



TC07804

Appeal number: TC/2020/00161

INCOME TAX - individual tax returns - penalties for late filing – penalties for late payment - whether properly imposed - yes- whether reasonable excuse – no - whether special circumstances - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NISAR AHMED DAR

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 3 August 2020 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 8 January 2020 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 6 April 2020 together with correspondence between the parties.

DECISION

Background

1. This is an appeal against late filing penalties visited on the appellant under Schedule 55 Finance Act 2009 (“**Schedule 55**”) for the late filing of individual tax returns for the tax years 2013-14, 2014-15 and 2015-16. And for late payment penalties under Schedule 56 Finance Act 2009 (“**Schedule 56**”) for the tax years 2012-13 and 2017-18. The penalties, details of which are set out in the following section, amount to £5,463.

Evidence and findings of fact

2. From the papers before me I find the following as facts:

(1) The appellant was set up on self-assessment on 6 February 1998. The appellant previously traded as a Café Owner (Chichilo Café Bar & Takeaway) and a takeaway owner (Spice Village). The appellant’s recent trade is as a Motor Mechanic (Dar Autos).

2012-13 tax year

(2) The notice to file (SA316) for the tax year 2012-13 was issued to the appellant on 6 April 2013. The return was filed before the due date on the 20 September 2013 showing a total of £4227.09 due in tax. However, as the tax due was not paid by the due date the appellant incurred late payment penalties totalling £583.

(3) 18 March 2014 – As the tax due was not paid before the respective due date, the appellant was charged a 30 day late payment penalty amounting to £211 in accordance with Paragraph 3(2) of Schedule 56 which was 5% of the tax unpaid at the time (£4,227.09).

(4) 18 August 2014 – As the tax was still due after 6 months after the payment date, the appellant was charged a further 6 month late payment penalty amounting to £211 in accordance with Paragraph 3(3) of Schedule 56 which was 5% of the tax unpaid at the time (£4,227.09).

(5) 14 October 2014 – The appellant made a payment of £1,000.00 towards the outstanding tax due. This reduced the outstanding tax due to £3,227.09.

(6) 24 February 2015 – As there was still tax unpaid 12 months after the payment due date for the 2012/13 tax year, the appellant was charged a 12 month late payment penalty amounting to £161 in accordance with Paragraph 3(4) of Schedule 56 which was 5% of the tax remaining unpaid (£3,227.09).

(7) 6 March 2019, 05 January 2020 & 31 January 2020 – Further payments towards the outstanding tax were received in the amounts of £810.06, £129.15 & £560.06 tax due. This means the tax still outstanding is £1,727.82 (excluding interest).

2013-14 tax year

(8) 29 March 2019 – The notice to file (SA316) for the 2013-14 tax year was issued on the 06 April 2014 with the online filing date being 31 January 2015. The return was received late on the 29 March 2019 therefore the appellant incurred late filing penalties totalling £1,600.

(9) 18 February 2015 – As the tax return was not submitted by the online filing date, the respondents charged the appellant with a first late filing penalty for the amount of £100 under Paragraph 3 Schedule 55.

(10) 2 June 2015 – A 30 day daily late filing penalty reminder was issued for the 2013/14 tax year advising the appellant was incurring daily penalties and had already incurred daily penalties totalling £300.

(11) 30 June 2015 – A 60 day daily late filing penalty reminder was issued for the 2013/14 tax year advising the appellant was still incurring daily penalties and he had already incurred £600 in daily penalties for the tax year.

(12) 14 August 2015 – HMRC charged the appellant daily penalties amounting to £900 and a 6 month late filing penalty amounting to £300 for the 2013-14 tax year under Paragraphs 4 and 5 of Schedule 55.

(13) 23 February 2016 – As the tax return was still outstanding 12 months after the filing date, a further late filing penalty was charged for the amount of £300 for the 2013-14 tax year under Paragraph 6 Schedule 55.

2014-15 tax year

(14) 8 March 2019 – The notice to file (SA316) for the 2014-15 tax year was issued on the 06 April 2015 with the online filing date being 31 January 2016. The return was received late on the 08 March 2019 therefore the appellant incurred late filing penalties totalling £1,600.

(15) 17 February 2016 – As the tax return was not submitted by the online filing date, the respondents charged the appellant with a first late filing penalty for the amount of £100 under Paragraph 3 Schedule 55.

(16) 31 May 2016 – A 30 day daily late filing penalty reminder was issued for the 2014/15 tax year advising the appellant was incurring daily penalties and had already incurred daily penalties totalling £300.

(17) 5 July 2016 – A 60 day daily late filing penalty reminder was issued for the 2014/15 tax year advising the appellant was still incurring daily penalties and he had already incurred £600 in daily penalties for the tax year.

(18) 12 August 2016 – HMRC charged the appellant daily penalties amounting to £900 and a 6 month late filing penalty amounting to £300 for the 2014-15 tax year under Paragraphs 4 and 5 of Schedule 55.

(19) 21 February 2017 – As the tax return was still outstanding 12 months after the filing date, a further late filing penalty was charged for the amount of £300 for the 2014-15 tax year under Paragraph 6 Schedule 55.

2015-16 tax year

(20) 8 March 2019 – The notice to file (SA316) for the 2015-16 tax year was issued on the 6 April 2016 with the online filing date being 31 January 2017. The return was received late on the 8 March 2019 therefore the appellant incurred late filing penalties totalling £1,600.

(21) 7 February 2017 – As the tax return was not submitted by the online filing date, the respondents charged the appellant with a first late filing penalty for the amount of £100 under Paragraph 3 Schedule 55.

(22) 6 June 2017 – A 30 day daily late filing penalty reminder was issued for the 2015/16 tax year advising the appellant was incurring daily penalties and had already incurred daily penalties totalling £300.

(23) 4 July 2017– A 60 day daily late filing penalty reminder was issued for the 2015/16 tax year advising the appellant was still incurring daily penalties and he had already incurred £600 in daily penalties for the tax year.

(24) 11 August 2017 – HMRC charged the appellant daily penalties amounting to £900 and a 6 month late filing penalty amounting to £300 for the 2014-15 tax year under Paragraphs 4 and 5 of Schedule 55.

(25) 20 February 2018 – As the tax return was still outstanding 12 months after the filing date, a further late filing penalty was charged for the amount of £300 for the 2014-15 tax year under Paragraph 6 Schedule 55.

2017-18 tax year

(26) 31 January 2019 – The return for the 2017-18 tax year was filed on the 31 January 2019 showing a total of £810.06 due in tax. However, as the tax due was not paid by the due date the appellant incurred late payment penalties totalling £80.

(27) 19 March 2019 – As the tax due was not paid before the respective due date, the appellant was charged a 30 day late payment penalty amounting to £40 in

accordance with Paragraph 3(2) of Schedule 56 which was 5% of the tax unpaid (£810.06) at the time.

(28) 27 August 2019 – As the tax was still due after 6 months after the payment date, the appellant was charged a further 6 month late payment penalty amounting to £40 in accordance with Paragraph 3(3) of Schedule 56 which was 5% of the tax unpaid (£810.06) at the time.

(29) 10 May 2019 – An appeal letter was received by HMRC from the appellant dated 22 April 2019. The appellant advised that he was unaware of his requirement to submit self assessment tax returns and of the issues he faced regarding his business and family pressure. Furthermore, the appellant stated that he moved from Sheffield to London.

(30) 6 August 2019 – The respondent wrote to the appellant advising he did not have a ‘reasonable excuse’ for the late filing of his tax returns and the failure to pay the tax due by the due date for the tax years under appeal.

(31) 30 August 2019 – the respondents received a request for an independent review from the appellant.

(32) 17 October 2019 – Review conclusion letters were issued to the appellant upholding the late payment penalties for 2012-13 and 2017-18 tax years. Furthermore, the review officer upheld the late filing penalties for the 2013-14, 2014-15 and 2015-16 tax years.

(33) Following receipt of correspondence dated 8 November 2019, on 29 November 2019, the respondents advised the appellant that he should make a formal application of appeal to the Tribunal.

(34) 8 January 2020 – the appellant submitted an appeal to the Tribunal.

(35) 18 February 2020 – As the tax is still outstanding after his appeal to Tribunal for the 2017-18 tax year, a further 12 month late payment penalty amounting to £40 has been issued to the appellant. However no appeal has been received by HMRC from the appellant against this penalty.

The Law

Legislation

3. A summary of the relevant legislation is set out below:

Obligation to file a return and late filing penalties

(1) Under Section 8 Taxes Management Act 1970 (“**TMA 1970**”), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if

filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55.

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(d) failure to file for 12 months (i.e. the 12 month penalty) - 5% of payment due or £300 (whichever is the greater) (paragraph 6).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to me under paragraph 20, I can either give effect to the same percentage reduction as HMRC have given for special circumstances. I can only change that reduction if I think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Obligation to pay tax on time and penalties

(12) Schedule 56 penalises a failure to pay tax on time (as distinct from a failure to file a return on time which is the province of Schedule 55).

(13) Successive penalties are imposed depending on how late payment is made. In the context of income tax (with which this appeal is concerned), the first penalty arises under paragraph 3 of Schedule 56 if the payment is more than 30 days late.

(14) Paragraph 1(4) of Schedule 56 defines the date 31 days after the due date as the “penalty date”.

(15) Paragraph 3 of Schedule 56 imposes further penalties if payment has not been made by 5 months after the penalty date (broadly 6 months after the due date) or 11 months after the penalty date (broadly 12 months after the due date).

(16) The amount of all these penalties is, by virtue of paragraph 3 of Schedule 56, 5% of the unpaid tax.

(17) Paragraph 11 of Schedule 56 imposes requirements in connection with the charging of late payment penalties that are in all material respects identical to those of paragraph 18 quoted above. In particular, therefore, a penalty under paragraph 1 of Schedule 56 has to be both “assessed” and “notified to P”.

(18) Paragraphs 9, 13, 14 and 16 of Schedule 56 contain provisions which are, to all intents and purposes, identical to the provisions of paragraphs 16, 20, 22 and 23 of Schedule 55.

Service of documents

4. Under Section 115 TMA 1970:

“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 HMRC may be so served addressed to that person..... at his usual or last known place of residence, or his place of business or employment.....”

5. Under Section 7 of the Interpretation Act 1978 (“IA”):

“Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is to be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”

Evidence of service

6. The Upper Tribunal in the cases of *HMRC v Nigel Rogers and Craig Shaw* [2019] UKUT 0406 (“**Rogers and Shaw**”), and in *Barry Edwards v HMRC* [2019] UKUT 131 (“**Edwards**”) have provided some extremely helpful guidance regarding the evidence required when considering a dispute between HMRC and a taxpayer as to whether HMRC have given a taxpayer a document (in both cases that document was a notice to file a return under Section 8 TMA 1970).

7. In *Rogers and Shaw* the Upper Tribunal said:

“48..... Conscious that the FTT determines large numbers of “default paper” penalty appeals, we give the following guidance to the FTT on how to address any future concerns that it has on the validity of s8 notices.

49. Paragraph [101] of *Goldsmith* records HMRC’s acceptance (which in our view is correct) that, in order to impose a penalty for late filing of a tax return under Schedule 55, HMRC must prove that a notice under s8 was in fact served. Before us, HMRC seemed less ready to accept this point, but we consider it follows from the following passage of the judgment of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC):

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.

50. It follows that, if HMRC fail to provide any evidence at all to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice. Where HMRC have given some evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC’s burden of proof. The FTT’s assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice.

Evidence to the effect that HMRC's systems record a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so."

8. And in *Edwards*:

"47. Mr Ripley submitted that HMRC needed to demonstrate to the FTT that notices to file answering the statutory description in s 8 TMA 1970 have been properly addressed and sent to Mr Edwards. However, HMRC did not produce any copies of the notices to file nor did they produce any witness evidence explaining that valid notices to file had been properly issued but could not be produced for some reason. The FTT appear to have accepted HMRC's factual case merely on the basis of an assertion by HMRC's representative at the hearing.

48. As regards the material referred to at [12] to [14] above, Mr Ripley submits that none of this demonstrates that notices to file were sent or, if they were, that they were sent to the correct address for the following reasons. There was no evidence before the FTT explaining the various screenshots which the material comprised. In particular, there is no evidence of the specific dates on which the notices to file were sent, the fact that the system records that returns were received does not demonstrate that notices to file were in fact sent, and, even if they were, there is no evidence to demonstrate the address to which they were sent. There was nothing to indicate that such address was still valid for the last two of the three tax years to which this appeal relates. In essence, the SA Notes merely evidence the contact that HMRC have had with Mr Edwards over the years.

49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), 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 [HMRC’s Presenting Officer]; but there is no such evidence before us.”

52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be “anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file...”. The FTT declined to infer that the production of a “Return Summary” sheet showing “Return Issue date” with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision

53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:

“... 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.”

54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an “absence of cogent and/or reliable evidence of system”, finding that the documentary evidence produced was “no more than equivocal”.

55. Mr Ripley submitted that the position was the same in this case, that is that the FTT was not entitled to draw an inference from the material provided by HMRC that the relevant notices to file had been sent.

56. We accept that on its own the material before the FTT would not have enabled the FTT properly to draw the necessary inference that notices to file were sent to Mr Edwards. However, there was other evidence available to the FTT on the notice to file issue, namely the oral evidence that Mr Edwards gave at the hearing, as well as the entries in HMRC’s records recording its interactions with Mr Edwards, and in particular the sending of penalty notices and the subsequent communications with Mr Edwards in relation to those notices. Mr Edwards did not dispute the fact that he was sent the various penalty notices and reminders, as recorded by the FTT at [10] of the Decision.”

Case law

9. A summary of the relevant case law is set out below

Notification of penalty

(1) As can be seen from [3(4)] above, in order to visit a daily £10 penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

(2) These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*").

(3) The Court of Appeal decided that:

(a) the high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.

(b) a notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three month's late and specified the date from which the penalties were payable. This was in compliance with the statute.

(c) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the TMA 1970 which the Court of Appeal held applied to the notice. And so

they concluded that the failure to specify the period for which the daily penalties had been assessed did not invalidate the notice.

Reasonable excuse

(4) The test I adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

"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?"

(5) Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

(6) Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

"The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

(7) HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

"So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".

"In HMRC's review it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

(8) The approach that I adopt when considering a reasonable excuse defence is that set out in the Upper Tribunal Decision in *Christine Perrin v HMRC* [2018] UKUT 156.

(9) In *Perrin*, the Upper Tribunal made the following comments:

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

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

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

72. Where the facts upon which the taxpayer relies include assertions as to some individual’s state of mind (e.g. “I thought I had filed the required return”, or “I did not believe it was necessary to file a return in these circumstances”), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in *In re B (Children)* [2008] UKHL 35, [2009] 1AC 11 at [15]:

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

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of

any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

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

.....

82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that “ignorance of the law is no excuse”, and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation.”

Special Circumstances

(10) While “special circumstances” are not defined, the following extract from the Upper Tribunal decision in *Edwards* sets out the correct test.

“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.”

Burden and standard of proof

10. The burden of establishing that the appellant is prima facie liable for penalties which have been properly notified and assessed lies with HMRC. They must also establish that they had served on the appellant a notice under Section 8 TMA 1970 to file a tax return for each of the relevant years.

11. The burden of establishing that he should not be liable for such penalties because, amongst other reasons, he has a reasonable excuse, or that there are special circumstances lies with the appellant.

12. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Late appeal

13. The appellant had notified his appeal to the Tribunal slightly late. HMRC consider that it is in the interests of justice if I were to hear the appeal notwithstanding this and I agree. I have a wide discretion under the Tribunal Rules to admit a late appeal and I exercise that discretion in favour of the appellant in this appeal.

Service of relevant notices

14. To engage the penalty regimes in Schedule 55 and Schedule 56 HMRC must have given the taxpayer a valid notice to file a tax return. This is the case even if the appellant does not challenge HMRC’s assertion that such notices were served on him (as in this case). I am satisfied on the evidence that they have done so. They must also assess the appellant to the penalties and notify him of that assessment. I am also satisfied, on the evidence, that HMRC have done this.

15. As evidence that they have given the taxpayer a notice to file a tax return for each of the years under appeal, HMRC have provided:

- (1) A pro-forma form SA316 notice to file a tax return which tells a taxpayer of its obligations to submit a self-assessment tax return.

(2) A computer printout entitled “Return Summary” which suggests that a return of the type “Notice to File” was issued to the appellant on 6 April in the relevant tax year, the due return dates, and the date of receipt of the return (for example, for the in time return for 2012-13, the date of receipt is 20 September 2013).

(3) A computer printout of the appellant’s address history.

16. This is very weak evidence, on its own (see the comments to this effect in *Edwards*), and without more I would be disinclined to accept it. However, there is other evidence of receipt as a result of which I am prepared (only just) to accept that valid notices to file a tax return were given to the taxpayer for each of the years under appeal. This evidence comprises of:

(1) The fact that the appellant has not disputed that he received notices to file (I do not accept that his vague suggestions that he made a mistake “unknowingly”, or that “the moment I came to know about my tax issues..... I tried my best to keep them updated” is evidence that he did not receive the notices to file).

(2) He received and responded to the penalty notices which were sent to the same addresses as HMRC assert the notices to file were sent.

(3) He submitted his returns for 2012-13 and 2017-18 on time. There is no suggestion that HMRC’s system was different in those tax years than in any of the others.

(4) His accountant friend who assisted in submitting his late returns has not said (either to the Tribunal or via the appellant) that the appellant had not received the returns (even though that accountant friend told him that he had to file returns; I do not however take this as meaning that he did so having seen notices to file).

17. I now turn to the penalty notices.

18. As evidence that they have properly assessed and notified the penalties on this appellant, HMRC have adduced the following:

(1) The pro-forma SA316 notice to file (which also informs a taxpayer of the late filing penalty regime).

(2) Extracts from the appellant’s self assessment notes containing entries indicating that late filing penalty reminder letters were sent to the appellant on certain dates.

(3) Pro-forma’s of those reminder letters.

(4) Pro-forma notices of late filing and late payment penalties which include provision for inclusion of the period in respect of which the penalty is charged.

(5) A computer record of the appellant’s address history.

(6) In respect of the late filing penalties, a computer printout headed “View/Cancel Penalties” which summarises the dates on which penalty notices had been sent to the appellant.

(7) A witness statement given by Officer Georgina Mitchell which provides evidence of the system adopted by HMRC for sending penalty notices and its relationship with its print provider.

19. This evidence still suffers from the same lack of taxpayer specificity as does the evidence of service of a notice to file a tax return. But the witness statement of Officer Mitchell is helpful in providing corroboration for the other paperwork and the assertion made by HMRC that the penalty to notices and reminder letters were sent out on the dates so asserted.

20. As in the case of the notices to file a return, the appellant does not challenge receipt of the documents which HMRC say were sent to him in respect of the penalties.

21. As stated above, therefore, it is my view that on the balance of probabilities those notices and reminder letters were sent to the appellant at the correct address and they contained the required statutory information.

22. I am also satisfied that as far as the late filing penalties are concerned HMRC have made a decision of the kind required by paragraph 4(1)(b) of Schedule 55 since the “generic policy” referred to in *Donaldson* applies to all taxpayers including this appellant.

Appellant’s grounds of appeal

23. The appellant in his notice of appeal and in correspondence puts forward a number of grounds of appeal. He has always been honest and law-abiding; he completed his 2012-13 tax return but later on his business went bust and he has had to struggle to earn his livelihood; he was very stressed at this time and his family circumstances were unhappy ones; he was not aware that he had to submit tax returns even if he was not in business; his mother lives in Pakistan and has been ill recently which is another factor in his depression; he has rectified any mistakes that he has made; the penalties are unfair; he asks that I treat his position sympathetically and that I waive the penalties and interest.

Respondents’ submissions

24. The respondents submit that: the appellant does not dispute that his tax returns for tax years 2013-14, 2014-15 and 2015-16 were filed late, nor that he did not pay his tax for 2012-13 and 2017-18 by the respective due dates; the appellant’s only substantial submission is that he has a reasonable excuse for these failings; the appellant has been in the self-assessment regime since 1998, and has managed to submit tax returns for a number of years on time and pay his tax on time; I have no jurisdiction to consider the appellant’s assertion that the penalties are unfair; HMRC appreciate that the loss of his business would have been difficult for the appellant but expect him to have made the necessary arrangements for payment of the tax as the returns for the tax

years in question were filed on time; there is still £1,727.82 of tax (excluding interest) owing for the 2012-13 tax year, and £810.06 owing for the 2017-18 tax year; the appellant has provided no documentary evidence supporting his contention that he was under massive stress as a result of that closure of his business and his personal family issues (and in any event he would still have been aware of his obligation to file his tax returns and pay his tax on time); even if he had made a mistake, that is not a reasonable excuse; HMRC have considered special circumstances and do not believe that there are any which apply to this appellant.

Reasonable excuse

25. The test of whether a taxpayer has a reasonable excuse is set out above. I must consider whether this appellant's failure to submit returns on time and to pay his tax late was reasonable judged by the light of a reasonable taxpayer who is conscious of and intends to comply with his obligations regarding tax; and in considering this I can take into account the circumstances of this particular taxpayer and his experience with the tax system.

26. I am afraid that judged by these criteria, the appellant has no reasonable excuse. In the years before the first year of default under appeal (2012-13) the appellant appears to have had no difficulty in complying with his self-assessment tax obligations, both as regards filing and paying his tax. In that tax year he completed a tax return on time but failed to pay the tax. His reason for doing so is somewhat imprecise (I take it that his business went bust and that his family circumstances were difficult in that tax year). But lack of funds (if this is what the appellant is asking me to find, he does not say so in his submissions) cannot be a reasonable excuse. And no corroboration has been given by the appellant of his assertion that his business went bust, nor, specifically, of the personal and financial implications of that event and why they prevented him from submitting returns or paying his tax, in each case on a timely basis.

27. I am sympathetic towards the appellant as regards his mother's illness, and the fact that she is in Pakistan. However that appears to be something which is current, and no evidence has been adduced that this illness, and its effect on his mental health, was something which stretches back to 2012-13.

28. I have found as a fact that the appellant received the notices to file tax returns for all of the years under appeal. A reasonable taxpayer in the circumstances, who was in doubt as to whether he needed to submit a return in response to those notices in years when he was earning nothing, would have contacted HMRC, or checked on HMRC's website to resolve that doubt. There is no evidence that this taxpayer did either.

29. The appellant asks that I take a sympathetic approach towards him and that he should not be penalised for his mistakes. And that he has put things right. Yet he still owes a substantial amount of tax to HMRC for the 2012-13 and 2017-18 tax years. And, as submitted by HMRC, the test is whether the appellant has a reasonable excuse not whether he has made a mistake.

Special circumstances

30. Like HMRC, whilst I am sympathetic to the business and personal circumstances of the appellant, I do not think that they are sufficiently special that it is right for me to reduce the amount of the penalties. There are a number of reasons for this. Firstly there is, as I have said above, very little evidence of the precise consequences of the appellant's business failure has been submitted by the appellant. Secondly there is little evidence of the precise time at which that occurred nor the period over which it affected him. I find it difficult, frankly, to consider that it is a special circumstance if it arose in 2012-13 yet he is still claiming it to be a justification for failing to pay tax on time in 2017-18. HMRC have considered the situation and have concluded that there are no special circumstances, and I do not find that conclusion to be flawed.

Proportionality

31. HMRC, in their statement of case, have (somewhat obliquely) raised the issue of proportionality and have said that in their view, the penalties are justifiable because they are there to promote the efficient operation of the tax system. The appellant has not suggested that the penalties are disproportionate (even though he has suggested they are unfair). But I have considered the issue and it is my view that the penalties are proportionate. In view of the justification for the imposition of penalties (namely that it is essential for the proper functioning of a self-assessed tax regime that the taxpayer provides timely and accurate information and pays tax on time), I consider that penalties for late filing and late payment do not go beyond what is strictly necessary for the objective pursued. The penalties are far from being not merely harsh but plainly unfair.

32. I have no jurisdiction to consider the appellant's contention that the penalties are unfair.

Decision

33. In light of the above, I dismiss this appeal.

Appeal rights

34. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 10 AUGUST 2020