Neutral Citation: [2023] UKFTT 01007 (TC)

Case Number: TC09010

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/13979

INCOME TAX – penalties for failure to notify liability to CGT – appellant relied on case law which could not be found on any legal website – whether cases generated by artificial intelligence such as ChatGPT – yes, case law invented and not genuine – whether appellant had reasonable excuse for failure to notify – principles in Christine Perrin considered and applied – appeal dismissed

Heard on 10 August and 23 November 2023
Judgment date: 04 December 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MS HELEN MYERSCOUGH

Between

FELICITY HARBER

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant in person

For the Respondents: Ms Fiona Man, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Mrs Harber disposed of a property and failed to notify her liability to capital gains tax ("CGT"). HMRC issued her with a "failure to notify" penalty of £3,265.11. Mrs Harber appealed the penalty on the basis that she had a reasonable excuse, because of her mental health condition and/or because it was reasonable for her to be ignorant of the law.

2. In a written document ("the Response") Mrs Harber provided the Tribunal with the names, dates and summaries of nine First-tier Tribunal ("FTT") decisions in which the appellant had been successful in showing that a reasonable excuse existed. However, none of those authorities were genuine; they had instead been generated by artificial intelligence ("AI"). In this decision, we have called these "the Cases in the Response" or "the AI cases", and they are set out at §13ff below.

3. We accepted that Mrs Harber had been unaware that the AI cases were not genuine and that she did not know how to check their validity by using the FTT website or other legal websites.

4. In deciding Ms Harber's appeal, we applied the principles set out in *Christine Perrin v HMRC* [2018] UKUT 156 ("*Christine Perrin*"), and having done so, we found that she did not have a reasonable excuse. We therefore dismissed her appeal and upheld the penalty.

5. In coming to that decision, we did not take into account her reliance on the AI cases. In other words, our decision would have been the same if Mrs Harber had not provided the cases in the Response. Nevertheless, providing authorities which are not genuine and asking a court or tribunal to rely on them is a serious and important issue. We make further observations at §23 to §24.

THE AUGUST HEARING

6. Mrs Harber's case was categorised as "basic" under Rule 23 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). It was listed to be heard at 2pm on 10 August 2023; another basic case was listed for 3.30pm. HMRC had provided a Bundle of documents in advance; this included Mrs Harber's grounds of appeal and the correspondence between the parties before the appeal was notified to the Tribunal. HMRC also provided a Bundle of authorities, including *Christine Perrin.*

7. The hearing proceeded, with Mrs Harber giving oral evidence and being cross-examined by Ms Man. Both parties then set out their reasons as to why they considered they should succeed. The hearing was thus coming to an end when Mrs Harber said that the Tribunal and HMRC had not commented on the Response, which had included further submissions together with "other cases" where the Tribunal had "sided with the taxpayer".

8. As we had not received the Response, we adjourned, and a clerk from the Birmingham Tribunal Centre identified that Mrs Harber had sent the Response to the Tribunal on 3 May 2023, but had not copied it to HMRC. We reconvened to update the parties; this was followed by a further ten minute break for Ms Man and the Tribunal to consider the Response. At the end of that short adjournment, Ms Man said she had checked a few of the cases in the Response to the FTT website, but been unable to find them.

9. The Tribunal told Mrs Harber that we would carefully consider the Response, and we subsequently issued directions which said:

> "…in our judgment the position is as follows:

(1) Documents such as the Response are normally available to the Tribunal and the other party in good time before the hearing.

(2) This allows the Tribunal and the other party fully to appreciate the points which are being put forward.

(3) In this case, very little time was available to the Tribunal or to HMRC to reflect on the Response in the context of the other evidence and the case law.

(4) Had there been no administrative error, the Tribunal and HMRC would have been in a position to ask Ms Harber to expand on her new evidence and the case law.

(5) It was not Ms Harber's fault that the Response was not provided on a timely basis.

(6) It is in the interests of justice for there to be another opportunity for Ms Harber to expand on the matters in the Response. This includes:

(a) the new evidence (about her health, the property and the letting arrangements); and

(b) the case law, including how she identified the particular FTT decisions which she asked the Tribunal to take into account."

10. The case was relisted for a hearing date which took into account the availability of the parties and of the Tribunal.

THE CASES IN THE RESPONSE

11. We first set out the cases in the Response, followed by the related evidence and submissions, and concluding with our findings and observations.

The text of the cases

12. The cases in the Response were divided into two categories, those which related to "ignorance of the law" and those which related to mental health conditions.

Ignorance of the law cases

13. Four of the cases in the Response dealt with ignorance of the law; they are set out below *verbatim*:

"In the case of 'David Perrin v HMRC' (2019), the taxpayer, David Perrin, successfully appealed against a penalty charge for failing to notify HMRC of his liability to pay tax. Mr. Perrin argued that he was unaware of his obligation to notify HMRC and that the penalty charge was therefore unfair. The First-tier Tribunal (Tax Chamber) found in favor of Mr. Perrin, stating that his ignorance of the law constituted a reasonable excuse for the failure to notify HMRC'.

'Jewell v HMRC' (2016): The taxpayer successfully appealed against a penalty for late filing of a tax return on the basis of a lack of knowledge of the requirements to file. The taxpayer argued that they had not been aware of the requirement to file a tax return as they had not received any correspondence from HMRC. The First-tier Tribunal (Tax Chamber) found in their favor.

'McMullen v HMRC' (2018): The taxpayer successfully appealed against a penalty for late filing of a tax return on the basis of ignorance of the law requirements. The taxpayer argued that they had not been aware of the requirement to file a tax return as they had not received any correspondence from HMRC. The First-tier Tribunal (Tax Chamber) found in their favor.

'Milner v HMRC' (2020): The taxpayer successfully appealed against a penalty for late filing of a tax return on the basis of ignorance of the law

> requirements. The taxpayer argued that they had not been aware of the requirement to file a tax return as they had not received any correspondence from HMRC. The First-tier Tribunal (Tax Chamber) found in their favour."

The mental health cases

14. Five of the cases in the Response concerned mental health; they are set out below *verbatim*.

> "'Smith v HMRC' (2021): The taxpayer successfully appealed against a penalty for late filing of a tax return on the basis of mental health issues. The taxpayer argued that their mental health condition, combined with other factors, had made it impossible for them to submit the return on time. The First-tier Tribunal (Tax Chamber) found in their favor.'
>
> 'Oyesanya v HMRC' (2020): In this case, the taxpayer successfully appealed against a penalty for late filing of a tax return. The taxpayer argued that they had a reasonable excuse for the late filing due to their mental health condition, which had prevented them from being able to manage their affairs effectively. The First-tier Tribunal (Tax Chamber) found in their favor.
>
> 'Baker v HMRC' (2020): The taxpayer successfully appealed against a penalty for late filing of a tax return on the basis of mental health issues. The taxpayer argued that their mental health condition, combined with other factors, had made it impossible for them to submit the return on time. The First-tier Tribunal (Tax Chamber) found in their favor.
>
> 'Acheson v HMRC' (2021): In this case, the taxpayer successfully appealed against a penalty for late filing of a tax return. The taxpayer argued that they had a reasonable excuse for the late filing due to their mental health condition, which had prevented them from being able to manage their affairs effectively. The First-tier Tribunal (Tax Chamber) found in their favor.
>
> 'Talal v HMRC' (2019): In this case, the taxpayer successfully appealed against a penalty for late filing of a tax return. The taxpayer argued that they had a reasonable excuse for the late filing due to their mental health condition, which had prevented them from being able to manage their affairs effectively. The First-tier Tribunal (Tax Chamber) found in their favor."

Evidence and submissions

15. At the reconvened hearing, Mrs Harber said that the cases in the Response had been provided to her by "a friend in a solicitor's office" whom she had asked to assist with her appeal. Mrs Harber did not have more details of the cases, in particular, she did not have the full text of the judgments or any FTT reference numbers.

16. Ms Man told the Tribunal that she had checked each of the cases in the Response to the FTT website, using not only the appellants' names and the year as provided by Mrs Harber, but where the name was relatively common, she had extended the search to several years on either side. For example, when looking for "Smith v HMRC (2021)", she had looked at cases between 2019 and 2023 where the appellant was called Smith. Despite that extended search, Mrs Man had not identified any FTT decision which matched the cases in the Response.

17. Ms Man did however note that:

> (1) the case of "Baker v HMRC (2020)" had similarities with *Richard Baker v HMRC* [2018] UKFTT 0763 (TC) ("*Richard Baker*"), in which a Mr Richard Baker appealed on the basis that his depression constituted a reasonable excuse. However, not only was the year different, but Mr Richard Baker lost his appeal; and

(2) the appellant in "David Perrin (2019)" had the same surname as the appellant in *Christine Perrin*, but the latter case was heard by the FTT in 2017 and by the Upper Tribunal ("UT") in 2018, and Mrs Perrin had lost at both the FTT and the UT.

18. The Tribunal told the parties that we too had looked at the FTT website and other legal websites, and had also had been unable to find any of the cases in the Response. We asked Mrs Harber if the cases had been generated by an AI system, such as ChatGPT. Mrs Harber said this was "possible", but moved quickly on to say that she couldn't see that it made any difference, as there must have been other FTT cases in which the Tribunal had decided that a person's ignorance of the law and/or mental health condition provided a reasonable excuse.

19. Mrs Harber then asked how the Tribunal could be confident that the cases relied on by HMRC and included in the Authorities Bundle were genuine. The Tribunal pointed out that HMRC had provided the full copy of each of those judgments and not simply a summary, and the judgments were also available on publicly accessible websites such as that of the FTT and the British and Irish Legal Information Institute ("BAILLI"). Mrs Harber had been unaware of those websites.

Findings of fact

20. In considering whether the cases in the Response were genuine FTT judgments or whether they had been generated by an AI system such as ChatGPT, the Tribunal first carried out a review of other published judgments, and having done so, took into account the following points:

(1) None of the cases in the Response is included in the FTT website or other legal websites.

(2) Mrs Harber accepted that it was "possible" that the cases in the Response had been generated by an AI system, and she had no alternative explanation for the fact that no copy of any of those cases could be located on any publicly available database of FTT judgments.

(3) The Solicitors' Regulation Authority ("SRA") recently said[1] this about results obtained from AI systems:

> "All computers can make mistakes. AI language models such as ChatGPT, however, can be more prone to this. That is because they work by anticipating the text that should follow the input they are given, but do not have a concept of 'reality'. The result is known as 'hallucination', where a system produces highly plausible but incorrect results."

(4) The cases in the Response were "plausible but incorrect" because:

(a) The leading authority on the approach the FTT should take in reasonable excuse appeals is the UT judgment in *Christine Perrin*, commonly referred to simply as *Perrin*. The cited case of "David Perrin" uses the same surname and also concerns an appeal against a penalty on the grounds of reasonable excuse. However:

(i) the appellants have different first names;

(ii) the dates of the judgments are not the same; and

(iii) Christine Perrin lost her appeal whereas "David Perrin" succeeded.

[1] Risk Outlook report: the use of artificial intelligence in the legal market, 20 November 2023

(b) In the cited case of "Baker v HMRC (2020)", the appellant challenged a penalty on the basis that his mental health difficulties provided him a reasonable excuse. This mirrors what happened in the *Richard Baker* judgment identified by Ms Man, see §17(1) above. However, that case was decided in a different year from the cited case, and Mr Richard Baker lost his appeal, unlike the appellant in the cited case.

(c) In the cited case of "Smith v HMRC (2021)", the appellant successfully claimed a reasonable excuse on the basis of mental health difficulties. In *Smith v HMRC* [2018] UKFTT (TC) in which Mr Colin Smith similarly submitted that he had a reasonable excuse on the basis of "confusion and poor health", but that case was again decided in a different year from the cited case, and Mr Colin Smith lost his appeal, unlike the appellant in the cited case.

(d) The FTT has decided 16 other reasonable excuse penalty cases in which the appellant's surname was "Smith", but none was issued in 2021, the year of the judgment cited by Mrs Harber, and none referred to mental health difficulties.

(e) The case of *McMullen Holdings v HMRC* [2011] UKFTT 327 (TC). That appeal concerned a VAT penalty for late registration and the FTT allowed the appeal. The cited case of "McMullen v HMRC (2018)" was similar in that the appellant successfully appealed a penalty, but that penalty had been charged for late filing of a tax return not for late registration for VAT, and the year was also different.

(f) The issue in *Milner v HMRC* [2014] UKFTT 735 (TC) was whether the appellant had a reasonable excuse for a VAT penalty; Mr Milner lost his appeal. The cited case of "Milner v HMRC (2020)" similarly concerned a reasonable excuse, but the penalty was charged for a different type of failure, in a different year, and the appellant won his appeal.

(g) The appellants in the other cases in the Response have the same surnames as those in reported decisions of other courts or tribunals. In BAILLI there are:

(i) five judgments in the last ten years in which one of the parties had the surname "Jewell";

(ii) five judgments in the last ten years in which one of the parties had the surname "Oyesanya";

(iii) twenty judgments in which one of the partes had the surname "Acheson"; and

(iv) four judgments in which one of the parties had the surname "Talal".

(h) The wording of the cases in the Response is similar to that of published FTT decisions. To give just a few examples:

(i) The summary of "David Perrin" states that the appellant "argued that he was unaware of his obligation to notify HMRC and that the penalty charge was therefore unfair". Numerous genuine FTT cases include as part of the published "key words" or headnotes, the phrase "appellant unaware of the obligation to notify… whether reasonable excuse", see for example *Clarke v HMRC* [2020] UKFTT 144 (TC) and *McDonough v HMRC* [2020] UKFTT 421 (TC), in which the issue as to whether the penalty was "unfair" is also discussed.

(ii) The summary of "Jewell v HMRC (2016)" states that the appellant had submitted that "they had not been aware of the requirement to file a tax return as they had not received any correspondence from HMRC". In the published case of *One Motion Logistics v HMRC* [2021] UKFTT 260 (TC), the appellant similarly claimed that "he had not been aware" of the relevant statutory requirement because the relevant correspondence "had not been received" from HMRC, and that as a result he had a reasonable excuse.

(iii) The summary of "Oyesanya" states that the appellant had submitted that "their mental health condition prevented them from being able to manage their affairs effectively". In the published case of *Freiberga v HMRC* [2014] UKFTT 746 (TC), the appellant similarly claimed a reasonable excuse because she "was unable to manage her business affairs" as the result of "suffering from [an] acute bout of depression and suicidal thoughts".

(5) The Tribunal was also assisted by the US case of *Mata v Avianca* 22-cv-1461(PKC), in which two barristers sought to rely on fake cases generated by ChatGPT. Like Mrs Harber, they placed reliance on summaries of court decisions which had "some traits that are superficially consistent with actual judicial decisions". When directed by Judge Kastel to provide the full judgments, the barristers went back to ChatGPT and asked "can you show me the whole opinion", and ChatGPT complied by inventing a much longer text. The barristers filed those documents with the court on the basis that they were "copies…of the cases previously cited". Judge Kastel reviewed the purported judgments and identified "stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals".

(6) Unlike the barristers, Mrs Harber did not take the further step of asking ChatGPT for full judgments, so we had only the less detailed summaries. These had fewer identifiable flaws than those which Judge Kastel had identified in the longer full decisions with which he was provided. However, we noted that all but one of the cases in the Response related to penalties *for late filing*, and not for failures to notify a liability, which was the issue in Mrs Harber's case. There were also the following stylistic points:

(a) The American spelling of "favor" in the sentence "The First-tier Tribunal (Tax Chamber) found in their favor" which appears in six of the nine cited cases.

(b) The frequent repetition of identical phrases: three of the four ignorance of the law" cases say that "the taxpayer argued that they had not been aware of the requirement to file a tax return as they had not received any correspondence from HMRC". Two of the "mental health" cases say that "the taxpayer argued that their mental health condition, combined with other factors, had made it impossible for them to submit the return on time" and the other two both say "the taxpayer argued that they had a reasonable excuse for the late filing due to their mental health condition, which had prevented them from being able to manage their affairs effectively".

21. Having considered all the points set out above, we find as a fact that the cases in the Response are not genuine FTT judgments but have been generated by an AI system such as ChatGPT.

22. We also find as a fact that Mrs Harber was not aware that the cases in the Response were fabricated, and did not know how to locate or check case law authorities by using the FTT website, BAILLI or other legal websites.

The Tribunal's view

23. Although we have accepted that Mrs Harber did not know the AI cases were not genuine, we reject her submission that this did not matter because the Tribunal had decided other reasonable excuse cases on the basis of ignorance of the law and/or mental health issues. We instead agree with Judge Kastel, who said on the first page of his judgment (where the term "opinion" is synonymous with "judgment") that:

> "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the…judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."

24. We acknowledge that providing fictitious cases in reasonable excuse tax appeals is likely to have less impact on the outcome than in many other types of litigation, both because the law on reasonable excuse is well-settled, and because the task of a Tribunal is to consider how that law applies to the particular facts of each appellant's case. But that does not mean that citing invented judgments is harmless. It causes the Tribunal and HMRC to waste time and public money, and this reduces the resources available to progress the cases of other court users who are waiting for their appeals to be determined. As Judge Kastel said, the practice also "promotes cynicism" about judicial precedents, and this is important, because the use of precedent is "a cornerstone of our legal system" and "an indispensable foundation upon which to decide what is the law and its application to individual cases", as Lord Bingham's said in *Kay v LB of Lambeth* [2006] UKHL 10 at [42]. Although FTT judgments are not binding on other Tribunals, they nevertheless "constitute persuasive authorities which would be expected to be followed" by later Tribunals considering similar fact patterns, see *Ardmore Construction Limited v HMRC* [2014] UKFTT 453 at [19].

25. We now move on to the substantive issue in this appeal, namely whether to set aside or uphold the penalty.

THE EVIDENCE RELATING TO THE SUBSTANTIVE ISSUE

26. We make our findings of fact relevant to the substantive issue in this appeal on the basis of the documents in the Bundle and Mrs Harber's oral evidence.

27. When the Tribunal reconvened in November 2023, Mrs Harber applied for a further adjournment to allow her to provide medical evidence of her mental health. Having considered Rule 2 of the Tribunal Rules, we decided it was not in the interests of justice to grant that further adjournment. HMRC had accepted that Mrs Harber suffered from mental health conditions at the relevant time, and an adjournment would cause a further delay and increase the costs of both HMRC and the Tribunal; in addition, Mrs Harber had had plenty of time to provide further evidence.

THE FACTS RELATING TO THE SUBSTANTIVE ISSUE

28. We set out below our findings of fact about the properties Mrs Harber owned and managed; about her mental health, and about her contact with HMRC.

The properties

29. In 2006, Mrs Harber purchased a property in Sunderstead Road ("Sunderstead Road") for £135,000; the house was in her sole name, but some finance was provided by another person. Sunderstead Road was let out to tenants from 2007. Mrs Harber was aware of her

responsibilities as a landlord: she carried out gas checks, made sure the property was safe, collected the rent and paid the mortgage. She did not notify HMRC that she was liable to tax on the rental income because she believed her earnings were below the tax threshold. Until after the events with which this appeal is concerned, Mrs Harber had never completed a self-assessment form.

30. From 2014 onwards, Mrs Harber let her own property for a period and subsequently had lodgers; she understood that the income from the lodgers was tax free because of the rent-a-room scheme. She had called HMRC to check this was the case, but could not remember when this was, saying only that it was "years ago".

31. In 2018, Mrs Harber put Sunderstead Road on the market, and instructed solicitors and estate agents; it was sold in October of that year for £252,000. The solicitors did not provide Mrs Harber with any advice about CGT. However, she subsequently told HMRC that she "did realise that after paying off the mortgage and loans taken against the house there would possibly be some tax to pay" and her oral evidence before the Tribunal was that she had been aware at the time of the sale that HMRC "would want money". Having estimated the CGT payable, Mrs Harber put £20,000 into government bonds.

32. At this stage, Mrs Harber took no professional advice from an accountant or solicitor about the CGT position, because this would have been "expensive". She also did not call or otherwise contact HMRC, and she did not look on the HMRC website to find out whether she had to notify her CGT liability. She knew the sale would be reported on the government's Land Registry site in due course, and thought that she would hear from HMRC "after the sale was lodged". When asked if she would have contacted HMRC to report the gain if she hadn't heard from them, she said "if time had gone on I might have done".

Mrs Harber's health

33. Mrs Harber cared for her mother from 2008 until 2013, when she passed away. As her mother lived a long way from Mrs Harber this involved a lot of travelling, and she found it very stressful in other ways; she also experienced significant grief following her bereavement. From at least 2013, Mrs Harber suffered from anxiety and panic attacks, which were exacerbated by the break-up of a long-term relationship which occurred around the time she sold Sunderstead Road.

The contacts with HMRC and the penalty

34. HMRC received information from another source that Mrs Harber was receiving letting income, and on 25 September 2021, HMRC asked her for information about each property, including the rental income and expenses. Having received no response, on 10 December 2021, HMRC issued Mrs Harber with a notice under FA 2008, Sch 36.

35. Mrs Harber responded on 5 January 2021, providing the following information:

(1) she had rented out Sunderstead Road;

(2) it had been sold in 2018;

(3) she also had rented out her own property;

(4) she had subsequently had lodgers; and

(5) on receipt of HMRC's letter she had contacted Tax Aid for advice, and was "now seeking advice from a tax professional".

36. At the end of the same email, Mrs Harber listed relevant deductions from the sale proceeds of Sunderstead Road, including the purchase price, mortgage interest, legal costs and estate agents' fees.

37. Correspondence continued, and on 12 April 2022 Mrs Harber instructed a firm of accountants in relation to the calculation of the CGT on the sale of Sunderstead Road.

38. On 21 July 2022, HMRC issued Mrs Harber with a CGT assessment for £16,325.56 on the basis that the gain had been £82,327.69. HMRC decided that disclosure had been prompted but non-deliberate, for which the penalty range is between 20% and 30%. HMRC gave Mrs Harber the maximum mitigation, so the penalty rate charged was 20%. A penalty of £3,265.11 was issued on the same date, 21 July 2022.

39. Mrs Harber appealed the penalty, but not the CGT assessment. The penalty was upheld on statutory review and Mrs Harber made an in-time notification of the appeal to the Tribunal.

THE LAW

40. The applicable statutory provisions so far as relevant to this appeal, and the related case law, are set out below.

Statutory obligation to notify liability

41. Section 7 of the Taxes Management Act 1970 ("TMA") is headed "Notice of liability to income tax and capital gains tax" and reads:

> "(1) Every person who
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) falls within subsection (1A) or (1B)
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
>
> (1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the persons total income and chargeable gains."

42. The reference to a "notice under section 8" is to a self-assessment return; those within self-assessment do not need to notify liability under TMA s 7 because they will include the related amounts in their tax returns. Mrs Harber had not received such a return, and so was required by TMA s 7 to notify her liability to CGT.

43. TMA s 7(1C) provides that the "notification period" during which a person in Mrs Harber's position was required to notify her liability was six months after the end of the relevant tax year. Mrs Harber sold Sunderstead Road in October 2018, in the tax year 2018-19, and was thus required to notify her CGT liability by 6 October 2019, six months after the end of that year. She did not notify HMRC until her letter of 5 January 2021.

Schedule 41

44. The penalty was charged under FA 2008, Sch 41. Para 1 of that Schedule provides:

> "A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a 'relevant obligation')."

45. The first of those "relevant obligations" is the obligation to notify liability under TMA s 7. As Mrs Harber had failed to notify by the end of the "notification period" set out in TMA s 7, she was liable to a penalty under Sch 41.

46. Sch 41, para 20 is headed "reasonable excuse" and reads:

> "(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC

> or (on an appeal notified to the tribunal) the tribunal, that there is a reasonable excuse for the act or 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 relevant act or failure, and
>
> (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

47. The other provisions of that Schedule were not in issue.

Not deliberate

48. As is clear from Sch 41, para 20(1), a person who is liable to a penalty for failure to notify can only rely on a reasonable excuse defence if the failure was not deliberate.

49. When Mrs Harber was asked whether, if HMRC had not written to her, she would have contacted HMRC, she said "if time had gone on *I might have done*" (our emphasis). However, HMRC did not seek to argue that was a case of "blind eye" knowledge: in other words, that Mrs Harber deliberately avoided notifying HMRC about her CGT liability, see the discussion about blind-eye knowledge in *CPR Commercials v HMRC* [2023] UKUT 61 (TCC).

The case law on reasonable excuse

50. In *Christine Perrin* at [81] the UT set out a recommended process for this Tribunal to use when considering whether a person has a reasonable excuse:

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. In doing so, the Tribunal should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

51. At [82] the UT said:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular

> requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long…"

WHETHER MRS HARBER HAD A REASONABLE EXCUSE

52. Mrs Harber put forward two bases on which she had a reasonable excuse; her mental health condition and because it was reasonable for her to be ignorant of the law. We have dealt with each of these separately below.

Mental health condition

53. The first and second steps recommended in *Christine Perrin* are that the Tribunal establish the facts which Mrs Harber considers form her reasonable excuse. There was no dispute that Mrs Harber was suffering from a mental health condition and we have set out our findings at §33.

54. The third step is whether Mrs Harber's mental health condition amounts to an objectively reasonable excuse for her failure to notify her CGT liability, taking into account her experience and other relevant attributes and the situation in which she found herself at the relevant time.

55. Ms Man submitted that Mrs Harber's mental health condition did not amount to a reasonable excuse because it did not prevent her from:

(1) putting Sunderstead Road on the market, liaising with her solicitors and dealing with the sale;

(2) working out the approximate capital gain and putting £20,000 into government bonds; and

(3) dealing with the lodgers in her own property.

56. We agree. We find that the reasonable person in Mrs Harber's position would not have been prevented by her mental health condition from contacting HMRC and informing them of the sale and the likely CGT liability. Mrs Harber's mental health condition therefore does not provide her with a reasonable excuse.

Ignorance of the law

57. Mrs Harber relied on the following points, which we have found to be facts:

(1) She had never previously completed a self-assessment return.

(2) The solicitors who acted for her in the sale did not provide her with advice on CGT.

(3) She knew the sale would be reported on the government's Land Registry site in due course and thought that she would hear from HMRC "after the sale was lodged".

58. However, the following other facts are also relevant:

(1) Mrs Harber knew enough about CGT to recognise that she had made a gain on the sale.

(2) She knew that "HMRC would want money". and put £20,000 into gilts.

(3) She did not take professional advice at this stage because this would have been "expensive" and not because she was confident she was correct. She only took professional advice later, when she was debating the quantum of the gain with HMRC

(4) She had previously rung HMRC about the lodgers and rent-a-room, so she knew HMRC gave free advice about tax by phone, but she did not call to find out what she needed to do in relation to the capital gain she knew she had made.

(5) Mrs Harber did not seek advice from Tax Aid until after HMRC had written to her in September 2021.

59. In our judgment, the reasonable taxpayer in Mrs Harber's position, who had previously obtained advice from HMRC, and who knew she had made a capital gain, would have contacted HMRC, Tax Aid, an accountant or a lawyer to find out what she needed to do. That hypothetical reasonable person would not simply have put some money away and waited for HMRC to make contact.

60. In coming to that finding we have taken into account the fact that Mrs Harber suffered from anxiety and panic attacks. We have already found that this did not prevent her from putting Sunderstead Road on the market; liaising with her solicitors; dealing with the sale, calculating the gain or dealing with her lodgers; it also did not prevent her from contacting HMRC, Tax Aid, a lawyer or an accountant to find out what law applied to the reporting of her capital gain.

61. We therefore agree with Ms Man that Mrs Harber's ignorance of the requirement to notify her liability was not objectively reasonable.

OVERALL DECISION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. For the reasons set out above, we find that Mrs Harber does not have a reasonable excuse for her failure to notify liability, and we confirm the penalty. The appeal is therefore dismissed.

63. 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 Rules. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 04th DECEMBER 2023