



TC06566

Appeal number: TC/2017/08659

INCOME TAX – penalty for failure to pay tax Schedule 56 FA 2009 – whether assessment of penalties validly made: no, failure to state date by which appeal to be made not rescued by s 114 TMA 1970 – whether reasonable excuse considered – whether special reduction due considered – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SEAN GILL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 22 June 2018 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 1 December 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 February 2018.

1. This is an appeal by Mr Sean Gill (“the appellant”) against a notice of assessment of three penalties, of £88, £88 and £48, made under the provisions of Schedule 56 Finance Act (“FA”) 2009 because of the appellant’s failure to pay income tax for the tax year 2014-15 before certain dates set out in that Schedule.

Facts

2. I set out here the what the documents attached to the statement of case (“SoC”) prepared by HMRC show.

3. HMRC’s records, in the form of a screenshot of Contact History Details, indicate that on 14 October 2012 they issued a “CHB Awareness letter” to the appellant. In their statement of case (“SoC”) HMRC state that it was issued because the appellant’s earnings were over £48,000, but they do not say in which tax year that was.

4. HMRC’s records from the same source indicate that on 17 August 2013 they issued a Form SA252 to the appellant. In the SoC HMRC state that the form was issued to all higher rate taxpayers who did not have a self-assessment record.

5. The SA252 in the form issued to the appellant said:

“The new High Income Child Benefit Charge came into effect on 7 January 2013. You are liable to pay the tax charge if **all the** following statements apply to you, or applied in the 2012-13 tax year:

- You have an individual income of over £50,000 a year
- Either you or your partner received any Child Benefit payments after 7 January 2013, and
- Your income for the tax year is higher than your partner’s. The partner with the higher income is liable to pay the charge if both partners have income over £50,000.

...

If it [*the tax charge*] does apply, you must register for Self Assessment for the 2012-13 tax year by 5 October 2013, so that you can declare the Child Benefit you received, pay the tax charge on time and avoid a late payment penalty.

You might be able to avoid Self Assessment in future years if you (or your partner if they are the Child Benefit recipient) choose to opt out of receiving Child Benefit and avoid incurring the tax charge.”

6. On 30 October 2017 HMRC wrote to the appellant telling him that he had not registered to receive a self-assessment return for the tax years 2014-15 and 2015-16. He was told that if certain conditions applied to him, those set out in the three bulleted lines in §5 save that in the second bulleted line the dates given were “between 6 April 2014 and 5 April 2015 and [*between*] 6 April 2015 and 5 April 2016”, he was liable to pay the “new” High Income Child Benefit Charge (“HICBC”).

7. Without establishing whether the conditions did apply, HMRC informed the appellant in the same letter of the amount of “High Income Child Benefit” (*sic*) due which for 2014-15 was said to be £1,770. This must be an error as the appellant is not entitled to receive child benefit, and it must be a reference to the tax chargeable on the

appellant on the assumption that his wife received child benefit, his earnings were over £50,000 and were higher than his wife's income.

8. He was asked to contact HMRC by phone or in writing to say by 29 November 2017 whether he agreed or not that he had to pay this amount. Failure to reply to HMRC by then would, the letter said, result in assessments being made on him under s 29 Taxes Management Act 1970 ("TMA") for the tax HMRC thought he owed, and they would register him for self-assessment so that he would have to complete a tax return for 2016-17. [My emphasis]

9. He was also informed in the same letter that late payment penalties would be charged if the tax on the assessments was not paid within 30 days of the date of the s 29 TMA assessments.

10. He was further informed that he would have to pay failure to notify penalties based on the "additional tax due", and a Helpsheet called "Helping us with this check" was issued to him. He was also told about, but not given, Factsheet CC/FS9 "The Human Rights Act and Penalties" and Factsheet CC/FS11 "Penalties for failure to notify".

11. On 2 November 2017 HMRC's records (SA Notes entry dated 2 November 2017 referring to form SA316 and Return Summary) show the appellant was issued with an income tax return containing on its face a notice to file for the tax year 2014-15. [My emphasis] The due date for delivery of the return was shown on the Return Summary as 9 February 2017.

12. On 6 November HMRC's records, an SA Note of that day and Contact History details, show that the appellant phoned Cardiff Compliance Centre. He was it seems told that the HICBC was due and that his wife (who he passed the phone to once he had passed the security checks) agreed.

13. The return for 2014-15 was filed electronically on 10 November 2017 showing tax liability of £1,769.20. From the calculation in the bundle I can see that £1,770 was, as shown by HMRC, the amount of the HICBC, so that on the remainder of his income the appellant had overpaid by 80 pence.

14. On 14 November 2017 HMRC issued a notice informing the appellant that additional penalties totalling £224 for the year ended 5 April 2015 had been assessed for not paying income tax by 1 March 2016, 1 August 2016 and 1 February 2017. They were said to be additional to any penalties the appellant had previously received. The evidence for this is the copy of Form SA370, the notice of assessment, supplied by the appellant with his notification of his appeal to the Tribunal.

15. On 20 November 2017 HMRC's records, an SA Note of that day, show that he phoned HMRC and was told he could appeal against the penalties by writing to HMRC.

16. On 1 December 2017 the appellant notified an appeal to the Tribunal.

The law

17. The law imposing the penalties for late filing (ie delivery) of income tax returns is in Schedule 56 FA 2009 ("Schedule 56"). The relevant parts for this decision are set

out below. The appendix contains the rest of the text of those parts of Schedule 56 relevant to this appeal.

“1—(1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P’s failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
PRINCIPAL AMOUNTS			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid

3—(1) This paragraph applies in the case of—

(a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,

...

(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.”

18. Section 59B TMA relevantly provides:

“(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and

any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below ...

(2) The following, namely—

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year ...

shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.

...

(6) Any amount of income tax or capital gains tax which is payable by virtue of an assessment made otherwise than under section 9 of this Act shall, unless otherwise provided, be payable on the day following the end of the period of 30 days beginning with the day on which the notice of assessment is given.

...

(8) PAYE regulations may provide that, for the purpose of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations.”

19. Paragraphs 9 and 16 of Schedule 56 provide respectively for a case where special circumstances may exist and where a person says they have a reasonable excuse for the failure to pay at the right time. They say:

“SPECIAL REDUCTION

9—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, ...

...

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

- (a) staying a penalty, and
- (b) agreeing a compromise in relation to proceedings for a penalty.

...

REASONABLE EXCUSE

16—(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment 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.”

Grounds of appeal & HMRC's response

20. The grounds of appeal are:

- (1) The appellant was not aware he had to submit a return for 2015-16, although he now understands.
- (2) He is a PAYE taxpayer and had no other income. The child benefit was paid to his wife.
- (3) He wants to know why it took HMRC over two years to notify him that he owed money. The system should have flagged up his liability much earlier

21. In terms of Schedule 56 FA 2009 I interpret these grounds as arguing that the appellant had a reasonable excuse for not paying the tax shown on his self-assessment by the payable date and that was that he was unaware of any such liability and could not reasonably be expected to be aware. He is not relying on either paragraph (b) or (c) of paragraph 16(2) Schedule 56 FA 2009.

22. HMRC in their SoC argue that:

- (1) Customers liable to pay the HICBC were legally obliged to register for self-assessment by 5 October 2013. [My emphasis]
- (2) The CHB Awareness letter and the SA252 were issued to the appellant but he did not respond to the former.
- (3) In accordance with the CHB awareness letter sent on 17 August 2013 (in fact it was the SA252 that was issued then), the information on HMRC's website and the press campaign, the appellant should have registered for self-assessment by 5 October 2015 [My emphasis]
- (4) The appellant did not tell HMRC that he needed to complete a tax return and this would be (*sic* – it was) classed as a failure to notify case.

- (5) The obligation to pay the tax does not depend on a tax return having been filed, or a bill for the tax liability or reminder having been received from HMRC.
- (6) The due dates for payment of self-assessment tax liabilities are set out in statute and readily ascertainable. Statute is clear that it is the taxpayer's responsibility to comply with such due date and HMRC has no statutory obligation to notify the appellant of the due date.
- (7) A failure on the part of a taxpayer to correctly establish the due date for payment is not, therefore, a reasonable excuse for late payment of a self-assessment tax liability.

Discussion

23. Before I consider the appeal I need to make further findings of fact, drawing inferences from the matters I have set out in §§3 to 16:

(1) I find as fact that HMRC issued the CHB Awareness letter and the SA252 to the appellant. They say he did not respond to them. The appellant maintains that he was not aware he had to submit a return for 2015-16. HMRC have not shown that the two documents were sent to the appellant at the address on their records, nor can they rely on s 7 Interpretation Act 1978 as the letters were not statutory notices. In these circumstances I find that they were not received by the appellant.

The SA252 did not in any case ask the appellant to submit a return for 2014-15.

(2) I find that the appellant was not aware until he received the letter of 30 October 2017 that HMRC considered that he should have filed a tax return for 2015-16. And I find that he was not aware on 2 March 2016 or at any time until 30 October that any income tax for the year 2015-16 might be payable, or until he made his return on 13 November 2017 that £1,769.20 was payable or until he received the notice of assessment of penalties that that amount was payable by 2 March 2016 if he was to avoid penalties.

(3) I find that the appellant expected HMRC to tell him that he owed tax for 2015-16 at a time when he would not be penalised for paying it late.

(4) I find that the appellant assumed that any tax liability would have been dealt with through PAYE.

24. I now look at three aspects of this case in turn.

Procedural issues: appeal to HMRC

25. In this case it seems the appellant was told by HMRC on 8 November 2017 that to appeal he must notify HMRC. This was correct advice, but the appellant simply made his appeal to the Tribunal directly. HMRC do not seek to say that the appellant is too late to make an appeal to HMRC and must seek permission from the Tribunal to do so, before the Tribunal can hear the appeal. In those circumstances I give permission for the appeal to be made to HMRC and waive any formalities that might be necessary to get the appeal properly before the tribunal.

Validity of penalty notice

26. No point has been taken by the appellant about the validity of the notice to file a 2014-15 return or the penalty notice. As to the latter I hold that it meets the explicit

procedural requirements of Schedule 56 FA 2009, and in particular it indicates the tax period to which the penalties relate.

27. In accordance with s 30A(3) TMA applied to this case by paragraph 11(3)(a) Schedule 56 FA 2009 it has also to be clear that the notice of assessment states the date on which it is issued and the time within which any appeal against the assessment may be made.

28. The date of issue is stated on its face. But as to appealing all the notice says is:

“Do you need our help?

See the enclosed notes, *especially if your tax return was late* for a good reason and you want to appeal.” [my emphasis]

29. The notes that should have been enclosed are not included in the bundle, even as a specimen. Nor is there any evidence that they were in fact enclosed beyond what is said in the notice of assessment.

30. This is not sufficient to amount to a notice stating the relevant date, and therefore the notice is flawed, and potentially invalid. The question then is whether s 114(1) TMA can help HMRC. That says:

“(1) An assessment ... or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.”

31. An important factor in considering s 114(1) is whether the error or omission (in this case the omission to give the relevant appeal date) was objectively misleading. In this case the appellant did find out how he could appeal before the date the notice of assessment was issued (even if he didn't follow the advice) and he did appeal, albeit to the wrong person, within the time that should have been stated.

32. But that does not detract from the fact that the notice is objectively misleading, because it suggests that the notes should be consulted “especially if your tax return was late for a good reason and you want to appeal”, a statement that clearly refers to a Schedule 55 FA 2009 penalty, not a Schedule 56 penalty. That is likely to mislead a person who has received a late payment penalty into thinking that there is no appeal right against that penalty in the same way as there is no appeal right against interest on late paid tax.

33. In my view the omission of vital information about appeal rights from the notice and the discouragement of the recipient from consulting the notes, even if they can be taken into account, is a sufficiently gross or fundamental error to make the notice invalid. HMRC have, as they acknowledge, the burden of proof in this area, and they have not discharged it. Had the notes that should have been enclosed with the notice of assessment been provided in the bundle they *may* have helped HMRC, but I cannot guess what they say.

34. I do not need to invoke Article 6 of the European Convention on Human Rights but it is clear from art 6(1) that the right to fair trial in criminal matters is one of the rights protected by the convention. Whether or not a Schedule 56 penalty of this magnitude amounts to a criminal offence in the light of cases such as *Jussila v Finland* [2006] ECHR 996 is not a matter for me to decide, but I note that HMRC sent the appellant a Human Rights Act factsheet. A hearing by a tribunal of an appeal by a person on whom a penalty has been imposed can only be set in train if an appeal is made to that tribunal and, in a case such as this, notice of that appeal is given to HMRC within 30 days of the notice of penalty assessment. If it is given after that time, then the right to a “trial” is discretionary. Thus the time limit is crucial.

35. I therefore hold the notice of assessment to be invalid, as incapable of cure by s 114(1) TMA.

36. Other matters do not need to be determined, but I give my views on those briefly in case they assist HMRC in deciding whether to appeal or in any subsequent appeal that may be made.

Were the amounts and the due dates correct?

37. In this case the s 59B(1) TMA amount was £1,769.20 and was payable, in accordance with subsection (4) on 31 January 2016. The date after which the penalty was incurred was therefore 30 days later, 1 March 2016 (2016 being a leap year).

38. The first penalty, at 5% of the unpaid tax, was therefore incurred on 2 March 2016, the second on 2 August 2016 at 5% of the then still unpaid tax and the third on 2 February 2017 also on 5% of the then still unpaid tax. HMRC have explained why the third penalty is only £48. They say that the full £1,769.20 was outstanding on 2 August 2016 but that only £970 was outstanding on 2 February 2017. There is no explanation of the source of the £799.80 which was paid between 2 August 2016 and 2 February 2017, and no mention of it on the Statements of Account supplied.

39. It is possible that it was the crediting of an overpayment made in a previous or even subsequent year, although I would have expected to see that on the Statement of Account that was supplied. The absence of an explanation makes me wonder whether in fact this payment of £799.80 was the only one that should have been credited to the account of the appellant so as to reduce the tax bill for 2014-15.

40. It is implicit in the scheme in s 59B TMA and Schedule 56 that “unpaid tax” includes tax which, at the time of the penalty date, had not been contained in a self-assessment made before that date, so had not been established or particularised as an amount within s 59B(1) payable in accordance with s 59B(4) TMA.

41. This is what has happened here. The return including a self-assessment was delivered on 10 November 2017, particularising the tax due at £1,769.20, yet the tax was retrospectively deemed to have been payable on 31 January 2016.

Was there a reasonable excuse?

42. The test for whether an excuse for not paying income tax is a reasonable one is, subject to any specific provision that deems a reasonable excuse not to be reasonable, the same test as is applied to excuses for not paying VAT on time, and the same test as is applied to excuses for failures for not delivering tax returns by the due date. Since HMRC’s SoC used, without acknowledgement, a test set out in a valuable and often

cited decision of this Tribunal (Judge Roger Berner), *Barrett v HMRC* [2015] UKFTT 329 (“*Barrett*”), I shall use it. At [154] in *Barrett* the Tribunal said:

“154. The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.”

43. Authoritative universal guidance has however now been provided by the Upper Tribunal in the case of *Christine Perrin v HMRC* [2018] UKUT 156 (TCC). In giving that guidance the Upper Tribunal said:

“The correct test for ‘reasonable excuse’

69. Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of “reasonable excuse” becoming relevant.

70. Assuming that hurdle to have been overcome by HMRC, the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.

71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

72. Where the facts upon which the taxpayer relies include assertions as to some individual’s state of mind (e.g. ‘I thought I had filed the required return’, or ‘I did not believe it was necessary to file a return in these circumstances’), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief

which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:

‘There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.’

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

74. Where a taxpayer’s belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. ‘I did not think it was necessary to file a return’, or ‘I genuinely and honestly believed that I had submitted a return’. In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.”

44. In §23 I have made findings of fact about the appellant’s actions and statements, including that he was unaware that on 2 March 2016 he had failed to pay the amount of tax which he was first informed about on 30 October 2017. Was it objectively reasonable for a person in the appellant’s circumstances not to know of this failure? The circumstances include that the appellant was a PAYE taxpayer whose annual liability to pay tax was determined by the issue of a P800 and by collection of any underpayment through a tax code. He was not someone who was, in HMRC’s phrase, “within self-assessment”. The circumstances are also that he seems to have become liable to the HICBC for 2014-15 for the first time (HMRC do not allege that he was liable for any earlier year, and the documents sent to him in 2012 and 2013 do not say so) but HMRC did not contact him in 2015 to inform him, even though they must have known he was liable (there is nothing in the letter of 30 October 2017 to suggest that HMRC did not and could not have had or obtained such knowledge in 2015).

45. The other relevant circumstances are as pointed out by HMRC that an “awareness letter” was issued to the appellant on 14 October 2012 as HMRC records showed that his earnings were over £48,000, a letter to which HMRC say the appellant did not reply.

46. They also say that a form SA252 was issued to the appellant on 17 August 2013 and that it explained what actions should be taken, including the deadline for “registering for self-assessment”.

47. It is important to be clear about what precisely the failure here is. That is because HMRC have alleged more than one failure in relation to 2014-15, one being the appellant’s failure to notify chargeability and another his failure to register for self-assessment, as well as his failure to pay the tax on time. HMRC’s responses to the appellant’s grounds of appeal relate to all of these failures.

48. The question in this appeal is whether it was reasonable for a person in the circumstances I have set out not to do what the appellant failed to do, to pay an amount of £1,769.20 before 2 March 2016.

49. In my opinion it was reasonable for a PAYE only taxpayer to be unaware on 1 March 2016 that were he to be required to file a tax return for 2014-15 at any time in the future, any tax shown on that return as payable would be deemed to have become due on 31 January 2016 and that he would have 30 days after then to pay the tax without incurring a penalty.

50. What was arguably not reasonable was the appellant's failure, not to "register for self-assessment" as that has no legal meaning, but to notify his chargeability to tax for 2014-15 before 1 November 2015. Section 7 TMA had been amended by Finance Act 2012 to require any person liable to the HICBC to notify chargeability. Failure to do so opens up the person so failing to penalties under Schedule 41 FA 2008, and that is what HMRC have threatened to impose on the appellant. But that failure is not the failure for which penalties have been imposed under Schedule 56.

51. Thus had it been necessary I would have found that the appellant had a reasonable excuse for his failure to pay the tax on or before the statutory date.

Special circumstances?

52. I have also considered whether HMRC have made a decision as to whether there were special circumstances that might justify a reduction of the penalties, and if they have whether it is flawed in the judicial review sense (paragraph 15(3) and (4) Schedule 56).

53. HMRC say they have addressed the question whether there were special circumstances, but have found none. But nowhere is there any indication in the documents that special circumstances have been addressed. The SoC says "HMRC have considered that Mr Gill was not aware that he needed to complete a tax return relating to his Child Benefit claim" and they then submit that this is not a special circumstance. It does not say who in HMRC considered what the appellant said. The statement he made was made first in his notification of his appeal to the tribunal, so it seems to me that the only person who might have considered it was M Goulding, the officer who prepared the SoC. That it was M Goulding who considered whether the appellant's lack of awareness over his need to submit a tax return and that he did so in preparing the SoC is no bar to HMRC's saying that they did make a decision about whether there were special circumstances (see *Bluu Solutions Ltd v HMRC* [2015] UKFTT 95 (TC) (Judge Anne Redston and Derek Speller FCA) at [151]) so I do not say that there was no decision at all.

54. The SoC strongly implies that the decision was made under or by reference to paragraph 16 Schedule 55 FA 2009 (failure to make a return) which is not the penalty provision in question here. However the actual provision they should have considered, paragraph 9 Schedule 56, is identical. The matter they say they have taken into account is that the appellant was unaware that he needed to complete a return relating to his "child benefit claim". Since the appellant did not make a child benefit claim (his wife would have done) the decision is clearly flawed as having taken something into account which they should not have, a non-existent claim by the appellant. But if I assume that what they really meant was just that the appellant was unaware that he needed to, ie was obliged to complete a return, then there are two things that make the decision

flawed. One is that they do not explain why that is not a special circumstance, and secondly there is an error of law. No one needs to complete a return unless they have been given a notice to file, for which see *Shiva & Ushma Patel v HMRC* [2018] UKFTT 185 (TC) (Judge Guy Brannan) and the appellant was not given one until November 2017, so that on 2 February 2016 he was under no such obligation.

55. As a result I could remake the decision about special circumstances. In my view there is a special circumstance here. On 31 October 2017 the appellant was explicitly told that if he did not reply to the letter then he would be assessed for 2014-15 under s 29 TMA on the HICBC, and that he would be required to be within self-assessment *for 2016-17 onwards*. But on 2 November 2017 HMRC sent him a notice to file (SA316) for “all 3 ty”, ie the three tax years 2014-15, 2015-16 and 2016-17.

56. The effect of this broken promise might seem one of no consequence to HMRC. The tax had to be collected one way or another (though they ignored the obvious possibility of collecting the HICBC through the appellant’s tax code, something Parliament was persuaded in FA 2012 to facilitate by a change in the law).

57. But if a s 29 assessment had been issued the relevant item in the table in Schedule 56 FA 2009 would have been item 19 which gives as the penalty date the day after the end of the period of 30 days starting with the day on which the notice of assessment was given (s 59B(6) TMA). If a s 29 TMA assessment had been made and notice given on 30 November 2017 (probably an unfeasibly quick reaction) then the tax would have become payable on 30 December 2017 by virtue of s 59B(6) TMA.

58. In my view this misleading conduct was an unusual and out of the ordinary circumstance. At least I certainly hope it was, and that HMRC will not protest that it happens all the time.

59. I would then, had it been necessary, have made a special reduction on account of these special circumstances. What I would have done was to calculate, as best I could, the penalty that would have become due had a s 29 TMA assessment been issued.

60. From the papers in the bundle I can see that the tax was “finally paid in full” on 16 November 2017. If that was the case then clearly no penalty would have been imposed and so the reduction would be of the full £224.

Decision

61. I cancel the penalties of £88, £88 and £48.

62. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 27 June 2018

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SCHEDULE 56 PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

...

ASSESSMENT

11—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must--

- (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
- (b) may be enforced as if it were an assessment to tax, and
- (c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of an amount of tax which was due or payable.

(4A) A replacement assessment may be made in respect of a penalty if an earlier assessment operated by reference to an overestimate of an amount of tax which was due or payable.

...

12—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the date specified in or for the purposes of column 4 of the Table (that is to say, the last date on which payment may be made without incurring a penalty).

(3) Date B is the last day of the period of 12 months beginning with—

- (a) the end of the appeal period for the assessment of the amount of tax in respect of which the penalty is assessed, or
- (b) if there is no such assessment, the date on which that amount of tax is ascertained.

(4) In sub-paragraph (3)(a) “appeal period” means the period during which—

- (a) an appeal could be brought, or
- (b) an appeal that has been brought has not been determined or withdrawn.

APPEAL

13—(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.

14—(1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

- (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
- (b) in respect of any other matter expressly provided for by this Act.

15—(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

- (a) affirm HMRC’s decision, or
- (b) substitute for HMRC’s decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 9—

- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
- (b) to a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).