Neutral Citation: [2023] UKFTT 00059 (TC)

Case Number: TC08701

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/00781

INCOME TAX - PENALTIES - Whether HMRC had adduced adequate evidence as to system and its production and posting of penalty notices amounting to approximately £280,000? - Yes - Whether Appellant had rebutted the presumption arising under Interpretation Act 1978 section 7? - No - Appeal dismissed

Heard on: 1 November 2022
Judgment date: 17 January 2023

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA

Between

MR NICOLAS BURLEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Yates KC, instructed by PricewaterhouseCoopers LLP

For the Respondents: Paula O'Reilly, a Litigator of HM Revenue and Customs' Solicitor's Office and Legal Services

DECISION

INTRODUCTION AND BACKGROUND

1. Mr Burley appeals against a number of penalty assessments, amounting to £282,397.

2. By far the largest part of this sum - £241,522 - relates to two successive 5% penalties (each of £120,761) applied in relation to a failure to pay tax (i) within 30 days of the due date; (ii) within 6 months of the due date, for 2016/17 (FA 2009 Sch 56 Para 3(3): '**the 2016/17 Penalties**'.

3. Both the 2016/17 Penalties are said by HMRC to have been issued on 8 January 2019.

4. The other penalties, ten in number, being a mixture of late filing and late payment penalties, all relate to 2015/16 ('**the 2015/16 Penalties**'). Of those, five were said to have been issued on 8 January 2019 (ie, the same day as the 2016/17 Penalties), and five on 15 January 2019.

5. At the hearing, HMRC confirmed that daily penalties coming to £900 imposed on 11 August 2017 were not being pursued due to a defect in the form used at the time to notify the penalties. Insofar as the appeal is advanced against those daily penalties, it is allowed by consent of the parties.

6. Mr Burley's Grounds of Appeal, dated 25 November 2021, are (in full) as follows:

> "HMRC contend that I failed to notify chargeability to tax for 2015/16 and 2016/17 and that they made and notified me of penalty assessments for these years under the provisions of Schedule 55 and 56 of FA 2009.
>
> I have repeatedly informed HMRC that I never received such penalty assessments and as such I have not, as is required by paragraph 11(1)(b) of Schedule 56 FA 2009, been notified of such penalties.
>
> HMRC have not provided any direct evidence that such assessments were in fact made, if they were made what they actually stated or that they were in fact posted to me."

7. In saying what outcome he would like, Mr Burley said:

> "HMRC should accept that any penalty assessments that may have been made are not valid as they have not been notified to me as is required by statute."

8. Because this is a penalty case, the Revenue bears the initial burden of showing that all the requisite elements are met.

9. The standard of proof in relation to disputed matters is the same as in all civil proceedings - namely, the balance of probabilities (or, put differently, whether something is likelier than not).

10. In *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, Lord Hoffmann made the following helpful remarks concerning the operation of this standard when it comes to fact finding:

> "[2] If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated

> as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

11. That guidance applies here.

THE FILING DATES

12. For 2015/16, a Notice to File was issued to the Appellant on 13 October 2016. The filing date was 13 January 2017 for a paper return, or 31 January 2017 for an online return.

13. For 2016/17, no Notice to File was initially issued. The Appellant was obliged to notify HMRC, by no later than 5 October 2017, of his chargeability to tax.

14. For 2016/17, a Notice to File was subsequently issued on 13 July 2018. That Notice required the Appellant to file within three months.

THE LAW

15. There is very little dispute as to the applicable law. The following are all common ground.

16. Where a taxpayer is liable for a penalty, then HMRC must (a) assess the penalty, (b) notify the taxpayer, and (c) state in the notice the period in respect of which the penalty is assessed: FA 2009 Sch 55 Para 18(1) and Sch 56 Para 11(1).

17. Section 7 of the Interpretation Act 1978 reads:

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

18. TMA 1970 section 115 provides that a notice which is to be served on a natural person may be delivered or left at his usual or last known place of residence, and that this may be done by post.

19. FA 2020 section 103(1) ("HMRC: exercise of officer functions") provides that "Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (*whether by means involving the use of a computer* or otherwise)" (italicised emphasis added by us). That section is treated as always having been in force: section 103(5). Hence, it is to be treated as having been in force at the time of all the notices here.

HMRC'S CASE

2015/16

20. The Appellant was bound to file a self-assessment return for 2015/16 by 31 January 2017 (if online). He did not file a return on time. He filed a self-assessment return on 10 January 2019. Penalties for late filing are due and payable.

21. The due date for payment of tax due for 2015/16 was 31 January 2017. The liability was not paid until 29 August 2018. Penalties for late payment are due.

2016/17

22. Mr Burley filed a self-assessment return on 10 January 2019.

23. The due date for payment of tax due for 2016/17 was 31 January 2018. The liability was not paid until 29 August 2018. Penalties for late payment are due.

THE APPELLANT'S CASE

24. The Appellant's case has a narrow focus. Mr Burley says HMRC must prove that the notices were sent to him, but that, even if HMRC do discharge their burden, he nonetheless is certain that he never received them. He does not believe that it is possible that, if he had received them, they would have been misplaced or would not have resulted in him contacting HMRC immediately.

25. It is important to note that Mr Burley does not seek to advance any case that he had a reasonable excuse for not paying the tax on time, or that there are some special circumstances which we should consider.

26. We did not hear evidence from any witness on behalf of HMRC. HMRC's case is entirely documentary.

THE 'HALF-TIME' SUBMISSION

27. After the Revenue had closed its case, and before we heard evidence from Mr Burley, Mr Yates KC invited us to consider a submission that there was no case to answer, and that therefore the proceedings should be determined in favour of Mr Burley, peremptorily and at that point, without the need to hear evidence from Mr Burley, or indeed to hear any further evidence or submissions at all.

28. The application was made in the face of the Tribunal. That is to say, there was no application notice, and it was not foreshadowed in Mr Yates' otherwise helpful and succinct Skeleton Argument. Indeed, it was not consistent with those written submissions, which focussed on the evidence which Mr Burley was going to give.

29. In response to questions from the Tribunal, Mr Yates KC told us that the application was not being advanced under Rule 8, but rather, in his view, engaged the Tribunal's case-management powers under Rule 5 to deal with any issue as a preliminary issue: Rule 5(3)(e).

30. We said that we would consider the application, but would nonetheless go on to hear the rest of the case - including the oral evidence of Mr Burley - on a *de bene esse* basis.

31. We reject the application. For present purposes, and treating it as a properly justiciable application to have made (although we do not think it was, for the reasons below) it nonetheless seems to us, for the reasons set out in more detail in our discussion of Step 1, that, even if the evidence of system were to have been dealt with, in effect, as a preliminary issue, Mr Burley's application to stop the case against him at that point would still have failed.

32. In and of itself, that is sufficient to dispose of the application. But we nonetheless consider it appropriate to express some (necessarily obiter and non-binding) views as to the deployment of this power in this fashion:

(1) It seems to us that the concession that no appropriate source of such power can be found in Rule 8 was an appropriate one to make;

(2) We are not persuaded that a 'half-time' submission of this kind is within the proper meaning and effect of Rule 5(3)(k) which contemplates preliminary issues (when those properly arise) being dealt with in advance of the substantive hearing, not (as here) during them.

STEP 1 - THE EVIDENCE OF POSTING ETC

33. As the Tribunal has remarked on other occasions, adequate evidence is not a luxury. It is a necessity.

34. The key word here is "adequate". The question for us is not whether there could or should have been better evidence in support of the process whereby penalty notices are generated and

posted. The question for us is simply whether the evidence before us is good enough - adequate - to meet the burden which the Respondent Commissioners must discharge. That is a binary question. The Commissioners' evidence is either adequate, or it is not.

35. In *Qureshi v HMRC* [2018] UKFTT 0115 (TC) at [14], endorsed by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC) at [51], the Upper Tribunal described such evidence as "sufficiently detailed and cogent".

36. A mere assertion of the occurrence of a relevant event in a statement of case is not sufficient: *Perrin v HMRC* [2018] UKUT 156 (TC) at [69]. Nor are assertions by a presenting officer or advocate that something "would have" or "should have" happened sufficient.

37. Documents on their own without a supporting witness statement may be sufficient to prove relevant facts: *Qureshi v HMRC* at [8]; *Barry Edwards v HMRC* at [50].

38. Evidence of the system in general as evidence of the application of that system in an individual case is evidence of a kind which the Tribunal has received and accepted in the past.

39. In *Qureshi*, the Upper Tribunal said:

> "We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage pre-paid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material".

40. Different cases in this Tribunal have reached different outcomes:

(1) In *Musca* [2019] UKFTT 304 (TC) (Judge Geraint Jones KC, a case dealt with on the papers) held that there was no such "sufficiently detailed and cogent" evidence, and the appeal was allowed;

(2) In *Gladman* [2019] UKFTT 662 (TC), Judge Gething and Mr McBride, at a hearing, and having heard oral evidence from both sides tested in cross-examination, allowed the taxpayer's appeal on the basis that HMRC had failed to discharge their burden. There, the Revenue's officer made an extensive series of concessions in cross-examination (see Paragraph [8] of the Decision) and both the Appellant and the Revenue produced evidence which, in the Tribunal's view, was inconsistent with the Revenue having properly addressed, pre-paid and posted a letter: see Paragraph [20].

41. In our view, the evidence here as to the production and dispatch of the penalty notices was sufficiently detailed and cogent.

42. HMRC's print-out of its Self-Assessment record for Mr Burley is populated with the penalties: see pages 107 (2015/16) and 108 (2016/17) of the bundle. Those documents, which we accept as authetic and accurate, show the penalties being sent to Mr Burley in two tranches: on 8 January 2019 and 15 January 2019.

43. Page 431 of the bundle is an HMRC internal document, marked "Official", which sets out, in abbreviated form, using codes and abbreviations, the penalties imposed.

44. In summary, it records the following activities undertaken by the High Net Worth Unit:

(1) 8 January 2019, penalty amounts charged for late filing and late payment for 2015/16;

(2) 8 January 2019, penalty amounts charged for late payment for 2016/17;

(3) 15 January 2019, penalty amounts charged for late filing and late payment for 2015/16.

45. All that information was provided by HMRC to a contractor, Communisis, which handles the physical production and posting of penalty notices.

46. HMRC rely on two documents from Communisis, described as "Evidence of print and despatch, based on Print Service records".

47. The first of these is at page 427 of the bundle. It is signed by one Matt Forber, described as a Communisis Account Manager. It is populated after the event.

48. It records, as "Product (eg SA316 Statutory Notice to File)":

> "1. SA 370
> Recorded Issue Date: 09/01/2019
> X 2 cases
> Document ID's
> HZ1919036CC
> HZ1919036IU"

49. An SA370 is a penalty assessment.

50. The "Despatch Date" is given as "10/01/19".

51. A second document, at page 429 of the bundle, records, as "Product":

> 1. SA 370
> Recorded Issue Date 16/01/2019"
> It records, as "Despatch Date", "19th Jan 2019"

52. We are satisfied that the Communisis documents at [427]-[428] and [429] relate to Mr Burley, and are accurate and authentic.

53. We are satisfied to the appropriate standard that the document at page 431 of the bundle is accurate and authentic, and can be cross-referenced to the Communisis documents:

(1) Items (1) and (2) in the immediately preceding paragraph cross-refer to the Communisis document at [427]

(2) Item (3) in the immediately preceding paragraph cross-refers to the Communisis document at [429].

54. That is to say, we are satisfied, to the appropriate standard, that HMRC directed production of the penalty notices, that the same were produced in the ordinary course of events, and were properly addressed, pre-paid and posted.

55. We are also satisfied that the notices, once produced and put into the post, did not come back to HMRC through its 'dead-letter' service.

STEP 2 - SERVICE

56. Because HMRC has satisfied us as to Step 1, we move onto Step 2.

57. Step 1 simply gives rise to a presumption. It is then for Mr Burley to displace that presumption. He bears the burden of doing so, albeit subject only to the usual civil standard. If

he does discharge the burden, then - as a fact (see Re B, above) - he was not notified of the penalties. If that mandatory statutory element is not met, then his appeal must be allowed. There is no discretionary element at play.

58. Mr Burley's written and oral evidence was that he lives at an address in Common Lane, which is a property behind electric gates. Accordingly, all mail is delivered either (i) in person for documents to be signed for (with someone inside having to open the gates) or (ii) into a locked external mail box which is on the wall immediately outside the gates.

59. There is nothing to suggest that any of these notices were sent as 'signed-for'. They were sent in the "ordinary" post.

60. His evidence is that the external mailbox has one key, and is typically opened by his wife on a daily basis, although "on rare occasions" he may too collect the mail. Once mail comes into the house, it is sorted into up to four piles on the kitchen table - one pile for things addressed to Mr Burley, one for things addressed to Mrs Burley, one for things addressed to the businesses which have registered offices at Common Lane, and one for anything addressed to the Burleys' three children, who no longer live at home.

61. The evidence was that the Burleys' daughter, who manages the 'back office' for the businesses which have registered offices at Common Lane, visits daily and takes the 'business' pile away. We were told that sometimes personal mail gets into the business pile, but is returned by her to Common Lane within 24 hours. There was no evidence from Mr Burley's daughter herself.

62. Mr Burley had been away, but was at home from 5 January 2019.

63. As Morgan J put it in *Calladine-Smith v Saveorder Ltd* [2021] EWHC 2501 (Ch) at Para [26]:

> "Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including the credibility of witnesses".

64. It was striking that it was not suggested to Mr Burley, in the course of his cross-examination, that he was not being truthful about not receiving the notices, and (consistently with this) nothing was said in closing as to Mr Burley's honesty, or the reasons which he might have had to give untruthful evidence about receipt of the notices. Accordingly, nothing in this decision can be read as adverse to Mr Burley's honesty, character or integrity.

65. In our view, for a number of reasons, he has failed to rebut the presumption of service. Any of those reasons would suffice individually.

66. For the reasons already set out, this is not a finding as to his honesty.

Reason 1

67. His evidence as to non-receipt was not credible and we do not think that we can safely rely on it.

68. He accepted that a significant volume of other post from HMRC had reached him, through the post, at home. This included post about penalties (for 2015/16, a late filing penalty issued on 7 February 2017, and daily penalties and a 6 month late filing penalty both issued on 11 August 2017).

69. It also included post sent at, or about, the time the penalty notices were sent, including at least one, and possibly two, determination warning letter(s), both recorded on HMRC's self-assessment notes as having been sent by both post and email, dated 21 December 2018,

complaining that the 2015/16 and 2016/17 self-assessment returns had not been filed, and indicating that HMRC was arranging for a Revenue Determination to be issued in respect of each year: see page 25 of the Supplementary Bundle.

70. On 8 January 2019, HMRC's Debt Management service wrote to Mr Burley, giving him notice of warning of enforcement by taking control of goods, and enclosing a number of items. We are satisfied that letter was sent, and its attachments, were also received.

71. Put shortly, it is simply not credible that the only HMRC correspondence not to have reached Mr Burley's home were the notices in dispute in this case.

72. It is not for us to make findings as to the adequacy of the Burleys' arrangements for dealing with post once it arrived in the external post-box at Mr Burley's address, or to speculate what did or might have happened to properly-addressed post after it reached Mr Burley's external post-box. That is the arrangement which he chose to use. It has nothing to do with HMRC.

73. Other things were going on at the time the notices had been sent. At 3.45pm on 10 January 2019 Mr Burley wrote to Officer Egerton (a Higher Officer of the High Net Worth Unit, with whom he had been in correspondence) that he had filed, online, his returns for the then-latest four years. He set out certain calculations as to the amounts owing for 2014/15, 15/16, 16/17, and 17/18, coming to about £2.745m, and the amounts already paid on account (about £2.8m). There is nothing in that letter to suggest that Mr Burley, at that time and date, had received any notices sent by HMRC on 8 January 2019 (he will not, of course, at that point have received anything sent on 15 January 2019), but this is not probative of non-receipt generally.

Reason 2

74. A feature of Mr Burley's evidence which factors into the credibility of his evidence overall is that his evidence as to the timeliness of his historic self-assessment filings was not accurate. Page 4 of the supplementary bundle set out, in a short summary, the dates on which his self-assessment returns had been received. Mr Burley confirmed that he was aware of the January deadline and said that he generally used to push up against the deadline, and, if he filed late, it would only be '1 or 2 days'. That was not correct. He did not file at all in 2012/13 or 2013/14, and had otherwise consistently filed his self-assessment returns out of time. For example, 2011/12 was filed on 6 February 2013 (more than '1 or 2 days' late) and attracted a £100 late filing penalty and £60 daily penalties.

75. The filing for 2015/16 was two years late.

76. Overall, the undisputed evidence allows us to find that Mr Burley was not an individual who was consistently compliant with the filing obligations imposed on all those in the self-assessment regime. Mr Burley had been subject to the full suite of late filing, daily, 6 month and 12 month penalties for three successive years: 2012/13, 2013/14, and 2014/15. Those were 12 penalties in all, imposed over a total period of three years between February 2014 and February 2017. It was not in dispute that all of those had reached him. But, unlike 2016/17, none of those penalties, in the absence of a self-assessment return, were tax-geared. The problem which Mr Burley encountered for 2016/17, which may to some degree have been obscured by the (relatively modest) penalties imposed in relation to earlier years - hundreds of pounds - was that 2016/17 penalties were tax-geared, with that tax being assessed against several million pounds worth of income arising in that particular year.

Reason 3

77. It is also relevant, as part of our overall evaluation, that the contemporary correspondence is not readily consistent with the trenchant case of non-receipt now being advanced.

78. On 1 March 2019, HMRC's Officer Egerton wrote a lengthy letter (sent by email) in relation to due dates, interest, and penalties. That referred, amongst other matters, to the 30 day late payment penalty and the 6 month late payment penalty, each of £120,761.

79. If Mr Burley were indeed right that those notices - coming to the best part of quarter of a million pounds - had not arrived, then the email of 1 March 2019 would have been the first that Mr Burley had learned of them.

80. On 6 March 2019, Mr Burley responded by email ('**the First Letter**'), saying that he had found the letter of 1 March 2019 "very disappointing", and saying "You are now imposing circa £250k of penalties on a technical matter of filing dates with threats from collections teams of enforcement action received prior to any notification from HMRC as to any outstanding amounts which are all penalties for which I had understood HMRC had at least some discretion." He complained that he had been working constructively with HMRC to establish the amount of tax he needed to pay.

81. Mr Burley's email of 6 March 2019 is good evidence as to what the actual situation was on 6 March 2019, including the actual state of his belief.

82. It is striking that what Mr Burley's email of 6 March 2019 does not do is just say, clearly and unequivocally, in the way that he did much later in his Notice of Appeal, words to the effect of "This is the first I have ever heard of any penalties. Why are you suddenly talking about quarter of a million pounds worth of penalties when you have never even sent me a penalty notice?"

83. Rather, the gist of his complaint in March 2019 was that he was being penalised despite being co-operative. That was the basis on which he sought to invoke discretion on the part of HMRC. He did not simply say "What penalties? Where are the penalty notices?".

84. The amount of money being sought under the penalties was so large that any person who had really not received any penalty notices at all, but who was alerted, for the first time, on 1 March 2019 that penalties were due, would, in our view, have been protesting loudly to HMRC that no penalties could possibly have been due because of the absence of penalty notices. The silence is all the more conspicuous when it is borne in mind that Mr Burley was a financially sophisticated individual who had already encountered the penalty regime.

85. Further email correspondence from Mr Burley on 12 March 2019 ('**the Second Letter**') focussed on Mr Burley's contention that HMRC were notified by PWC as to a tax liability for 2016/17. He said:

> "HMRC were therefore notified but did not issue to me a notice of a requirement to file a return and indeed still have not to the best of my knowledge. Accordingly it is difficult to see how I am technically late in filing and practically and in the spirit of our approach my previous correspondence referred to. In the light of the attached can you please confirm that penalties referred to in your letter of 1 March are not appropriate."

86. "The attached" was a request by PWC for clearance of a transaction under section 701 ITA 2007, and HMRC's clearance. That was the transaction which gave rise to the large amount of money received by Mr Burley in 2016/17 and the large amount of tax payable which gave rise to the two large tax-geared late payment penalties. But, again, the focus of this email, read neutrally, is that no penalties should be imposed because HMRC had been notified of the transaction and had given clearance to it. The focus was not that penalties should not be due because Mr Burley had never been notified that they were due. That is not mentioned at all.

87. HMRC read the email of 12 March 2019 as setting out the view that the post-transaction clearance application made by PWC was to be taken as fulfilling Mr Burley's obligation under section 7 TMA 1970. In our view, that was a fair reading by HMRC of Mr Burley's letter.

88. On 11 April 2019, Mr Burley wrote again ('**the Third Letter**'). The Third Letter is expressly stated to be 'formal appeal against the penalties'. It pursued the point made in the Second Letter about whether HMRC had been notified of his chargeability when PWC sought clearance from HMRC. Like both the First Letter and the Second Letter, the Third Letter did not say, as his appeal now does, words to the effect of "You cannot charge me penalties because I never got the penalty letters".

89. The silence on the point of receipt - in three successive letters between 6 March 2019 and 11 April 2019 - is striking. Mr Burley knew about the penalties, was seeking to challenge them, and was seeking to get HMRC to change its mind about them. He - as a former CFO of a large company - was advancing a sophisticated and nuanced argument about notification of chargeability. But the simplest and most obvious point, if he had indeed not received penalty notices, would have been just to have said so. But he did not do that. Mr Yates KC submits that there is nothing to be read into this, because, on his case, Mr Burley did not know about the penalties. But that submission, insofar as it has force, does not hold good after 1 March 2019. Even if Mr Burley had not received the penalties, nothing thereafter stood in the way of him raising the point about non-receipt of penalties. He could have done so in any of his letters.

90. A meeting took place between Officer Egerton and Mr Burley on 26 June 2019. According to HMRC's note, the purpose of that meeting was whether Mr Burley had failed to notify HMRC about his liability to CGT for 2016/17 - the very point raised in the Second and Third Letters.

91. Non-receipt of penalty notices was not mentioned in those simple, unequivocal, terms. The note records Mr Burley "interjecting", mid-meeting, to say "that he considered there had been a lack of Penalty Notices, and stated that the Enforcement Notice he received was the first contact he had had about the Late Payment Penalties." Assuming the note to be accurate, it seems to us that the language being used was careful and somewhat equivocal. Mr Burley was not positively asserting, front-and-centre, that the penalties could not be charged because he had not been notified of them. He is rather advancing a view - not put as fact, but as a matter of opinion ("he considered") - that there had been "a lack" of penalty notices.

92. The true gist of the complaint about penalties emerges at a later stage in the meeting when Mr Burley complains that HMRC "had not mentioned any failure to notify penalties immediately, and this came up only after discussions regarding the Late Payment Penalty". This is a reference back to the discussions which had been taking place between Mr Burley and HMRC between April 2018 (when Mr Burley first wrote to HMRC, aware that he had not made returns for 2015/16 and 2016/17) and 10 January 2019 (when Mr Burley finally established what he considered to be the appropriate figures for his late returns).

93. These arguments were set out, at greater length and in more detail, by PWC in its letter dated 24 October 2019.

94. It was not until PWC's letter of 11 March 2020 - over a year after the penalties had been sent - that it was asserted "Having considered all of the available information, and discussed the matter with our client, there appears to be no evidence available to support HMRC's assertion that Late Payment Penalty notices for 2016/17 were issued and delivered to our client". There is no explanation as to why this point was not raised, if indeed extant, fairly and squarely, over the preceding year. It was asserted, on behalf of Mr Burley, that he had "consistently disputed having ever received Late Payment Penalties for 2016/17". That was not correct. It was, in the circumstances above, demonstrably incorrect.

OUTCOME

95. Except for that penalty no longer pursued by HMRC, the entirety of the appeal is dismissed, and the penalties are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 17th JANUARY 2023