



TC06264

Appeal number: TC/2016/03864

DAILY PENALTIES – failure to comply with information notice – whether letters amounted to an appeal – no – whether permission to appeal out of time should be given – no – in any event finding penalties properly imposed and no reasonable excuse – appeal not admitted and would have been dismissed if admitted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JOSHY MATHEW

Appellant

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

**Sitting in public at Taylor House, Rosebery Avenue, London on 1 December
2017**

Mr S Reevell, Counsel, for the Appellant

Ms H Jones, HMRC officer, for the Respondents

DECISION

1. By his notice of appeal, the appellant applied for closure of various enquiries
5 into his tax returns. It was accepted that by the same notice of appeal he applied to
appeal against two penalties imposed on him for failure to comply with an
information notice.

2. The hearing was originally listed in May 2017 but just before that hearing the
parties agreed to adjourn it until 1 December 2017. Just before the 1 December 2017
10 hearing, the parties agreed that the applications for closure would be adjourned. This
was on the basis the appellant has recently provided HMRC with more information
and HMRC needed time to consider whether they now had sufficient information to
close the enquiries. I agreed to the adjournment.

3. After some discussions, both parties took the position that they were not
15 applying for the hearing of the proceedings with respect to the two penalties to be
adjourned. Therefore, that hearing proceeded and this decision records the outcome.

4. It was HMRC's position that the appellant had not appealed the penalties in
time; and that he should not be given permission to appeal them out of time; and if he
was, the appeal should be dismissed. The appellant did not accept that he had not
20 lodged an appeal in time but considered that if his appeal was out of time, he should
be given permission to appeal out of time, and that either way his appeal should be
allowed.

5. The facts were (largely) not in dispute: the parties agreed the sequence of
events and the letters which had passed between them. They put a different
25 interpretation on them. And to the extent that either side made representations about
the writers' motivations, I had no evidence other than the contents of the letters
themselves. No witnesses were called. I find as follows:

Findings of fact

The Information Notice and the appeal against it

30 6. In March 2014, HMRC opened enquiries into the appellant's tax returns for the
five years ended April 2009-2013. On 14 April 2015 HMRC issued an information
notice. Some information was provided but HMRC was not satisfied.

7. On 13 August 2014, HMRC issued a further information notice to the appellant
under Sch 36 §1 of Finance Act 2008. It required a number of items including bank
35 and building society statements covering the tax years 11/12 and 12/13. The due date
for compliance was 12 September 2014. I will refer to this as 'the Information
Notice' as it is the information notice in respect of which the penalties at issue in this
hearing were assessed.

8. On 15 September 2014, HMRC assessed the appellant to a £300 fixed penalty for failure to comply with the Information Notice. This penalty was not appealed. This fact was recorded at §4 in Judge Redston’s decision to which I will refer to in more detail immediately below, and Mr Reeve did not suggest otherwise in the hearing before me.

9. On 24 September 2014, the appellant applied to this Tribunal (‘the FTT’) for closure of four of the enquiries into his tax affairs. On 3/11/14 he appealed against the Information Notice and applied for closure of the fifth enquiry. The Tribunal (Judge Redston) issued its decision on 31 March 2015 dismissing the closure applications. The decision is reported at [2015] UKFTT 139 (TC). In respect of the appeal against the Information Notice, Judge Redston’s decision recorded at §209:

[7] The Tribunal decided to vary the Sch 36 Notices and for ease of reference have set out the Notices (as varied) at Appendix 1. We direct that Mr Mathew comply with Notices, as varied, by 30 days from the date of issue of this decision.

10. Appendix 1 included some minor variations to the Information Notice but there was no variation to the requirement to provide bank and building society statements for tax years 11/12 and 12/13. The revised compliance date was 30 April 2015 as that was 30 days after issue of Judge Redston’s decision.

11. So far as Mr Mathew’s rights of appeal were concerned, the Tribunal stated:

[209] There is no right of appeal against the decision in relation to the Sch 36 Notices, see Sch 36, para 32(5).

[210] Any party dissatisfied with the closure notice decision has a right to apply for permission to appeal against it

12. It is also worth noting that one of the issues that Tribunal had to deal with was whether a particular letter from Mr Mathew should be treated as an appeal. The Tribunal’s decision recorded:

[43] It is clear from the facts already set out that Mr Mathew did not appeal the Sch 36 Notices by writing to [HMRC]. We considered whether his letter of complaint could be read as an appeal. However, we decided that it could not, because:

- (1) it explicitly stated that it was a complaint;
- (2) it made no reference to the First Notice at all, still less to appealing against that Notice;
- (3) it crossed with the Second Notice, so could not be an appeal against that Notice; and
- (4) when [the HMRC officer] replied to the letter, he said ‘I am treating this as a letter of complaint.’ Had Mr Mathew wanted it to be treated as an appeal, he could have responded by saying that the purpose of his letter had been misunderstood. But he did not do so.

Events after the FTT determination

13. Following the issue of this decision, on 10 April 2015, HMRC wrote to Mr Mathew reminding him that the Tribunal's decision was that he had to comply with the information notices no later than 30 April 2015. And on 28 April 2015, the
5 appellant provided HMRC with some of the information required by the Information Notice. It was accepted by Mr Reeve that he did not, and has never, complied fully with the information notice because he has never provided copies of his bank and building society statements.

14. On or around 22 May 2015, Mr Mathew wrote to the FTT seeking permission to
10 appeal Judge Redston's decision.

15. And on 10 July 2017, HMRC wrote to the appellant pointing out his failure to fully comply with the information notice and forewarning him that HMRC intended to assess daily penalties from 1 May 2015.

The first batch of daily penalties

16. On 27 July 2015, HMRC issued an assessment of daily penalties to the
15 appellant totalling £5,220. The daily penalties were assessed at the maximum rate of £60 per day and were charged for the period 1 May 2015 to 26 July 2015 (87 x £60 = £5,220). The assessment letter explained that if he disagreed with the decision:

20 '...you can appeal. You need to write to us within 30 days of the date on this notice, telling us why you think our decision was wrong.....

If you appeal, you do not have to pay the penalty whilst the appeal is being considered.

You can find further information about your appeal and review rights in fact sheet.....'

17. The appellant's reply of 31 July 2015 in its opening specifically identified the
25 daily penalties charged by the 27/7/15 assessment and stated:

30 ...Further to this varied notice issued, the requisite information and documents have been already furnished to HMRC. I opine that I have fully complied with the varied notice requirement and the requisite information and the documents reasonably required for the HMRC's review has been already provided. Hence the requirement of rushing with issuance of the Penalty notice seems not necessary where sufficient information and documents have been provided forthwith.

35 Additionally as informed in my previous letter dated 23 July 2015, I reiterate that I am seeking an appeal against the judgment dated 31/3/15, which is under consideration before the Tribunal judge. As such it would be prudent that the penalty notice be held back till we hear further direction from the Tribunal.

18. On 11 August 2015, Judge Redston issued her decision on the application for
40 permission to appeal. She noted that Mr Mathew had sought not only to appeal her refusal to issue a closure notice but also her decision upholding (with slight variation)

the Information Notice. She referred him again to §209 of her decision notice stating that there was no right of appeal against her decision on the Information Notice. She went on to consider the application in respect of her decision to refuse the closure applications. At the conclusion of that, the Judge included the standard paragraph notifying a person that if they were dissatisfied with her decision, an application for permission to appeal could be made to the Upper Tribunal.

19. On 24 August 2015, HMRC wrote to Mr Mathew acknowledging his letter of 31 July 2015 and treating it as an application to put the penalties 'on hold'. It stated HMRC's view that Mr Mathew was still in breach of the Information Notice due to his failure to provide his bank statements. It went on to say that if he had not complied by 30 September 2015, HMRC would assess daily penalties as from 12 August 2015.

20. On 9 September 2015, Mr Mathew lodged with the Upper Tribunal an application for permission to appeal against Judge Redston's decision. At the end of that application he said:

The appellant would also wish to take this opportunity to appeal the penalties levied. It is important to consider that the Appellant has tried time and again tried to cooperate with the HMRC and has already provided sufficient information for the HMRC to conclude this enquiry. A further penalty notice dated 27/7/15 has been issued charting penalties amounting to £5,220 and also suggesting that a further failure would result in imposing of daily penalties. This is nothing but another form of 'coercion'.....

21. On 29 September 2015, Mr Mathew wrote to HMRC to notify them that he had applied to the Upper Tribunal for permission to appeal and asking, amongst other things, for confirmation that in the meantime HMRC 'shall suspend and refrain from levying any further penalties'. The heading of that letter was 'Request – penalties and further enquiry to be kept on hold: Permission to appeal preferred to the Upper Tribunal.' It seems the Upper Tribunal did not receive the application if it was sent: either way a (further) application was sent by the appellant and received by the Upper Tribunal in early November 2015.

The second batch of daily penalties

22. It appears that having been informed by the Upper Tribunal that no appeal had been lodged, on 30 October 2015 HMRC issued a further assessment of daily penalties to the appellant totalling £4,740. Again, the daily penalties were assessed at the maximum daily rate; they were for the period of 79 days from 12 August 2015 to 29 October 2015 (79 x £60 = £4,740). It stated that an appeal could be made and the instructions on how to do so were contained in the attached notice of assessment.

23. The same letter enclosed another information notice (relating to a different year of assessment). Again, it stated that an appeal could be made and that the instructions on how to do so were contained in the attached information notice.

24. The appellant's reply of 9 November 2015 explained that the PTA application had just been sent again to the Upper Tribunal. It went on to state

5 Therefore, as the matter is still before the Upper Tribunal for consideration, I would request that the penalties imposed are withdrawn and suspended....I would like to bring to your attention that I do not wish to provide any further information and documents until the outcome of the appeal to the Upper Tribunal as I strongly believe that I have provided sufficient information for the HMRC to conclude this matter. I would also like to formally appeal against this Information Notice as this demand seems unreasonable.

10 As stated above, the HMRC has been provided with sufficient information, however the continuation of the enquiries and levying of further penalties has only resulted in further harassment for which I wish to get an immediate relief. As a result of which I have sought to escalate the matter to Upper Tribunal.

15 I would therefore request that all the penalties are suspended at this stage.

25. HMRC did not treat this as an appeal against the second batch of penalties: they did treat it as an appeal against the information notice. As that appeal is not the subject of this hearing, I need not refer to the outcome of it.

26. On 9 November 2015, the Upper Tribunal issued a decision stating that there was no right to appeal to the Upper Tribunal a decision of the FTT on an information notice because of §32(5) Sch 36. Permission to appeal on all grounds was in any event refused. In so far as the appellant's application was an attempt to appeal the daily penalties to the Upper Tribunal, Upper Tribunal Judge Bishopp noted that Mr Mathew was unable to do so as he had not first lodged an appeal with HMRC. He notified Mr Mathew of his right to request an oral hearing. Mr Mathew made such a request and it was listed for 15 February 2016.

Proceedings before this Tribunal in respect of the daily penalties

30 27. On 4/1/16, HMRC's debt management unit wrote to the appellant seeking to enforce payment of the daily penalties. The appellant replied on 11 January 2016 pointing out that he had an oral hearing for permission to appeal coming up. He said:

35 Previously two letters (dated 31/7/15 and 29/09/15 attached) were sent to [HMRC] informing her of the ongoing appeal and that the HMRC should suspend and refrain from levying any further penalties pending the outcome of the Upper Tribunal. It seems she has ignored those and passed the matter to your department.....

....Please consider this letter as a further appeal against the assessment for the overdue tax/debt calculated as per your letter dated 4/1/16.....'

40 28. HMRC's Debt Management Unit wrote back agreeing to put collection of the penalties on hold. The HMRC officer dealing with the enquiry treated that letter as an attempt to appeal the two sets of daily penalties. She wrote on 1 February 2016 asking

for further information in order to action it as an out of time application for permission to appeal.

29. Two days later, on 3 February 2016, HMRC issued another information notice to Mr Mathew in respect of tax years 11/12 and 12/13. Mr Mathew's reply of 12 February, possibly because it referred to the notice as the 'varied information notice' was taken by HMRC to mean that Mr Mathew no longer considered himself obliged to provide the information requested by the earlier Information Notice. HMRC therefore wrote to him on 16 February 2016 to explain that the original Information Notice was still outstanding and had not been complied with because Mr Mathew had failed to provide his bank and building society statements.

30. Mr Mathew, in his reply of 29 February 2016, stated that he had withdrawn the application for PTA to the Upper Tribunal because he understood that the Information Notice had been withdrawn and replaced. The same letter said 'Please note that I wish to appeal the penalties levied under both this notices' – having identified the two penalties the subject of the hearing. He went on to say

Irrespective of supply of this information, the HMRC still proceeded with charging of penalties. I had immediately vide my letter dated 31/7/15 exhibited my dismay of HMRC's act of levying this penalty where the requisite information has been already supplied.....

31. As it was HMC's opinion that this letter, despite HMRC's request in its letter of 1 February, did not explain why an appeal had not been lodged within 30 days, HMRC refused permission for Mr Mathew to appeal out of time. He was notified that he would have to apply for the Tribunal for permission.

32. He replied on 25 April 2016 to say that he did not see why he should spend resources in doing so: he said HMRC acted in bad faith as (he said) they had agreed to let the matter go in return for the withdrawal of the appeal with the Upper Tribunal. He asked for a review of the decision.

33. He was told by HMRC in a reply dated 1 June 2016 that there had been no agreement in respect of his decision to withdraw his application before the Upper Tribunal; he was also informed that a review was not available. On 23 June 2016, he lodged an application with the FTT for closure of the same enquiries as before (as he is entitled to do, of course) and an appeal with the FTT against the issue of another information notice. It was also taken to be an application for permission to appeal against the daily penalties out of time.

35 *Is an application to appeal out of time necessary?*

34. The appellant did not accept that he required permission to appeal out of time. His position was that his letters of 31 July (§17) and 9 November 2015 (§24) amounted to appeals and both were sent to HMRC within 30 days of the notification of the assessments, as required by §48 of Sch 36.

35. I was not addressed on what was necessary to constitute a ‘notice of appeal’ within the meaning of §48 Sch 36 which requires ‘Notice of an appeal’ to be given in writing to start the appeal process. While I do not think it always essential to use the word ‘appeal’, I think the would-be appellant must (objectively) communicate an intention that it was the start of legal proceedings to challenge the subject of the intended appeal. There is, I consider, a distinction between a complaint and an appeal. Someone can express displeasure at a decision without wishing to initiate a formal challenge. And the question must be objective because an appeal is a proceedings between two persons and so the question must be whether the communication which passed between them should have been understood as an appeal, irrespective of the would-be applicant’s intention and of the would-be respondents’ understanding of what was said. Nevertheless, while actual intention and understanding may be irrelevant, the surroundings circumstances must be relevant as that may affect what it would be reasonable to infer from communications passing between two persons.

36. The only candidate for the lodging of an in-time appeal in respect of the first batch of daily penalties was Mr Mathew’s letter of 31 July 2015 (§17). And it is clear that this expressed unhappiness with HMRC’s assessment of the first batch of daily penalties, while at the same time it makes no express reference to an appeal.

37. In favour of Mr Reeve’s interpretation that it was notice of an appeal is:

(a) if it was not a notice of an appeal, what was it?

(b) It did express dissatisfaction with the imposition of the penalties: Mr Mathew stated that they were ‘not necessary’ and should be ‘held back’.

38. However, I think, considered objectively, and in its context, the letter was properly understood as no more than a complaint and did not communicate that it was the first step in the appeals process because:

(a) Mr Mathew clearly knew, and HMRC knew that he knew, what the word ‘appeal’ meant and what an appeal was. He had at that time already been a party to appeal proceedings with HMRC; he was able to clearly express an intention to appeal when he wished to do so (see §20 and §24). The penalty letter had given instructions on how to ‘appeal’. Yet he chose not to use that word in his letter of 31 July 2015, so objectively speaking, it would not be reasonable to infer that he intended to initiate an appeal;

(b) There had been an issue before between Mr Mathew and HMRC over whether a complaint letter he had written should have been read as notification of an appeal: see §12. Mr Mathew ought to have been on notice of the need to distinguish between a complaint and an appeal, and HMRC would have been aware of that, yet he chose in this instance not to use the word ‘appeal’. It would not be reasonable to infer, therefore, that an appeal was intended.

39. I do not think Mr Mathew's actual intent matters: as I have said, I think the question is what reasonably should have been understood from what he said. However, I find (if it matters) that Mr Mathew did not intend the letter to be notification of an appeal. This is for the reasons given at (a) and (b) above but also
5 because he did not at the time suggest that the letter was an appeal. He referred to his letter of 31 July 2015 on 11 January 2016 (§27) without indicating that it had been an appeal, and indeed when he referred to it again in his letter of 29 February 2016 (§30), he referred to it as merely expressing 'dismay'. Moreover, on 9 September 2015 (§20) he had attempted to appeal the penalties direct to the Upper Tribunal, something
10 that would have been unnecessary if he thought he already had an appeal before HMRC.

40. The position is even clearer in respect of the second batch of daily penalties. The only candidate as an in-time notification of appeal is Mr Mathew's letter of 9 November 2017 (§24). While again he is clearly dissatisfied with the imposition of
15 the penalties, and asks for them to be 'withdrawn and suspended', he clearly lodges an 'appeal' against an information notice in the same letter. His failure to use the word 'appeal' in respect of the penalties is marked. Indeed, the explanation for this on the face of the letter is his belief that the matter is before the Upper Tribunal. Objectively speaking, the letter could not be read as notification of an appeal against the second
20 batch of daily penalties. Subjectively, on the evidence I have, I find it was not intended as such either for much the same reasons as I gave with respect to the 31 July 2015 letter.

41. In conclusion, the first occasion on which Mr Mathew gave HMRC notification of an appeal against the first and second batch of daily penalties was his letter of 29
25 February 2016 (§30) which was long after the expiry of the 30 day time limit imposed by §48 of Sch 36 for appeals against penalties for non-compliance with information notices.

Application to appeal out of time

42. Because of §48(5) of Sch 36, the Tribunal has power under s 49(2)(b) Taxes
30 Management Act 1970 ('TMA') to grant permission to Mr Mathew to lodge an appeal with HMRC out of time. The Tribunal has power to do this in this case because HMRC has refused to exercise its power under s 49(2)(a): see §31.

43. When considering whether to exercise this power, the Tribunal should take into account all relevant matters. Unlike HMRC, it is not restricted to considering whether
35 Mr Mathew had a reasonable excuse for lodging the appeals late. Indeed, it could grant permission even if it concluded Mr Mathew did not have a reasonable excuse.

44. What are relevant matters? They include:

- (a) How late the appeal is lodged;
- (b) The reason why it was lodged late;
- 40 (c) The prejudice to Mr Mathew if permission is not given;

(d) The prejudice to HMRC if permission is given.

How late were the appeals?

45. The last date on which to appeal the first batch of daily penalties was 26 August 2015; the last date on which to appeal the second batch of daily penalties was 29 November 2015. The appeal was lodged on 29 February 2016. The first appeal was therefore lodged 6 months' late and the second 3 months' late. The appeals were therefore significantly late.

Why were the appeals lodged late?

46. It is Mr Mathew's case that he laboured under the illusion that he could appeal the penalties direct to the Upper Tribunal. I don't have any evidence of this belief other than that is what he tried to do on 9 September 2015 (§20). He was told by the Upper Tribunal on 9 November 2015 (§26) that he could not do so. Yet he did not lodge an appeal with HMRC until 29 February 2016, and then only after HMRC's debt management department had sought to enforce the debt.

47. It is for Mr Mathew to satisfy me that I should permit him to appeal out of time. It is therefore for him to satisfy me of the reason why he did not lodge his appeal with HMRC in time. Yet he has provided no evidence of his motivation, not even a witness statement. Nor did he attend the hearing. I find he has not proved that it was a belief that he could appeal direct to the Upper Tribunal that caused him to lodge the appeal late because:

(a) It would not explain why he did not lodge an appeal with HMRC for nearly 3 months after receiving the Upper Tribunal's decision of 9 November 2015;

(b) Such a belief would be unreasonable and therefore was unlikely to be held. It would be unreasonable because (i) HMRC had informed him of the necessity to lodge an appeal with HMRC (ii) Mr Mathew knew this anyway as he was no stranger to appeals against HMRC decisions – see what I said at §38.

(c) I am wary of putting much reliance on what Mr Mathew said in his letters as the reasons he did things: for instance, the explanation he gave for withdrawing his appeal to the Upper Tribunal was originally (in his letter of 29 February 2016 (§30)) that he had understood HMRC had withdrawn the Information Notice, but by his letter of 25 April 2016 (§32) this had transmogrified into a stated belief HMRC had agreed to withdraw the Information Notice in exchange for him withdrawing the appeal.

48. So I have no explanation for why Mr Mathew did not appeal the penalties on time.

The prejudice to Mr Mathew if the appeals are not accepted late?

49. If Mr Mathew cannot appeal the penalties, he is liable to pay them. How prejudicial that is in reality depends on the likelihood of any appeal succeeding. However, it is not for a Tribunal to determine the % likelihood of success to the nth
5 degree: it is just that the prejudice to the applicant is very limited indeed if the appeal has no reasonable prospect of success, while the prejudice is very great if the appeal is very likely to succeed.

50. I deal with the appeal itself below, as the hearing was on the basis that I would determine both the application for permission to appeal, and the appeal itself if
10 permission was given. The Tribunal deals with applications for permission to appeal penalties late this way because, for the reasons given in the previous paragraph, it needs to understand the grounds of appeal in order to determine the application, so it might as well hear the parties' full cases.

51. And from the representations made to me, and my consideration of the appeal,
15 I would categorise the appeal as one with a reasonable prospect of success (because of a few technical legal points I identified) although not one which was very likely to succeed. For that reason, I conclude that it would be prejudicial to Mr Mathew if the appeals are not accepted out of time.

The prejudice to HMRC if the appeals are accepted late?

20 52. While on the one hand HMRC seeks only to collect tax and penalties which are properly due, they are necessarily prejudiced if taxpayers are able to appeal matters out of time as it prevents HMRC being able to be sure of the current state of a taxpayer's affairs. It is therefore prejudicial to HMRC to permit Mr Mathew to appeal out of time.

25 *Decision on whether to grant permission to appeal out of time*

53. The situation I have found is that the appeals were significantly late and no reason, good or bad, for their lateness has been proved. I do not know why, assuming Mr Mathew wished to challenge the penalties, he did not appeal the penalties on time, when it is clear that he does understand the appeal process. Without a good reason for
30 the late appeal, taking into account the prejudice to HMRC if I permit an out of time appeal, and also the prejudice to Mr Mathew if I do not, I do not consider that time should be extended.

Determination of the appeal

54. As I have refused permission to Mr Mathew to appeal out of time, I do not need
35 to determine the appeal. However, as I have said, I needed to consider the grounds of the appeal to reach the conclusion which I did reach in §49-51. Moreover, it is useful for me to set out a final conclusion on the matter in case there is a successful appeal from my decision not to grant permission to appeal out of time as it might save the need to remit the appeal.

What HMRC must prove

55. It is well established that in an appeal against penalties, HMRC must prove that the penalties were properly imposed. It is then for the appellant to prove they should be discharged because there is a reasonable excuse. HMRC therefore have to prove that:

5

(a) There was a valid information notice properly served on Mr Mathew which had not been complied with;

(b) A first £300 penalty for non compliance had been validly assessed and properly served on Mr Mathew;

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(c) The daily penalties were validly assessed and properly served on Mr Mathew.

56. The daily penalties were imposed under §40 which enabled HMRC to impose a penalty of up to £60 per day for each day the failure to comply continues after §40(1) the date on which the first penalty was imposed under §39.

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57. The penalty can only be assessed within 12 months from the date at which (in Mr Mathew's case) the appeal against the Information Notice was determined (§46(3)(c)).

20

'In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following –

(a) the date on which the person became liable to the penalty,

(b) the end of the period in which notice of an appeal against the information notice could have been given, and

25

(c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn

(a) non compliance with the Information Notice

58. The Tribunal cannot infer from silence that the appellant accepts the penalties were properly imposed: see *Burgess and Brimheath* [2015] UKUT 578 (TCC). Nevertheless, Mr Reeve did appear to accept that the information notice was properly served and had not been fully complied with in that the bank statements had never been provided. Relying on the evidence in front of me, I find that the Information Notice was properly served under §1 Sch 36 on Mr Mathew, there was an open enquiry into the two relevant tax years at that time (§21) and the Information Notice has not been complied with.

35

(b) Was a §39 penalty properly assessed?

59. As Ms Jones pointed out, daily penalties can only be assessed under §40 where a penalty has been imposed under §39. It seems an obvious inference that daily penalties can only be imposed where the §39 £300 penalty was properly assessed.

60. HMRC's point was that a §39 £300 penalty was imposed on Mr Mathew on 15 September 2014 for failure to comply with the Information Notice. They also pointed out that that penalty was never appealed (see §8): by itself that does not matter as §40 only requires that the penalty was imposed. It would be irrelevant to HMRC's power to impose daily penalties whether or not the £300 penalty was appealed, unless perhaps it was successfully appealed.

61. However, it seems to me that a failure to appeal means that the Tribunal must take it that the penalty was validly assessed: it is enforceable as a matter of law because it was not appealed and therefore it seems to me that it is valid for all purposes.

62. Nevertheless, it occurred to me that there might have been two arguments – both based on hindsight - that the £300 penalty was invalidly assessed. And that was because it was assessed (a) before the revised compliance date and (b) long before Mr Mathew's appeal against the Information Notice was determined. As I have said, §46 provides:

In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following –

- (a) the date on which the person became liable to the penalty,
- (b) the end of the period in which notice of an appeal against the information notice could have been given, and
- (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn

The latest of (a)-(c) might, with the benefit of hindsight, be said to be 31 March 2015 when Judge Reston determined the appeal against the Information Notice, or even 30 April 2015, which was the revised compliance date.

63. However, my view is that §46 must have been intended to be read as applying as at the date the penalty was actually imposed and so, if at that date there was no live appeal against the Information Notice, (c) was irrelevant. And the compliance date should be taken to be the compliance date as at the date the penalty was assessed, irrespective of any later changes to it. If this were not the case, any penalty assessed would be potentially assessed too early as there would always be the possibility of a taxpayer giving late notice of appeal, which would lead to the 12 months running either from the date of determination or from a revised compliance date.

64. In this case HMRC waited the 30 days from the issue of the Information Notice and imposed the penalty 3 days after what was the then due date for compliance. At that time, there was no live appeal and no live application for permission to appeal the Information Notice. In my view, the £300 penalty was correctly assessed. Although, as I have also said, I think that was conclusively determined against Mr Mathew because he did not appeal the £300 penalty.

(C) Were the daily penalties properly assessed?

65. So far as service of the daily penalties were concerned, I find on the evidence in front of me that they were. This point was not in dispute in any event.

5 66. Mr Mathew's case, apparent at least from his correspondence, is that there was a live appeal against the Information Notice until early February 2016 when he withdraw his application for an oral hearing in front of the Upper Tribunal. Therefore, it appears to be his case, both batches of daily penalties were assessed too early.

10 67. Mr Reeve pointed out that Mr Mathew had lodged an application for permission to appeal Judge Redston's decision at first instance dismissing his appeal against the Information Notice (§14); Judge Redston's decision on that application had notified him of a right to apply to the Upper Tribunal (§18). He had applied to the Upper Tribunal (§20) and although initially unsuccessful had been notified of his right to apply for an oral hearing (§26). His case was that there were live proceedings up to the point in February 2016 when Mr Mathew withdraw his application for an oral hearing and therefore the penalties were assessed too early.

15 68. This argument relies on §46 which I have cited above. The point is that the daily penalties cannot be assessed before the date of determination of an appeal against the Information Notice. So when was Mr Mathew's appeal determined? HMRC's position is that it was determined on 31 March 2015 (the date of issue of the FTT decision) because there was no right of appeal, so any attempt by Mr Mathew to appeal the decision was invalid. It is §32(5) of Sch 36 which provides that there is no right of appeal against an FTT decision on an Information Notice: both Judge Redston and Upper Tribunal Judge Bishopp had referred to this when refusing Mr Mathew permission to bring an appeal. The paragraph read as follows:

25 §32(5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the Tribunal on an appeal under this Part of this Schedule is final.

The vires of §32(5)

30 69. Logically, the first question is whether §32(5) is lawful. I was not addressed on this at the hearing. In the hearing, everyone took §32(5) at face value. On reflection, however, I considered whether it was in law a valid provision. The question is highly significant to this appeal because, as I have said, the penalties would not have been properly imposed if the permission to appeal against Judge Redston's decision which Mr Mathew sought was validly sought, as the appeal proceedings would have remained live until February 2016, long after the penalties were imposed.

35 70. So is it valid? Paragraph 32(5) of Sch 36 was inserted into the Finance Act 2008 by Statutory Instrument 2009/56 The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 art 3(1), and §§471(1) and 10(c) of Sch 1. A statutory instrument can only modify an Act of Parliament where Parliament gives it authority to do so. The provision relied on to insert new §32(5) was s 124 Finance Act 2008.

71. That provided, in so far as relevant, as follows:

124(1) The Treasury may by order made by statutory instrument make provision—

5 (a) for and in connection with reviews by the Commissioners, or by an officer of Revenue and Customs, of HMRC decisions, and

(b) in connection with appeals against HMRC decisions.

(2) An order under subsection (1) may, in particular, contain provision about—

10 (a) the circumstances in which, or the time within which—

(i) a right to a review may be exercised, or

(ii) an appeal may be made, and

(b) the circumstances in which, or the time at which, an appeal or review is, or may be treated as, concluded.

72. That provision has been used by the Treasury to block various rights of appeal from FTT decisions. In particular, it was used to block a right of appeal from the FTT's decision on hardship in VAT appeal cases and in that context the legality ('vires') of the statutory instrument doing so was considered by the Court of Appeal in *R (oao Totel Ltd) v HMRC* [2012] EWCA Civ 1401. The Court ruled that it was unlawful ('ultra vires') because blocking the right of appeal went beyond what was permitted by S 124 Finance Act 2008 and the Court therefore quashed that particular amendment of the Value Added Tax Act.

73. That did not have the effect of quashing §32(5) of Sch 36 Finance Act 2008, as that was not the provision with which the Court of Appeal was concerned, albeit it was a provision purportedly made under the same primary legislation. So that gives rise to two questions:

25 (1) Unlike the Administrative Division of the High Court, this Tribunal has no judicial review jurisdiction. It cannot quash unlawful secondary legislation. But is it obliged to give effect to what it considers to be unlawful secondary legislation which has not yet been quashed by a judicial review action?

30 (2) And if the FTT does have jurisdiction to consider the lawfulness of secondary legislation, is §32(5) unlawful?

74. So far as question (1) is concerned, I considered this before in the case of *Dong* [2014] UKFTT 369 (TC). I consider that what I said at §§10-41 is right. In summary, while this is a statutory tribunal without judicial review powers, Parliament cannot be supposed to have intended any Tribunal to give effect to unlawful secondary legislation. In any event, my conclusion on (1) only matters if I consider that §32(5) is unlawful, and so I go on to consider that.

75. The courts presume that Parliament intended any power which enables a Government department to amend a statute to be narrowly construed. Applying such a principle of construction meant that the Court of Appeal in *Totel* concluded at [22-24] that the abolition of a right of appeal did not fall within s 124(1)(b) as being 'in

connection with appeals' because, by its nature, it meant an appeal could not take place.

76. The Court also concluded that s 124(2)(b) 'the circumstances in which, or the time at which, an appeal or review is, or may be treated as, concluded' did not cover the abolition of the right to appeal against a decision on hardship. This seems to have been because the Court viewed *the appeal* as being against HMRC's decision on the VAT matter at the root of the appeal, and not HMRC's decision on hardship, the right of appeal beyond the FTT which had been abolished. Therefore, as the decision on hardship did not conclude the appeal against the VAT matter, it was not within s 124(2)(b). See [21-22] and [25-27] of the Court's judgement.

77. If my understanding of these passages from the Court of Appeal's judgment is correct, that means that the Court's reasoning at least on s 124(2)(b) is inapplicable to §32(5) of Sch 36 because that abolished the right of appeal beyond the FTT of the appeal itself (the appeal being against the issue of the information notice). Unlike a hardship decision, it was not a step in other appeal proceedings: it was the appeal proceedings. §32(5) really does deal with the circumstances in which the appeal against the issue of the information notice 'is...treated as, concluded'. It appears to be within the authorisation of s 124 FA 2008.

78. Moreover, it seems to me that the reasoning with respect to s 124(1)(b) is not applicable either to the new version of §32(5) because that new version did not, in fact, abolish of appeal rights: it merely confirmed the existing restriction on the right to appeal. This is because, before it was amended, §32(5) read:

32(5)A decision by the First-tier Tribunal on an appeal under this Part of this Schedule is final.

79. In conclusion, I am satisfied that the change to §32(5) was lawful: it did nothing more than confirm the existing block on an appeal beyond the FTT. The wording was changed simply to put the position beyond doubt and in particular to ensure that the later Tribunals Courts and Enforcement Act establishing the Upper Tribunal as the court for appeals against FTT decisions was not seen to change the original position that there was no appeal beyond first instance in respect of information notices.

Conclusion on (c) and whether the daily penalties were correctly assessed

80. Therefore, I find Sch 32(5) was valid and there could be no appeal from Judge Redston's decision. There were therefore no valid appeal proceedings in respect of the Information Notice after Judge Redston issued her decision on 31 March 2015. §32(5) provided that there was no appeal against that decision, therefore Mr Mathew's attempt to gain permission to appeal did not prevent the determination of his appeal taking place on 31 March 2015.

81. Even if Judge Redston's PTA decision (§18), and then later Judge Bishopp's PTA decision (§26) had indicated that there was a right to make the application in the Upper Tribunal, that could not alter the legal position that there was no right to apply

5 either the FTT or Upper Tribunal for leave to appeal. In any event, I do not accept that either Judge wrongly indicated a right of appeal existed: it was clear from reading both PTA decisions that each Judge was notifying the right to apply at the next stage only in respect of Mr Mathew's appeal against the dismissal of his application for closure. Both judges were quite clear there was no right of appeal against the Information Notice determination. Valid proceedings in respect of that ceased on 31 March 2015.

10 82. So I find that the appeal against the information notice was determined on 31 March 2015. The first batch of penalties was assessed on 27 July 2015. That was well within the 12 months permitted by §46. The second batch of daily penalties was assessed on 30 October 2015. That was also well within the 12 months permitted by §46.

15 83. My overall conclusion is that HMRC have proved that both daily penalties were properly imposed. That means the only way Mr Mathew's appeal can succeed is if he can prove that he had a reasonable excuse for his non-compliance.

Reasonable excuse

84. §45 of Sch 36 provides that 'reasonable excuse' is a defence to a penalty for failing to comply with an information notice although §45(2)(c) provides that:

20 Where the person had a reasonable excuse for the failure ...but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied...without unreasonable delay after the excuse ceased.

25 85. It was accepted by Mr Reeve that the appellant has never fully complied with the information notice because he has never provided his bank and building society statements. So whatever the reason for his failure to comply with the Information Notice, it must be a 'reasonable excuse' to at least the date of the hearing. Because if the reasonable excuse has cease sometime before the hearing, then he would be unable to show that he complied without 'unreasonable delay after the excuse ceased' because it is accepted that he has never complied.

30 86. So what excuse is put forward? The appellant's case is that he should not be penalised for failing to comply with the Information Notice as, at the time the penalties were imposed, he was actively pursuing an appeal against the Information Notice.

87. However, for this to be a reasonable excuse, Mr Mathew would have to prove:

- 35 (a) He genuinely believed it and it was the cause of his failure to comply;
- (b) Such a belief was reasonably held; and
- (c) His reasonable excuse continued to this day (as there has never been compliance).

88. Dealing with (a) first, the only evidence I have of his beliefs and motivation is that fact that he did attempt to lodge an appeal with the Upper Tribunal against Judge Redston's decision. However, as I have already said at §47, I do not accept his letters as proof of his motivations and beliefs. He provided no witness statement and did not attend the hearing, and his letters were, as pointed out at §47(c) inconsistent. Such a belief would have been unreasonable because he was repeatedly told there was no right of appeal and therefore was unlikely to have been held. So I find he has not proved that he genuinely believed he had a right of appeal and that that was the cause of his failure to comply.

89. I have already said that such a belief could not be reasonably held: so it could not amount to a reasonable excuse in any event.

90. Lastly, dealing with (c), it was clear that he had dropped the proceedings, such as they were, by February 2016. He has still not complied as at December 2017. Such proceedings could not be a reasonable excuse for his *continuing* failure to comply.

91. The appellant's suggested answer to this point (c) is irrelevant in that I have already said for other reasons that this suggested reasonable excuse is not a reasonable excuse. Nevertheless, dealing with the point, his suggested case is that the reasonable excuse continued but changed its nature: from February 2016, it was suggested, Mr Mathew did not comply with the Information Notice because he believed it was no longer in force, having been, he believed, superseded by the information notice of 3 February 2016 (§29).

92. I agree, theoretically, that a person would have a continuous reasonable excuse if the reason for their failure to comply changed, as long as the reasons for non-compliance were always objectively reasonable and the cause of the default at that time. Therefore, the same questions arise with respect to this second reasonable excuse as the first put forward. And I deal with them in turn.

93. With regards (a), the only evidence of such a belief was his letter of 12 February 2017, which did suggest he had chosen to treat the later information notice as varying the first. However, as I have already said at §47 and §88, I do not accept his letters as proof of his motivations and beliefs. He provided no witness statement and did not attend the hearing, and his letters were, as pointed out at §47(c) inconsistent. Moreover, such a belief would not be reasonable as there was no suggestion the later information notice replaced or partly duplicated the Information Notice. In any event, HMRC specifically stated the Information Notice was still in force in their letter of 16 February 2016, so such a belief could not have been reasonably held after that date. Because it would not be reasonable, it suggests that it was not a genuine belief. I find he has not proved that he believed that the Information Notice ceased to apply nor that that was the reason that after 3 February 2016 he continued not to comply with it.

94. So far as (b) is concerned, I have already said that the belief would not have been reasonably held. It cannot therefore amount to a reasonable excuse.

95. So far as (c) is concerned, even if it was a reasonable excuse for the short period from 3-16 February 2016, it provides no explanation of why Mr Mathew has still not complied to date.

96. I find Mr Mathew did not have a reasonable excuse at any point during the period of his non-compliance: neither of the two reasonable excuses put forward were proved, and even if they had been, they failed to explain the non-compliance for the last eighteen months.

97. I note that HMRC do now have at least some of Mr Mathew's bank statements for the relevant period as they issued §3 Sch 36 third party information notices to certain banks. It was not suggested by Mr Reeve that this superseded the Information Notice and I agree.

98. Mr Mathew did not suggest that the amount of the penalty should be reduced. I see no grounds on which it should be reduced. On the contrary, the Information Notice has been outstanding a very long time. I am not satisfied that at any point in time Mr Mathew had a reasonable excuse for not complying with it. I do not consider it should be reduced. In particular, I do not consider the fact that there has been partial compliance is a reason for a reduction. While substantial compliance might be a reason for a reduction, there was no suggestion there had been substantial compliance here. On the contrary, it seemed to me that Mr Mathew's bank statements were the crux of the Information Notice and he has never provided them.

Summary of decision

99. Mr Mathew did not appeal the two daily penalties by the due date for appeal; I do not extend time to appeal. Even if I had reached the opposite conclusion on either of these matters, I would have dismissed the appeal as I find that the penalties were properly imposed on him and he had no reasonable excuse for his continuing failure to comply.

100. 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.

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 13 DECEMBER 2017