Neutral Citation: [2024] UKFTT 00179 (TC)

Case Number: TC09093

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/01175

INCOME TAX – employment income – payments of agency fees made on behalf of professional footballer to agent – whether deductible under section 336 Income Tax (Earnings and Pensions) Act 2003 – no – whether deductible under section 352 Income Tax (Earnings and Pensions) Act 2003 – no

PENALTIES – Schedule 55 Finance Act 2009 – whether notice to file return given – yes – permission for late appeals – refused – whether reasonable excuse - no

Heard on: 24 July and 25 July 2023
Judgment date: 28 February 2024

Before

JUDGE ASHLEY GREENBANK
MR JOHN AGBOOLA

Between

BAYE OUMAR NIASSE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ben Blades, counsel, instructed by Elliotts Shah, chartered accountants

For the Respondents: Sebastian Purnell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

FORM OF HEARING

1. The form of the hearing was V (video) via the Tribunal video hearing system. An in-person hearing was not held because of rail strikes making it difficult for the parties and their representatives to attend.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. This appeal is brought by Mr Baye Oumar Niasse against assessments made by the Commissioners for His Majesty's Customs and Excise ("HMRC") by way of two closure notices dated 16 February 2021 in the amounts of £76,410 (in respect of the tax year 2015/16), and £76,463.10 (in respect of the tax year 2016/17).

4. Mr Niasse is a professional football player. At relevant times, he was employed by Everton Football Club ("Everton"). The issues giving rise to the amendments made by the closure notices relate to deductions claimed by Mr Niasse from his employment income from Everton in respect of fees paid to his agent in connection with Mr Niasse's transfer to Everton from FC Locomotiv Moscow on 1 February 2016. Mr Niasse claims that these fees are deductible either under section 336 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") or under section 352 ITEPA.

5. Mr Niasse also appeals against penalty assessments raised by HMRC in connection with the late filing of his tax returns for each of the tax years 2015/16, 2016/17 and 2017/18 in the total amount of £5,262.

THE EVIDENCE

6. We were provided with an electronic hearing bundle of 514 pages and a joint authorities bundle also in electronic form. We were provided with additional authorities in the course of the hearing.

7. The hearing bundle contained a witness statement of Mr Arvind Shah, which was filed on behalf of Mr Niasse.

8. Mr Shah is a chartered accountant with Elliotts Shah, advisers to Mr Niasse. Mr Shah has advised Mr Niasse since February 2019. Mr Shah gave evidence and was cross-examined on his statement.

9. Mr Shah's witness statement contained statements of opinion on matters of law which are for the Tribunal. It also contained various statements of facts to which Mr Shah would not have been the most obvious witness. For example, the witness statement gave details of Mr Niasse's career, on which this Tribunal may have expected to have heard evidence from Mr Niasse himself.

10. In examination in chief, Mr Blades sought to introduce evidence in support of an argument that it was necessary in order to obtain employment with a Premier League football club and particularly with Everton, for a player to engage an agent. Once again, with the greatest of respect to Mr Shah, the Tribunal might have expected to hear evidence on this issue from those more closely connected with the industry. In particular, the Tribunal heard no evidence from Mr Rita, any representative of Everton, or indeed Mr Niasse himself. We have taken these factors into account in determining the weight that we should give to Mr Shah's evidence.

FACTS

11. Our findings of fact are set out in this section.

Summary of the background to the transfer to Everton

12. Mr Niasse is a professional footballer who has played for several clubs both in the UK and elsewhere. He has also played for the Senegal national team.

13. In July 2014, Mr Niasse signed a contract to play for FC Lokomotiv Moscow.

14. On 24 November 2015, Mr Niasse entered into a Standard Representation Contract (the "Representation Contract") with an agent, Mr Ivo Rita of RX Brothers Limited.

15. The key provisions of the Representation Contract were as follows.

(1) Under the Representation Contract, Mr Niasse granted Mr Rita "worldwide exclusive authority to represent [Mr Niasse] in all contractual negotiations" (clause 1);

(2) The Representation Contract was expressed to commence on 24 November 2015 and terminate on 23 November 2016 (clause 2).

(3) The consideration payable by Mr Niasse under the Representation Contract was "a commission amounting to 10% of the Player's Basic Gross Income as a result of any employment contract negotiated or renegotiated by [Mr Rita]" (clause 4).

(4) Any other arrangements arising out of or in connection with the provision of Mr Rita's services were to be in accordance with the requirements of the FA Regulations on Working with Intermediaries (the "FA Regulations") and the FIFA Regulations on Working with Intermediaries (clause 5).

(5) The Representation Contract was governed by the laws of England and Wales (clause 7).

16. On 1 February 2016, Mr Niasse joined Everton. Mr Niasse was represented by Mr Rita in relation to the arrangements with Everton. Mr Rita also represented Everton. On 1 February 2016:

(1) Mr Niasse, Mr Rita and Everton entered into a tripartite representation contract (the "Tripartite Contract");

(2) Mr Niasse entered a Premier League Contract with The Everton Football Club Company Limited under which he agreed to provide his services to Everton until 30 June 2020.

17. A summary of the principal terms of these agreements is set out below in this decision notice. As set out in more detail in that summary, under the terms of the Tripartite Contract, Everton agreed to pay certain sums to Mr Rita to discharge Mr Niasse's liability to pay fees to Mr Rita under the Representation Contract.

18. The FA Regulations required, inter alia, that an Intermediary Declaration Form (an "IM1 Form") be completed in respect of any transaction involving a "Registration Event" such as a permanent transfer of a player from one club to another. The transfer of Mr Niasse from FC Lokomotiv Moscow to Everton was a Registration Event.

19. An IM1 Form was filed in respect of Mr Niasse's transfer on 1 February 2016. The IM1 Form noted that Everton would discharge Mr Niasse's liability to pay fees to Mr Rita.

20. The first of the payments to Mr Rita by Everton on behalf of Mr Niasse was made on 1 February 2016. Further payments were made to Mr Rita in accordance with the terms of the Tripartite Contract.

The agreements signed on 1 February 2016

The Tripartite Contract

21. The main terms of the Tripartite Contract are set out in the following paragraphs.

22. The recitals to the Tripartite Contract recorded the following matters:

(1) that Mr Niasse was "currently registered as a professional football player with Football Club Lokomotiv Moscow" (Recital (2));

(2) that Mr Niasse was represented by Mr Rita under the Representation Contract (Recital (4));

(3) that Everton was "interested in acquiring [Mr Niasse's] registration under the terms of a Standard PL Professional Playing Contract" (Recital (5));

(4) that Everton wished "to utilise the services of [Mr Rita] in procuring the registration of [Mr Niasse] with the Club" (Recital (6));

(5) that Mr Niasse had consented to Mr Rita acting on behalf of both Everton and himself and had consented to Mr Rita receiving a fee in connection with his services to Everton (Recital (7)).

23. Under clause 1, Mr Rita was obliged to provide, inter alia, the "Club Services":

> "The Club hereby appoints the intermediary to provide services on the following terms:
>
> (a) acting in the negotiations with Lokomotiv to procure the transfer of the Player's registration to [Everton] on a permanent basis on terms acceptable to [Everton];
>
> (b) advising [Everton] on negotiation strategy with regard to the Contract;
>
> (c) acting as an intermediary for [Everton] in any communications with [Mr Niasse] regarding the Contract, including the communication of [Everton's] proposed terms;
>
> (d) assisting [Everton] in reaching an agreement with [Mr Niasse] to accept [Everton's] proposed contractual terms instead of pursuing any other options available to him;
>
> (e) concluding the terms of the Contract so that [Mr Niasse] may be registered with [Everton] under the Contract by the FA and the PL and [Mr Rita] has agreed to so act in this matter…"

24. Clause 1(f) provided for Mr Rita to provide further services to encourage a stabler relationship between club and Mr Niasse (referred to as the "Further Services"). It was in the following terms:

> "The Club also wishes that the Intermediary works to encourage a future stable relationship between the Club and the Player during the term of the Contract for the benefit of the Club and the Player as further set out in clause 13 below (the 'Further Services')."

25. Clause 1 also contained an acknowledgement that Mr Rita was obliged to provide the "Player Services" to Mr Niasse under the Representation Contract:

> "It is acknowledged and agreed that the intermediary shall also provide services to the Player under the Player Representation Contract in connection with the negotiation of the Contract with the Club ("the Player Services")."

26. Subject to the provisions of the Tripartite Contract that provided for earlier termination in the case of a material breach, the term of the Tripartite Contract was expressed to be:

(1) "in respect of the provision of the Club Services only", until Mr Niasse was registered with Everton (clause 2(1)(a));

(2) "in respect of the provision of the Further Services only", until the expiry of the Premier League Contract (clause 2(1)(b)).

27. Clause 4 provided that neither Everton nor Mr Niasse was required to use Mr Rita's services:

> "Neither the Club nor the Player shall be obliged to use the services of the Intermediary during the term of this Representation Contract and the Club may represent itself and/or the Player may represent himself should they so desire."

28. Clause 5 provided that if Mr Rita had not provided any of the "Services" (being the Club Services, the Player Services and the Further Services" he would not be entitled to any payment under the contract.

29. Mr Rita's remuneration for the Club Services was governed by clause 6. His remuneration in respect of those services was the following three sums:

> "(a) £141,500…within 14 days of the Player being registered with the Club under the Contract by the FA and the [Premier League];
>
> (b) £141,500…on 7 February 2017; and
>
> (c) £142,000…on 31 December 2018."

30. Clause 7 provided for the remuneration clause in the Representation Contract not to apply and for the consideration due to Mr Rita for the provision of the Player Services to be a series of payments set out in clause 7:

> "The Player and the Intermediary hereby agree that the existing remuneration clause in the Player Representation Contract shall not apply and in consideration for the provision of the Player Services by the Intermediary to the Player, the Intermediary shall be paid, in accordance with the requirements of the [FA Regulations] and the terms of this [Tripartite] Contract (including but without limitation clause 8 below) the following sums:
>
> (a) £141,500…within 14 days of the Player being registered with the Club under the [Premier League Contract] by the FA and the [Premier League];
>
> (b) £141,500…on 7 February 2017; and
>
> (c) £142,000…on 31 December 2018..."

31. Also under clause 7, Mr Niasse authorized Everton to pay these sums (together with any VAT) to Mr Rita on his behalf. It was agreed that Mr Niasse was to account to HMRC for any income taxes or social contributions due in respect of the sums payable.

32. The payments due to Mr Rita under clauses 6 and 7 were conditional upon Mr Niasse remaining registered to play for Everton on the relevant date for payment (clause 8).

33. Under the terms of clause 12 of the Tripartite Contract, Mr Rita undertook and warranted to both Everton and Mr Niasse that he would perform the "Services" "in good faith and in the best interests of" Everton and Mr Niasse. The clause then set out a series of particular obligations and warranties of Mr Rita regarding the performance of the services under the contract (such as, complying with the rules and regulations of the FA).

34. Clause 13 dealt with the Further Services. It was in the following form:

> "In consideration of the mutual promises contained herein the Intermediary shall also have ongoing obligations to assist the Club in the performance of the Further Services, which shall include, without limitation:
>
> (a) he will not, and shall procure that no Company officer shall, induce the Player (or any other player at the Club) to terminate unilaterally any registration or contract (including the Contract) he has with the Club or to otherwise act in breach of it or act in any manner which is inconsistent with the Player's duties and obligations thereunder;
>
> (b) he will not, and shall procure that no Company officer will, without the prior written consent of the Club make any public and/or private statements that the Player is interested in terminating his relationship with the Club;
>
> (c) he will not, and shall procure that no Company officer will, interfere with or damage the relationship between the Player and the Club or the Player and any officer or employee of the Club or lessen in any way the Player's contentment with the Club;
>
> (d) he shall use his best endeavours to ensure that the Player attends Club official engagements and works with the Club's sponsors so as to promote and strengthen the Club's relationship with such persons;
>
> (e) he shall use his best endeavours to ensure that the Player understands his position as a representative of the Club in the public eye and acts accordingly in a proper manner and in the best interests of the Club at all times; and
>
> (f) he shall advise the Club (in the case of any Company officer via the Intermediary) on the welfare of the Player and on any difficulties perceived by the Intermediary, a Company officer, the Player or the Club in achieving the objectives set out in this clause."

35. The Tripartite Contract was governed by the laws of England and Wales.

The Premier League Contract

36. The main terms of the Premier League Contract are set out in the following paragraphs.

37. Under clause 2, Everton engaged Mr Niasse as a professional footballer for the duration of the contract subject to any early termination. The termination date of the contract was 30 June 2020 (Schedule 2, paragraph 2)

38. Everton agreed to pay Mr Niasse remuneration in accordance with Schedule 2 of the contract (clause 5).

39. The remuneration specified by Schedule 2 comprised the following:

> (1) a basic wage of £40,000 per week which was agreed to increase to £42,000 per week upon reaching 25 first team competitive Match Starting Appearances and to £44,000 upon reaching 35 such appearances;
>
> (2) a signing-on fee of £441,666;
>
> (3) an annual loyalty bonus of £575,000 payable on 15 February each year of the currency of the agreement that Mr Niasse remained a registered and contracted player of Everton provided that Mr Niasse had not requested the transfer of his registration from Everton;
>
> (4) possible bonuses payable, inter alia, if Everton qualified for certain UEFA competitions.

40. Mr Niasse's obligations under the Premier League Contract were set out in clause 3:

> "3.1 The Player agrees:
>
> 3.1.1 when directed by an authorised official of the Club:
>
> 3.1.1.1 to attend matches in which the Club is engaged;
>
> 3.1.1.2 to participate in any matches in which he is selected to play for the Club; and
>
> 3.1.1.3 to attend at any reasonable place for the purposes of and to participate in training and match preparation;
>
> 3.1.2 to play to the best of his skill and ability at all times;
>
> 3.1.3 except to the extent prevented by injury or illness to maintain a high standard of physical fitness at all times and not to indulge in any activity sport or practice which might endanger such fitness or inhibit his mental or physical ability to play practise or train;
>
> 3.1.4 to undertake such other duties and to participate in such other activities as are consistent with the performance of his duties under clauses 3.1.1 to 3.1.3 and as are reasonably required of the Player;
>
> 3.1.5 that he has given all necessary authorities for the release to the Club of his medical records and will continue to make the same available as requested by the Club from time to time during the continuance of his contract;
>
> 3.1.6 to comply with and act in accordance with all lawful instructions of any authorised official of the Club;
>
> 3.1.7 to play football solely for the Club or as authorised by the Club or as required by the Rules;
>
> 3.1.8 to observe the Laws of the Game when playing football;
>
> 3.1.9 to observe the Rules but in the case of the Club Rules to the extent only that they do not conflict with or seek to vary the express terms of this contract;
>
> 3.1.10 to submit promptly to such medical and dental examinations as the Club may reasonably require and to undergo at no expense to himself such treatment as may be prescribed by the medical or dental advisers of the Club or the Club's insurers;
>
> 3.1.11 on the termination of this contract for any cause to return to the Club in a reasonable and proper condition any property (including any car) which has been provided or made available by the Club to the Player in connection with his employment.
>
> 3.2 The Player agrees that he shall not:
>
> 3.2.1 undertake or be involved in any activity or practice which will knowingly cause to be void or voidable or which will invoke any exclusion of the Player's cover pursuant to any policy or insurance maintained for the benefit of the Club on the life of the Player or covering his physical well-being (including injury and incapacity and treatment thereof);
>
> 3.2.2 when playing or training wear anything (including jewellery) which could be dangerous to him or any other person;
>
> 3.2.3 except to the extent specifically agreed in writing between the Club and the Player prior to the signing of this contract use as his regular place

> of residence any place which the Club reasonably deems unsuitable for the performance by the Player of his duties other than temporarily pending relocation;
>
> 3.2.4 undertake or be engaged in any other employment or be engaged or involved in any trade business or occupation or participate professionally in any other sporting or athletic activity without the prior written consent of the Club PROVIDED THAT this shall not:
>
> > 3.2.4.1 prevent the Player from making any Investment in any business so long as it does not conflict or interfere with his obligations hereunder; or
> >
> > 3.2.4.2 limit the Player's rights under clauses 4 and 6.1.8;
>
> 3.2.5 knowingly or recklessly do write or say anything or omit to do anything which is likely to bring the Club or the game of football into disrepute cause the Player or the Club to be in breach of the Rules or cause damage to the Club or its officers or employees or any match official.
>
> Whenever circumstances permit the Player shall give to the Club reasonable notice of his intention to make any contributions to the public media in order to allow representations to be made to him on behalf of the Club if it so desires;
>
> 3.2.6 except in the case of emergency arrange or undergo any medical treatment without first giving the Club proper details of the proposed treatment and physician/surgeon and requesting the Club's consent which the Club will not unreasonably withhold having due regard to the provisions of the Code of Practice."

41. The Premier League Contract was expressed to be governed by English law.

Correspondence between the parties and procedural matters

42. It is HMRC's case that a notice under section 8 of the Taxes Management Act 1970 ("TMA") requiring Mr Niasse to submit a tax return for the tax year 2015/16 was issued to Mr Niasse on 12 August 2016. This is disputed by Mr Niasse, and we address the evidence on this point later in this decision notice.

43. On 24 March 2017, HMRC issued a penalty of £100 to Mr Niasse for the late filing of his tax return for the tax year 2015/16.

44. It is HMRC's case that a notice under section 8 TMA requiring Mr Niasse to submit a tax return for the tax year 2016/17 was issued to Mr Niasse on 6 April 2017. This is also disputed by Mr Niasse, and we address the evidence on this point later in this decision notice.

45. On 3 August 2017, HMRC wrote to the Mr Niasse notifying him that his tax return for the tax year 2015/16 was outstanding and asking him to submit a completed return.

46. On 17 September 2017, HMRC issued a penalty of £300 to Mr Niasse for the late filing of his tax return for the tax year 2015/16 and a further penalty of £900 for the late filing of his tax return for the tax year 2015/16.

47. On 22 March 2018, HMRC issued a penalty of £100 to Mr Niasse for the late filing of his tax return for the tax year 2016/17.

48. On 29 March 2018, HMRC issued a further penalty of £300 to Mr Niasse for the late filing of his tax return for the tax year 2015/16.

49. On 19 July 2018, HMRC sent a letter to Mr Niasse in relation to his failure to file his return for the tax year 2016/17, notifying him that his tax return was outstanding and asking him to submit a completed return.

50. It is HMRC's case that a notice under section 8 TMA requiring Mr Niasse to submit a tax return for the tax year 2017/18 was issued to Mr Niasse on 6 April 2018. Once again, this is disputed by Mr Niasse and we address the evidence on this point later in this decision notice.

51. On 16 September 2018, HMRC issued a penalty of £300 to Mr Niasse for the late filing of his tax return for the tax year 2016/17 and a further penalty of £900 also for late filing of his tax return for the tax year 2016/17.

52. On 16 October 2018, HMRC wrote to Mr Niasse to inform him that he still had not filed his overdue tax returns for the tax years 2015/16 and 2016/17 and that penalties (with interest) in the sum of £1,607.46 were due on account of the late filing of tax returns.

53. On 7 February 2019, Elliotts Shah wrote to HMRC to notify HMRC of their authorization to act for Mr Niasse. They also responded to HMRC's letter of 16 October 2018. On behalf of Mr Niasse, Elliotts Shah appealed against the late filing penalties on the grounds that: (i) Mr Niasse was new to the country and was unaware of the obligation to file a tax return, and (ii) he had not received notice to file a tax return.

54. HMRC responded on 22 March 2019 in two separate letters – one in relation to the tax year 2015/16 and one in relation to the tax year 2016/17 – explaining that they could not consider the appeals against the penalties until tax returns for the relevant tax years had been filed. Both letters stated:

> If you still want to appeal once you've sent your tax return, please send me a new appeal. You should give full details of the reason that stopped you from filing on time and confirm the date that you filed the tax return.

55. On 26 March 2019 HMRC notified Elliotts Shah that Mr Niasse's return for the tax year 2017/18 had not been filed in time and that an initial penalty of £100 would be charged. Also on that date, HMRC issued a further penalty of £300 to Mr Niasse for the late filing of his tax return for the tax year 2016/17.

56. On 18 April 2019, Elliotts Shah wrote to HMRC enclosing paper copies of Mr Niasse's tax returns for the tax years 2015/16 and 2016/17.

(1) The tax return for the tax year 2015/16 included a claim to deduct the agent's fees as an expense of Mr Niasse's employment. The deduction sought in 2015/16 was £169,800 (i.e. £141,500 payable under clause 7(a) of the Tripartite Contract plus VAT).

(2) The tax return for the tax year 2016/17 also included a claim to deduct the agent's fees as an expense of Mr Niasse's employment. The deduction sought in 2016/17 was also £169,800 (i.e. £141,500 payable under clause 7(b) of the Tripartite Contract plus VAT).

57. In that letter, Elliotts Shah reiterated the appeal against the penalties at the same time. They stated the grounds of appeal as being (i) that no notice to file a tax return was issued; (ii) the self-assessment tax record for Mr Niasse was not set up until March 2019; and (iii) Mr Niasse was of the "sincere view" that he was not required to file a tax return as he had no other income and his earnings were being taxed at source under PAYE. They also informed HMRC that they had filed Mr Niasse's return for the tax year 2017/18 on-line and appealed against the initial penalty for late filing of that return issued on 26 March 2019.

58. HMRC accept that the letter of 18 April 2019 enclosing the returns for the tax years 2015/16 and 2016/17 was received by HMRC on 23 April 2019. They also accept that the return for the tax year 2017/18 was filed on-line on 18 April 2019.

59. HMRC gave notice of intention to enquire into the tax returns for the tax year 2015/16 and the tax year 2016/17 on 12 November 2019.

60. By way of closure notices dated 16 February 2021, HMRC made amendments to the returns and raised assessments on Mr Niasse in the sum of £76,410 (in respect of the tax year 2015/16) and £76,463.10 (in respect of the tax year 2016/17). A closure notice was also issued in respect of the tax year 2017/18, but it is not in issue in this case.

61. On 16 February 2021, HMRC issued a notice of penalty assessment in respect of the tax year 2016/17 in the amount of £1,962.

62. Following the issue of the closure notices and the penalty assessment, Mr Niasse gave notice of his intention to appeal against the closure notices and the penalty assessment on 10 March 2021. In relation to the appeal against the penalties, the letter referred to their letters of 7 February and 18 April 2019.

63. Mr Niasse appealed against HMRC's decision to the Tribunal on 9 April 2021. The notice of appeal included an appeal against penalties in the amount of £1962, being the penalties charged in relation to the late submission of the tax return for the tax year 2016/17 but not against the penalties for the other tax years. The grounds of appeal did not include any grounds that are relevant to the appeal against the penalties.

64. In a series of emails between HMRC and Elliotts Shah between 19 April 2021 and 25 June 2021: Elliotts Shah made some small corrections to the grounds of appeal stated in the notice of appeal; HMRC noted that Mr Niasse had been sent a notice to file his return for the tax year 2016/17 on 6 April 2017, but had failed to file the return on time; HMRC requested information relating to the grounds of appeal against the penalty assessment and asked whether the appeal should also extend to the other penalties; and Elliotts Shah confirmed that the appeal should extend to all penalties (not just those for the tax year 2016/17).

65. Also on 25 June 2021, HMRC wrote to the Tribunal requesting a direction, inter alia, that Mr Niasse should be required to confirm if the matters under appeal should include any penalties other than penalties charged in relation to the late submission of the tax return for the tax year 2016/17 and if so: to confirm which penalties are subject to appeal; to seek permission from HMRC to agree to a late appeal where no such appeal had already been submitted; and to submit grounds of appeal against the late filing penalties.

66. Mr Niasse served amended grounds of appeal on 6 July 2021. In relation to the penalties, Mr Niasse sought permission to amend the notice of appeal to include all the penalties for late filing of returns and set out the following grounds:

(1) Mr Niasse's income was employment related;

(2) his tax code "took account of deductions that needed to be made under PAYE and there was no loss to [the Exchequer]"; and

(3) Mr Niasse "was a novice on the procedures for the filing of tax returns".

67. In an email of 4 August 2021, HMRC wrote to Elliotts Shah asking for confirmation of the specific penalties that Mr Niasse was seeking to appeal, the reasons for not submitting the appeals any earlier, and the proposed grounds of appeal for each penalty.

68. Elliotts Shah responded to HMRC in an email of 17 August 2021 addressing HMRC's requests. In relation to the grounds of appeal in relation to the penalties, the email stated:

> The ground for the appeals in all cases are similar. [Mr Niasse] was new to the Country as he arrived here from Moscow in February 2016, he had only one source of income which was his employment with Everton Football Club and the loss to HMRC, given the tax codes issued, did not lead to any loss to the Exchequer for any taxes due. The appeals were lodged at the earliest opportunity once my firm was notified.

> Besides the above, [Mr Niasse] who started playing for Everton has been loaned on to Hull and Cardiff and split from his wife, may not have seen or received HMRC communications. Certainly nothing has been passed to my firm other than the statement of account dated 16th October which we received at the same time as the form 64-8 new was submitted to you.

69. On 1 September 2021, the Tribunal issued directions to the parties. Those directions required:

> (1) Mr Niasse to provide further and better particulars of his grounds of appeal to HMRC and the Tribunal within 28 days;
>
> (2) HMRC to serve their statement of case within 60 days of the provision by Mr Niasse of further and better particulars of his grounds of appeal.

70. In an email of 27 September 2021, HMRC asked Elliotts Shah to confirm the penalties which Mr Niasse was seeking to appeal (by reference to a table similar to the one at [136]) and also to confirm that the grounds of appeal were those set out in Elliotts Shah's email of 17 August 2021.

71. Elliotts Shah responded on the same day confirming "the reasons for the late submissions" were those referred to in HMRC's email (i.e. the grounds as set out in Elliotts Shah's email of 17 August 2021). We infer that the reference to "late submissions" should have been to the reasons for the "late appeals", as that was the question asked by HMRC.

72. On 7 October 2021, Elliotts Shah confirmed by email the details of the penalties which are under appeal.

THE FA REGULATIONS

73. The arrangements regarding the role of agents in professional football have to be viewed in the context of the regulatory environment, in particular, the FA Regulations. The appendix to this decision notice contains some of the relevant provisions of the FA Regulations to which the parties referred in argument.

THE ISSUES BEFORE THE TRIBUNAL

74. The issues before the Tribunal divide into those which relate to the deductibility or otherwise of the payments made by Everton to Mr Rita on Mr Niasse's behalf from Mr Niasse's employment income and those which relate to the imposition of penalties.

75. We will begin with the issues relating to the deductibility of the payments.

DEDUCTIBILITY OF PAYMENTS

76. Mr Niasse accepts that the payments made by Everton to Mr Rita on his behalf are either taxable as employment income under section 62 ITEPA or as an employment-related benefit under section 201 ITEPA. The question is whether the payments are deductible from his employment income under section 336 ITEPA or section 352 ITEPA.

Deduction under section 336 ITEPA

77. Under section 336 ITEPA a deduction is allowed for certain expenses incurred wholly, exclusively, and necessarily in performance of the duties of an employment. Section 336 provides as follows:

> **336 Deductions for expenses: the general rule**
>
> (1) The general rule is that a deduction from earnings is allowed for an amount if—
>
> (a) the employee is obliged to incur and pay it as holder of the employment, and

> (b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.
>
> (2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.
>
> (3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses). [Insert quotation]

78. The parties addressed the two limbs of section 336(1) separately. We will do the same.

Was Mr Niasse obliged to incur the agency fees as holder of his employment for the purpose of section 336(1)(a)?

The parties' submissions

79. Mr Blades says that Mr Niasse was obliged to incur the agent's fees as a holder of his employment with Everton.

> (1) Mr Niasse, in accordance with clause 3.1.6 of the Premier League Contract, was required to act in accordance with the lawful instructions of any authorized official of Everton. Everton required Mr Niasse to engage an agent. Mr Niasse was obliged to pay for Mr Rita's services under the Tripartite Contract. That agreement formed part of the contractual framework of Mr Niasse's employment.
>
> (2) The Premier League Contract expressly envisaged that Mr Niasse would be represented by an agent. Mr Niasse submits that it is indicative of the obligation he was under to enlist the services of an agent.
>
> (3) In the alternative, it is "almost obligatory, if not customary" for a professional footballer to be represented by an agent. An obligation to be represented by an agent could be implied by custom even if it was not an express term of Mr Niasse's contractual arrangements with Everton. It would have been impossible to conclude a contract between the parties without Mr Rita's involvement.

80. Mr Purnell submits that Mr Niasse was not obliged to incur the agency fees as a holder of his employment with Everton.

> (1) The duties of Mr Niasse as a professional footballer did not oblige him to incur the agent's fees. The duties of Mr Niasse's employment with Everton were governed by the Premier League Contract. The Tripartite Contract was not part of the contractual framework for that employment. The Tripartite Contract was entered into to bring about the employment with Everton.
>
> (2) There is no evidence that Everton directed Mr Niasse to engage an agent. The Tripartite Contract itself (in clause 4) expressly states that Mr Niasse is not obliged to engage the services of Mr Rita.
>
> (3) There was no evidence to support Mr Blades's submission that it was "almost obligatory, if not customary" for professional footballers to engage an agent. Mr Niasse's decision to engage an agent was a personal choice and not an expense he was obliged to incur in the performance of the duties of his employment. The FA Regulations expressly provide that a player may represent himself/herself and that a club is prohibited from making a transfer conditional upon the player's agreement to deal with a specific agent.

Relevant case law

81. We were referred by the parties to various authorities on the meaning of "obliged to incur" in section 336(1)(a). Those authorities included, but were not limited to, *Ricketts v Colquhoun* [1926] AC 1 ("*Ricketts*"), *Shortt v McIlgorm* [1945] 1 ALL ER 391 ("*Shortt*"), *Lomax v Newton* [1953] 1 WLR 1123 ("*Lomax*"), *Brown v Bullock* [1961] 1 WLR 1095 ("*Brown*"), *Elwood v Utitz* (1966) 42 TC 482 , *Fitzpatrick v IRC* [1994] 1 WLR 306, *Madeley v HMRC* [2006] STC (SCD) 513 ("*Madeley*"), and *HMRC v Banerjee* [2011] 1 WLR 702 ("*Bannerjee CA*").

82. We do not propose to conduct a comprehensive review of the case law. We have instead set out below the principles that we draw from it. There is an inevitable degree of overlap between these principles and those that are relevant to the second limb of section 336(1).

(1) For a person to be obliged to incur and pay an expense as the holder of an employment, the expense must be one that that person is obliged to incur "by the very fact that [he/she] holds that office and has to perform its duties" (*Ricketts* per Viscount Cave at p4). It must be an expense which "each and every occupant of the particular employment is necessarily obliged to incur in the performance of its duties" (*Ricketts* per Lord Blanesburgh at p7 to p8).

(2) The test is whether the expense is prescribed by the duties of the employment. "The test is not whether the employer imposes the expense, but, rather whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties themselves must involve the particular outlay" (*Brown* at p1102 per Donovan LJ).

(3) The duties of the employment are the duties which form "an intrinsic part of the job" that the employee is paid to perform, not merely a collateral obligation undertaken at the employer's request, nor an extracurricular obligation that employee chooses or is required to undertake in order to qualify to do the job, or improve his/her prospects of promotion (Henderson J in the High Court in *Bannerjee v HMRC* [2010] 1 WLR 800 ("*Bannerjee HCT*") at [34], cited with approval by Rimer LJ in *Bannerjee CA* at [34]).

(4) It follows that an express contractual obligation to incur an expense is neither necessary nor sufficient for an expense to be deductible.

(a) If the duties themselves do not prescribe the expenditure (for example, club memberships in *Brown*, or the costs of newspapers for journalists in *Fitzpatrick*), no deduction is allowed.

(b) For similar reasons, even expenses which an employee is obliged to incur are not deductible if they are "personal or social obligations and so not part of the employee's official duties" (for example, an officer's mess fees in *Lomax*).

(c) That having been said, an expense may still be deductible even if there is no express contractual obligation to incur it provided that the duties require it (for example, training costs in *Bannerjee CA* and club memberships in *Elwood*).

(5) A payment made by an employee in order to obtain an employment (for example, a fee to an employment agent) is not deductible because it is not an expense that he or she is obliged to incur as a holder of the employment (*Shortt* at p392C, *Madeley* [79][1]).

[1] In this notice, we have used the paragraph numbers in *Madeley* taken from the report in Simon's Tax Cases (Special Commissioners' Decisions) as that was the report to which the parties referred in argument before us. There are some errors in the numbering of the paragraphs in that report, which the editor's note suggests are derived from the original decision notice.

Discussion

83. The case law is clear that the test in section 336(1)(a) ITEPA is whether the duties of the employment impose the liability to incur the relevant expense (*Brown* at p1102 per Donovan LJ).

84. There is no argument between the parties that the duties of Mr Niasse's employment with Everton encompassed his duties as a player under the Premier League Contract, in particular, his obligations under clause 3 of that agreement. The parties differ, however, in their views of the Tripartite Contract.

85. Mr Blades submits that the Tripartite Contract is part of the contractual framework for Mr Niasse's employment with Everton. The payments to Mr Rita were made pursuant to that contract and accordingly as part of the duties of his employment.

86. On his analysis, the payments of the agency fees to Mr Rita by Everton on behalf of Mr Niasse were payments for a bundle of services which included not just Mr Rita's services in negotiating the terms of the transfer and any subsequent amendments to Mr Niasse's employment contract on Mr Niasse's behalf (the "Player Services") but also the "Further Services" set out in clause 13 of the Tripartite Contract. Those Further Services – which were expressed to be "for the benefit of the Club and the Player" and "to encourage a future stable relationship between the Club and the Player" (see clause 1(f)) – continued throughout Mr Niasse's employment with Everton.

87. We reject this submission. In our view, the duties of Mr Niasse's employment in this case are defined by reference to the Premier League Contract, that is, in essence, his duties as a professional footballer. The Tripartite Contract is not part of the "contractual framework" of Mr Niasse's employment as Mr Blades described.

> (1) The only services provided by Mr Rita to Mr Niasse are those set out in the Representation Contract. That agreement concerns arrangements put in place to negotiate the employment arrangements with Everton and future renegotiation of its terms.
>
> (2) Although the Tripartite Contract amends the payment arrangements under the Representation Contract and provides that Mr Rita may also act as an agent for Everton, it does not affect fundamentally the services to be provided by Mr Rita to Mr Niasse. It simply refers to the provision of the "Player Services", which are, in essence, the services that Mr Rita was engaged to provide to Mr Niasse under the Representation Contract. The services remain concerned with the creation of the employment relationship and the negotiation of its terms rather than the performance of any duties of the employment. Furthermore, the Tripartite Contract refers to Mr Niasse as being registered to play football for FC Locomotive Moscow. It is expressed to be made against a background of Everton being interested in acquiring Mr Niasse's registration as a player under the Premier League Contract and engaging Mr Rita's services in order to achieve that outcome (see recitals (5) and (6) of the Tripartite Contract).
>
> (3) In particular, although the terms of the Tripartite Contract are not entirely clear on this point, the better view is that the Further Services are to be provided to Everton and not to Mr Niasse, even if Mr Niasse may benefit from those services being performed:
>
> > (a) clause 1(f) of the Tripartite Contract begins with the words "the Club wishes", which demonstrates that the Further Services are provided at the behest of Everton;

(b) the opening words of clause 13 of the Tripartite Contract – "the Intermediary shall also have ongoing obligations to assist the Club" – suggest that the Further Services are to be provided by the Intermediary (Mr Rita) to the Club (Everton);

(c) the various obligations of Mr Rita that are set out in clause 13 are primarily obligations that Everton expects Mr Rita to fulfil because of his pre-existing relationship with Mr Niasse; and

(d) the payments made by Everton on Mr Niasse's behalf under the Tripartite Contract do not secure the provision of any other services by Mr Rita to Mr Niasse other than those services which Mr Rita was already obliged to provide to Mr Niasse under the Representation Contract.

88. It follows that the payments of the agency fees to Mr Rita are not imposed by the duties of Mr Niasse's employment with Everton.

89. Even if we are wrong in our interpretation of the Tripartite Contract, and the Further Services should be treated as provided by Mr Rita to both Everton and Mr Niasse, the position is unchanged. In our view, the case law demonstrates that, if the payment of the agency fees are to be deductible under section 336 ITEPA, the expenditure must be obliged by duties which form an "intrinsic" part of the job that Mr Niasse was paid to perform in his employment (to adopt the language of Henderson J in *Bannerjee HCT* [34]). The intrinsic duties of Mr Niasse's employment were those that he performed for Everton as a professional footballer. They were the duties that every professional footballer was obliged to undertake relating to the playing of football. Those were the duties in clause 3 of the Premier League Contract. Mr Niasse did not obtain any service that related to those duties from Mr Rita.

90. We also reject Mr Blades's submission there was any other obligation on Mr Niasse to appoint an agent.

(1) There was no express contractual obligation to that effect. No obligation to appoint an agent could be implied from the surrounding contractual arrangements. We acknowledge that the Premier League Contract contemplates that Mr Niasse may have appointed an agent and indeed takes into account the fact that Mr Niasse had appointed an agent, Mr Rita. However, the other documentation equally makes it clear that Mr Niasse was under no obligation from Everton to continue to use Mr Rita's services (see clause 4 of the Tripartite Contract). The regulatory background, the FA Regulations, also suggests that it cannot have been a term of the arrangements that Mr Niasse was obliged to engage an agent (FA Regulations, paragraph A4).

(2) There is no evidence that any person on behalf of Everton directed Mr Niasse in accordance with Clause 3.1.6 of the Premier League Contract to engage an agent.

(3) We also reject Mr Blades's argument that a term should be implied into the employment contract by custom.

(a) In this respect, we have taken into account Mr Shah's evidence. However, for the reasons that we have given, we do not regard it as being of sufficient weight to establish that an obligation to engage an agent must be implied by custom.

(b) The other evidence to which we have been referred – principally the level of spending of Premier League and English Football League ("EFL") clubs on agents for the period from 1 February 2019 to 31 January 2020 is also equivocal. It demonstrates that significant sums (in excess of £260 million in aggregate) were spent by Premier League clubs on the services of intermediaries in that period. However, it does not distinguish between fees paid in respect of agents representing

players and those representing clubs; and the sums paid by EFL clubs are considerably smaller. Whilst we accept that the figures appear to show that the use of agents by Premier League clubs is commonplace. It does not demonstrate that the use of agents is universal or, in effect, obligatory.

(c) We have not heard any evidence from Mr Niasse himself, or from any employee of Everton to the effect that it was understood that players for Everton would have engaged an agent. Furthermore, we have heard no evidence from those more closely involved in the industry to support this argument.

91. For these reasons, the obligation to pay the agent's fees – paid by Everton on behalf of Mr Niasse under the terms of the Tripartite Contract – was not imposed by the duties of Mr Niasse's employment. The requirements of section 336(1)(a) ITEPA are not met in this case.

Were the agency fees incurred by Mr Niasse wholly, exclusively and necessarily in the performance of the duties of his employment within section 336(1)(b)?

The parties' submissions

92. Mr Blades for Mr Niasse says that the requirements of section 336(1)(b) are met.

(1) The agent's fees were necessarily incurred by Mr Niasse for much the same reasons as Mr Niasse was obliged to incur the expense for the purposes of section 336(1)(a).

(2) The agent's fees were incurred in performance of Mr Niasse's duties of his employment because they were incurred pursuant to an arrangement which formed part of the contractual framework of Mr Niasse's employment. Those arrangements did not terminate at the execution of the Premier League contract. The arrangements were continuing; they included the services of renegotiating contracts and performance of the future services.

(3) Agent's fees were incurred wholly and exclusively in the performance of those duties. Mr Niasse did not obtain any personal benefit from the provision of the services. He was obliged to incur the expense. The sole purpose of incurring the agency fees was to enable Mr Niasse to fulfil his obligations under the Premier League contract as supplemented in oral instructions by Everton.

93. Mr Purnell says that the requirements of section 336(1)(b) are not met.

(1) The agency fees were not incurred necessarily in the performance of the duties of Mr Niasse's employment. The duties of that employment were to play football. They did not include engaging an agent.

(2) The agency fees were not incurred "wholly and exclusively" in the performance of the duties. The engagement of the agent was Mr Niasse's personal choice to assist him to procure the most favourable terms of employment that he could obtain (*HMRC v Kunjur* [2023] UKUT 00154 (TCC)).

Relevant case law

94. Once again, we were referred by the parties to various authorities in support of their arguments. As before, we do not propose to embark upon a comprehensive review. We will simply state the main principles that we take from them. As we mentioned above, there is significant overlap with the case law relating to the first limb of section 336(1).

(1) The test as to whether an expense is incurred wholly, exclusively and necessarily in the performance of duties has to be determined by reference to the nature of the duties themselves. The relevant duties are those which are "intrinsic" to the employment as opposed to those which are "collateral" to it (*Bannerjee HCT* [34]).

(2) An expense will not be incurred in the performance of duties of employment if it is incurred pursuant to obligations which are social or personal (*Lomax*) or which are obligations of employment that are collateral to the main duties themselves (*Fitzpatrick*).

(3) The expenditure incurred in engaging an agent who negotiates and/or renegotiates contracts of employment is not ordinarily incurred necessarily in the performance of duties of the employment. This is because the services that are obtained by the employee are not used by the employee in performing the duties of that employment (*Madeley* [83]-[84]).

(4) The question as to whether an expense is incurred "wholly and exclusively" in the performance of the duties of employment has to be applied in a manner similar to the test for the deductibility of expenditure incurred by self-employed individuals but by reference to the performance of the duties of the employment rather than by reference to the business of the self-employed person. In a case where there may be an element of personal benefit derived from the relevant expenditure, the question is whether the employee can demonstrate that any personal advantage that may be obtained is merely an effect of the expenditure as opposed to an object of the expenditure (*Kunjur* [29]).

Discussion

95. We agree with Mr Purnell that the agency fees were not incurred wholly, exclusively and necessarily in the performance of the duties of Mr Niasse's employment.

96. Mr Blades makes a similar argument in relation to the obligations of Mr Niasse under the Tripartite Contract as he made in the context of section 336(1)(a) ITEPA. In short, he says that the Tripartite Contract forms part of the contractual framework of Mr Niasse's employment and so the engagement of an agent and the payment of the agency fees were actions undertaken in the performance of the duties of that employment.

97. We reject that submission. For the reasons that we have given above, in our view, the Tripartite Contract was not part of the contractual framework of Mr Niasse's employment. Even if it was, applying the distinction drawn by Henderson J in *Banerjee HCT*, the duties of the employment of Mr Niasse that are relevant for this purpose are the duties that form an intrinsic part of the job that Mr Niasse was engaged to perform and not those that are collateral to it. In our view, those duties are reflected in Mr Niasse's obligations under the Premier League Contract to play football for Everton. The engagement of an agent was at best collateral to those duties and the agency fees were not paid in performance of them.

98. We are supported in that view by the case law relating to the payment of agency fees in other contexts, principally *Shortt* and *Madeley*. That case law demonstrates that a liability to pay an employment agency to find a job cannot be regarded as incurred in the performance of the duties of the employment itself (*Shortt* p392C). The same applies to a liability to pay an agent whose job involves negotiating an employment contract (*Madeley* [79]) and/or the provision of continuing services such as the monitoring of an employment contract and future representation of the employee (*Madeley* [84]). In *Madeley*, the Special Commissioner (Howard Nowlan) explained the point in this way (*Madeley* [83]-[84]):

> 83. The Schedule E test of expenses is narrower than the Schedule D test, not so much because of the addition of the words "and necessarily", to the phrase "wholly and exclusively", but rather because of the addition of the far more important words, namely "necessarily in the performance of the duties". Cases such as *Ansell (Inspector of Taxes) v. Brown* [2001] STC 1166 illustrate how even an expense (food supplements to enhance the fitness of a premier division rugby player) solely required to render him more suitable to perform

> his duties of employment were disallowed because the expense was still preparatory to the performance, and not necessarily incurred in the performance of the duties. The essential difference is the much narrower compass of the activities to which the expenses must be related under Schedule E .
>
> 84. In applying this rule, I conclude that services in this case geared to negotiating Richard and Judy's contracts, enforcing and monitoring the contracts, receiving payment and dealing with deductions and accounting for net payments to Richard and Judy and representing Richard and Judy in arguments designed to secure a better workplace environment are all disallowed. They were not relevant or used when Richard and Judy were actually performing their duties.

99. We agree. The result must be the same even for liabilities to pay the fees of an agent, such as Mr Rita, who is engaged not only to negotiate the employment contract, but also to undertake any future renegotiation of the contract and would be the same even if some of the fees related to the payment of the Further Services under the Tripartite Contract, which were designed to create a stable relationship between the club and Mr Niasse. These services are provided to bring about the employment relationship, to negotiate the terms or renegotiate the terms under which the duties of the employment will be performed, or to provide a better environment under which those duties will be performed. They are not required in the performance of the duties of the employment themselves.

100. For these reasons, in our view, the agency fees were not incurred necessarily in the performance of the duties of Mr Niasse's employment and so the requirements of section 336(1)(b) are not met. We do not need to decide whether the fees were paid "wholly or exclusively" in the performance of those duties for the purpose of this decision and we do not do so.

Conclusion

101. The agency fees are not deductible under section 336 ITEPA.

Deduction under section 352 ITEPA

102. Under section 352 ITEPA a deduction is allowed for certain agency fees paid by an "entertainer". Section 352 provides as follows:

> **352 Limited deduction for agency fees paid by entertainers**
>
> (1) A deduction is allowed from earnings from an employment as an entertainer for agency fees (and any value added tax on them) if the fees are calculated as a percentage of the whole or part of the earnings from the employment. This is subject to the limit in subsection (2).
>
> (2) Amounts may be deducted under this section in calculating the net taxable earnings from an employment in a tax year only to the extent that, in aggregate, they do not exceed 17.5% of the taxable earnings from the employment in the tax year.
>
> (3) Subsections (4) and (5) apply for the purposes of this section.
>
> (4) "Entertainer" means an actor, dancer, musician, singer or theatrical artist.
>
> (5) "Agency fees" , in relation to an employment, means—
>
> (a) fees paid under a contract between the employee and another person, to whom the fees are paid, who—
>
> (i) agrees under the contract to act as an agent of the employee in connection with the employment, and

(ii) at the time the fees are paid is carrying on an employment agency with a view to profit, and

(b) fees paid under an arrangement under which a co-operative society or the members of such a society agree to act as the employee's agent in connection with the employment.

(6) For the purposes of subsection (5)—

"co-operative society" does not include a society which carries on or intends to carry on business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with or lent to the society or any other person, and

"employment agency" has the meaning given by section 13(2) of the Employment Agencies Act 1973 (c. 35).

103. There were two issues between the parties on the application of section 352: (i) whether Mr Niasse could be regarded as an "entertainer" within section 352(4) and (ii) whether the agency fees paid to Mr Rita were calculated as a percentage of the whole or part of the earnings from Mr Niasse's employment.

Was Mr Niasse an "entertainer" within section 352(4) ITEPA?

The parties' submissions

104. We will turn to some of the detail of the parties' submissions in the discussion below. However, it will assist our explanation if we first summarize their positions.

105. In summary, Mr Blades submits that a broad interpretation should be given to the definition of "entertainer" in section 352(4). Mr Niasse was an "entertainer" within that definition. He says:

(1) A professional footballer should be treated as a "theatrical artist". This broad construction is supported by the legislative history and the requirement for symmetry with the Employment Agencies Act 1973.

(2) A focus on the language of the individual elements of section 352(4) fails to give appropriate weight to the defined term itself i.e. "entertainer" (*Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 per Lord Hoffmann at [38]).

(3) A professional footballer "entertains". It was a crucial part of Mr Niasse's role to create a positive image of Everton.

106. Mr Purnell submits that Mr Niasse is not an "entertainer" within section 352(4) ITEPA.

(1) A footballer is not a "theatrical artist". He/she does not "perform with a theatrical bent" as the definition requires (*Madeley* [56]).

(2) The legislative history supports the narrower interpretation. The definition deliberately excludes sportspeople. The cross-reference to the Employment Agencies Act 1973 supports the narrower interpretation.

(3) It is not permissible to use the defined term, "entertainer", to expand the definition.

The legislative history

107. In their submissions, both parties referred to the legislative history. We have been taken, for example, to the Hansard debates relating to the introduction, in 1990, of section 201A of the Income Corporation Taxes Act 1988 ("ICTA"), which became section 352 ITEPA as part of the Tax Law Rewrite Project, and also to the explanation of the provisions in the explanatory

notes to ITEPA. There is also an explanation of this legislative history in *Madeley* to which both parties refer.

108. The key points that we take from these materials and authorities are as follows:

(1) It is perhaps most straightforward to begin with the relevant provisions of the Employment Agencies Act 1973, which are referred to in section 352(5) and (6) ITEPA. The important point is that the Employment Agencies Act 1973 in section 6(1)(a) generally prohibits employment agencies from charging fees to any person for finding work for that person. The effect of that provision is that, in most cases, employment agencies charge their fees to the employer companies.

(2) There are some exceptions to that general prohibition. In particular, there is an exception from the general prohibition for cases where the person seeking work is found work by an agency in one of the occupations that are listed in Schedule 3 to the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) (the "Employment Agencies Regulations"). That Schedule specifies the following occupations:

> **Schedule 3: Occupations in respect of which employment agencies may charge fees to work-seekers**
>
> Actor, musician, singer, dancer or other performer;
>
> Composer, writer, artist, director, production manager, lighting cameraman, camera operator, make-up artist, film editor, action arranger or co-ordinator, stunt arranger, costume or production designer, recording engineer, property master, film continuity person, sound mixer, photographer, stage manager, producer, choreographer, theatre designer;
>
> Photographic or fashion model;
>
> Professional sportsperson.

(3) This exception is explained by the Special Commissioner in *Madeley* as follows (*Madeley* [8]):

> The rationale behind the general prohibition on agents charging fees against work-seekers, and behind the list of excepted occupations is not particularly material but it seems reasonable to suppose that the list of exceptions largely covers activities where the work-seeker would often have a continuing relationship with an agent, so that the agent might be finding numerous engagements for the worker, and indeed sometimes roles that might be unappealing to another organisation engaging the services of the worker. Accordingly, it would be unrealistic for the agent to have to charge fees against each particular supplier of work, and far more appropriate for the contractual relationship, and the liability for fees, to remain with the individual work-seeker. By contrast in the case of an employment agency finding new jobs for people in all the non-excepted occupations, whatever the policy behind the prohibition on charges being levied against the work-seeker, there is nothing particularly incongruous in the new employer being charged the fee.

(4) Section 352 ITEPA is derived from section 201A ICTA. Section 201A ICTA was introduced into the legislation by the Finance Act 1990. The reason for its introduction relates back to the decision of the High Court in *Fall (Inspector of Taxes) v Hitchen* [1973] STC 66 ("*Fall v Hitchen*"). In that case, a Sadler's Wells ballet dancer was found to be an employee taxable under what was then Schedule E rather than self-employed and taxable under Schedule D. That decision was a significant departure

from the previously accepted practice under which most actors and performers were treated as self-employed.

(5) The decision in *Fall v Hitchen* was very inconsistently applied by HMRC in the period between 1973 and 1990. However, in 1990, HMRC began to apply the decision more consistently to actors and performers in general. The effect of that change in practice was that actors and performers, who could be charged agency fees because of the exception in the Employment Agencies Regulations, and who had previously been entitled to deduct the agency fees from their income because they were treated as self-employed, were not able to deduct the agency fees when their income was treated as employment income. Section 201A was introduced in order to address that discrepancy.

109. One point that was at issue between the parties in this case was the extent to which there was intended to be any symmetry between the provisions of the employment agencies legislation and provisions of section 201A ICTA, which became section 352 ITEPA. Mr Blades suggested that there was intended to be some symmetry. However, we reject that submission. It is not possible to discern any such policy from the wording of the legislation itself. As can be seen, on its terms, the deduction provided by section 352 ITEPA is restricted to fees paid by taxpayers who are engaged in certain occupations as identified by the definition of "entertainer" in section 352(4). Whilst the wording of section 352(4) is in some respects similar to that of Schedule 3 to the Employment Agencies Regulations, the list in section 352 is far shorter than the list in Schedule 3, and notably, for present purposes, does not include professional sportspersons whereas Schedule 3 to the Employment Agencies Regulations does.

110. Even if it were possible to have a reference to the statements of Ministers set out in the extracts of Hansard to which we have been referred – many of which were recited in *Madeley* – those extracts would appear to confirm that the deduction introduced in section 201A ICTA (and reflected in section 352 ITEPA) was designed specifically to meet lobbying from members of the acting profession and entertainment industry. The government was particularly concerned not to extend the mitigation provided by what is now section 352 ITEPA more widely. This leaves open the possibility that some persons engaged in professions which can be charged fees by employment agencies (because their occupations fall within Schedule 3 to the Employment Agencies Regulations) will not be able to claim a deduction for those fees under section 352. The Special Commissioner in *Madeley* recognizes this point (*Madeley* [53]):

> 53. Indeed, even if I conclude that Richard and Judy meet the test of being "theatrical artists", there still appears to remain a mismatch in the wording between that contained in Schedule 3 to the Employment Agency Regulations and that contained in s.201A(5) . Leaving aside the crucial question of whether the words "and theatrical artists" are broadly analogous to "and other performers", fees can manifestly be charged under the former legislation against fashion models, professional sportsmen, and a string of ancillary workers in the theatrical and entertainment industry (i.e. those people listed in the second indent in Schedule 3 who may or may not all be accepted to be "theatrical artists"). Whether fashion models were or are now invariably taxed under Schedule D, so that the practical gap is closed, I do not know. The employment law that enables them to be charged fees is of course unconcerned with how they are taxed. Some professional sportsmen are probably taxed under Schedule E and I was told in a rather tentative way that it was thought that some footballers were taxed under Schedule E, and were simply given grossed-up remuneration to cover fees that they were charged. If that is so, it

> may seem to solve the problem for the individual footballer though it still seems unfair.

111. We conclude therefore that, whilst section 352 may have origins which are to an extent linked to the employment legislation and the fact that some of the occupations listed in section 352(4) may be charged fees by employment agencies, the tax legislation and the employment agencies legislation operate independently. It is not a requirement of section 352 that a person be engaged in one of the occupations listed in Schedule 3 of Employment Agencies Regulations in order to obtain a deduction for the agency fees; equally not all persons engaged in occupations under Schedule 3 of the Employment Agencies Regulations and who are charged an agency fee will be able to obtain a deduction for it under section 352 ITEPA.

Was Mr Niasse a "theatrical artist"?

112. We must now turn to the specific arguments raised by Mr Blades on behalf of Mr Niasse. The first is that Mr Niasse was a "theatrical artist" within the definition in section 352(4). The only authority to which we have been referred on this question is *Madeley* (to which we have already referred on occasion above).

113. That case concerned agency fees paid by the presenters of the morning television magazine programme "This Morning" by its hosts, Richard Madeley and Judy Finnigan. The agency fees were paid to their agent, Ms Sweetbaum, not for finding them employment – Richard and Judy were already employed by the television company before Ms Sweetbaum was engaged – but for negotiating and renegotiating their contracts and their remuneration whenever they came up for renewal and representing them more generally on other matters.

114. The Special Commissioner decided that Richard and Judy were to be treated as "theatrical artists" within section 201A ICTA (the predecessor to section 352 ITEPA) and were entitled to deduct the agency fees from their employment income.

115. The Special Commissioner's interpretation of the meaning of "theatrical artist" for this purpose is set out at [53][2] to [57] as follows:

> 53. I do not find the expression "theatrical artist" unambiguous.
>
> 54. I accept without hesitation that Richard and Judy are entertainers, and they are performers.
>
> 55. Without resort to the Ministerial statements, and to an HMRC Press Release (both of which I will refer to later and which support this proposition) I would certainly accept that there is no implicit requirement that the performance needs actually to be in the theatre. If an artist is performing on television, in a club or even in the street and the performance can be described as "theatrical", the fact that the performer may never have set foot in a theatre is irrelevant. "Theatrical" means "some sort of performance in the nature of that in the theatre".
>
> 56. When coupled with the word "artist", the composite phrase clearly eliminates the meaning under which some orators, Members of Parliament and others can be said to be "theatrical" or to speak and act in a "theatrical manner". The addition of the word "artist" connotes some form of professional performer or entertainer, so that the most natural meaning of the composite expression is "a performer or entertainer, performing with a theatrical bent, or in the manner of acting and theatre, but not necessarily in the theatre" .
>
> 57. Without resort to Ministerial statements, the history of the legislation and to the HMRC Press Release that I have just referred to, I incline to the view

[2] There are two paragraphs numbered [53] in the STC(SCD) report. This is the second of those paragraphs.

> that Richard and Judy are "theatrical artists" on the definition that I have adopted. Their performance is not comparable to the role of a newsreader. It is not comparable to the role of the presenter of a serious current affairs programme, indeed to the role of the standard TV interviewer. They were the core artists in the "This Morning" programme, and whilst total recording of acted skits may only have taken up a small proportion of the broadcast time, these skits were still in the same jokey, light-hearted vein as the rest of the presentation. That informal presentation gave the programme its fundamental appeal, and its rather novel character, and thus I repeat that I accept without hesitation that Richard and Judy were performers and entertainers, and I incline to the view that they are fairly described as "theatrical artists".

116. He then tested his initial interpretation by reference to the relevant HMRC press release and the statements in the Hansard report of the debates in Parliament surrounding the introduction of the provision. He confirmed his initial interpretation at [69].

> 69. I have already said in paragraphs 56 and 57 above that my fundamental interpretation of the critical phrase is in favour of the interpretation contended for on behalf of Richard and Judy. I now find that the HMRC Press Release supports aspects of that interpretation. I find that it was suggested in Parliament that the phrase had a broad meaning and that it covered people who sound significantly less like "theatrical performers" to me than Richard and Judy do. And I find it impossible to interpret the phrase in one way for one group and another for all others when there is no indication in the section itself that it is confined in its application to Equity members, people on Esher contracts, or new entrants to Schedule E . Finally HMRC's own admissions, in their skeleton argument, conceded that the expression covered "comedians, magicians, acrobats, hypnotists, jugglers and mind readers". In the light of these further indicators, I find my basic interpretation to be confirmed and not undermined.

117. At [70] to [75], the Special Commissioner then considered the position of various other presenters, gameshow hosts, newsreaders and other personalities to determine whether or not they would fall within his definition. He suggested that some would meet his criteria and others would not, but he concluded at [75] as follows:

> 75. The common thread then to Bruce Forsyth, Ant and Dec and Anne Robinson is that they are all putting on one or another form of act. Everything is a performance. And to my mind Richard and Judy share that attribute. Their act was and is to perform the role of the informal chatting husband and wife team, constantly trying to entertain, and making their personality and performance the core of the programme that they presented. And that makes them "theatrical artists".

118. We are not bound by the decision of the Special Commissioner in *Madeley*. However, it is persuasive authority and, in any event, we agree with it. The key points that we take from the Special Commissioner's decision in relation to the interpretation of section 352(4) are that:

(1) A "theatrical artist" is not limited to artists who perform in the theatre;

(2) The term "artist" connotes a performer or entertainer performing with a "theatrical bent" or who is "putting on an act".

119. Mr Blades says that Mr Niasse should be treated as a "theatrical artist" within this definition. He says the term should be given a wide meaning: there is no requirement that the employee in question should perform in a theatre; a footballer is engaged to entertain; and football fans and commentators often refer to performance by footballers and the stadiums in

which they perform in terms similar to those used in relation to theatrical or television performers.

120. We are not persuaded by Mr Blades's arguments. Even if the definition of "theatrical artist" can extend beyond performers in theatrical and television productions as might be suggested by some of the exchanges in the parliamentary debates which are referred to in *Madeley*, the definition of "theatrical artist" in section 352(4) does not, in our view, extend to professional footballers. A professional footballer does not perform with a "theatrical bent" in the manner required by that section. A footballer is not "putting on an act" when he or she performs his or her professional duties.

121. To the extent that it is relevant, in our view, the reference to the employment legislation does not support Mr Niasse's case. It would suggest that models and sports people have been deliberately omitted from the list of those occupations that are entitled to a deduction. The Special Commissioner recognized this potential gap in his decision in *Madeley*, and specifically referred to the fact that professional footballers would be amongst those who would not be entitled to claim a deduction under section 352.

122. Furthermore, as Mr Purnell pointed out, in other parts of the tax legislation, where a provision is intended to extend to sports people specific provision is made (see section 226E ITEPA, sporting testimonials).

123. We conclude therefore that Mr Niasse is not a "theatrical artist" within section 352(4) ITEPA.

Was Mr Niasse an "entertainer"?

124. Mr Blades also says that we have to take into account the ordinary meeting of the defined term itself (i.e. "entertainer") when we form a view of the scope of the definition. Mr Blades relies on the statement of Lord Hoffmann in his judgment in *Oxford County Council* (at [38]) and the decision of the Upper Tribunal in *Scott v HMRC* [2018] UKUT 236 (TCC) (at [36]) in support of this proposition.

125. We accept the general principle that the ordinary meaning of the defined term itself can be used as an aid to the interpretation of a statutory definition particularly where the definition is ambiguous. As Lord Hoffmann put it in *Oxford County Council* (at [38]) "in construing a definition one does not ignore the ordinary meaning of the word which Parliament has chosen to define". However, that does not change our view. Whilst a professional football player may "entertain", it would not be usual to describe a professional footballer as an "entertainer" in normal parlance. In any event, in our view, although there may be other respects in which the definition in section 352(4) is ambiguous, the other factors that we have identified above demonstrate clearly that a sports person is not to be included within the definition.

126. We conclude therefore that Mr Niasse is not an "entertainer" within section 352(4) ITEPA.

Were the agency fees "calculated as a percentage" of Mr Niasse's earnings?

127. There is also an issue between the parties as to whether the fees paid by Everton to Mr Rita on behalf of Mr Niasse are calculated as a percentage of the whole or part of Mr Niasse's earnings from his employment for the purposes of section 352(1) ITEPA.

128. We have concluded that Mr Niasse is not a "theatrical artist" and is not otherwise an "entertainer" within section 352(4). That is sufficient for us to conclude that a deduction is not available to Mr Niasse for the payments of the agency fees under section 352 ITEPA. We have, however, heard full argument on this issue and so will set out our views on the points that the parties have raised.

129. The agency fees to be paid by Everton on behalf of Mr Niasse are set out in clause 7 of the Tripartite Contract. They are stated as fixed sums and are not on their terms calculated by reference to the earnings of Mr Niasse's employment. However, Mr Blades says that the agency fees meet the requirements of section 352(1) for the following reasons.

(1) Section 352(1) does not require that the fee be calculated as a proportion of the earnings of the employment provided that, when the fee is calculated as a percentage of the earnings of the employment, the fee does not exceed the 17.5% limit set out in section 352(2).

(2) The fees paid by Mr Niasse are calculated as a percentage of his earnings from the employment because they are capable of being expressed as a percentage of those earnings.

(3) It is implicit that the agency fees are calculated as a percentage of the earnings of Mr Niasse's employment because that is what is required by the FA Regulations (see paragraph C3) and, as a matter of fact, the fee was calculated by reference to a percentage of his earnings being the percentage as set out in the Representation Contract.

130. We do not regard the first two of these arguments as sustainable.

(1) The requirements for the agency fees to be calculated as a percentage of the earnings of the employee's employment in section 352(1) ITEPA is a separate requirement. It operates independently of the 17.5% limit in section 352(2). Whilst we acknowledge Mr Blades' argument that this separate requirement creates a distinction between taxpayers who pay the same fee (one being a fixed sum and one being calculated as a percentage of earnings) the wording of the statute is clear. Furthermore, in our view, the creation of that separate requirement is quite deliberate and designed to reflect the manner in which agency fees were typically calculated in the entertainment industry.

(2) As regards the second argument, we agree with Mr Purnell that, if this argument were correct, it would render the requirement in section 352(1) meaningless as any one figure can be expressed as a percentage of another.

131. As regards his final point, Mr Blades, in argument, presented a calculation which was designed to show that the amounts paid to Mr Rita under the Tripartite Contract by Everton and Mr Niasse when taken together reflected the original 10% fee set out in the Representation Contract. Even on the basis of the figures that he presented, the calculation did not produce the correct figure. For our part, Mr Blades failed to meet the burden upon him to show that this requirement was met. We reject this submission.

132. In our view, the fees paid to Mr Rita on Mr Niasse's behalf were not calculated as a percentage of the whole or part of the earnings from Mr Niasse's employment for the purposes of section 352(1) ITEPA. If, contrary to our view as set out above, Mr Niasse should be regarded as an "entertainer" within section 352(4) ITEPA, he would still not have been entitled to a deduction for the agency fees under section 352 ITEPA.

Conclusion

133. For these reasons, Mr Niasse is not entitled to a deduction for the agency fees under section 352 ITEPA.

PENALTIES

134. The final part of this decision notice relates to Mr Niasse's appeal against penalties for the late filing of tax returns for the tax years 2015/16, 2016/17 and 2017/18.

Background

135. There is no dispute that Mr Niasse's tax returns for the tax years 2015/16 and 2016/2017 were filed on 23 April 2019 and his return for the tax year 2017/18 was filed on 18 April 2019.

136. The amounts and nature of the penalties that have been charged and are subject to appeal are also not in dispute. They are set out in the table below.

Tax year	Type	Amount	Date Issued	Appeal to HMRC	Delay (days)
15/16	Initial	£100	24/03/2017	07/02/19	656
15/16	6-month	£300	17/09/2017	07/02/19	479
15/16	Daily	£900	17/09/2017	07/02/19	479
15/16	12-month	£300	29/03/2018	07/02/19	285
16/17	Initial	£100	22/03/2018	07/02/19	292
16/17	Daily	£900	16/09/2018	07/02/19	113
16/17	6-month	£300	16/09/2018	07/02/19	113
16/17	12-month	£300	26/03/2019	18/04/19	n/a
17/18	Initial	£100	26/03/2019	18/04/19	n/a
16/17	6-month	£981	16/02/2021	10/03/21	n/a
16/17	12-month	£981	16/02/2021	10/03/21	n/a
		£5,262			

137. The issues before the Tribunal in relation to these penalties are as follows:

(1) subject to the issue to which we refer below, whether Mr Niasse received notice under section 8 TMA to file the relevant return;

(2) to the extent that the appeals against the penalties are out of time – which applies to all of the penalties expect those issued on 26 March 2019 and 16 February 2021 (shown in the last four rows of the table) – whether permission to make a late appeal should be given by the Tribunal;

(3) whether Mr Niasse had a reasonable excuse for the late submission of his returns.

138. In addition to these issues, Mr Purnell says that the question as to whether Mr Niasse received notice under section 8 TMA to file the relevant return is not before the Tribunal and so the Tribunal has no jurisdiction to decide upon it. We will address this question first.

Is the question of whether Mr Niasse received notice under section 8 TMA before the Tribunal?

139. By way of background, the penalties in this case were charged under Schedule 55 Finance Act 2009. The parties agree that, in order to impose a penalty under Schedule 55 for the late submission of a return, HMRC must prove that a notice under section 8 TMA was given to the taxpayer by HMRC. We were referred by the parties to the decision of the First-tier Tribunal ("FTT") in *DJ Wood v HMRC* [2018] UKFTT 0074 (TC) at [29] in support of this proposition. That decision is not, of course, binding upon us, but a similar conclusion is found in the decision of the Upper Tribunal in *HMRC v Rogers and Shaw* [2019] UKUT 406 (TCC) ("*Rogers*") at [49], which is.

The parties' submissions

140. Mr Purnell says that the question as to whether Mr Niasse received a section 8 TMA notice is not before the Tribunal. Mr Niasse has not pleaded the point. It is not referred to in his notice of appeal or in his amended grounds of appeal. The issue is not referred to in any of

the correspondence between the parties following the submission of the notice of appeal. If Mr Niasse wishes to argue the point before the Tribunal, he should make an application for permission to amend his grounds of appeal. But it is far too late to make such an application. The first time at which HMRC was aware that this point may be taken was when Mr Niasse sought to add additional authorities to the bundle on 21 July 2023. The correct approach for the Tribunal in the circumstances is to refuse to permit the point to be taken. If the Tribunal allows the point to be argued, HMRC should be given time to adduce further evidence. If the Tribunal did not do so, HMRC would be deprived of the opportunity to produce evidence to meet the point. That would be procedurally unfair.

141. Mr Blades says that the question of the issue of a section 8 TMA notice is clearly before the Tribunal. It was referred to in the parties' correspondence at various points. Mr Niasse does not need to make an application to amend his grounds of appeal.

Relevant principles

142. On this point, we have been referred by Mr Purnell to the decision of the Upper Tribunal in *Rogers*. A similar point to that raised by Mr Purnell arose on appeal to the Upper Tribunal in that case. The FTT had allowed an appeal by the taxpayer against a penalty under Schedule 55 for the late submission of a return on the grounds that the taxpayer had not been given a notice falling within section 8 TMA. One argument raised by HMRC on their appeal to the Upper Tribunal was that the FTT should not have considered whether a notice under section 8 TMA had been given to the taxpayer because it was not a pleaded ground of challenge and was not therefore before the Tribunal.

143. The Upper Tribunal concluded that it was procedurally unfair to HMRC for the FTT to have decided the question as to whether a section 8 TMA notice had been given without having permitted HMRC an opportunity to respond to the point or to provide evidence addressing the FTT's concerns (*Rogers* [48]). The main points of the Upper Tribunal's reasoning on this issue were as follows:

> (1) The case before the FTT was a default paper case to which rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTRs") applied. Within that rule, an email from the taxpayer to HMRC and the Tribunal raising the validity of a penalty should be treated as part of the taxpayer's reply to HMRC's statement of case within FTR 26 (*Rogers* [41]).
>
> (2) Although the taxpayer had not applied for permission to amend his grounds of appeal, all the parties had acknowledged that the contents of the email were before the Tribunal. This conclusion was consistent with the overriding objective (FTR 2(1)) and, in particular, with "avoiding unnecessary formality" as required by FTR 2(2)(b) (*Rogers* [42]).
>
> (3) The relevant email did not raise the argument that the taxpayer had not been given a notice under section 8 TMA and accordingly by deciding the case on that point, the FTT was deciding the case on a basis for which neither party had argued and without affording HMRC the opportunity to respond or provide evidence (*Rogers* [44]-[45]). The Upper Tribunal said this (at *Rogers* [44]):
>
> > 44. We therefore do not consider that Mr Rogers's email of 28 February 2018 was raising the argument that he had received no valid notice under s8 of TMA. At most his email was raising an argument that the penalty assessment he had received was invalid. We acknowledge that Mr Rogers was not professionally represented. However, any litigant, whether professionally represented or not, should expect to make their case clearly. That will not necessarily involve the use of technical or legal language but whatever

> language is used, it should be sufficient to identify the precise point that is made so that the other party can respond to it as necessary and the FTT can determine it. There is a material difference between an argument that a penalty assessment is invalid and an argument that the original notice triggering the requirement to deliver a return was invalid.

Application to the facts of this case

144. On the facts of this case, it is clear that the question of whether or not a notice under section 8 TMA has been issued to Mr Niasse was a matter of dispute before the notice of appeal was submitted by Mr Niasse (see, for example, the emails from Elliotts Shah dated 7 February 2019 and 18 April 2019). Mr Niasse's notice of appeal, however, contained no grounds of appeal in relation to the appeals against the penalty assessments. The amended grounds of appeal included only grounds that are relevant to the final question that we need to decide, namely whether or not Mr Niasse had a reasonable excuse for the late filing of his returns.

145. Following the submission of the notice of appeal and amended grounds of appeal, there was an exchange of correspondence between the parties which sought to resolve the questions of the penalties which were subject to appeal. In that correspondence Elliotts Shah also confirmed that the grounds of appeal in relation to all the penalties included that Mr Niasse "may not have seen or received HMRC's communications" (see Elliotts Shah's email of 17 August 2021, as confirmed in their email of 27 September 2021). There is no specific reference in those exchanges to Mr Niasse not having received a notice under section 8 TMA. There is also no evidence that this exchange was shared with the Tribunal notwithstanding the Tribunal's direction of 1 September 2021.

146. We have come to the view that, on balance, the point is not a new issue and should properly be regarded as being before the Tribunal. We acknowledge that the point is not properly formally pleaded. However, the point was clearly at issue between the parties before the submission of the notice of appeal. The notice of appeal and the amended grounds of appeal did not correctly refer to the penalties and HMRC, to their credit, took some steps to clarify the scope of the appeal. Although the wording of Elliotts Shah's email of 17 August 2021 is not particularly precise – the reference to not having "seen or received HMRC communications" could be taken to refer to the receipt of penalty assessments or other correspondence in addition to the receipt of the section 8 TMA notice itself – and we would have expected great clarity in professional correspondence, read in the context of the earlier exchanges, in our view, it should be regarded as including a reference to section 8 TMA notices. Accordingly, in exercise of our powers under FTR 5(3), we would permit Mr Niasse to make submissions on this point. In arriving at this conclusion, we are mindful of the overriding objective "to deal with cases fairly and justly" in FTR 2(1) and in particular the injunction in FTR 2(2)(b) to avoid "unnecessary formality".

147. That having been said, the correspondence with Elliotts Shah was not as clear as might have been reasonably expected. We can understand why HMRC may not have regarded the point as continuing to be in issue. As a result of the conclusions that we have reached below, we do not need to address this point. However, if we had not reached those conclusions, we would have considered that procedural fairness required us to permit HMRC to introduce further evidence to address the point and to allow them time to do so.

Was Mr Niasse given notice under section 8 TMA?

148. In *Rogers*, the Upper Tribunal provided some guidance to the FTT for dealing with cases in which it is asserted by a taxpayer that HMRC had not given notice to file a return under section 8 TMA. In summary, the Upper Tribunal advised as follows:

(1) If HMRC fail to provide any evidence at all that a notice under section 8 TMA was served, the penalties must be set aside (*Rogers* [50]).

(2) If HMRC have provided some evidence that a notice under section 8 TMA was served, it is a matter for the FTT to determine whether or not that evidence satisfied HMRC's burden of proof (*Rogers* [51]).

(3) The Upper Tribunal then set out the following guidance that should be applied in cases where some evidence is available to the FTT (at *Rogers* [51]-[52]):

> 51. Where HMRC have given some evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems record a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice 2, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so.
>
> 52. Where HMRC have adduced some evidence that a s8 notice was served, they do not need to anticipate every conceivable challenge that a taxpayer might make to the validity of such a notice and produce evidence to rebut all such potential arguments in advance. Such a requirement would be unworkable and disproportionate. Rather, where HMRC have given some evidence that a s8 notice was served, and there is no suggestion from the taxpayer that such notices are invalid, HMRC are entitled to proceed on the basis that no challenge is being made to the validity of those notices. If the FTT identifies its own concerns on the validity of a s8 notice, the proper course is for the FTT to write to the parties, before releasing its decision, to explain the nature of those concerns and to invite the parties to make submissions on the point and, if they wish, to apply for permission to adduce further evidence as necessary.

149. In the present case, the evidence before us comprises:

(1) the print outs from HMRC's computer records, which purport to show that a notice to file a return for the tax year 2015/16 was issued;

(2) a request for evidence sent to HMRC's third-party print provider, Communisis, which records that the notice to file a tax return for 2015/16 was issued on 12 August 2016 and that the notices for the tax years 2016/17 and 2017/18 were issued by the Digital Team;

(3) the report from Communisis, which shows that the statutory notices regarding the imposition of penalties for the tax years 2015/16 and 2016/17 were issued on the relevant dates to Mr Niasse's addresses;

(4) the letters from HMRC reminding Mr Niasse to file a return – such as the letters dated 3 August 2017, 19 July 2018, 16 October 2018 and 26 March 2019 – all of which proceed on the basis that a valid notice had been given.

150. We acknowledge the Upper Tribunal's caution (in *Rogers* [55]) concerning relying on the entries in HMRC's computer systems alone as evidence of service of a notice to submit a return. As in this case, that evidence tends not to show the precise date on which a return was issued. However, we consider that the weight of the evidence is sufficient to demonstrate that on the balance of probabilities the notices were issued in this case.

151. The height of Mr Niasse's case as set out in the email from Elliotts Shah of 17 August 2021 is that Mr Niasse "may not have seen or received HMRC's communications" (our emphasis) because he was playing at other clubs at the time. It is not part of Mr Niasse's case that the notices were not sent to the correct address. Accordingly, we conclude that notices under section 8 TMA were given to Mr Niasse to make or deliver a return for each of the relevant tax years.

Should Mr Niasse be permitted to make a late appeal against the penalty assessments?

152. As we have mentioned above, HMRC accepts that a timely appeal was made against the penalties issued on 26 March 2019 and 16 February 2021[3]. Mr Niasse does not need permission to make an appeal against these penalties.

153. As regards the other penalties, all the appeals were made on 7 February 2019. They were all made promptly following the appointment of Elliotts Shah. However, all of these appeals were made after the expiry of the 30-day period permitted by section 31A TMA. They were all late, and in all cases considerably late as shown in the table at [136] above.

Relevant principles

154. The question for us is whether we should exercise our discretion under section 49(2)(b) to permit a late appeal. In its decision in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"), the Upper Tribunal set out (at *Martland* [44]-[45]) a three-stage process that the FTT might usefully follow when considering applications for permission to appeal out of time as follows:

> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton and others v TH White Limited and others* [2014] EWCA Civ 906]:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess

[3] The documentary evidence is not clear as to whether an appeal was made against the 12-month penalty for the tax year 2016/17 issued on 26 March 2019. However, HMRC's skeleton proceeds on the basis that an appeal was made and we have proceeded on the same basis.

> 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…

Application to the facts of this case

155. We have already addressed the first stage of this process. The delays in this case are both serious and significant.

156. As regards the second stage, the reasons that Mr Blades gives in his skeleton for the late appeals against these penalty assessments are that:

> (1) Mr Niasse was not in a position to make an appeal against the penalty assessments because, as explained by HMRC in their letter of 22 March 2019, he could not give notice of an appeal to HMRC until he had filed the relevant return;
>
> (2) he was persuaded by HMRC to delay giving notice of appeal until the relevant tax returns had been submitted and accordingly the Tribunal should exercise its powers under section 49(2)(b) TMA to permit Mr Niasse to make a late appeal.

157. In argument, Mr Blades also relied on the argument that Mr Niasse did not receive a notice to file a return – an assertion that we have addressed above – but we also consider as a possible reason the argument that Mr Niasse "may not have seen or received HMRC's communications" as set out in the email from Elliotts Shah of 17 August 2021.

158. We should deal first with the argument that Mr Niasse could not give notice of an appeal against the penalties until he had filed the relevant returns. This point derives from HMRC's letter to Elliotts Shah of 22 March 2019.

159. Neither counsel provided any authority in support of this suggestion. Paragraph 20 Schedule 55 FA 2009 contains the right of appeal against a penalty imposed under Schedule 55. It provides simply that:

> (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.

160. There is no limitation of which we are aware to suggest that a taxpayer may only appeal against a penalty under Schedule 55 FA 2009 for late submission of a return once the relevant return has been filed. We can only conclude that the suggestion in HMRC's letter of 22 March 2019 was simply wrong. Mr Niasse could have appealed against the penalty assessments when they were made. The usual time limit as set out in section 31A TMA applied.

161. That having been said, a representation was made by HMRC in their letter of 22 March 2019 to the effect that Mr Niasse could only appeal against the penalty assessments once the returns had been filed. We have no doubt that this representation affected Elliotts Shah's approach – a revised appeal was not made until the returns were submitted on 18 April 2019 – however, it did not affect Mr Niasse's initial failure to appeal against the penalty assessments. The representation was made after Elliotts Shah made the appeals on behalf of Mr Niasse on 7 February 2019. There is no evidence of HMRC having made a representation at an earlier time. If we accept that the appeals were validly made on 7 February 2019 rather on 18 April 2019, as we do in the table at [136] above, the appeals were still significantly out of time.

162. We have also considered whether there is substance to Mr Niasse's assertion that he "may not have received" communications from HMRC. On the balance of probabilities, we are not

satisfied that this was the case. We have not seen any evidence to support this assertion. Indeed the evidence suggests that Mr Niasse did receive the notices of assessment as he was able to pass them and other communications on to Elliotts Shah before they submitted the appeals on 7 February 2019.

163. It follows that Mr Niasse has not shown any good reason why the Tribunal should permit him to make an appeal out of time. Having also taken 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, we refuse to extend the time period for appeals against the penalties that were issued on 24 March 2017, 17 September 2017, 22 March 2018, 29 March 2018, and 16 September 2018.

Did Mr Niasse have a reasonable excuse for the late submission of the returns?

164. The final issue that we must address is whether Mr Niasse had a reasonable excuse for his failure to submit his returns on time.

The relevant legislation and case law principles

165. Paragraph 23 Schedule 55 FA 2009 provides that a liability to a penalty for a failure to submit a return does not arise if the taxpayer satisfies the Tribunal that there is a reasonable excuse for the failure.

166. Paragraph 23 provides as follows:

> **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.

167. The Upper Tribunal provided guidance to the FTT on the approach to be taken in cases involving the reasonable excuse defence in its decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) ("*Perrin*"). The Upper Tribunal said this (at *Perrin* [81]-[82]):

> 81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (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, it 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 FTT, 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 (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT 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.
>
> 82. 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. [*Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234] itself provides an example of such a situation.

Application to the facts of this case

168. As a starting point, it follows from our refusal to permit Mr Niasse to make appeals out of time in relation to some of the penalty assessments, that this section applies only to the penalty assessments that were appealed in time (that is those in the final four rows of the table at [136] above). Those penalties relate only to the late submission of returns in relation to the tax years 2016/17 and 2017/18.

169. If we follow the guidance in *Perrin* ([at 81]) we should first establish the facts that Mr Niasse asserts give rise to a reasonable excuse.

170. The facts on which Mr Niasse relies are expressed differently in his grounds of appeal, the various emails from Elliotts Shah and in Mr Blades's skeleton argument, but, in summary, Mr Niasse gives the following reasons for his failure to submit his returns on time:

> (1) his lack of understanding of UK tax law given that he had recently arrived in the UK;
>
> (2) his genuine belief that, as his only source of income was his employment with Everton, all of his tax would be accounted for under the PAYE system and that he did not need to file a tax return;
>
> (3) that he had separated from his wife;
>
> (4) that he may not have received communications from HMRC as he was, at various times, playing for other clubs in the UK while on loan from Everton.

171. The next stage is to determine which of those facts are proven.

> (1) The only evidence that we have of Mr Niasse's lack of understanding of UK tax law and his belief that he did not have to file a tax return because his only source of income was his employment with Everton, is a statement in Mr Shah's witness statement. We do not regard that a particularly strong evidence. We would have preferred to hear evidence of Mr Niasse's belief from Mr Niasse himself.

(2) We have no evidence of Mr Niasse's separation from his wife or how that separation may or may not have affected Mr Niasse's ability to file his returns.

(3) For the reasons that we have given above, on the balance of probabilities, we find that Mr Niasse received notices to file his tax returns. With regards to the other communications from HMRC, we have no evidence for Mr Niasse's assertion that he did not receive other communications such as the penalty assessments and other reminders. On the balance of probabilities we find that the communications were received by Mr Niasse. This is particularly given the case that Mr Niasse was able to provide the information to Elliotts Shah so that they could appeal against the various assessments.

172. We therefore move to the third stage which is to decide whether the facts as proven do indeed amount to an objectively reasonable excuse taking into account the experience in other relevant attributes of Mr Niasse and the situation in which he found himself.

173. As we have mentioned above, Mr Niasse asserts that he believed that on his arrival in the UK that he did not need to file a tax return. Even if we accept that assertion on the basis of Mr Shah's evidence, we note that the relevant penalties for these purposes relate to the late filing of the returns for the tax years 2016/17 and 2017/18. By the time that these returns were due, Mr Niasse was in receipt of the notices to file the tax returns and several reminders in relation to the tax year 2015/16. They would have put him on notice that he may have an obligation to file a return. Furthermore, Mr Niasse is a professional footballer. He was supported by professional advisers, such as Mr Rita. He had not inconsiderable income and yet failed to obtain relevant advice and to file his returns despite these promptings.

174. We conclude that Mr Niasse did not have a reasonable excuse for his failure to file his returns for the tax years 2016/17 and 2017/18.

DISPOSITION

175. For the reasons that we have given:

(1) we dismiss the appeals against the conclusions in the closure notices for the tax year 2015/16 and the tax year 2016/17; and

(2) we dismiss the appeal against the penalty assessment in the sum of £5,262.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

176. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 28th FEBRUARY 2024

APPENDIX

Selected provisions from the FA Regulations

A1 Only an Intermediary[4] may be used and paid by a Player or Club in relation to any Intermediary Activity. Alternatively, a Player or Club may represent themselves in any matter relating to a Transaction.

…

A4 Any party to a Transaction is prohibited from:

a. proposing in any way, either directly or indirectly, to any other party to the Transaction that the Transaction is dependent upon a Player's agreement to contract with a specific Intermediary; or

b. making the Transaction conditional on a Player's agreement to contract with a specific Intermediary.

…

B10 An Intermediary can only enter into a Representation Contract with a Player for a maximum duration of two years.

…

C3 Where the Intermediary and the Player agree in the Representation Contract that a commission (either by way of lump sum or by instalments) is to be paid in respect of a Transaction, it shall be calculated on the basis of the Player's Basic Gross Income as set out in the employment contract concluded by the Player in respect of which he was represented by the Intermediary.

…

C11 As a recommendation, Players, Clubs and Intermediaries may adopt the following benchmarks:

a. The total amount of remuneration per Transaction due to Intermediaries who have been engaged to act on a Player's behalf should not exceed three per cent (3%) of the Player's Basic Gross Income for the entire duration of the relevant employment contract.

b. The total amount of remuneration per Transaction due to Intermediaries who have been engaged to act on a Club's behalf in order to conclude an employment contract with a Player should not exceed three per cent (3%) of the Player's eventual Basic Gross Income for the entire duration of the relevant employment contract.

c. Subject to Regulation E5, the total amount of remuneration per Transaction due to Intermediaries who have been engaged to act on a Club's behalf in order to conclude a transfer agreement should not exceed three per cent (3%) of the eventual transfer compensation paid in connection with the relevant transfer of the Player.

[4] i.e. a registered agent