[2018] UKFTT 485 (TC)

TC06663

Appeal number: TC/2018/02264

INCOME TAX – repayment claims by non-resident – personal allowances s 56 ITA 2007 – claims under s 788 ICTA 1988 and s 6 TIOPA – whether reasonable excuse for late claims in some years – **Raftopoulou** ***applied – whether in date claims refused had been enquired into –*** **Portland Gas** ***and*** **Raftopoulou** ***considered.***

INCOME TAX – penalties for late filing of returns – whether returns delivered before the due date.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOANNA PARSONS **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 23 July 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 18 November 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 8 May 2018, the Appellant's Reply dated 15 May 2018 (with enclosures) and submissions by HMRC on 24 July 2018 in accordance with the Tribunal's directions.

DECISION

1. This was an appeal by Ms Joanna Parsons ("Joanna") against two penalties each of £100 assessed on her for her failure to deliver to the respondents ("HMRC") an income tax return for the tax years 2014-15 and 2015-16 by the due date of 20 May 2017.

2. She also claimed to appeal against decisions of HMRC not to make repayments to her of income tax suffered on interest from banks and building societies for the tax years 2008-09, 2009-10, 2010-11 and 2011-12. I have also taken her as having appealed the refusal by HMRC to repay such tax for the years 2014-15 and 2015-16 (repayments having been made for the intervening years, 2012-13 and 2013-14).

3. In the relevant periods (ie from 6 April 2008 to 5 April 2016) Joanna was not resident in the United Kingdom and was resident in Guadeloupe, an overseas department (département d'outremer – DOM) of France. She has been represented in her dealings with HMRC and the Tribunal by her father, Mr Oliver Parsons ("Oliver"), with whose own tax affairs hers are linked. I mean no disrespect by referring to each by their first name, as I think it would be unnecessarily confusing to refer to the appellant, the appellant's agent and the appellant's father, especially when I need to refer to Oliver both in his capacity as Joanna's agent and in relation to his own tax affairs, which are closely bound up with Joanna's.

Facts

4. As is usual in paper cases I have a bundle prepared by HMRC consisting of their statement of case ("SoC") to which they appended some of the relevant papers. Oliver, in his appeal to the Tribunal on Joanna's behalf and in his reply to the SoC, has also exhibited a number of documents and schedules, including a schedule of correspondence. Not all of the letters referred to in that schedule are in the bundle and, where they are not, I have not referred to them in this decision unless I indicate by referring to the "OP Schedule". But even then given Oliver's very brief précis of the contents and what seems to be some dubious dating in places, I put no substantial weight on them except where other documents I do have corroborate the description.

5. The facts set out below are not in dispute. There is one issue of fact which is central to the penalty appeal and that is whether the returns were delivered by the due date (as Joanna asserts) or not (as HMRC say). I make findings about that issue in the discussion section.

The enquiry into Oliver's returns

6. On 11 January 2013 HMRC began an enquiry under s 9A Taxes Management Act 1970 ("TMA") into Oliver's return for 2010-11.

7. The reason for the enquiry was that HMRC had information (which they had doubtless obtained under the powers in Schedule 23 Finance Act 2011 and regulation 5 of the Data-gathering Powers (Relevant Data) Regulations 2012) about interest

received under deduction of tax from accounts in Oliver's name with banks and building societies in the UK, which interest was not disclosed on the return.

8. On 12 March 2013 HMRC amended Oliver's return, charging tax on the interest at excess rates (ie the excess of higher rates over basic rate). They also charged a penalty.

9. I assume that Oliver appealed against the amendment. Certainly on 15 February 2014 he supplied detailed information for 2010-11, 2011-12 and 2012-13 about the accounts from which interest had been omitted from his return. He explained that he held the accounts in trust for Joanna and asked for the amendments and the penalty to be cancelled.

10. On 23 May 2014 Oliver wrote to give further information and explained that in May 2008 Joanna had asked him to place her money in British building societies, and that she had minimal income in France and drew the interest to live on. The accounts are in the name of Mr and Mrs Parsons and when asked by the banks etc to name the accounts they call them "Joanna". As the income belonged to Joanna he had not returned it.

11. On 19 June 2014 Mr Paul Kilpatrick of HMRC Local Compliance replied saying:

> "As these accounts were opened in your name then they are assessable on you.
>
> Your daughter would only receive personal allowances if the money was invested in her name."

12. The rest of the letter was devoted to the penalties that flowed from the fact that:

> "it has now been established that the following error has been included (sic) in the 2011-12 Tax Return ….
>
> - You have failed to declare taxed interest received of £6,108 on your Tax return for this year."

13. The next letter from Mr Kilpatrick in the bundle is one of 14 August 2015 replying to Oliver's letter of 15 May 2015. In this he said that:

> "I have discussed the information provided [by Oliver] with a technical specialist who has clarified that the interest is fully assessable on you as the monies (*sic*) were invested in accounts in your name and are treated as your as a result of this. The only way to avoid this is to have your daughter invest the monies herself. As long as the funds remain in your account they will continue to be assessable on you."

14. The next letter from Mr Kilpatrick in the bundle is one of 14 October 2015 replying to Oliver's letter of 22 September 2015. In this he says that:

> "I should give you a bit more background about what has happened in this case.

> My initial thoughts were that the income was clearly assessable on you as the bank accounts are clearly in your name, the funds may well have come from your daughter but they are held solely in your name and therefore assessable on you by law, these are the facts and I have no leeway on this.
>
> A colleague suggested there may be a trust in existence and the monies may be held in trust, but when you eventually sent me the information this proved not to be the case.
>
> I then took advice from a more senior officer who is a technical specialist in this field and he clarifies that as the interest is held in your name it is clearly assessable on you and she agrees with my findings.
>
> I have also referred this to a senior manager who agrees with the view of the technical specialist."

15. The next letter from Mr Kilpatrick in the bundle is one of 23 November 2015 replying to Oliver's letter of 19 October 2015. Here he admits to performing a volte face:

> "I have spoken to a Trust Specialist at length about the case and he agreed that I can accept that these monies were invested on behalf of Joanna."

16. The amendments to the tax returns were cancelled as was a s 29 TMA assessment and the penalties charged.

Joanna's claims

17. On 31 August 2016 Joanna wrote to HMRC giving her National Insurance number and address in Guadeloupe and saying that she had had savings invested on her behalf in UK Building Societies in the names of her parents, and that after extensive correspondence with HMRC it was now agreed that the interest was her income.

18. She enclosed a schedule of the interest and said that it was below her personal allowance and asked for repayment of the tax deducted at source.

19. She added that funds had now been reinvested in a buy-to-let property (I assume in the UK) and she asked for a tax reference number (UTR) and tax return forms.

20. The schedule shows the interest from 2008-9 to 2015-16, though the amounts for the last year were less than £100. The accounts were all closed or had no interest after 2015-16.

21. OP Schedule refers to a letter from HMRC to Joanna of 26 September 2016 where it is said that HMRC needed Forms R40 for 2012-13 onwards and dates of the buy-to-let property.

22. OP Schedule refers to a letter of 22 January 2017 where it is said that Joanna enclosed Forms R40 for the 8 years 2008-09 to 2015-16; explained that HMRC had considered the interest was her father's between 12 February 2013 and 23 November 2015; asked HMRC to accept the refund claims for all years and explained that the

property had been bought on 27 November 2014 and let from 1 December 2014 to 23 September 2016.

23. In post-hearing submissions HMRC has supplied a copy of "Contact History Details" dated 11 February 2017. The "contact" was a "letter in" from Joanna. The "actions" recorded are:

> "R40 Form received for 08/09-15/16. Set up SA for TP as IFP net income over £2500. IABD updated with R40 info for 12/13 and 13/14. P800 issued and repayment sent to bank."

24. I find that these contact details must refer to the letter described in §22. But in her letter of 20 April 2017 (see §28) Ms S Godley, an officer of HMRC, says the R40s were received by HMRC on 2 February 2017. As the precise date is not material I do not need to decide whether Ms Godley or Oliver is correct.

25. Screenshots of the "Return Summary" on HMRC's Self Assessment computer system show that for 2014-15 and 2015-16 Joanna was issued with a "full return" on 13 February 2017 and that the case was classified as a "Failure to Notify" case.

26. OP Schedule refers to a letter of 14 February 2017 where it is said that HMRC would repay 2012-13 and 2013-14. (In her letter of 20 April 2017 Ms Godley says this was done on 1 March 2017). OP Schedule also says that HMRC told Joanna that earlier years were out of time; said they required 2014-15 and 2015-16 tax returns by 20 May 2017 and gave her a UTR.

27. OP Schedule refers to correspondence on 16 February 2017 about which it is said that HMRC sent tax calculations for 2012-13 and 2013-14 including personal allowances and showing the repayment due.

28. The next letter in the bundle is from HMRC to Joanna on 20 April 2017, replying to her letter of 21 February. Ms Godley said in it that she understood that Joanna was unhappy that HMRC were unable to refund tax for years before 2012-13. It goes on:

> "We … explained to you that you would need to file a form R40 for the 2012-13 to 2015-16 tax years in order that we could consider your claims.
>
> On 2 February 2017, we received your completed R40's for the period 6 April 2008 to 5 April 2016. Unless the specific legislation relevant to a particular claim for relief applies a longer or shorter period, the time limit for making an Income Tax Self Assessment (ITSA) claim is 4 years after the end of the year of assessment to which it relates.
>
> In accordance with this legislation, we have refunded you the tax you have overpaid for the period 5 April 2012 to 5 April 2014. For the 2014-15 and 2015-16 tax years, you have been issued with 2015 and 2016 Self Assessment Tax returns, as you have now declared that during this period, you have received income from property. Please ensure that your completed returns are filed by 20 May 2017, to prevent penalties being incurred.

> At this time, we also advised you that we were unable to repay the tax deducted on your investment income for the period 6 April 2008 to 5 April 2012, as your claim was received outside the permitted time"

29. The letter then went on to reconsider the question of the claims being out of time, and stated that it was Joanna's position that she was precluded from making an in time claim by the enquiry into her father's tax returns. Ms Godley said she had considered Extra-statutory Concession ("ESC") B41[1] and said that it did not apply.

30. She said that:

> "we are now aware that during the period in question, you were resident in Guadeloupe. You therefore should have filed a completed R43 (claim to personal allowances and tax repayment by an individual not resident in the UK) by the following dates:"

31. There follows a schedule showing that Joanna should have made the 2008-09 claim by 5 April 2013 and so on. The letter went on to add:

> "You did not however instigate your claim until 31 August 2016, which is over nine months after the date our enquiry was closed."

32. And later:

> "I can therefore confirm (*sic*) that there has been no error on the part of HMRC as we acted in accordance with the information provided to us.
>
> I must also stress that our enquiry into your father's Self Assessment tax returns did preclude (*sic* – I assume a "not" is missing before 'preclude') you from making a timeous claim and I am therefore unable to agree your request.
>
> There is no right of appeal against the refusal to admit a late claim."

33. OP Schedule says the tax returns for 2014-15 and 2015-16 were posted on 17 May 2017. The HMRC screenshot shows the date of receipt as 26 July 2017 at Office 296101 (Self Assessment) and that the returns were logged by third party scan and captured on 14 December 2017 by LDC ("Local Data Capture"). The "unlogged" parts of the screen are blank.

34. OP Schedule says late tax return penalties were sent on 23 May 2017 with a letter that enclosed SA370 Appeal forms. HMRC's "View/cancel penalties" screenshot also shows the date of issue as 23 May 2017.

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[1] The concession says

> 'repayments of tax will be made in respect of claims made outside the statutory time limit where an overpayment of tax has arisen because of an error by HMRC or another government department, and where there is no dispute or doubt as to the facts.'

35. On 5 June 2017 Joanna enclosed appeals against the penalties and said that the income for all years (including income from property) was below the personal allowance and that the returns were sent on 17 May 2017.

36. On 21 July 2017 Ms Godley wrote in reply to a letter from Joanna of 29 April 2017 (listed in OP Schedule). Ms Godley's letter explains in more detail the reason for the refusal of the out of date claims. Among the points it makes are:

> "Until 5 April 2016, banks and building societies paid interest net of tax. As you however reside in Guadeloupe but are a citizen of a European Economic Area (EEA) country, you are entitled to claim the Personal Allowance at the end of each year against your UK income and claim any refund of tax, which may be due.
>
> …
>
> Personal allowances have to be claimed by an individual and the legislation for this is at Section 35 of the Income Tax Act 2007. It is usually given provisionally through the code issued for the main source of earned income. If it is not included in the code then it needs to be made by the individual as a stand-alone claim.
>
> As you are non-resident but in receipt of UK income, you are required to register under the Self assessment system and file a return by 31 January following the year end. Your self-assessment returns should therefore have been filed by the following dates:"

There follows a schedule showing that a 2008-09 return should have been filed by 31 January 2010 and so on. The letter continues:

> "As your claim for personal allowances was not received until 2 February 2017, you failed to make a claim for your personal allowance [in time]
>
> …
>
> Technically, the interest is assessable on your father, due to the way in which your bank/building society accounts were registered. On 23 November 2015, it was however agreed that on this occasion only, Mr Kilpatrick could take a pragmatic approach and accept that the aforementioned income was invested on your behalf."

37. This letter of 21 July 2017 also deals with the returns that were delivered by Joanna. That part of the letter said that as she was in receipt of income from property:

> "As per the guidance available on our website, as a non-resident landlord, you should have either:
>
> - received your rent with tax already deducted by your letting agent or tenant, or
> - completed a form NRL1i. If you had completed an application and it was approved we would have advised your letting agent not to deduct tax from your rent.

> Whichever method you opted for, you were required to file a Self assessment tax return by 31 January following the year end.
>
> As you did not take the required action, on 13 February 2017, we issued you with Self assessment tax returns for the 2014-15 and 2015-16 tax years. Your completed returns should have been filed by 20 May 2017
>
> Your incomplete returns were not received until 22 May 2017 and as a result you have incurred a late filing penalty for both years.
>
> On 7 July 2017 we established that you had omitted each year's residence page. We have therefore had no optioned (*sic*) but to send a copy of each year's return and a blank residency page, back to you for completion."

38. On 21 July 2017 Ms Godley wrote another letter in response to the appeals made on 6 June. She said that Joanna did not have a reasonable excuse because the return was incomplete. A reasonable excuse in HMRC's view could only be present if:

> "an unexpected or unusual event, either unforeseeable or beyond your control, has prevent you from sending your return in on time."

39. Joanna was informed that she could provide further information, request a review or notify her appeal to the Tribunal.

40. On 31 July 2017 Joanna made a request on form SA634 for a review of Ms Godley's decision to deny the benefit of ESC B41. In that request she also asked for penalties issued on her on 23 May 2017 to be cancelled as her returns were posted to HMRC on 17 May and she would have expected them to reach HMRC by 20 May, the deadline imposed by HMRC.

41. On 31 July 2017 Joanna also responded with further points on the ESC claim, and in relation to the returns she said that they had been posted on 17 May and she would have expected them to arrive with HMRC on 19 or 20 May. As 20 May was a Saturday she asked what happened to post received on Saturdays. She added that she did not attach an SA109 (residence pages) as HMRC already had all the information about it, and requested HMRC's statutory authority for requesting the pages.

42. OP Schedule refers to a letter of 22 July 2017 where it is said that Joanna had enclosed her returns this time with the SA109 pages. HMRC computer records show the receipt of the returns on 26 July 2017.

43. Post-hearing submissions included screenshots of the entries on the returns for 2014-15 and 2015-16.

44. They show that on the page TR2 on the main return "What makes up your tax return" Joanna made entries for "UK Property" (SA 105), "Resident, remittance basis" (SA 109) and "Tax Calculation Summary" (SA 110). The "main" pages show entries for "Taxed UK interest", the property pages show an adjusted profit of £2,633 and £7,745 respectively. I consider the detail on the SA 109 pages later (see §XX).

45. HMRC say however in their post-hearing submissions that they have made a conscious decision to redact Joanna's bank details so that I cannot see them. This, it is said, was for security reasons.

46. On 21 September 2017 Joanna replied to Ms Godley's letter of 21 July and asked for a report on progress of the review she had requested. She asked again for information about mail handling on Saturdays and the legal authority for the SA 109.

47. On 21 October 2017 HMRC in the person of Lisa Hutson, a Review Officer, gave the conclusion of her review which was to uphold the penalties. In that letter HMRC said that it appeared that the tax returns reached HMRC on 22 May 2017, were posted back as incomplete on 7 July 2017 and received complete on 26 July 2017.

48. Lisa Hutson added that her responsibility did not include considering the matters of ESC A19 and B41; that a copy of a letter from Joanna on it had been sent to the "relevant department" and that HMRC had sent a letter about this on 29 August 2017 (which Joanna says she did not receive).

49. On 26 October 2017 Joanna replied disagreeing with the review conclusions and asking for a reconsideration. She also said she had not received an answer about Saturday post handling arrangements or the statutory authority for the SA109.

50. On 2 November 2017 Ms Godley replied to Joanna's letter of 21 September 2017. In this letter she explained that s 8 TMA requires a person within the self-assessment system to make a return of all the information needed to enable a self-assessment to be calculated.

51. She also dealt, or purported to deal, with Joanna's request for information about the post-handling arrangements in the relevant office on Saturdays. Ms Godley says she has taken this as a request for HMRC "to confirm when a return is noted as received".

52. On this subject she says that:

> "'Deliver to the officer' in s 8(1)(a) TMA is generally taken to mean that the tax return is received at an HMRC office 'on or before' the relevant day.
>
> HMRC accept that delivery can be made up to midnight and to recognise this will accept as 'on time' tax returns found in the office post box at the start of the next day. HMRC will normally accept a tax return as having been filed on time f it is clear that the taxpayer took steps to ensure that would be the case, although for some reason it was delayed thereafter (for example, by a Post Office delay).
>
> Your returns were delivered to HMRC on the morning of 22 May 2017. These were sent back to you as you indicated on the Main Tax Return (SA 100) that a residency (*sic*) page (SA 109) was necessary. You however omitted to include this and so these (*sic*) were returned to you.

> An unsatisfactory return is a return that fails to satisfy the filing requirements of Sections 8 and 8A TMA 1970 as stated in the 'Notice to File'.
>
> As you failed to file satisfactory returns until 26 July 2017, our Appeals Review Unit has advised you that your 2014-15 and 2015-16 late filing penalties remain due and payable."

53. This letter also said that Oliver had stated that the SA302 tax calculations sent to Joanna for 2014-15, 2015-16 and 2016-17 did not include the personal allowance. Ms Godley said that:

> "This is due to the fact that [you] have not made a claim to personal allowance on your 2015, 2016 and 2017 form (*sic*) SA 109.
>
> As the legal charge to tax is created by the receipt of a completed self-assessment tax return and supplementary pages, please advise under which box number you wish to claim this: [there follows a URL which links to the 2017 Notes for completing an SA 109]."

54. On 17 November 2017 Joanna replied asking for an amendment to the three returns at box 16 to claim Personal Allowances. She added:

> "I understand that the claim was in my letter of 31st August 2016, and my entitlement to Personal Allowances was confirmed in your letter of 8th September 2017.
>
> Please recalculate to show the repayments due."

55. On 18 November 2017 Joanna acting through her father notified her appeals to the Tribunal.

56. On 15 December 2017 Joanna was sent (in Guadeloupe) an updated SA Statement as of 14 December 2017. This showed:

(1) A balancing payment (ie amount due under s 59B(1) TMA) for 14/15 of £501.85 extinguished by a credit of the same amount as "adjustment from SA return 14 DEC 17" to give an amount of £0.00.

(2) A balancing payment for 15/16 of £1,548.95 extinguished by a credit of the same amount as "adjustment from SA return 14 DEC 17" to give an amount of £0.00.

(3) A Late Filing Penalty for 14/15 of £100 paid by setting an overpayment from Return 05 APR 15 of £100 against it.

(4) A Late Filing Penalty for 15/16 of £100 paid by setting an overpayment from Return 05 APR 15 of £100 against it.

(5) A 30 days late payment penalty for 15/16 of £77 reduced by two adjustments of £40 and £37 respectively on 14 DEC 17.

(6) A 6 months late payment penalty for 15/16 of £77 reduced by two adjustments of £40 and £37 respectively on 14 DEC 17.

(7) A 1st payment on account due for 16/17 of £774.47 reduced by two adjustments, one from the SA return 19 OCT 17 of £409.67 and one an adjustment following 15/16 Amendments of £364.80.

(8) A 2nd payment on account due for 16/17 of £774.48 reduced by two adjustments, one from the SA return 19 OCT 17 of £409.68 and one an adjustment following 15/16 Amendments of £364.80.

(9) An overpayment from 14/15 return of £593.25

(10) An overpayment from 15/16 return of £19.25

(11) Repayment supplement 31 JAN 16 to 31 JAN 17 of £3.99.

57. In an email sent to the Tribunal after the hearing, Oliver informed the Tribunal that on 19 April 2018 HMRC repaid the income tax deducted from interest for 2014-15 and 2015-16 but not in full. HMRC had reduced the 2014-15 repayment by £200, the penalties incurred by Joanna for her alleged late filing of her tax returns for those years.

Law

58. The law relating to the penalties in this case is in Schedule 55 Finance Act 2009, the only relevant parts of which are:

> "**1**—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.
>
> …
>
> (4) In this Schedule—
>
> "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;
>
> "penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).
>
> (5) In the provisions of this Schedule which follow the Table—
>
> (a) any reference to a return includes a reference to any other document specified in the Table, and
>
> (b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	*Return or other document*
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970

		(b) Accounts, statement or document required under section 8(1)(b) of TMA 1970
	…	…

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

3 P is liable to a penalty under this paragraph of £100.

APPEAL

20—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

…

21—(1) An appeal under paragraph 20 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.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

…

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

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."

59. Section 8 TMA, the section referred to in the table, provides:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source ….

(1D) A return under this section for a year of assessment (Year 1) must be delivered—

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered—

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners—

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under this section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under this section may require different information, accounts and statements in relation to different descriptions of person.

(5) In this section … any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income."

60. It is s 8(1G) that applied in this case.

Discussion – penalties for late returns

61. The failure penalised by paragraph 1 Schedule 55 FA 2009 is, in relation to item 1 in the table, the failure to make or deliver a return required under s 8(1) TMA on or before the "filing date". The filing date is defined in paragraph 1(3) to mean the date by which the return is required to be made or delivered to HMRC.

62. That date is to be found in s 8 TMA. In this circumstances of this case it is s 8(1G) which gives the relevant date, as the notices to file were given on 13 February 2017 which is later than 31 October in Year 2, ie 31 October 2015 and 2016 respectively. Thus the return must "must be delivered during the period of 3 months beginning with the date of the notice".

63. The date of the notice would appear to be 13 February 2017. That is the "return issued date" on the screenshots. Yet those same screenshots show 20 May 2017 as the filing date. I can only assume that HMRC interpret "the date of the notice" as not being the date *on* the notice but that it means the date the recipient got the notice, ie received the notice to file. I can think of no other explanation, as HMRC cannot by whim or concession override the words of the statute.

64. They are therefore assuming that it can take up to seven days for notice to reach a taxpayer. This may obviously cater for the normal course of second class post but also seems to add an extra measure, perhaps for the time between the date the computer gives instructions for the notice to be issued and the time the notice leaves the HMRC premises where it is printed and enveloped.

65. It seems to me that by doing this HMRC are eschewing any reliance on s 7 Interpretation Act 1978 ("IA 78"). If so it would appear to be open to a taxpayer to prove that they did not receive the notice until a date after the seven days from the date of the notice that HMRC allow.

66. But that is not what has happened here. Joanna does not say that she did not receive the notices after 20 February (seven days from the date HMRC records as the date of issue). She simply says that in response to the notices the returns were posted second class on 17 May 2017 and she expected them to arrive by 20 May, a Saturday.

She had no proof of postage that she included in the bundle. I do not know if it was she or her father who posted the returns, or whether both were present.

67. HMRC's case on the SoC is that HMRC received the returns on 22 May (a Monday). This repeats what Ms Godley said on 21 July 2017 and again on 2 November 2017. This was repeated by Ms Hutson on 20 October, who also said "it appears they reached HMRC on Monday 22 May 2017".

68. The screenshots "Return Summary" for both returns shows quite clearly "Date of Receipt" as 26 July 2017 at "Office 296101 Self Assessment". This date is, it seems, the date on which HMRC received the returns for the second time, then including the SA 109 "residency (*sic*) pages" as HMRC call them.

69. Joanna has repeatedly asked HMRC to say what the arrangements for handling post arriving on a Saturday are in the relevant office. They have declined to answer. Ms Godley's letter to Joanna of 2 November explained in detail how HMRC make assumptions about letters found in an HMRC office letter box the morning after a deadline day. But this practice would not be relevant where the day the post was found was a Monday and the deadline day was a Saturday. In the absence of any evidence from HMRC about the post handling arrangements I find that on the balance of probabilities HMRC's offices are not open on Saturdays or Sundays, or if they are, no one there examines the letter boxes or other places where mail is delivered to.

70. It could be the case that Ms Godley was saying that she knew for a fact that the return was actually delivered by Royal Mail on the Monday. But she did not say so in terms or say how she knew that for a fact when it is unlikely that it was part of the duties of an officer of HMRC in her position to open the post or collect it from a post-box.

71. Joanna has given the postcode to which the returns were addressed, and this is a BX1 postcode which is used as a substitute for all previous HMRC office addresses. She also refers to her expectation as to the normal course of post. This leads me to think that she or her father had in mind s 7 IA 78. Does it apply here?

72. It applies if what has been delivered was something authorised by an Act to be delivered by post. The only candidate for that is s 115(2) TMA, which authorises any notice to be delivered under the Taxes Acts to be served by post. Is a notice under s 8(1) a notice under the Taxes Acts? By s 118(1) TMA the Taxes Acts include "this Act" ie TMA itself, so s 115(2) does authorise service by post and s 7 IA 78 does apply.

73. In my view Joanna has shown that the letter was properly addressed and prepaid and posted (as required by the first limb of s 7 IA 78) and so is deemed served on HMRC. As delivery of a s 8 TMA return is time critical then by the second limb of s 7 IA 78 it is deemed to have been served in the ordinary course of post.

74. Joanna clearly thinks that three days after the date of postage by second class post is sufficient. For members of the public the obvious place to get such a notion is the Royal Mail. What the Royal Mail's website shows is:

> "With 2nd Class mail we aim to deliver your letters and parcels in two or three working days, including Saturdays."

75. In my view then Joanna is deemed to have delivered her returns on Friday 19 or more likely Saturday 20 May[2]. But this is subject to the contrary being proved by HMRC. What I have from HMRC seems to be mere assertion, not backed up by any account of how post received at a weekend is handled. In my view they have not proved to the contrary.

76. And it is not as if Joanna's argument was a surprise to HMRC. It has been their only argument, repeatedly made, since the appeal against the penalties.

77. I would add that even without s 7 IA 78 I would have found that on the balance of probabilities the letter was delivered to HMRC on 20 May 2017.

78. HMRC point out however that even if Joanna's letter was, or was deemed to have been delivered to HMRC on 20 May 2017, they sent the returns back because the SA109 was missing and they did not receive "satisfactory" returns until 26 July. A "satisfactory" return is one that meets the filing requirements in s 8(1) TMA. That subsection, and subsection (1AA) with which it must be read, provide that:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source …"

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[2] I am aware of the contents of Practice Direction [1985] 1 WLR 489 which held that in the Queen's Bench Division of the High Court to avoid uncertainty as to the date of service in that division that date would be taken to be on the second working day after posting for 1st class post and the fourth working day for 2nd class post. I do not think it is relevant here because, firstly it has been superseded by PD6A in the Civil Procedure Rules which deal only with first class post, second class no longer being permitted for service under the Rules, and secondly because those Rules have nothing to do with correspondence between HMRC and a taxpayer.

79. Joanna's response was to say that the tax return main pages do not say that the SA 109 pages must be filed with the return. Page TR2 of the 2014-15 and 2015-16 returns are headed:

> "**What makes up your tax return**
>
> To make a complete return of your taxable income and gains for the year to 5 April 2016 you may need to complete some **separate supplementary pages**. Answer the following questions by putting 'X' in the 'Yes' or 'No' box." [their emboldening]

80. Under the heading "Foreign", Item 6 of the TR2 says:

> "If you:
>
> - were entitled to any foreign income, or income gains
> - have, or could have, received (directly or indirectly) income, or a capital payment or benefit from a person abroad as a result of any transfer of assets
> - want to claim relief for foreign tax paid
>
> read the notes to decide if you have to fill in the 'Foreign' pages. Do you need to fill in the 'Foreign' pages?"

81. Joanna did not answer either "Yes" or "No".

82. Under the heading "Residence, remittance basis etc", Item 8 of TR2 says:

> "Were you, for all or part of the year to 5 April 201[5][6], one or more of the following:
>
> • not resident
>
> • not domiciled in the UK and claiming the remittance basis
>
> • dual resident in the UK and another country?"

83. From the screenshot of the captured entries on the returns, Joanna put a cross in the "yes" box.

84. The Notes for completing the TR2 page for both years say:

> "8 Residence, remittance basis etc
>
> You should fill in the 'Residence, remittance basis etc' pages if you:
>
> - are not a UK resident
> - …"

85. I also note that on page TR2 in several other places the wording in the item informed the taxpayer that if they have a given type of income or gains they should complete the relevant pages (eg employment, self-employment, partnership, capital gains and additional information"). On income from property or from trusts and estates there is no mention of separate pages.

86. Joanna also points out that the heading TR2 says "you *may* need to complete some separate supplementary pages."

87. In my view it is a reasonable and natural reading of the TR2 page to think that if the heading says that a person "may" need to complete separate pages, then the individual items which refer to separate pages are the only ones where a separate page is required. Item 8 does not say that, not does it sign to the reader that they should read the notes which do say it..

88. But in any event, in my view the returns submitted by Joanna on 17 May did contain all the information necessary to establish the amount in which she was chargeable to income tax, including the amounts of tax deducted at source (although these were only deducible from net amounts actually shown in the returns). She included on the main return pages the interest details and in the SA105 pages the income from property. Even if an SA 109 was required by page TR2 the only thing that would be included in it is a claim for an allowance, so even if it is said that she had made no claim for a personal allowance in the returns posted on 17 May, this is irrelevant to the question whether the returns met the requirements of s 8(1).

89. On that basis the appeals against the penalties succeed.

90. But even if I had agreed with HMRC that the returns were late, I would have considered that Joanna had a reasonable excuse for not filing on time. She did what a reasonable person would have done and filed on a date which in accordance with the Royal Mail's website gives sufficient time for second class post to be delivered within the deadline. If it was not delivered on the Saturday then it was Royal Mail's fault, not Joanna's, and postal delays that are Royal Mail's fault are accepted by HMRC as a reasonable excuse.

Discussion – claims for repayment

91. Joanna made claims for repayment of income tax deducted at source using the Forms R40 that HMRC had told her to use for the purpose.

92. These were obviously claims made outside a return and HMRC have not suggested that, so far as 2014-15 and 2015-16 were concerned, they ought to have been made instead in the returns issued to her for those years[3].

93. On receipt of a claim made outside a return HMRC are required by paragraph 4(1) Schedule 1A TMA to give effect to the claims. They did so in relation to 2012-13 and 2013-14. They did not do so in relation to 2014-15 and 2015-16 or in relation to the years before 2012-13.

[3] They did of course insist on penalising Joanna for her failure to give details in the SA 100 returns of her claim to personal allowances which as far as they were concerned were the only reason that Joanna might be entitled to a repayment and where for the purposes of establishing the amount of the repayment they told her to use the R40s.

2008-09 to 2011-12

94. In relation to 2008-09 to 2011-12 they did not repay because they said the claims were out of time. In this regard they referred to the time limit of four years for making claims, unless some other rule gives a longer time. They did not identify where this rule is in tax legislation or whether they had considered whether there was a longer time limit in these particular circumstances.

95. The main rule is in s 43 TMA:

> "(1) Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates.
>
> (2) A claim (including a supplementary claim) which could not have been allowed but for the making of an assessment to income tax or capital gains tax after the year of assessment to which the claim relates may be made at any time before the end of the year of assessment following that in which the assessment was made."

96. The claim here was in the view of HMRC made under s 35 Income Tax Act 2007 ("ITA") as they say it is a claim for a personal allowance to be given in calculating income tax liability. Neither s 35 ITA nor any other enactment in Part 3 of that Act specifies a longer (or indeed shorter) period than four years, so HMRC set out the correct legal position on that basis[4].

97. HMRC was therefore correct to say that the claims for those years were out of time. However from 1 December 2016 the law allowed an out of date claim if the claimant had a reasonable excuse for the lateness. This was as a result of the decision of the Upper Tribunal in *Dr Vassiliki Raftopoulou v HMRC* [2015] UKUT 630 (TCC) ("*Raftapoulou*"). This decision was overturned by the Court of Appeal in April 2018 so restoring the law to what HMRC considered it was, but no one in HMRC was to know that at the time of the events in this case.

98. The appellant has put forward what amounts to her claim that she had a reasonable excuse for her failure to make claims in time for these years. As a result of the Court of Appeal decision it becomes unnecessary to consider them. It is conceivable that the claim of Dr Raftopoulou will be upheld by the Supreme Court, so I will say this. In my view the circumstances the appellant prays in aid, the enquiry into Oliver's liability on the interest, does not amount to a reasonable excuse. Before that enquiry both she and her father would have taken the (correct) view that the interest belongs to her. There was at that time nothing to prevent her making a claim in her own right. Even once the enquiry started, there was nothing to prevent her making a claim: indeed it might have assisted her father's arguments had she done so. And even if the enquiry did justify the

[4] In my view, as I explain later, the claim is better seen as one under s 6 Tax (International and Other Provisions) Act 2010 (or for 2008-09 and 2009-10 s 788 Income and Corporation Taxes Act 1988), but there the time limit is not specified so must also be four years. Sections 816 ICTA and 19 TIOPA though are capable of extending the time limit for a claim but they apply only to claims for credit, not for exemption.

tardiness there was a gap of more nine months between the enquiry ending and Joanna making her claim, and that is not a reasonable time to remedy lateness once a reasonable excuse had ceased.

2012-13 and 2013-14

99. Before turning to the claims for repayment for 2014-15 and 2015-16 I must mention the 2012-13 and 2013-14 claims. These were repaid without question: thus by doing so HMRC were following paragraph 4(1) Schedule 1A TMA giving effect to them without enquiry. Why?

100. The claims were intimated to HMRC on 31 August 2016 and they included schedules of the interest from which tax had been deducted. What happened then in relation to these years is:

(1) HMRC's responded on 26 September 2016 (according to OP Schedule) saying that HMRC needed Forms R40 for 2012-13 onwards.

(2) On 22 January 2017 Joanna enclosed R40s for the 8 years 2008-09 to 2015-16.

(3) On 14 February 2017, HMRC agreed to repay 2012-13 and 2013-14.

(4) HMRC repaid all the tax deducted from interest for the years 2012-13 and 2013-14 on 1 March 2017.

101. It can only have been in reaction to the R40s that HMRC repaid. They can only have repaid on the basis that the appellant was entitled to personal allowances, as there was no other basis known to them and it is clear from Ms Godley's letters that that was the only basis she was aware of that would enable repayment of the tax deducted.

102. An R40 does not contain any reference to personal allowances, because it states on its face that it is a form for UK residents[5]. But Ms Godley said in her letter of 20 April 2017 (§28) that it was "[i]n accordance with this legislation" (it is not really clear which legislation) that HMRC had repaid Joanna for those years.

2014-15 & 2015-16

103. I now turn to 2014-15 and 2015-16. The first question I ask myself is what is different about these years? What distinguishes them from 2012-13 and 2013-14? HMRC clearly thought that there was a difference because they refused to repay. What did Joanna do and what did they do that explains the difference in treatment?

104. The opening part of §100 and sub-paragraphs (1) and (2) apply to these years as they apply to others, with the addition in (2) that Joanna also submitted schedules for her income from property in the UK (presumably in amplification of Item 5 on page 3 of the R40). The difference starts at (3) where for these years the position is:

[5] All UK residents are entitled to a personal allowance for any tax year during some time in which they existed.

(3) On 14 February 2017, HMRC agreed to repay 2012-13 and 2013-14, and sent her notices to file returns under s 8 TMA by 20 May 2017 for 2014-15 and 2015-16.

(4) On 20 April 2017 HMRC said that for the 2014-15 and 2015-16 tax years, she had been issued with 2015 and 2016 Self Assessment Tax returns, as she had declared that she had received income from property.

(5) On 5 June 2017 Joanna said that the income for all years (including income from property) was below the personal allowance.

(6) On 2 November 2017 HMRC said that Joanna did not claim personal allowances in her returns.

(7) On 17 November 2017 Joanna told HMRC that she had requested personal allowances.

105. What am I to make of this?

106. First, I note in passing that HMRC did not need to send Joanna returns to enable them to take account of the letting income. The R40 contains spaces for this information and is a return of the type referred to in paragraph 2(5) Schedule 1A.

107. It therefore seems to me that by issuing notices to file (which would be contained in the paper returns themselves) HMRC are asking for a return of that which has already been returned. It would be apparent from the R40s that Joanna was entitled to a repayment for both years, so it did not need the returns to enable her to make a self-assessment to the effect that she was due a repayment. I am inclined to think that this is a stronger case than that in *Goldsmith v HMRC* [2018] UKFTT 5 (TC) in which I held that a notice to file a return should not be issued where a P800 had already established a person's liability to pay (or to get a repayment). But as I have already decided that the penalties must be cancelled, I do not need to decide this point, on which I would require submissions from HMRC.

108. Second, as I have noted, the appellant made a claim for each of these two years for repayment of the income tax suffered, just as she had for 2008-09 to 2013-14. All of those claims were governed by Schedule 1A TMA. HMRC refused to give effect to the first four years' claims because they were out of time. They did not enquire into them or give effect to them as they were not valid claims under s 42 TMA. HMRC did give effect to those for 2012-13 and 2013-14 under paragraph 4(1) Schedule 1A TMA because they were valid in time claims.

109. HMRC refused to give effect to the 2014-15 and 2015-16 claims, something they may only do in relation to an in time claim if they open an enquiry into the claim under paragraph 5 Schedule 1A. They must then have done so.

110. But, HMRC would no doubt have said in response, the Court of Appeal in *Raftopoulou* says that refusal of a claim does not automatically carry the consequence that the claim must have been enquired into under paragraph 5 Schedule 1A or that the refusal is a closure notice under paragraph 7 giving the claimant a right of appeal to the Tribunal. But I do not read *Raftopoulou* as saying that this denial of an appeal right

will necessarily apply where the claim is in date. I also note that the Upper Tribunal ("UT") in *Portland Gas Storage Ltd v HMRC* [2014] UKUT 270 (TCC) (Judges Timothy Herrington and Judith Powell) ("*Portland*") said:

> "44. We can see the force of Ms Choudhury's submission in relation to the letter of 15 August 2012 taken in isolation because it would appear that the only 'examination' that took place was to ascertain that the original return in respect of which an amendment was sought was more than 12 months before the claim was made. In other words, HMRC did not have to go beyond the face of the letter that they were sent to respond to it and in our view that is insufficient to amount to an enquiry in the context of paragraph 12 of Schedule 10 FA 2003.
>
> 45. We also observe that Portland's solicitors' letter of 18 July 2012 made no reference to the question of the time limit; it simply made an amendment to the return and sought a repayment claim. At that stage therefore HMRC had no argument before it that would cause it to examine the claim in any further detail beyond establishing that the claim was made more than twelve months before it was submitted.
>
> 46. However, in our view HMRC's subsequent actions following receipt of Portland's solicitors' letter of 23 August 2012 do demonstrate that it opened an enquiry into the return. In particular, HMRC's letter of 6 September 2012 notes that Portland wished to proceed with its claim and therefore it notified Portland that it was seeking policy advice on the time limit in the light of Portland's arguments. It is therefore clear that at that stage HMRC had determined to examine the claim in further detail. In our view the further steps that it took, namely to seek legal advice on the arguments raised by Portland, did amount to an enquiry within the ordinary meaning of that term. In essence, the question is one of degree and in our view the further steps taken indicate the undertaking of an 'examination', 'investigation' or 'scrutiny' of the return.
>
> 47. That being so, has HMRC given notice of their intention to enquire into the return as required by paragraph 12 of Schedule 10? In our view the indication in HMRC's letter of 6 September 2012 that they were seeking further advice and would respond on receipt of that advice is sufficient for that purpose. This finding is consistent with the decision of the FTT in *Cooltinney Developments Limited v HMRC* [2011] UKFTT 252 (TC). That case considered whether a mistake in what was clearly intended to be a notice of enquiry rendered it invalid. In construing the requirements of section 83(2) FA 2003 the FTT concluded at [31] to [33] as follows:
>
> > 'In applying the first of these tests we need to consider what it is that is to be regarded as the notice. What para 12, Sch 10 requires is that HMRC 'give notice' of their intention to enquire into a land transaction return. It does not say give a notice. There can be no assumption therefore that the notice be comprised in a single document, nor, where more than one document is sent to the purchaser, that any one of those documents should be regarded as *the* notice. The notice in these cases was given by means of the collection of documents sent to the purchaser.

> On that basis we find that the notice given by HMRC to each of the Appellants on 18/19 August 2008 was substantially in conformity with Part 4 FA 2003. No formality is prescribed for the notice, and there are no specific provisions for what it must contain. The only requirement is that it gives notice of the intention to enquire into a land transaction return. Whilst there was an error in the letter sent to each appellant, the copy of the letter sent by HMRC to the Appellant's adviser, and COP 25, both contain the necessary reference to land transaction returns, and contain information about the process.
>
> As regards the second test, we find that the requirement that the intended effect be reasonably ascertainable is apt to apply an objective test. One that basis, having regard to what Lord Steyn said in *Mannai* (at p 767G), '[the] issue is how a reasonable recipient would have understood the notice'. But one does not, in context of s 83(2), have regard only to a hypothetical reasonable recipient. It is necessary to consider, therefore, the characteristics of the recipient, its own knowledge (or lack of it) and the overall factual context in considering what the intended recipient could reasonably have been expected to have understood from the notice.'
>
> 48. In our view this reasoning is clearly based on the principle that a notice of enquiry need not be in any particular form, the only requirement being that it gives notice of an intention to enquire into a land transaction return. In our view the letter of 6 September 2012 achieved that. In our view consistent with the policy in section 83(2) FA 2003, a communication should be regarded as giving notice of an intention to enquire provided the intended effect is reasonably ascertainable by the person to whom it is directed. In our view Portland would clearly ascertain from HMRC's letter that there was an intention to enquire further into the return in the light of the further submissions made by Portland's solicitors."

111. In *Raftopoulou* Patten LJ, giving the only reasoned judgment, declined to comment on the UT's view in *Portland* that the actions of HMRC subsequent to the letter of 15 August 2012 amounted to an enquiry. It should be noted that *Portland* was also an "out of time" case and that the subsequent actions by HMRC were still concerned with the interpretation of the time limit in that case, which was rather less obvious than in *Raftopoulou*.

112. That the UT should strive as it did in *Portland* to find that there *was* an enquiry is not surprising. Before self-assessment claims, as now, were governed by s 42 TMA which before 1995-96 said:

> "(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> …
>
> (3) An appeal may be brought against the decision of the inspector or the Board on a claim by giving written notice to the inspector or the

> Board as the case may be within thirty days of receipt of written notice of that decision: …"

A decision of an inspector clearly covered a simple refusal, whatever the reasons.

113. After 1994-95 claims remained subject to s 42 TMA but there were separate rules for claims made in a return and other claims. The former were governed by the enquiry provisions of s 9A TMA. If no enquiry was made into the return the claim stood good and was given effect to by a self-assessment which would incorporate for example any repayment due which would be paid under s 59B TMA. If an enquiry was made into the claim then HMRC would have to give their conclusions and give effect to them, or the appellant could seek a closure notice from the General or Special Commissioners and later this Tribunal.

114. If a claim was outside a return then the rules are that either a claim is given effect to or is enquired into in which case repayments may be withheld.

115. Thus before self-assessment refusal to repay or give other effect to a claim was appealable. And under self-assessment where the claim is in a return it is automatically repaid or given effect to by the act of self-assessment unless an enquiry is made, and the conclusions of the enquiry are appealable.

116. But in a claim outside a return there is no self-assessment which could give rise to an automatic repayment. Only where an enquiry is begun under paragraph 7 Schedule 1A can an appeal right arise. *Raftopoulou* and *Portland* show that a simple refusal to meet a claim because it is on its face out of time is not an enquiry and so there are no appeal rights. But outside that special case of invalidity through failure to meet time limits, it seems that whether by accident or design a valuable appeal right, one that existed before self-assessment in s 42(3) TMA 1970, may have been taken away by FA 1994 in relation to Schedule 1A claims that are not met in full. It is unlikely that Parliament intended to do that and in my view this state of affairs justifies taking a rather more liberal approach to what is an enquiry into in time claims than *Raftopoulou* says is the law in relation to out of time claims. That it seems to me is what the UT did in *Portland Gas*.

117. In my view the actions of HMRC in response to the claim by Joanna amount to an enquiry into the claims for 2013-14 and 2014-15. They did not refuse to pay by simply saying they were out of date, as they justifiably did in relation to the years before 2012-13. They justified their not giving effect to the claim immediately on receipt as was required by paragraph 4(1) Schedule 1A TMA by reference to their view of the law, HMRC guidance and Joanna's using the wrong forms (the R40s they had in fact asked her for). And when they informed her that they refused to repay, then that was the giving of the conclusion of their enquiries into the claims. The grounds for their refusal were that the appellant had not made a valid claim for personal allowances.

118. I take the statement by the appellant on 17 November 2017 that she had requested personal allowances as an appeal against the conclusions of the enquiry. HMRC are encouraged to take a liberal view of what constitutes an appeal (see for example ARTG 2140 in HMRC's Appeals, Reviews and Tribunals Guidance Manual) and I take a

similarly liberal view of what is contained in the appeal notification to the Tribunal on 18 November 2017. I consider that the appeals are within my jurisdiction.

Consideration of the appeals

119. I completely fail to understand why HMRC said in the conclusion of their enquiry into the claims that the appellant had not claimed personal allowances. But there are clues in the correspondence I have recited at some length.

120. In her letter of 20 April Ms Godley said:

> "we are now aware that during the period in question, you were resident in Guadeloupe. You therefore should have filed a completed R43 (claim to personal allowances and tax repayment by an individual not resident in the UK) by the following dates …"

121. That was a reference to the out of date years, but it can I think only be the thinking expressed in this letter which has led HMRC to take the view that no personal allowances had been claimed. This thinking is completely misguided.

122. For one thing it overlooks the fact that the appellant was told to file R40s. This is despite the fact that HMRC must know that on the front page of an R40 is the statement:

> "If you are not a UK resident, please complete form R43."

123. Admittedly the R43 contains a section which says:

> "**F Claim for UK tax allowances**
>
> To make a claim follow these instructions:
>
> • to claim the Personal Allowance, complete part **F1**
>
> • for other allowances, tick the box(es) in parts **F2** and **F3** •
>
> • if you are not entitled to allowances, tick the box at **F4**
>
> **F1 Personal Allowance**
>
> Tick the box that applies to you and enter details where requested.
>
> I have read note 3 of the booklet 'Guidance notes for form R43(2016)' and claim the **Personal Allowance** because I am:
>
> - a British citizen or a national of another member state of the European Economic Area (EEA)
> - resident in the Isle of Man or the Channel Islands
> - entitled to claim under any of the conditions shown in c, d, e, f or g in note 3 of the 'Guidance notes for form R43(2016)' (enter the condition)
> - a national and also a resident of (enter name of country)
> - a national of Israel or Jamaica (please state which)
> - a resident of (enter name of country)"

124. Faced with this section of the R43 Joanna would have ticked the first box as a British citizen and the last box as a resident of France. Had she done that I have no doubt that she would have been accepted as having an entitlement to a personal allowance under s 35(3) (read with s 56) ITA 2007 because she was a national of an EEA state, the United Kingdom. The UK is an EEA State (see the definition in the Schedule to the Interpretation Act 1978).

125. The R40 that she was told to complete does not include anywhere to claim any form of personal allowance. The tax return SA 100 that she was asked to complete does not include any place for a UK resident to claim a personal allowance. In her 21 July 2017 letter Ms Godley says:

> "Personal allowances have to be claimed by an individual and the legislation for this is at Section 35 of the Income Tax Act 2007. It is usually given provisionally through the code issued for the main source of earned income. If it is not included in the code then it needs to be made by the individual as a stand-alone claim."

126. This is a statement about taxpayers generally, not about non-residents. Those UK residents who do not complete a tax return but are within PAYE (a majority of the taxpaying population) do I agree receive their personal allowances in their code (though I do not know what is provisional about this process) but they do *not* make a claim. Ms Godley says that everyone else not within PAYE has to make a "stand alone" claim. This I think would come as a great surprise to the large minority of the population who are required to file an SA 100 but are not within PAYE and to those not within either category but who wish to claim repayment of tax suffered at source and who use an R40 for that purpose.

127. Anyone in that minority of UK residents would, as I have pointed out, find that there is nothing on the SA 100 tax return or the R40 that refers to personal allowances, so on HMRC's approach no claim to them is made. But HMRC's calculation tool for providing a "self" assessment under s 9(3) TMA and the lengthy and complex Tax Calculation Summary Notes ("TCSN") for those intrepid and persistent enough to do their own self-assessment both give the personal allowance (at box A77 of the 2015 TCSN). So why would anyone need to make a stand alone claim?[6]

128. I have to assume then that it is HMRC's contention that completion of an R40 or an SA 100 tax return by a UK resident is insufficient to constitute a claim for personal allowances. If it is then *a fortiori* a person whose only dealings with HMRC are through PAYE has not made a claim, irrespective of the code number which includes that allowance. Perhaps that is what Ms Godley meant when she said the coding was provisional but as I have said I cannot see what further steps a PAYE-only taxpayer is expected to take to establish their claim.

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[6] The answer of course is that they don't. For the tax system to work the claim must be implicit. After all, the only condition for claiming it as far as a UK resident or national is concerned is that they existed at some time in the tax year. Delivery of a return or claim seems to establish that, without the formality of an explicit claim.

129. This is such an outlandish contention that I can only seek to understand it by assuming that in her 20 July 2017 letter Ms Godley meant (though she did not say so) that where a taxpayer is *non-resident* they *must* complete an R43 to establish entitlement to relief within s 56 ITA. That is in fact what she said in her letter of 20 April 2017. It may be that she took the view that the absence of R43s was the justification for her refusal of the claims, even though the appellant had by 20 July 2017 already sent in R40s and given information about her residence and nationality position by letter.

130. Things then took an even more bizarre twist. HMRC's own records show that Joanna filed satisfactory returns on 26 July 2017, and since the only reason they were unsatisfactory to HMRC when filed in May was the missing SA 109 which Joanna had indicated she was filing, I cannot but conclude that the 26 July returns included the completed SA 109s. In fact of course I know they did because I asked HMRC to provide them to me, and there the entries (emboldened) are:

> "Residence status
>
> Box 1. If you were not resident in the UK for [2014-15][2015-16] put 'X' in the box. **X**
>
> Box 9. If you had a home overseas in [2014-15][2015-16] put 'X' in the box. **X**
>
> Box 10. Number of days spent in the UK during [2014-15][2015-16]. **30**
>
> Personal allowance
>
> Box 16. If you are entitled to claim on some other basis [not by virtue of a Double Taxation Agreement], put 'X' in the box. **X**
>
> Box 18. Enter the code(s) for the country or countries in which you were resident for [2014-15][2015-16]. **FRA**"

Yet still repayment was refused.

131. So I wholly fail to understand what more Ms Godley wanted Joanna to do after she filed her complete returns on 26 July 2017. But it gets worse. The next step taken by HMRC which refers to a claim for allowances is Ms Godley's letter of 2 November 2017. In that she says in relation to the personal allowances:

> "In your father's letter dated 28 October 2017, he has advised that your 2014-15, 2015-16 and 2016-17 tax calculation do not include the personal allowance."

132. OP Schedule dates the receipt of these tax calculations to 20 October 2017, which is consistent with what is said here. The letter goes on:

> "This is due to the fact that [you] have **not** made a claim to personal allowance on your 2015, 2016 and 2017 form (sic) SA 109. [my emphasis]
>
> As the legal charge to tax is created by the receipt of a completed self-assessment tax return and supplementary pages, please advise under

> which box number you wish to claim this: [there follows a URL which links to the 2017 Notes for completing an SA 109]."

133. Not surprisingly Joanna then made yet another request for personal allowances on 17 November 2017. No action was take by HMRC until March 2018 when they repaid the income tax, but subject to holding back £200.

134. This behaviour of Ms Godley seems irrational, even more irrational than her readily agreeing to repay 2012-13 and 2013-14 where so far as she was aware the only basis for claim was Joanna's claim to personal allowances for those years, but refusing it for the later two years because Joanna had not claimed the personal allowances for the later years, when in fact there was absolutely no difference between the two groups of years.

A s 6 TIOPA claim?

135. But in any event I fail to see what personal allowances really have to do with the claim. Suppose that in fact the appellant was a resident of France (as she is) but a national of say Mauritania[7]. As such she would not be entitled to a personal allowance under s 56 ITA 2007. But as a resident of France (whether or not a national) she would still be entitled to claim repayment of tax deducted at source in the UK, and that is a result of article 12(1) of the UK/France Double Taxation Convention ("the Convention") of 19 June 2008 (attached as a schedule to the Double Taxation Relief and International Enforcement (Taxes on Income and Capital) (France) Order 2009 (SI 2009/226)).

136. Article 12(1) of the Convention provides that interest arising in a Contracting State[8] (the UK here) and beneficially owed by a resident of the other Contracting State (France here) shall be taxable only in that other state (France). Guadeloupe is an overseas department of France so is included in the definition of France in Article 3(1)(b) of the Convention.

137. In order to obtain repayment of the tax charged on the interest by the United Kingdom a person must make a claim. This is the effect of s 788(3)(a) Income and Corporation Taxes Act 1988 for the tax years 2008-09 to 2009-10 and of s 6 Taxation (International and Other Provisions) Act 2010 ("TIOPA") for tax years 2010-11 to 2015-16. It is clear to me that Joanna, a resident of France, made such a claim on 31 August 2016 (or 22 January 2017 at the latest when she sent in the R40s) and so is within the time in s 43 TMA 1970 in relation the tax years in question. The entitlement to repayment as a result of a claim under s 6 TIOPA is not dependent on a claim for personal allowances, as my example of a Mauritanian national resident in France shows.

138. If Joanna had been given R43s, the correct form as Ms Godley realised without seeming to understand that Joanna had been asked to file R40s, then a claim under

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[7] I have chosen Mauritania as an example of a country with which the UK had no arrangements in relation to double taxation and is not a country which would entitle a national to claim the UK personal allowance.

[8] See article 3(1)(d) of the Convention.

s 6 TIOPA could have been made on the R43. Just as there is on an R43 a space at F1 for claiming a personal allowance to obtain a repayment, there is a space at F4:

> "**If you are not entitled to allowances, but wish to claim a repayment**
>
> I do **not** satisfy any of the conditions set out in section 3 of the 'Guidance notes for form R43(2016)'. I am **not** entitled to UK tax allowances but I claim repayment of the UK tax taken off (*sic*) in excess of my liability to tax in the UK."

139. Whether they recognised it or not as such a claim, HMRC have enquired into it and given their conclusions on it in relation to the tax years 2014-15 and 2015-16 which conclusions were to refuse it.

What if the claim should have been made in the return?

140. It may be that I am wrong in thinking that the claims made by the appellant on 31 August 2016 or in the R40s on 22 January 2017 in relation to 2014-15 and 2015-16 fell within Schedule 1A TMA. I therefore consider what the position is if the correct view is that in the circumstances of this case the claims were required to be made in a return.

141. Thus on 26 July 2017 when HMRC record receipt of a satisfactory return, the claim had been made for personal allowances in the returns.

142. The next step taken by HMRC which refers to a claim for allowances is Ms Godley's letter of 2 November 2017. In that she says in relation to the personal allowances:

> "In your father's letter dated 28 October 2017, he has advised that your 2014-15, 2015-16 and 2016-17 tax calculation do not include the personal allowance."

143. OP Schedule dates the receipt of these tax calculations to 20 October 2017, which is consistent with what is said here.

144. There then followed Ms Godley's letter of 2 November 2017 where she is still referring to a need for SA 109s and then Joanna's further request for the allowances on 17 November. Finally there were new tax calculations and repayments.

145. What is the legal effect of these actions? The first question is as to the status of the October tax calculations. They cannot it seems to me amount to an HMRC prepared self-assessment, because by the date of their issue Joanna had filed the SA 109 pages. Nor does it seem to me that Joanna can say that her letter of 17 November was an amendment to each of the returns again given the filing of the SA 109. But it seems to have been treated as that by Ms Godley because otherwise the giving effect to the repayments in March 2018 is inexplicable.

146. There is therefore no appealable decision on the basis that the claims were required to be made in the return. The moral to this tale is that where returns are sent in well after 31 January following the end of the tax year concerned, do not rely on HMRC to exercise their discretion in s 9(3) TMA, especially if a repayment is indicated.

Instead complete the SA 110 tax calculation summary by entering the repayment due in Box 2 on page TC1.

Decision

147. Given all this my decision is that under paragraph 9(5) Schedule 1A Joanna's claims under s 6 TIOPA for the tax years 2014-15 and 2015-16 are allowed.

148. This decision would seem to be sufficient to entitle the appellant to repayment of the tax she has suffered on her interest income from UK sources. But it may be that a tribunal or court superior to this one might consider that to make a successful claim under s 6 TIOPA it was necessary to use an R43 and in no other way, so I consider in the alternative her claim under s 35 ITA 2007.

149. I uphold it of course. Since there is no prescribed form for a claim to personal allowances then the letter of 21 August 2016 was a valid claim. As was the submission of the R40s. As was the submission of the SA 100 without the SA 109. As was the submission of the SA 109.

150. My decision on this basis is that under paragraph 9(5) Schedule 1A Joanna's claims under s 35 ITA 2007 for the tax years 2014-15 and 2015-16 are allowed

151. After the appeal was notified to the Tribunal HMRC had, I was informed by Oliver, repaid the tax suffered in those two years. But although they had repaid the 2015-16 claim in full, they had not done so in relation to 2014-15 because they purported to set £200 against the penalties.

152. This should not have been possible. Under paragraph 21(1) Schedule 55 FA 2009 provisions about appeals in TMA operate in relation to penalties as they operate in relation to income tax appeals. But that does not require the provisions of s 55 TMA to operate so as to require a postponement application. Paragraph 21(2) simply and clearly provides that nothing in paragraph 21(1) is to require payment of a penalty which is appealed until the determination of that appeal.

153. Thus when an appeal is made collection of the penalty must be suspended until the appeal is determined. I have just determined the appeal against the penalties so what should happen is that the suspension of the penalties is replaced by a discharge of them.

154. HMRC must give immediate effect to this decision by repaying the £200 with any appropriate repayment interest.

Observations

155. It will not surprise readers who have got this far that I consider that Joanna has been poorly treated by HMRC. She and her father have been steadfast and persistent in their pursuit of the repayments of modest amounts of money that were due to her. She has been faced with a series of bizarre reasons why she was not entitled to them for two years but entitled to them for two other years.

156. I struggle to understand the reasons for this mishandling of the claims. The letter headings to HMRC's letters to Joanna give no indication that Ms Godley is in a unit specialising in claims by non-residents. It may be that none exists any more.

157. But even more bizarre was the treatment of Oliver. Apparent "specialists" do not seem to have heard of the notion that not all bank deposits and accounts are beneficially owned by the person whose name is on the account or of declarations of trust. To add insult to injury, Ms Godley said in her letter of 21 July 2017 (§36):

> "Technically, the interest is assessable on your father, due to the way in which your bank/building society accounts were registered. On 23 November 2015, it was however agreed that on this occasion only, Mr Kilpatrick could take a pragmatic approach and accept that the aforementioned income was invested on your behalf."

158. The second sentence is simply untrue and not what Mr Kilpatrick said.

159. 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: 16 August 2018