



**TC07239**

**Appeal number: TC/2019/00633**

*Income tax – self assessment – late filing – requirements of s.8(1) Taxes Management Act 1970 – burden of proof – inferences of fact – Platt and Qureshi considered – Edwards applied – HMRC failed to prove necessary fact pleaded – reasonable excuse – yes – special circumstances – no – appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS ANGELA MAY GRIFFITHS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JAMES AUSTEN**

**The Tribunal determined the appeal on 12 June 2019 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 28 January 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 26 March 2019. The appellant did not submit a reply to HMRC's Statement of Case.**

## DECISION

1. This is an appeal by Mrs Angela May Griffiths (“the appellant”) against the following penalties:

(1) £100 imposed under Paragraph 3 of Schedule 55 Finance Act 2009 (“FA09”) for the late filing of the Individual Tax Return for the year ending 5 April 2017;

(2) Daily penalties, totalling £900, imposed under Paragraph 4 of Schedule 55 of FA09 for failing to file the Individual Tax Return for the year ending 5 April 2017 within three months of its due date; and

(3) £300 imposed under Paragraph 5 of Schedule 55 of FA09 for failing to file the Individual Tax Return for the year ending 5 April 2017 within six months of its due date.

2. I allow the appeal and set aside the penalties for the reasons set out below.

### **Preliminary issue: s.8(1) Taxes Management Act 1970 (“TMA 1970”)**

3. Sub-section 8(1) TMA 1970 provides as follows:

#### 8 Return of income

(1) Any person may be required by a notice given to him by an inspector or other officer of the Board to deliver to the officer within the time limited by the notice a return of his income, computed in accordance with the Income Tax Acts and specifying each separate source of income and the amount from each source.

4. (Subject to other provisions of that Act not relevant here,) it follows that no obligation arises on a person to submit a self-assessment Individual Tax Return absent such a notice. Section 115 TMA 1970 specifies the requirements for delivery and service of documents under the Taxes Acts:

#### 115 Delivery and service of documents

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment...

(3) In subsection (2) above "prescribed" means prescribed by regulations made by the Board, and the power of making regulations for the purposes of that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons...

5. HRMC alleges in its Paper Hearing Submission that a notice to file a return (under s.8(1) TMA 1970) was issued to the appellant on 6 April 2017, in support of which it provides a printout of a computer record for the appellant entitled "Return Summary". A printout of a second page is provided to indicate the address which HMRC had on file for the appellant as at 5 April 2017. HMRC adduces no further evidence to show valid delivery of the notice to file pursuant to the requirements of ss.8(1) and 115 TMA 1970.

6. In its Paper Hearing Submission, HMRC includes a "Note to Tribunal", which reads as follows, insofar as relevant:

21. It should be noted that the customer is requested to provide a copy of HMRC's decision(s) that the appeal relates to. Where the customer complies with this instruction HMRC evidences the notice(s) provided as folioed documentation in the statement of case.
22. The cost of keeping this physical evidence for all customers, for all penalties, would be vast and is unrealistic. The systems HMRC have in place shows [*sic*] a high probability the notices recorded were posted.
23. HMRC are not able to include a copy of £100 [*sic*] the penalty notice sent to Mrs Griffiths as neither a paper nor a scanned photocopy are held on the department's files.
24. In the recent tax case of *Kwiecinski v HMRC* (TC/2017/08739) at paragraphs 46-48 Judge [*sic* for Presiding Tribunal Member] Barrett states:
25. *"It is established and accepted that it would place an intolerable burden on HMRC if they were obliged to retain duplicate copies of all standard letters and notices sent out by them to tax payers. Instead, HMRC keep a computerised record which shows, often by reference to 'shorthand' codes, which standard letters and notices have been sent to a particular tax payer, and when they have been sent. We are satisfied that HMRC have provided this record in the bundle of documents and further that they have then provided, again within the bundle, the requisite 'specimen' copies of the standard letters and notices which have been sent out to the appellant."*

7. To my mind, this "note" is an extraordinary example of special pleading. It essentially invites this Tribunal to take on trust HMRC's assertions that the relevant notices were produced and validly served on the appellant in this case and to dispense with the requirement that proper evidence should be produced to substantiate HMRC's claims.

8. HMRC and Presiding Tribunal Member Barrett are doubtless correct when they aver that a requirement to keep physical copies of all notices sent to taxpayers would

be unduly burdensome – not to mention an appalling waste of paper. But this is surely not the only way that evidence could be retained and put before the Tribunal. If HMRC had been able to produce true copies (including scanned or electronic copies) of notices as sent, satisfactorily corroborated by internal records such as the “Return Summary”, then absent contradictory evidence this Tribunal could easily satisfy itself that the notices were indeed sent and that HMRC’s computer records faithfully recorded the real position.

9. As it is, the terms of HMRC’s “note” and the absence of such evidence make it necessary to consider the initial burden of proof on HMRC.

*Burden of proof*

10. HMRC’s Paper Hearing Submission states that “[t]he onus of proof is for [HMRC] to show that the penalties have been correctly calculated. The burden then shifts to the [a]ppellant to demonstrate that a reasonable excuse exists for the defaults. The standard of proof is the ordinary civil standard, which is on the balance of probabilities.”

11. This summary is correct insofar as it goes. However, it omits to mention that the onus on HMRC is not just to demonstrate that the calculation of the penalties was arithmetically correct: HMRC must also demonstrate that the penalties have, in fact, arisen as a matter of law.

12. No penalty can arise in any case where the taxpayer is not in default of an obligation imposed on him or her by statute. One such situation will be where HMRC fails to establish on the balance of probabilities in a penalty appeal that an appellant was sent a valid notice to file an Individual Tax Return for the tax year in question under s.8(1) TMA 1970.

13. I understand paragraphs 24-25 of HMRC’s Paper Hearing Submission to indicate that HMRC relies on *Kwiecinski* to the effect that computer printouts of the sort provided with the Paper Hearing Submission should suffice – without more – to show that the required Notice to File was prepared and issued to the appellant at her then home address on 6 April 2017. No copy of the *Kwiecinski* decision was included with my bundle, nor (having checked various sources) is it to be found online. As a result, it is impossible for me to review Presiding Tribunal Member Barrett’s quoted remarks in their proper context, nor to consider the weight I should accord to them. Since I consider that the *Kwiecinski* decision has not been adequately brought to the Tribunal’s attention in this case – and, in any event, as it is not binding on me – I decline to follow it.

14. What is absolutely not “established and accepted” – and what I do not believe Presiding Tribunal Member Barrett would have decided in *Kwiecinski* – is that practical obstacles in the storage and retrieval of documents and information somehow require or permit the Tribunal to relieve HMRC of its obligation to supply evidence in support of a positive case such that it makes out the facts for which it

contends on the balance of probabilities. It is for the Tribunal to consider the quality of the evidence provided and the weight to be given to it.

15. Remarkably similar issues to those presented in this case recently arose in *Platt v HMRC* [2019] UKFTT 0303 (TC). I agree with the approach taken by Judge Geraint Jones QC in that case and I gratefully adopt his reasoning:

[2] As this appeal is in respect of penalties, the jurisprudence of the European Court of Human Rights in *Jussila v Finland* [2006] ECHR 996 makes it clear that article 6 of the European Convention on Human Rights (right to a fair trial) applies to the instant appellate process.

[3] The right to a fair trial plainly requires that the hearing is before an independent Court of Tribunal which acts procedurally fairly which, in the context of this appeal, includes the following:

(1) Noting that because this appeal involves penalties, the respondents bear the onus of proving the several facts and matters said to justify the imposition of penalties.

(2) The Tribunal making its findings of fact based upon admissible evidence; not based upon unsubstantiated assertions made by the respondents in their Paper Hearing Submission.

[4] Thus the present situation is that in the absence of an admission by the appellant of a fact which the respondents must prove to justify the imposition of a penalty, it is for HMRC to prove that factual prerequisite. That is so regardless of whether HMRC is on notice that the appellant expressly asserts that she did not receive a Notice to File because a litigant in person cannot be expected to know that (proof of) service of a Notice to File is a prerequisite to the respondents being able successfully to resist the appeal...

[7] Whatever form the admissible evidence takes, adequate evidence is a necessity; not a luxury...

[10] HMRC has chosen not to adduce any witness evidence.

[11] In respect of serving a Notice to File [to] HMRC for the fiscal year ended 5 April 2017, HMRC has simply produced a document, presumably printed from some computer held record, headed "Return Summary" which bears the appellant's name, tax reference number and national insurance number. There is then a column which contains the words "Return Issued Date" alongside which appears "06/04/17". HMRC contends that I can be satisfied that a Notice to File was sent to the appellant's correct address because it would have been sent to the address for the appellant which the respondents hold on file by way of another computer record headed "Individual Designatory Details".

[12] In my judgment the “Return Summary” falls well short of being sufficient evidence to prove, even to the civil standard, that a Notice to File was actually sent to the appellant. That is because:

(1) Where the document shows a “Return Issue Date” of “6/04/16” I can be reasonably certain that that is a fiction, because those with experience in this Tribunal well know that, absent special circumstances, that is the date which appears alongside every person’s Return Summary alongside the words “Return Issued Date”. It is equally well known that the reality is that HMRC sends out Notices to File on a staggered basis because, logistically, it simply could not hand over to the Royal Mail the huge volume of letters which it would need to send if every relevant taxpayer was sent a Notice to File on the same day of each year. Nonetheless, that would have to be the factual situation for that record to be a true and reliable record. The record is therefore inherently improbable and unreliable. It may well be that HMRC sends out some Notices to File on 6 April in each year, but there is, literally, no reliable evidence to show that that happened in the case of this appellant on 6 April 2017 or indeed on any other date. Accordingly, the Return Summary probably contains false information and it would require cogent evidence from HMRC for me to find as a fact that a Notice to File was sent to this appellant on 6 April 2017.

(2) Even if HMRC could show that a Notice to File was intended to be sent to this appellant on 6 April 2017, there is no evidence to show that any such Notices to File were actually sent. That is because even if the date shown in the Return Summary, whether inserted by a person or a computer, is accurate, it falls far short of evidencing and proving actual dispatch of any particular document.

(3) I acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant’s address held on file and then sealed it in a postage pre-paid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material. There is no such evidence in this case.

[13] Accordingly in circumstances where HMRC has failed to prove a prerequisite to issuing the penalties in dispute in this appeal, the appeal must be allowed in full in respect of the fiscal years ended 5 April 2017.

16. The Tribunal in *Qureshi v HMRC* [2018] UKFTT 115 (TC) (Judge Geraint Jones QC and Christopher Jenkins) decided the same point in almost identical terms. One striking exchange is worth mentioning:

[12] Miss Donovan referred us to pages 14 and 15 in the respondents' bundle of documents and told us that because a document headed "Return Summary" contains an entry "Return Issued Date" and alongside it appears "12/6/14", we can conclude that a notice to file "*must have been*" sent on that date. She then went further and informed us that a "Return Summary" page would only come into existence if the respondents had sent out a notice to file. Miss Donovan also informed us that any notice to file "*would have been*" sent to such address for the appellant as the respondents then held on file.

[13] It was at this juncture, when we queried Miss Donovan's use of the past conditional tense, that she informed us that the respondents had "*an understanding with the Courts and Tribunals*" with that "understanding" being, inferentially, that the respondents enjoy some kind of special privilege when the need for adequate evidence is being considered. We roundly reject any such notion and give Miss Donovan's assertion no credence whatsoever. It is frankly incredible that the respondents would seek to have or expect to have any kind of privileged position in litigation before the Courts or Tribunal in this country or, even if it did so, that the courts and/or Tribunals would countenance or tolerate any such arrangement, understanding or any attempt to procure [the] same...

17. *Qureshi* was recently approved by the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) (Nugee J and Judge Timothy Herrington):

[49] Mr Ripley referred us to [*Qureshi*], a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.

[50] In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:

"In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."

[51] The FTT also made the following observations at [14] to [16] with which we would agree:

"14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on

a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.

15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.

16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."

18. I apply the quoted paragraphs from *Edwards* in this appeal.

19. In *Perrin v HMRC* [2018] UKUT 156 (TCC), Judge Timothy Herrington and Judge Kevin Poole considered the proper approach for this Tribunal when deciding penalty appeal cases. The Upper Tribunal held as follows:

[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.

20. This statement is binding on me. It follows that I must consider whether a positive case has been pleaded by HMRC, with evidence meeting the civil standard adduced to substantiate the case pleaded.

21. In *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) (a discovery assessment case), Judge Roger Berner and Judge Tom Scott held at [49] and [53] that the "competence issue" (ie whether the technical requirements of the legislation were complied with) and the "time limit issue" (ie whether those technical requirements were met within any specified time limits) had to be pleaded by HMRC where they had not been conceded by the appellant – even if the appellant had not specifically raised them. As Judges Berner and Scott held at [49]: "Those matters formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made." Given the difference of subject matter, *Burgess and Brimheath* is not directly binding on me in this context. Nevertheless, I believe that



the short principle stated above also accurately reflects the law pertaining to the initial burden of proof on HMRC in this case *mutatis mutandis* and I apply it on that basis.

22. As Judge Richard Thomas put it in *Appiah v HMRC* [2019] UKFTT 0331 (TC) at [9], “[t]his is primarily a fact-finding jurisdiction, and facts depend on evidence. As other compositions of the Tribunal have remarked, evidence is a necessity. It is not a luxury. 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.”

23. I direct myself accordingly.

#### *Drawing inferences*

24. The Tribunal may draw presumptions or evidential inferences of fact from the direct evidence before it. Making common sense inferences is an important tool in the efficient administration of justice (*Crewe Services and Investment Corporation v Silk* (2000) 79 P&CR 500 at 509, per Robert Walker LJ, as he then was). As Ryder J (as he then was) held in *A Local Authority v A (No 1)* [2010] EWHC 28 (Fam); [2011] 2 FLR 137 at [18]:

A judicial inference... is no more or less an evidential assessment than a determination of likelihood... It has to be based on facts which can be found. If there is no direct evidence of the primary fact, there have to be secondary facts from which an inference as to the primary fact can be drawn.

Anything else is not inference, it is mere speculation.

25. The question is therefore whether the printouts of the Return Summary and the Taxpayer Address History are sufficient to presume or infer that a valid Notice to File was sent to the appellant, or whether doing so goes further than drawing an inference and strays into speculation. This question arose in three other recent cases: *Qureshi; Loial v HMRC* [2018] UKFTT 138 (TC); and *Galiara v HMRC* [2018] UKFTT 190 (TC). In each case, HMRC had issued penalty notices for non-filing of an Individual Tax Return and the only relevant evidence were printouts of a Return Summary. The cases proceeded to a hearing and advocates appeared for HMRC in each. *Qureshi* is treated here as representative of all three cases.

26. The Tribunal in *Qureshi* reminded itself at [17] of the “stringent requirements for drawing inferences (or making secondary findings of fact) from established primary facts. It referred to *R v Hedgcock, Dyer and Mayers* [2007] EWCA Crim 3486 (CA Criminal Division) at [19] to [21], which it described as giving the “leading judgment and guidance on that issue”. Given that *Hedgcock* was a criminal appeal, the standard of proof in that case was ‘beyond reasonable doubt’, rather than the civil standard which applied in *Qureshi* – and here. Accordingly, the Tribunal in *Qureshi* at [18] adapted the test set out by the Court of Appeal Criminal Division, as follows:

[A] Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn.

27. This formulation of the test was approved by the Upper Tribunal in *Edwards* at [53]. However, the formulation was doubted in an article in *Taxation* (K. Gordon, ‘Do not pass go’, *Taxation* [2018] 181 (4645), pp. 8-10), albeit before the decision in *Edwards*. Mr Gordon writes at p. 9:

I would respectfully take the view that (by referring to ‘the only available inference’) the tribunal has wrongly retained too much of the criminal standard of proof in the translation process. Indeed, I would go so far as to say that, *in a civil context an inference may be drawn in any case as long as the court or tribunal considers it more likely than not to be correct.* (My emphasis)

28. Were I to have had a free hand on this point, I would have respectfully departed from the test set out in *Qureshi* and instead preferred the form proposed by Mr Gordon (in italics in the quotation above) for the reason he gives. It seems to me that there are good reasons for concluding that the Tribunal may draw an inference from a primary fact if it is satisfied that the inference drawn is more likely than not to be correct. There is, I think, a tension between requiring that a fact – including an inferred fact – be found on the balance of probabilities and a requirement that “it is more probable than not that the inference contended for is probably *the only available inference that can be properly drawn*” (*Qureshi*) or that it is “*the only reasonable conclusion that could be drawn from the evidence*” (*Edwards*) (my emphasis in both cases). Nevertheless, *Edwards* has concluded the point in favour of the more stringent test in *Qureshi* and that is now the test to be applied.

29. It may be relevant that this Tribunal is not subject to strict rules of evidence (Rule 2(a) of the Tribunal Rules). This flexibility, in common with the ability to draw inferences from primary evidence, is a powerful tool in meeting the overriding objective of dealing with cases fairly and justly. However, for that Rule to be in point, relevant evidence (such as hearsay evidence, for example) must actually be produced. In this case, the issue arises precisely because additional evidence has not been put before the Tribunal. In my view, Rule 2(a) of the Tribunal Rules does not go so far as to enable the Tribunal to infer a fact from a submission – a submission is not evidence that the Tribunal may admit whilst a Court could not: it is not evidence at all, and it would be improper to treat it as such (see *Qureshi* at [15]).

30. Ideally, in a case such as this, there would be direct primary evidence that a Notice to File was sent to the appellant on a given date. I understand that this is not possible for practical reasons. However, HMRC could satisfy the burden of proof by providing other corroborative evidence, as suggested in *Platt* at [12] (quoted above) and similarly in *Qureshi* at [14] to [16].

31. I direct myself on that basis.

*Conclusions on the preliminary question of whether a valid s.8(1) TMA 1970 notice was issued to the appellant*

32. Like Judge Jones in *Platt* at [12], I derive little or no assistance from the document marked “Return Summary” included in my bundle. In particular, I have no confidence that the stated “Return Issued Date” of 6 April 2017 for the Notice to File is accurate. In fact, for the reasons given by Judge Jones, it seems more likely than not that this date is a “fiction”, rendering the printout “inherently improbable and unreliable” and I find accordingly. I am unable to tell from the Return Summary alone whether or not a Notice to File was issued to the appellant and, if it was, on what date it was sent. The evidence offered, such as it is, is not sufficiently detailed and cogent to discharge the evidential burden on HMRC. There is no other evidence before me, including evidence of HMRC’s internal systems and processes, which could assist in resolving these questions in HMRC’s favour.

33. The Return Summary is not apt to support the required inference that on the balance of probabilities a valid Notice to File was sent to the appellant. In my view, I could only properly draw that inference from evidence of HMRC’s systems and processes – but that evidence is not before me. The inference of fact is therefore two steps removed from the evidence actually presented, ie I would have to infer from the Return Summary that: (1) HMRC’s systems and processes would probably have meant that a Notice to File was validly prepared; and, from that inference, (2) that those systems and processes meant that such a notice was probably sent to the appellant. The first of those inferences alone would not suffice and it is a stretch too far to draw an inference from an inference in my view. I should have reached this decision on either the test as set out in *Qureshi* and approved in *Edwards* or the modified version proposed by Mr Gordon in *Taxation*.

34. I have reviewed the appellant’s evidence to see whether she has acknowledged receipt of a Notice to File, which would have determined the point against her (see *Burgess and Brimheath* at [49] and *Platt* at [4]). She has not. Because, in my view, the statements in *Perrin* and *Burgess and Brimheath* quoted respectively at [19] and [21] above are accurate descriptions of the law in relation to the initial burden of proof on HMRC in penalty appeals, I consider that the appellant’s silence in this regard should not be misconstrued as acquiescence of the inference alleged by HMRC; neither does it absolve HMRC from pleading a positive case supported by evidence.

35. As a result, I conclude that it is not possible to make a positive finding of fact – on the balance of probabilities – that a valid Notice to File was issued to the appellant on any given date in respect of the tax year 2016/17. I do not believe it likely that such a Notice was prepared and sent on 6 April 2017 as purported by the Return Summary printout – I believe that date to be a “fiction”. Nor can I presume or infer on the balance of probabilities the existence of a valid Notice to File from the evidence actually presented: to do so would be to speculate rather than to draw a proper judicial inference from a primary fact. In particular, the lack of evidence as to HMRC’s systems and processes makes it impossible for me to infer that those systems and processes were such as to make it more likely than not that a valid Notice to File was sent to the appellant. HMRC has not satisfied the burden of proof on it. It

follows that I am unable to conclude that the appellant had an obligation to file an Individual Tax Return for that year. Her appeal must therefore be allowed in full and the penalties set aside.

### **Reasonable excuse and special circumstances**

36. In case my decision at [35] is wrong, I now go on to consider whether the appellant would have a reasonable excuse for the failure to submit an Individual Tax Return for the tax year 2016/17, or whether special circumstances exist which might merit reducing the penalties. The relevant statutory provisions are set out below.

37. Paragraph 16 of Schedule 55 to FA09 relevantly provides that:

- (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, or
  - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (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.

38. Paragraph 22 of Schedule 55 to FA09 relevantly provides that:

- (3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—
  - (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 16 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.

39. Paragraph 23 of Schedule 55 to the FA09 relevantly provides that:

- (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.

*Reasonable excuse*

40. There is no statutory definition of “reasonable excuse” (other than the two negative propositions at Paragraph 23(2)(a)-(b) FA09), but the words have been judicially considered on a number of occasions.

41. In *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 239; [1991] BVC 568, HHJ Medd OBE QC said at 569-570:

I may allow the appeal if I am satisfied that there is a reasonable excuse for the appellant company’s conduct. Now the ordinary meaning of the word ‘excuse’ is, in my view, ‘that which a person puts forward as a reason why he should be excused’. A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey said were such that he should be excused, do in fact provide the company with a reasonable excuse.

In reaching a conclusion on that question the first question that arises is can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way, which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? By expressing the question I must answer in this way I am not acceding precisely to the submission that Mr Lister made to me when he suggested what the test should be. His test, if I understood it right, involved asking oneself whether a reasonable trader (not necessarily a trader having the attributes possessed by the appellant) would have believed that what he had done was in order. It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would

conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statute which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* [1978] 2 All ER 168.)

42. This statement was approved as “helpful guidance” by this Tribunal in *Coales v HMRC* [2012] UKFTT 477 (TC) (Judge Guy Brannan) at [28]. Judge Brannan wrote at [29]:

In my view, this decision clearly explains that the test is an objective one: it involves considering the actual circumstances of the taxpayer in question but applying an objective analysis of those circumstances.

43. And at [31]:

A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. The word “reasonable” imports the concept of objectivity, whilst the words “the taxpayer” recognise that the objective test should be applied to the circumstances of the actual (rather than some hypothetical) taxpayer.

44. And at [36]:

The excuse must be objectively reasonable and that test must be applied to the facts of the individual case.

45. The Upper Tribunal in *Perrin* (cited at [19] above) settled the correct test to be applied when considering reasonable excuse arguments in this Tribunal. It determined as follows:

[70] ...[T]he 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.

[75] It follows from the above that we consider the FTT was correct to say (at [88] of the 2014 Decision) that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account."

46. The paragraphs quoted from *Perrin* are binding on me and set out the test to be applied in this case.

### *Special circumstances*

47. Referring to Paragraphs 16 and 22 of Schedule 55 to FA09 (quoted at [41]-[42] above), the Tribunal in *Ghafoor v HMRC* [2019] UKFTT 0205 (TC) (Judge Andrew Scott and Julian Sims) wrote:

[56] Although it is provided that certain cases do not constitute “special circumstances”, no further assistance is provided by the legislation in determining what counts as “special”. HMRC guidance refers to the decision in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 and the decision in *Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152 for help. There is [sic for “are”] dicta in those cases to the effect that special circumstances means something “exceptional, abnormal or unusual” or “something out of the ordinary run of events”.

[57] It seems to us that neither of those cases provides any meaningful assistance. They concerned different legislation with a different purpose from that of Sch.55 to FA09. The expression “special circumstances” is not a term of art used by Parliament to engage case law relevant to its meaning in other (different) statutory contexts. Rather, it is an ordinary English expression that, in accordance with basic rules of statutory interpretation, must be given its ordinary meaning. We should consider the language that Parliament has chosen to use, not other synonymous expressions.

48. HMRC directed me to *Crabtree v Hinchcliffe* and *Clarks of Hove Ltd v Bakers’ Union* in its Paper Hearing Submission. I was also directed to *David Collis v HMRC* [2011] UKFTT 588 (TC) at [40] in support of the proposition that the special circumstances must apply to the particular taxpayer and may not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

49. These authorities were reviewed by the Upper Tribunal in *Edwards* at [68] and following. The Upper Tribunal decided:

[72] In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of “special circumstances” as follows:

“the respondent argues that this provision has a very limited application... I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it”.

[73] The FTT then said this at [101] and [102]:

“101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in



schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.

102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC’s decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.”

[74] We respectfully agree. As the FTT went on to say at [105], *special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.* (My emphasis)

50. The reference to judicial review principles at Paragraph 22(4) of Schedule 55 to FA09 (and commented on briefly in *Ghafoor* at [55]) was helpfully explained in *Abel v HMRC* [2018] UKFTT 194 (TC) (Judge Tony Beare) at [19]:

...[T]he decision as to whether any particular circumstances constitute “special circumstances” is entirely a matter for the Respondents to determine in their own discretion and... their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (“*Wednesbury*”). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents’ decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents’ decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

*Submissions by the appellant*

51. The appellant’s evidence, insofar as material, is as follows:

(1) The appellant separated from her husband (“H”), from whom she is estranged, in May 2016. She is 62 years old. H is a senior lawyer in private practice at the Bar.

(2) Since the breakdown of her marriage, the appellant received no financial support from H for almost three years, until obtaining interim maintenance pending suit in divorce proceedings of £750 per month. In the meantime, the appellant had been living off capital, which is all-but exhausted. The appellant's remaining capital is a pension of approximately £45,000.

(3) The appellant had ceased paid employment in 2002, since when she was totally financially dependent on H. The appellant has been unable to obtain employment since the breakdown of her marriage, despite her best efforts.

(4) After the breakdown of her marriage, the appellant's home was repossessed by the bank.

(5) The appellant then moved into rented accommodation but became unable to afford the rent. She drew down £30,000 of pension funds to pay rent in advance. (Presumably once that fund had been exhausted), her landlord granted a rent-free period until January 2019, following which she expected eviction and the necessity of seeking state benefits.

(6) During her marriage, the appellant's tax affairs (which included the receipt of offshore rental property income) had been dealt with by a major accountancy firm with offices in London, the UK and worldwide ("the Accountants") on the basis of information supplied by H. H was the keeper of all financial records and the appellant's involvement in her personal tax affairs was limited to signing tax returns prepared by the Accountants.

(7) The financial aspects of the appellant's divorce from H are contested and protracted, complicated by bankruptcy proceedings against the appellant and H. Whilst the appellant is unrepresented in the application for a financial order in her divorce due to lack of funds, H retains two firms of solicitors and accountants in both his matrimonial affairs and the bankruptcy proceedings.

(8) H has been "dragging his feet" in the divorce proceedings and has failed to comply – or has at best complied belatedly – with a number of Court Orders in the Family Division.

(9) Since the breakdown of their marriage, H has declined to pay for accountancy and tax advice for the appellant and has instructed The Accountants not to act for the appellant as a result of a conflict of interests given their continuing instructions from him. The Accountants have, in any event, refused to act for the appellant as a result of outstanding fees incurred against her account with them which the appellant has no means to settle. H refuses to settle those fees.

(10) The Accountants proposed to the appellant that she should approach the charity "Tax Help for Older People" for assistance in lieu of their advice. It is not clear from the evidence whether the appellant did so.

(11) The appellant has obtained a number of Orders against H in the Family Division requiring him to release financial details (relevant to this appeal) to the appellant. At least two of those Orders (dated 2 March 2018 and 24 September 2018) required the Accountants to release information to the appellant but, on legal advice, the Accountants concluded that H must authorise their disclosure

of this information. H delayed his consent – without explanation – for a number of months during which time the Accountants did not provide any information to the appellant. H confirmed to the Court on 24 September 2018 that he had given his consent to the Accountants for the release of the relevant information, but the Accountants wrote to the appellant on 10 October 2018 confirming that no such consent had yet been received by them (six months after the date of the 23 March Order).

(12) The appellant had been in e-mail correspondence with the Accountants, asking for assistance with her tax returns, and for information about the financial and tax affairs of her and H since at least 16 November 2017 – after the date for submission of a paper Individual Tax Return for the tax year 2016/17, but before the deadline for submission of an online return. The appellant did not receive any material assistance from the Accountants as a result of that correspondence.

(13) The appellant had also been in correspondence with HMRC since early 2018 enquiring about the obligation to submit a tax return for 2016/17 as her income was within her personal allowance, resulting in no tax to pay. On 5 June 2018, HMRC wrote to the appellant confirming that a tax return was necessary.

(14) On 9 June 2018, the appellant sent an e-mail to the Accountants, which included: “Perhaps the best way forward is for me just to duplicate my 2017 return and put that in?”.

(15) The appellant filed a paper tax return for the tax year 2016/17 on 14 June 2018, after the due date for submission of either a paper return or an online return.

(16) HMRC imposed penalties (as set out above) for late submission of the appellant’s 2016/17 tax return. Unlike the two preceding years, HMRC has not cancelled those penalties. The appellant appealed the penalties to HMRC, which upheld its decision. The appellant then appealed to this Tribunal.

52. The appellant contends that these facts make out a reasonable excuse for her failure to file her tax return online and/or that they constitute special circumstances.

53. I am conscious that I only have the appellant’s perspective on these issues, and questions of conduct in matrimonial proceedings are often emotive and partial. I have not had evidence from H. Nevertheless, the overall picture emerging from the appellant’s evidence as summarised in [51] above is of a bitter and hard-fought divorce, a continuing and striking degree of financial hardship arising from that, and a complete lack of access to professional assistance. For the purposes of this appeal (but not further or otherwise), I am prepared to treat the appellant’s evidence as summarised above as fact and I so find: the evidence is both internally consistent and consistent with the details one might expect to encounter in a difficult divorce.

#### *Submissions by HMRC*

54. HMRC’s case is in essence as follows:

- (1) The appeal is not concerned with an obscure area of tax law but with the ordinary everyday responsibility to file a tax return by the due date. The due date for the return was clearly stated on the notice to file that had (we are assuming for these purposes) been sent to the appellant and information about deadlines and consequences of failing to meet them are readily available.
- (2) The Appellant did not file a tax return until 14 June 2018 despite the (purported) issue of a Notice to File on 6 April 2017 and the first penalty notification of (or around) 13 February 2018. By being in default of her filing requirements, the appellant did not act in the manner of a prudent person, exercising reasonable diligence and due foresight, having proper regard for her responsibilities under the Taxes Acts.
- (3) The appellant previously received penalty notices in respect of late filing of her 2014/15 and 2015/16 Individual Tax Returns. Those earlier were cancelled by HMRC pursuant to its powers under s.54 TMA 1970.
- (4) HMRC acknowledges that the circumstances giving rise to the cancellation of the earlier penalties are still continuing. However, the appellant has not established that her personal difficulties were so serious that they reasonably prevented her from filing the return on time for the tax year 2016/17. The Appellant has therefore not established the existence of a reasonable excuse or special circumstances.

### *Discussion*

55. The due date for submission of the return was 31 October 2017 if filed on paper and 31 January 2018 if filed electronically. HMRC contend, and provide evidence in support of the contention, and the appellant has not sought to deny, that the return was filed on paper on 14 June 2018 and processed on 18 October 2018. This followed correspondence between the appellant and HMRC, which concluded on 5 June 2018 with HMRC writing to the appellant to confirm that she should submit a tax return. On the material before me, I find as a fact that this is all so. The appellant does not suggest that the penalties have not been correctly calculated in accordance with the legislation. It follows that the return was late and that as a matter of law the appellant would be liable to the penalties unless she has a reasonable excuse for the lateness, or unless HMRC (or the Tribunal) considers that there are special circumstances justifying a reduction in the penalty.

56. It is well established that the burden is on the appellant to establish the existence of circumstances amounting to a reasonable excuse on a balance of probabilities. A reasonable excuse will serve to relieve a taxpayer of penalties “if the failure is remedied without unreasonable delay after the excuse ceased” (Paragraph 23(2)(c) to Schedule 55 of FA09).

57. The salient reasons, briefly stated (and based on the facts I have found at [53] above), which the appellant contends amount to a reasonable excuse are:

- (1) The lack of information available to her about her financial and tax affairs given that this information was controlled by H and that the Accountants

(who had previously prepared her tax returns on information from H) would not release details to her;

(2) The fact that she had taken “significant steps” to obtain the information from H (via the Family Division) and from the Accountants by correspondence;

(3) The fact that as a result of the breakdown of her marriage, her separation and estrangement from H – and the dire financial consequences for her as a result – she has no funds from which to pay a penalty.

58. In the alternative, the appellant argues that her personal circumstances are “both uncommon and exceptional” and, as such, merit treatment as “special circumstances” warranting reduction of penalties to zero.

59. Insofar as aspects of the appellant’s grounds of appeal are not mentioned in [57] and [58], I do not consider them persuasive and I discount them. In particular, any uncertainty in which the appellant found herself about her responsibility to file a tax return is not relevant to the question of her having a reasonable excuse, nor is the fact that she had no tax liability for the tax year in question.

60. HMRC accepts (at paragraph 68 of the Paper Hearing Submission) that “[the appellant’s] personal difficulties [which had merited the cancellation of penalties for the 2014/15 and 2015/16 tax years] remained”, but objects that these difficulties do not, in the context of the previous penalty waivers, constitute a reasonable excuse for late filing in the 2016/17 tax year.

61. HMRC notes that the appellant had been in the self-assessment tax regime since 2006/7, when an unsolicited tax return was received containing income from property over £2,500. HMRC argues from this that the appellant was “...experienced in the annual cycle of receiving a notice to file and making arrangements for that return to be completed.”

62. HMRC contends that absent current information from H and/or the Accountants, the appellant should have submitted an in-time tax return based on estimated figures drawn from her 2015/16 tax return, which she had submitted after the breakdown of her marriage and in respect of which the information was available to her.

63. HMRC objects that the appellant’s correspondence with them only began after the due date for filing an online tax return had passed.

*Conclusions on reasonable excuse and special circumstances*

64. Apropos of reasonable excuse, and adopting the test in *Perrin* at [70] to [75], I have decided as follows:

(1) The appellant has discharged her burden of proof in respect of the facts found at [51] above.

(2) I agree with the appellant that the relevant circumstances are those summarised at [57] above.

(a) I have taken into account the particular circumstances of the appellant, in terms of her divorce and the significant effect it has evidently had on her life – not least in terms of the instability it has caused to her housing position.

(b) I have considered HMRC’s inference (at [61] above) that because the appellant had been in the self-assessment tax regime for a number of years that she was experienced in such matters and should therefore have been accustomed to filing tax returns. I find on the balance of probabilities that the appellant had little or no practical experience of such matters because the Accountants dealt with her tax affairs on the basis of instructions and information from H and that the appellant’s involvement was limited to signing tax returns put before her.

(c) Whilst the appellant’s correspondence with HMRC only began after the due date for filing her tax return had passed, the appellant had in fact taken steps beforehand to ascertain her tax position: she had, for example, sent an e-mail to the Accountants on 16 November 2017 asking for details and explaining her “desperate” financial position. That correspondence continued throughout the relevant period.

(d) On 9 June 2018, the appellant sent an e-mail to the Accountants including for the first time the suggestion that “[p]erhaps the best way forward is for me just to duplicate my 2017 return and put that in?” The reply from the Accountants on 11 June does not address that question. The appellant filed her tax return on 14 June.

(e) I consider it relevant that the appellant tried a number of times to compel H to deliver to her relevant financial information, including by means of applying for and obtaining Orders in the Family Division but I note that the extent to which H complied with those Orders is unclear, and his compliance such as it was evidently took a considerable amount of time. In the circumstances, I do not consider that the appellant could have done anything more to obtain information from H or the Accountants and (subject as follows) I accept that they were the only ones in possession of the relevant information. I do not consider that the proposal by the Accountants that the appellant should contact the charity “Tax Help for Older People” to have been a credible proposal and no blame attaches to the appellant if she did not do so.

(f) HMRC’s argument that the appellant should have submitted a timely self-assessment tax return using estimated data based on her 2016/17 return has force. In fact, had the appellant done so, it is likely that she would have avoided the difficulties about these penalties entirely. This is certainly the course of action that would have recommended itself to someone experienced in tax matters. I find that it did not occur to the appellant, who was evidently concentrating her efforts on establishing the actual details for her tax return, until on or around 9 June 2018, when she first proposed it (in the form of a question) to the Accountants. I agree with HMRC that the notes to help individuals complete tax returns

helpfully deal with estimated figures, but I find that the appellant (who was inexperienced in tax matters) had no reason to be aware of them and there is no evidence that they were brought to her attention. The question for me is whether the reasonable taxpayer having the characteristics of the appellant (as I have found them to be) and finding him- or herself in the circumstances in which the appellant found herself to be (as found) would have used estimated figures based on a previous year's tax return to enable them to submit a timely tax return in 2016/17. I find that whilst a taxpayer experienced in the self-assessment regime would probably have done so, a reasonable taxpayer with the characteristics of the appellant and in the personal circumstances in which she found herself would not necessarily do so and that the appellant's failure to do so was accordingly reasonable in the circumstances for her.

(3) I do not consider that the state of mind of the appellant was a material factor.

(4) I conclude that the factors identified above, viewed objectively, are sufficient to constitute a reasonable excuse for her failure to submit her 2016/17 tax return.

(5) Alternatively, or in addition, I find that the appellant's present severe and persistent financial hardship, which amounts to a marked insufficiency of funds, is attributable to events outside her control. As she argues, it is attributable to the bitter divorce she is going through and, on her evidence, the lack of assistance from H. That finding enables me to determine that the restriction in Paragraph 23(2)(a) of Schedule 55 to FA09 (which excludes lack of funds as a reasonable excuse, save where the insufficiency of funds is attributable to events outside the appellant's control) is not in point. This factor is relevant to the wider considerations set out above in respect of reasonable excuse; I hold that it also qualifies as such in its own right.

65. Turning finally to special circumstances, I have some sympathy with the appellant's view that her circumstances throughout have been "both uncommon and exceptional". I have in mind the view stated by the Tribunal in *Advanced Scaffolding* at [102] and approved by the Upper Tribunal in *Edwards* at [74]: "[w]hat matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

66. I note that HMRC had considered the appellant's circumstances in 2014/15 and 2015/16 to merit cancelling penalties and HMRC acknowledged in this appeal that those circumstances persisted throughout the tax year 2016/17. The point is not expressly pleaded by HMRC, but insofar as I can tell, the difference is that in 2016/17, in HMRC's view, the appellant had relevant information from her 2015/16 return and could and should have made a return using estimated figures based on that information. I have already held at [64(2)(f)] above that I do not consider this to be determinative of the question of reasonable excuse. In my view, the same is true of special circumstances.

67. Were I to have had complete freedom on this point, I would have held that because of the circumstances of the appellant's divorce and H's reported conduct, there were special circumstances which merited reducing these penalties to zero. However, I am conscious that I may only overturn HMRC's decision on this point if I conclude that "it is one that no reasonable person could have reached upon consideration of the relevant matters" (Paragraph 22(4) of Schedule 55 to FA09; *Abel* at [19], applying *Wednesbury*). I would not go that far: I consider that HMRC's decision, whilst harsh in its effect, was within the penumbra of decisions that a tax authority could reasonably take. I therefore conclude for the purposes of this appeal that there were not special circumstances.

### **Decision**

68. The appeal is allowed in full and the penalties are set aside.

69. 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.

**JAMES AUSTEN  
TRIBUNAL JUDGE**

**RELEASE DATE: 28 JUNE 2019**