Regulation 80 determination in this case is predicated on there having been a liability to deduct in accordance with a particular code. If no such code was sent for the purposes of the regulations (noting that Regulation 8(2) deems a code which is sent to have been received) then there can have been no liability to deduct. The issue, in contrast to the prior one, is not of the process by which tax payable is determined but a pre-condition to the liability arising in the first place. It is therefore necessary to consider whether 1) consent was given for the purposes of Regulation 213(4) prior to the issue of the codes on 28 February 2010 and 2) if not whether the PAYE codes were otherwise sent in a paper form document to the appellant."

72. At [48] the FTT went on to consider whether consent had been given on the facts of the case:

> "At the hearing Mr Corbett brought along a print out of a screen shot which he said reflected the screen an employer would have seen if logging onto the PAYE online website as at 17 November 2003 entitled 'Enrol for PAYE Online for Employers'. It contained boxes to be filled in with the Employer's PAYE reference and the accounts office reference and stated the following:
>
> > 'Important note
> >
> > By registering for the PAYE Online Service your organisation will automatically receive statutory notices (such as Tax Code changes, Collection of Student Loans and reminders over the Internet.
> >
> > If your organisation (or agent) would prefer to continue receiving PAYE notices via EDI, magnetic media or by paper please contact the Online Services helpdesk'"

73. At [51] and [52] the FTT gave its conclusions on this issue:

> "51. Without further detail on the provenance of the screen shot and on the record keeping systems and procedures kept in relation to PAYE online registration there is insufficient evidence before me to make a finding of fact that the appellant was in fact registered for PAYE online on 24 November 2004 or that the document was in fact representative of what would have appeared on a registration screen on 17 November 2003. *But in any event it is not clear to me that registration pursuant to the note above at [48] would signify 'consent' for the purposes of Regulation 213. The note tells the reader they will receive statutory notices over the internet but it does not tell them in sufficiently clear terms that they will be taken to have agreed to receive notices which are operative for PAYE deduction purposes by internet only.* Read in combination with the second paragraph it is also left unclear whether, if someone were to contact the Online Services helpdesk and asked to continue receiving PAYE notices this would mean the electronic notices would stop, or whether the employer would receive both paper and electronic notices. In circumstances where

> paper codes and notifications continue to be received from an employer's point of view it is left ambiguous which are the operative codes which would first serve to trigger the employer's deduction obligation.
>
> 52. Similarly there was insufficient evidence brought forward to make a finding that employee H's code was amended by the appellant on 27 January 2012 as a result of the online issue of codes as opposed to the issue of paper codes. In relation to the appellant's letters of 31 August 2012 from Mr Scott Carter while these indicate that the appellant did have access to notifications on-line they are not inconsistent with the appellant's case which is that it had previously continued to receive and act upon the paper notifications it had received. *Even if were the case that the appellant made use of the on-line notifications, while on the face of it this would tend to suggest consent was given, it is not conclusive, in particular in a situation where it seems that paper notifications were normally sent and where it was possible therefore that the on-line facility was seen as something that could be used at the appellant's option, and in view of Mr Carter's oral evidence that the appellant did not give its consent."*

74. There are differences between this case and *Pendergate*. The consent mechanism used for PAYE codes was an opt out type of consent; the director of the appellant in that case said that the company had not consented; and there is no equivalent of regulation 5 Ecomms regulations in Part 12 of the PAYE Regulations. The consent provisions of regulation 213(4) PAYE regulations and those in regulation 3(1) Ecomms regulations are however the same.

75. But what *Pendergate* does show is that the FTT expected that any consent would be informed consent, that the appellant would understand what it is was they were consenting to and how precisely they would be informed of important matters that affected their tax liability or their liability to sanctions such as interest and penalties. Without that informed consent no notices given to the appellant electronically whether to a secure mailbox or an email address of the appellant is validly made.

76. The provisions of the Ecomms regulations relating to consent are:

> "3.—(1) The Board may only use electronic communications in connection with the matters referred to in regulation 2(1) if—
>
> (a) the recipient has indicated that he consents to the Board using electronic communications in connection with those matters; and
>
> (b) the Board have not been informed that that consent has been withdrawn.
>
> (1ZA) The Board may specify by specific or general direction the manner in which consent may be provided and withdrawn, including the time from which consent and withdrawal of consent is to take effect.".

77. The direction referred to in paragraph (1ZA) is a direction made under regulation 3(1ZA) on 3 April 2014 by Jim Harra and Edward Troup, two of the

Commissioners for Her Majesty's Revenue and Customs, which provides that consent may only be given though the Self Assessment Online service if they are, as the appellant was, a registered user of that service.

78. The SoC refers to a programme by HMRC since 2014 to make outputs, ie correspondence from them to taxpayers, available digitally and:

> "to replace the letters they receive with email *reminders* [my emphasis], a customer can log in to their online account … and make the election. … Where a customer has opted for paperless contact HMRC will deliver the relevant document or notice to file a return, (*sic*) digitally to their secure mailbox in their online account and at the same time an e-mail will be sent to the e-mail address the customer provided to advise the customer to check their mailbox for new messages"

79. The SoC explains that "Digital outputs include Statements, reminders to file tax return/pay outstanding tax and penalty notices".

80. The only evidence that the appellant gave consent for digital contact is an email from [redacted] to [redacted] opening "Hi [redacted]" and saying "the customer opted to go paperless and receive digital notifications on 19/1/2016 at 5.03pm".

81. The appellant has not denied that she signed up for paperless contact. But what was she told when she signed up? I have no evidence of what she saw on HMRC's website when she did sign up for paperless contact. Currently[15] the relevant page says:

> "Go paperless with HMRC
>
> You can choose to get electronic communications instead of letters from HMRC.
>
> These electronic communications include statutory notices, decisions, estimates and reminders relating to your tax affairs, such as notices to file a tax return, make a payment, *penalties due*, or information about other matters. [*My emphasis*]
>
> When you have a new electronic communication we will send you an email notification requiring you to log in to your HMRC online account.
>
> Go paperless now
>
> ⓪ Yes, send me electronic communications
>
> Email address
>
> Confirm email address
>
> I agree to the terms and conditions (https://www.tax.service.gov.uk/information/terms#secure)

[15] Accessed on 5 July 2018. I will not give the ridiculously long URL.

By signing up, you confirm that you:

- want to receive statutory notices, decisions, estimates and reminders electronically in connection with your tax affairs
- will keep your communications preferences and email address up to date using your HMRC online account to make sure you get your email notifications

⓪ No, I want to keep receiving letters"

82. It may not have said that at the time the appellant signed up, particularly in the paragraph where I have emphasised text. The current page however refers to the terms and conditions for using HMRC's online services, and it seems very unlikely that that link was not there in January 2016. As what the appellant was agreeing, ie consenting, to was those terms and conditions, I set them out. They say currently:

"*Secure mailbox*

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

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

7.3 If you opt to receive statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits, which may include notice to file a tax return, renew your tax credits, make a payment or information about other related matters electronically then these will be delivered to a separate dedicated secure online mailbox. This mailbox is different to the secure mailbox set up for you on the Government Gateway.

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

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

8.2 You will be asked to provide your consent before HMRC issues statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits to you using the secure online mailbox

> referred to in paragraph 7.3. Where this is the case you will be asked to provide this on screen. If you give your consent you will be required to register an email address with HMRC and HMRC will verify these details with you. When statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits are issued to you using your secure online mailbox, a notification email will also be sent to your registered email address to inform you of this. You should keep the details of your registered email address up-to-date and notify HMRC of any changes.
>
> 8.3 If you give the consent referred to in paragraph 8.2 you may also be asked to register a telephone number with HMRC. When statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits are issued to you HMRC may also send a text message to this telephone number, or to a daytime telephone number that you have already provided to HMRC, to inform you of this. You should keep the details of your registered telephone number up-to-date and notify HMRC of any changes.
>
> …
>
> *Information relating to your statutory obligations*
>
> 13.1 You can access legal information and guidance concerning your statutory obligations in respect of the various online services by going to the 'Your account' area. You should make sure you are familiar with this information as it will tell you what the statutory requirements for the use of online services are.
>
> 13.2 Updates to this information will be placed in the Legal conditions area which can be accessed via the 'Your account' area. You should ensure that you keep yourself updated as to your legal obligations by checking this area regularly.

83. Again I do not know if this was the same when the appellant signed up.

84. I am satisfied from this evidence, and on the basis of what is said in *Pendergate* that what the appellant gave her consent to was to be treated by HMRC in the way that the terms and conditions promise, as that is reasonably understood by someone who is not a tax expert. In my view that person would realise from reading those terms and conditions that they would get a notice to file a return sent to their secure mailbox, replacing the paper notices to file, that they would get reminders that returns and payments of tax are becoming due and that they would get statements of their tax position from time to time, that is things that they have been getting hitherto, and if they are experienced filers of returns, things they may already know well. What they would not necessarily realise is that if they came to be in the small minority of late filers, that not only would HMRC send any penalty notices[16] to the secure inbox, but also that any email they sent to alert a person to that notice of penalty would be as

[16] I recognise that the current webpage that prompts the signing up refers to "penalties due", but that term is just as capable of meaning reminders of the sort that HMRC send by post that warn that penalties may follow if returns are not filed, and in my view is more capable of meaning that than being a reference to notices of penalty assessments. In any event it is the terms and conditions that are important.

bland and uninformative as the emails that the appellant has put in evidence, which say:

> "**You've got a new message from HMRC** [in bold and large font in the original]
>
> Dear Miss Hannah Christina Armstrong
>
> You have a new message from HMRC about Self Assessment
>
> To view it, sign into your HMRC online account
>
> For security reasons, we have not included a link with this email.
>
> **Why you got this email** [in bold and larger font in the original]
>
> You chose to get paperless notifications instated of letters by post
>
> This means we send you an email to let you know you have a new message in your account
>
> From HMRC Self Assessment"

85. This one is dated 7 March 2017. The other on is dated 18 April 2018 and says:

> "New message in your online Tax Account [in bold and large font in the original]
>
> Dear Miss Hannah Christina Armstrong
>
> You have a new message from HMRC and can sign in to your online Tax Account to view it
>
> You've chose to receive paperless notifications from HMRC, and we'll send you an email when you have a new message in your account (we don't include links for security reasons)"

86. I find that the appellant did not give consent within the meaning of regulation 3(1ZA) Ecomms regulations to the receiving of notices of penalty assessment. But I find that she did consent within the meaning of those regulations to receive notices to file a return in her secure mailbox.

Is delivery to the appellant of relevant statutory notices established?

87. Because of my decision about consent I do not need to consider any further questions. But in case I am found to be wrong I will give my views on those further questions. I now consider whether modified regulation 5(1) applies in this case to establish the delivery to the appellant of relevant statutory notices, and in particular whether the condition in the text of the direction inserted by me in modified regulation 5(1) is met.

88. In this case the relevant statutory notices on which the validity of the penalty assessments depend are the notice to file a return for 2015-16 and the notices of assessment of the penalties in February and August 2017.

89. By virtue of regulation 5(1), read with the direction, what is required to be shown by HMRC is that all the conditions imposed by the Ecomms regulations are satisfied, and that HMRC have despatched an email message to the person's last

known verified email address notifying the person that information has been delivered to their secure mailbox. The second requirement is satisfied by showing that the despatch of the email is recorded on an official computer system, unless the official computer system also records that the email was not delivered to the person's email address (ie was "bounced") or it is proved in some other way that the email was not delivered to the person's email address, or alternatively and despite the bouncing HMRC can demonstrate in some other way that the email was delivered to that person.

90. The first question is: what are the conditions imposed by the regulations. The answer to this seems to me to be that there are none where the issue is communication from HMRC to a taxpayer. Thus, so long as delivery of the relevant notice etc is established, everything turns on whether the second requirement is met, whether the despatch of the notifying email is recorded on the HMRC computer system, and the answer depends on what evidence HMRC have shown to that effect.

91. In relation to the notice to file, HMRC, in the person of the unidentified officer who sent an email to Ms Goulding (who seems to have redacted her own name on the body of the email!), have said that the SA316 notice to file was issued digitally on 7 April 2016 and have shown a printout of the computer record of the issue of the notice to file and a printout of the computer record of the fact than an "email alert" was sent to "the customer" at an email address showing the name of the appellant at 10.17pm on 7 April 2016. The unknown officer also says that no emails have been bounced from this address.

92. I am satisfied from HMRC's evidence of the entries on their computer records that a notice to file was despatched on 7 April 2016 to a secure mailbox on HMRC's website to which the appellant had access. By virtue of regulation 9(1)(b) those entries are sufficient to deem delivery to have been effected unless the contrary is proved. The appellant has not done so, so I find that that the notice to file was delivered as if it had been delivered by post or personally served. But this is subject to the condition in the direction under regulation 5(1) Ecomms regulations having been met.

93. I am satisfied from HMRC's evidence of the entries on their computer records that four seconds after delivery to the secure mailbox an email was despatched to the email address provided to the appellant in the course of her signing up for paperless contact on 19 January 2016. What HMRC must do is to satisfy the tribunal that the taxpayer was notified by this email that *information has been delivered* to their secure mailbox [my emphasis]. I can only assume that the email sent on 7 April 2016 was not significantly different from the one the appellant has exhibited as having been received on 7 March 2017. Therefore the appellant was told that she "had a new message about self-assessment", and that was the only thing she was told.

94. The direction says that delivery of the email is deemed to have taken place if despatch is shown on the computer records of HMRC and the appellant does not prove to the contrary. The appellant has not done so – quite the opposite – so I find

that that the email was delivered in accordance with the direction, subject to the question whether it gave the requisite information to the appellant.

95. I note in particular that the email is simply required to give information. The direction does not say what the information has to be or that the information conveyed by the email must be such that the recipient can see precisely or otherwise what the content of the message in the secure mailbox. If the message was as the April 2017 example, then it would have said that the message was about self-assessment which was obviously true.

96. In my opinion the email of 7 April 2018 is deemed to have been delivered to the appellant because it met the conditions in the direction that it says that information had been delivered to her secure mailbox. As a result the notice to file for 2015-16 had been given to the appellant.

97. As to the notice of the penalty assessment in the sum of £100 issued in February 2017, HMRC have produced a computer record in the "View/cancel penalties record". But this is at best a record of the assessment having been made, not despatched[17]. Thus there is no computer record (as there is in the case of the notice to file) or other evidence of the notice having been despatched. By virtue of regulation 9(2)(b) of the Ecomm regulations that is conclusive that no notice was given to the appellant, unless HMRC prove to the contrary and they have not.

98. Nor is there any record to show that an email was sent to the appellant's email address to the effect that she had a message in her secure mailbox. They have not shown that such an email was delivered in some other way. The direction does not provide for a (rebuttable) presumption of non-delivery in the absence of a computer record in the way that regulation 9(2)(b) does, but in the absence of any other evidence to show delivery I cannot but find that there was none.

99. As to the notice of assessment in August 2017 of penalties of £1,200, HMRC, in the person of the same unidentified officer who sent an email to Ms Goulding or possibly another unidentified officer, have shown a printout of the computer record of the fact than a "newMessageAlert" was sent somewhere on 15 August 2017. The unknown officer sending the email to Ms Goulding says that they had run searches on when new digital messages were created and that "these have an associated email alert to the customer". This is perplexing because the printouts seem to be of the associated email alerts. The redacted officer also says that they have had no "comeback".

100. Although I am satisfied that an email informing the appellant that information had been delivered to her secure mailbox was delivered on 15 August 2017 in accordance with regulation 5(1) of the Ecomms regulations as modified by the

[17] I should add that in relation to all the penalties I have a "View/Cancel Penalties" screenshot in the name of Mrs H C Vanson. I have assume that it does relate to the appellant, but had it been critical, I would have required further submission from HMRC to explain to me why it shows the name "Vanson"".

direction, I have no evidence that the notice of assessment was delivered to her secure mailbox, nor any computer record that might raise a presumption of delivery. Accordingly regulation 9(2)(b) establishes that there was no despatch of the notice of assessment.

101. This if it were necessary I would find that neither notice of assessment had been given to the appellant, and I would have cancelled the penalties.

Reasonable excuse & special circumstances

102. In his submission Mr Matthew Armstrong does not in terms say that the appellant had a reasonable excuse. In fact he suggests that she didn't, so in the circumstances I do not consider the issue.

103. Mr Matthew Armstrong did raise arguments that the decision of HMRC was flawed and, as I interpret what he said, flawed in the judicial review sense. He also said the penalties were disproportionate. This is in effect to suggest that there were special circumstances that would justify a reduction in the penalties. In response HMRC have simply said that they took into account the appellant's arguments that the appellant had no liability; that the notice did not satisfy paragraph 4(1)(c) Schedule 55; that the penalty was disproportionate and that HMRC had an obligation to warn the appellant about the imposition of penalties. They have not said why none of these amounts to special circumstances, a failure to give reasons which makes the decision flawed.

104. Of the matters referred to neither of the first two can amount to a special circumstance. Lack of proportionality is capable of being a special circumstance, and no decision of the Upper Tribunal has considered whether Schedule 55 FA 2009[18] is either lacking in proportionality as a whole or might do so in specific cases. I do not intend to consider that issue, on which HMRC might well wish to put forward arguments that go beyond a simple denial that the penalties here were not disproportionate.

105. The same applies to the question whether the lack of specific warning of penalties, "the notice of a notice is not a notice" question, can amount to a special circumstance (or I suppose a reasonable excuse). I have some sympathy with the appellant's position on this, and there must be a reasonable argument in relation to the terms and conditions for paperless contact.

Decision

106. Under paragraph 22(1) Schedule 55 FA 2009, the penalties of £100, £900 and £300 are cancelled.

107. 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

[18] In *HMRC v Anthony Bosher* [2013] UKUT 579 (TCC) the Upper Tribunal referred to Schedule 55 but in the context of judging whether penalties under s 98A TMA were disproportionate.

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: 18 July 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).

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

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

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

(b) £300.

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.

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.