TC08014

VAT – Default Surcharges – Section 59(7) and 71 VAT Act 1994 - INCOME TAX — late filing and late payment penalties - paragraphs 23 and 16 of Schedules 55 and 56 to the Finance Act 2009 – forty-one penalties between 2007 and 2017 - issue: reasonable excuse - CEC v Steptoe, Perrin v HMRC and Raggatt v HMRC considered – self-employed barrister – late payment of fees by government agencies: legal services commission (LSC) and crown prosecution service (CPS) – cash flow difficulties caused by large aged debt when the LSC and CPS were slow to pay – appeal dismissed for all VAT default surcharge periods - appeal allowed for one income tax late payment penalty for reasonable excuse - no special circumstances

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02755 (V)

BETWEEN

ROBIN ST JOHN SELLERS **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES
GILL HUNTER

The hearing took place on 11 November 2020. With the consent of the parties, the form of the hearing was V (video) through the Tribunal video platform (TVP). A face to face hearing was not held because of the ongoing pandemic and public health risks during the second national lockdown. It was in the interests of justice to proceed in this manner. A fair remote hearing was possible, the facts of the case were not substantially in dispute and the issues were relatively simple points of fact and law. The documents to which we were referred were the parties' skeleton arguments, authorities bundle and the hearing bundle, all supplied in electronic format.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellant appeared in person

Rosemary James, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

Post hearing submissions were received from the parties on 18, 25 and 30 November 2020

DECISION

INTRODUCTION

1. The issue in this appeal is whether Mr Sellers ('the Appellant'), a practising barrister, has established a reasonable excuse for the late filing and payment of his VAT and self-assessed Income Tax such that forty-one surcharges and penalties imposed upon him by Her Majesty's Revenue and Customs ('HMRC') between 2007 and 2017 should be cancelled.
2. The Appellant contends that he has a reasonable excuse for late payment of these taxes because the government agencies who were due to pay his fees for advocacy in the criminal courts, such as the Crown Prosecution Service ('CPS'), Legal Aid Agency ('LAA') and Legal Services Commission ('LSC'), failed to pay him within stipulated or reasonable timescales. He submits that he was unable to pay one branch of the government (HMRC) because another branch of government, the executive agencies of the CPS, LSC or LAA, delayed or were unreasonably slow to make payments due to him which severely restricted his cash flow and ability to meet his tax liabilities.

The penalties under appeal

3. The appeal concerns forty-one surcharges and penalties issued by HMRC to the Appellant, totalling £37,568.42, as follows:
    i. twenty-one default surcharges for Value Added Tax (VAT) totalling £13,209.42 for the periods 09/07, 03/08, 12/08, 09/09, 12/09, 03/10, 06/10, 09/10, 03/11, 06/11, 09/11, 12/11, 03/12, 06/12, 09/12, 03/13, 06/13, 09/13, 12/13, 03/14, and 12/14 for late filing and/or late payment issued in accordance with Section 59 of the VAT Act (VATA) 1994.
    ii. one self-assessment (SA) late filing penalty for the 2010-11 tax year, in accordance with Schedule 55 of the Finance Act (FA) 2009.
    iii. nineteen SA late payment penalties totalling £24,359.00 for the tax years 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17, issued in accordance with Schedule 56 FA 2009.
4. The surcharges, penalties and relevant dates of filing and payment are shown in the Schedule of Defaults and Payments for each respective tax, Appendices 1 and 2 to this decision.
5. The Schedules of Defaults and Payments for the VAT and SA were completed in July 2019. Therefore, the information contained on payments made by the Appellant but received after this time is not included. This does not affect the substantive appeal, which concerns the original late payment and/or filing.

Facts

6. HMRC relied on a bundle of documents. The Appellant's evidence consisted of two witness statements and oral evidence that he gave during the hearing, including answering a number of the Tribunal's questions.
7. We found the Appellant to be an honest and open witness who went out of his way to be helpful. His answers were fair and reasonable. We recognise that he has suffered payment difficulties and struggled financially during the relevant years. We have real sympathy for the toll this has taken on him personally. There is also no doubt that he was well intentioned throughout this period, wanting to meet his tax liabilities, and that the

matters in question have caused him significant stress. Much to his credit, the Appellant has made active changes to adjust his finances and settled all his tax liabilities in recent years. In 2019 and 2020 he as paid around £92,000 to HMRC in respect of outstanding taxes by working as a lecturer and continuing in practice. The outstanding sums still owed to HMRC are limited to some of the penalties or surcharges in question.

8. We find the following facts on the balance of probabilities.

Vat Default Surcharges

9. The Appellant is a barrister and registered for the purpose of VAT as a sole proprietor with effect from 1 April 1996. He submitted his VAT returns on a quarterly basis.

10. The Appellant's history of defaults in filing returns and making VAT payments is shown in the document 'Default Surcharge Schedule of Defaults and Payments' (see Appendix 1). This shows that the Appellant was in the default surcharge regime from VAT period 09/07 onwards until 06/15. This document also shows when the default surcharges under appeal were issued.

11. On 3 January 2018, the Appellant's Agent requested a review of the default surcharges and for a copy of their client's ledger. HMRC responded as follows:

    i. On 19 January 2018, HMRC sent a copy of the ledger to the Appellant.

    ii. On 1 March 2018, HMRC reviewed the surcharges issued to the Appellant for the VAT periods 03/11, 06/11, 09/11, 12/11, 03/12, 06/12, 09/12, 03/13, 06/13, 09/13, 12/13, 03/14, 12/14, 06/15, 09/16 and 12/17. As a result of this review, the surcharge issued for the 06/15 VAT period and the help letter issued for the 09/16 VAT period were removed. Subsequent periods were adjusted accordingly.

12. On 27 March 2018, the Appellant submitted his appeal to the Tribunal against the VAT default surcharges.

Self-Assessment Penalties

13. The Appellant registered for self-assessment of his income tax of his profits as a self-employed barrister with effect from 1 March 1995.

14. The Appellant's penalty history is set out in the Appendix 'Self-assessment Schedule of Penalties and Payments' (Appendix 2). It shows that the Appellant has been issued with one late filing penalty and nineteen late payment penalties for tax years 2010-11 to 2016-17. This schedule shows when the penalties under appeal were issued.

15. On 3 January 2019, the Appellant's Agent requested a review of the self-assessment penalties issued to the Appellant. On 22 January 2019, HMRC responded, rejecting their request for a review as it was late.

16. On 14 February 2019 the Appellant submitted his appeal to the Tribunal against the self-assessment penalties.

17. The appellant's appeal to HMRC under s31A Taxes Management Act 1970 ('TMA 1970') was made outside the statutory deadline. HMRC did not object to the appeal being heard by the Tribunal even though the appeal to HMRC was submitted late. The ultimate decision on admitting the appeal rests with the Tribunal. Given that HMRC stated in their Statement of Case HMRC that they have no objection to the taxpayer's appeal under s31A being made late we are satisfied that HMRC have now given consent under s49(2)(a) TMA 1970.

Undisputed matters

18. It is not in dispute that the Appellant is unable to appeal interest due on penalties that have been issued. HMRC accept that if the Tribunal allows the appeal, any associated interest will be cancelled. Equally, if the Tribunal dismisses the appeal any interest is due and payable.

19. The Appellant has not disputed that he received, the notices to file the returns and make the tax payments, the default surcharge notices and self-assessment penalty notices under appeal. The burden is upon HMRC who have proved that these notices were given.

20. The Appellant does not dispute that he filed his returns and/or paid late in respect of the VAT and self-assessment liabilities. The issue in dispute is whether the Appellant had a reasonable excuse for such late filing and payments.

The Appellant's evidence

21. In summary, the Appellant believed he had a reasonable excuse for all late payments such that the tribunal should overturn the imposition of the late payment penalties, surcharges and interest charged thereupon. He believed he had a reasonable excuse in that he was unable to meet his tax liabilities as a result of significant delays in payment by the Legal Services Commission ('LSC') or Legal Aid Agency ('LAA') and the CPS of fees that were earned for advocacy services provided by him when prosecuting or defending legally aided clients in the criminal courts. He believed that the payment delays at the material times are well documented and experienced by a number of self-employed barristers.

22. The Appellant was called to the Bar in November 1994 and practised predominantly in the criminal courts from 2000 onwards. The overwhelming majority of his income was therefore derived either from the Legal Services Commission and its successor, from 1 April 2013, the Legal Aid Agency (for defence advocacy) or the Crown Prosecution Service (for prosecution advocacy). He believed that the reduction in publicly funded fees in recent years is well known and documented. What he believed was not so well publicised are the delays in payment experienced by practitioners.

23. He believed he was one of many individuals at the criminal Bar who fell into financial difficulties as a result of very poor cash flow from public funds. His aged debt from those two agencies of the Crown began to rise and peaked at £81,926 in September 2010 and £66,000 in May 2013. He exhibited a schedule of his levels of aged debt which is set out beneath. The peaks of his aged debt occurred in June to December 2010, September to December 2012 and May to November 2013 are highlighted in bold:

Date	total	qeb	23
01/01/2009	£28,139.46		£28,139.46
01/03/2009	£25,956.58		£25,956.58
01/06/2009	£11,907.34		£11,907.34
01/09/2009	£23,894.68		£23,894.68
01/12/2009	£15,408.2		£15,408.2
01/01/2010	£24,698.35		£24,698.35
01/03/2010	£20, 100.17		£20,100.17
01/06/2010	**£57,174.91**		£57,174.91
01/09/2010	**£81,926.08**		£81,926.08
01/12/2010	**£11,006.67**		£11,006.67
01/01/2011	£8,685.57		£8,685.57
01/03/2011	£7,948.67		£7,948.67
01/06/2011	£32,681.53		£32,681.53
01/09/2011	£17,722.68		£17,722.68
01/ 12/2011	£18,249.12		£18,249.12
01/01/2012	£12,886.80		£12,886.80

01/03/2012	£23,913.52		£23,913.52
20/03/2012	£30, 115.00		£30,115.00
01/06/2012	£29,412.79		
01/09/2012	**£45,347.85**		
11/10/2012	**£32,594.00**		£32,594.00
01/12/2012	**£40,247.94**		
31/03/2013	£22,152.00		£22,152.00
05/04/2013	£18,364.00	£18,364.00	
20/05/2013	**£66,549.00**		£66,549.00
26/06/2013	**£54,227.00**		£54,227.00
20/ 10/2013	**£16,789.00**	£16,789.00	
21/10/2013	**£46,458.00**		£46,458.00
20/11/2013	**£50,817.00**	£8,044.00	£42,773.00
20/01/2014	£32,484.00		£32,484.00
23/01/2014	£22,573.00		£22,573.00
24/01/2014	£ 14,012.00	£14,012.00	
30/09/2014	£33,579.00	£33,579.00	
28/01/2015	£31,608.00	£16,243.00	£15,365.00
average	£29,695.00		

24. To put his aged debt figures in context, the Appellant's self-employed profits from his earnings at the Bar and income tax liabilities for the relevant years were as follows:

Tax year	Profit after expenses	Tax Liability
2010-2011	£127,549	£47,370.30
2011-2012	£110,363	£41,703.48
2012-2013	£119,074	£46,577.88
2013-2014	£61,060	£19,422.25
2014-2015	£87,155	£28,489
2015-2016	£67,227	£20,533.80
2016-2017	£91,533	£30,212.80

25. The Appellant believed he had received relatively modest earnings at the criminal bar compared to other specialisms (although not compared to the average income of the population). The Appellant believed the late payments by the government agencies resulted in his high aged debt and this placed extreme stress on his financial position. By 2014 it forced him into mortgage arrears. All the time this was occurring he was receiving demands to pay income tax and VAT from HMRC, another arm of the government to the agencies which were failing to pay him within a reasonable time. He believed that there was no method open to a practitioner to sue the Crown for outstanding legal aid debts in order to speed up payments.

26. The lack of income caused the Appellant's credit rating to plummet and he was unable to obtain borrowing as a direct result. The problem was further exacerbated by the credit crunch from 2009 onwards when the banks, once content to provide large unsecured overdraft facilities to the members of the Bar, hardened their position. Lloyds bank unilaterally halved his facility and then required him to secure the borrowing to re-establish the levels that he needed to survive whilst awaiting payment.

27. On top of that there was a further development in that both the Legal Services Commission and the Crown Prosecution Service centralised their payments. The Appellant believed that every Crown Court used to have a payments officer dealing with advocates' fees. He believed there were at least eighty staff administering bills. This was replaced with a single unit that he believed was significantly understaffed. This built in further delays. The LSC in its monthly bulletins asserted that it would not answer telephone queries as this was slowing down the processing. The Appellant believed that the Government agencies were frequently in breach of their publicly stated deadlines for the settlement of fees.

28. The Appellant had endeavoured to address this problem by entering into time to pay arrangements ('TTP') for his tax liabilities over a number of years whilst he awaited payment. He entirely accepted that he defaulted on some of these as he was unable to meet the arrangement due to delays in receiving monies. He believed this was often used by HMRC to justify rejecting cooperation. He believed such a stance to be unjust bearing in mind the cyclical nature of the problem.

The history

29. The Appellant reflected that the problems occurred from 2009 onwards. The fundamental problem was the delay in payment by the above-mentioned government agencies impacted significantly on his cash flow as they were the sole source of income over the periods involved. He did very little privately funded work given his practice specialising in criminal law.

30. There was an accumulation of circumstances that aggravated the fundamental problem which were:
    (i) The general financial crisis that caused a reluctance on the banks to continue to fund higher levels of overdrafts. There was a reduction in his ability to borrow from £40,000 to £25,000 which required him to make secured provisions.
    (ii) The change in the basis of taxation of barristers from a simple receipts basis (cash basis accounting) to an invoice based system (traditional accounting including being taxed on earnings or aged debt) and 32 increases in liability as a result. His accounts for the year 09-10 to 14-15 were calculated on the invoice or earnings basis and final catch up charge was applied in the year 12-13. In the year 14-15 he began employment with the City University consequently in the year 15-16, 16-17, his turnover from being a self-employed barrister reduced under the new cash basis threshold of £77,000 therefore he used the cash basis for the years 15-16 and 16-17. Under the new rules effective from 2017-18 all taxpayers were entitled to adopt the cash basis of accounting if their turnover was less than £150,000 therefore the cash basis once again was applied.

(iii) He believed there was an approach by employees of the LSC to challenge counsel's fee claims that necessitated reference to a costs judge to resolve disputes. In particular in the case of *R v Wright, Doak & others* a matter had to be referred as staff sought to avoid the payment of fees where there were jury's discharged and sought to pay only at a later date as part of one elongated trial with an adjournment of six months as opposed to two distinct trials. This was resolved in favour of the latter approach but only after causing a delay of a year from the presentation of the initial fee note.

31. These factors exacerbated the Appellant's financial situation.

32. The Appellant took the decision in the summer of 2014 that the status quo was no longer a viable situation and started full time employment in September 2014 at City University Law School which was a salaried PAYE post. He had therefore become in receipt of a salary from then onwards. He continued to practise at the Bar and his ongoing solution to discharge any tax liability was to do so from self-employed earnings at the bar. This proposal was first put to HMRC in a letter dated 26th of March 2015. That proposal was rejected.

33. In December 2014 HMRC served a statutory demand upon the Appellant but took no further action. He assumed that lapsed over the period of the following four months. Since that period of time the Appellant sold his residential property, paid off his secured overdraft and applied his share of the equity to pay to HMRC. He also applied earnings made in 2015 as per his proposal of March 2015 notwithstanding HMRC's disagreement and his repeated offers to negotiate in correspondence dated 9 April and 8 September 2015.

34. The Appellant's tax adviser attempted in the interim to definitively establish the true level of liability. This was complicated by the application of interest and late payment penalties. It was the Appellant's belief, that the amount claimed in the statutory demand was incorrect.

35. Specifically, the Appellant's schedule of aged debt set out above was an important demonstration of the levels of aged debt that he was carrying in relation to his practice. It was compiled from aged debt reports from chambers where he held a tenancy.

36. Notably, the amounts of the Appellant's aged debt became significant twice in close succession. It rose to in excess of £80,000 in September 2010 and then £66,500 in May 2013 i.e. within 2 years 8 months. It is also of note that that his problems in payment of tax liabilities manifested themselves particularly in 2011. He asserted that this was not a coincidence and was a direct cause of the issue. Whilst one such peak may have been tolerable the second was, in consequence, beyond that which could be managed given the conditions above and the closeness in time.

37. This led to the position that the Appellant would be owed large amounts of money by one arm of government (the CPS or LSC) whilst being charged tax on received sums and, on occasion, unpaid sums on the invoice basis by another executive agency of government (HMRC). He believed that this resulted in an unfair and unreasonable position. It represented circumstances beyond his control.

38. The Appellant believed that to impose penalties and interest upon those penalties for late and non-payment borne out of that unfair position was unconscionable and he had established a reasonable excuse such that the imposition of the penalties should be reversed.

39. Whilst HMRC relied on the counterarguments such as the vagaries of "enterprise" or a "known payment risk within the normal hazards of trade" not being capable of founding a reasonable excuse, he believed that this failed to take into account factors that distinguish practice in the criminal courts as a self-employed barrister from normal commercial enterprise.

40. Most importantly the Appellant believed that barristers are not able to sue for unpaid fees from government agencies as any other trader would logically do to a reluctant payer. He believed it would also be highly unusual that a trader would be charged fees or have a liability with the same organisation that owed them considerable sums without a simple and practicable set off being an available accounting practice. He believed that exposure to a late payment penalty system on a statutory footing is also another distinguishing feature.

41. The Appellant believed that HMRC were wrong and acted unfairly in their imposition of such penalties and the pursuance of sums when amounts were unpaid to the appellant. The late payment therefore put him in a position where he was unable to save funds for his future tax liability.

42. The Appellant accepted that the tax liability itself or interest on that liability was clearly due. Indeed, the position is at the time of the hearing that all his self-assessment liability has been settled. This included some £24,000 of penalties and interest thereon. He believed that this figure is linked to the outstanding VAT liability of less than that sum, in that had the LSC and CPS paid on time he would have avoided the self-assessment penalties such that he would have been able to discharge his VAT liability.

43. The Appellant also believed that this global approach perhaps avoided having to rely on his ancillary point that he believed there to have been an inconsistent and puzzling application or allocation by HMRC of sums that he had paid towards his liabilities such that it has been difficult if not impossible to reconcile those figures.

The steps the Appellant took to remedy his cash flow difficulties caused by late payment of public funds which he believed provided a reasonable excuse for late payment of his tax

44. The Appellant confronted the trading conditions that impacted upon his cash flow by taking a number of steps over time. The Appellant believed that he had taken all the steps that a reasonable taxpayer, seeking to comply with their tax liability would take to remedy the difficulties caused by the late payment of his fees from public funds. These included:

    i. Seeking recourse to a Costs Judge to recover fees (see the case of R v Wright).

    ii. Seeking greater overdraft facilities and secured loan arrangements.

iii. Seeking to move away from publicly funded work (in 2013-2014 by moving Chambers).

iv. Seeking paid employment as an alternative source of funds (his lecturer role at City University from September 2014 onwards).

v. Seeking to secure borrowing to meet liability (including refusal of loans from Barclays, Lloyds and other third parties).

vi. Seeking informal borrowing from family members to meet some of the liability.

vii. Selling property and using the proceeds of sale to discharge liability when available (The Appellant sold his UK home in 2015 releasing £60,000 in equity, most of which the Appellant paid to HMRC. Thereafter he took up renting. The Appellant also sold his French property, which he had acquired in 2005, and paid the £18-20,000 of equity to HMRC in furthers lumps sums).

viii. Seeking to engage with HMRC for comprehensive arrangements (including correspondence for comprehensive offers for resolution and refusals by HMRC and a statement of Mr Kemp his accountant).

The Appellant's belief in the reasonableness of his excuse

45. The Appellant believed he had therefore discharged the burden of establishing a "reasonable excuse". The reasons for insufficiency of his funds to make payments of tax on time were for reasons outside of his control such that the Tribunal should order that the penalties be cancelled.

46. When asked by the Tribunal during the hearing how he had been able to settle his tax obligations, the Appellant stated that he had finally settled all his self-assessment liabilities through a combination of selling his two properties, receiving loans from family members and receiving the fees due to him from the government agencies.

47. The Tribunal specifically asked him whether during the relevant time he reasonably believed he could 'trade out' of his difficulties through practice at the Bar alone. He stated he held a reasonable belief that the aged debt and future anticipated earnings would be sufficient to meet the tax debts.

48. He collated the figures from the tax returns for the periods to show the earnings and the tax liability. He compiled the table of his profits and liabilities which is set out above and repeated below.

Tax year	Profit after expenses	Tax Liability
2010-2011	£127,549	£47,370.30
2011-2012	£110,363	£41,703.48
2012-2013	£119,074	£46,577.88
2013-2014	£61,060	£19,422.25
2014-2015	£87,155	£28,489

2015-2016	£67,227	£20,533.80
2016-2017	£91,533	£30,212.80

49. He stated that these figures reinforced his belief that he could trade his way out of his tax debts. The picture was one of a business that was still operating, profitable and owed money. The Appellant believed the only difficulty that the business was encountering was cash flow due to the delays in payment from the Legal Aid Agency and the Crown Prosecution Service. He believed there had always previously been a level of forbearance exhibited by HMRC to criminal barristers which he learnt of anecdotally from senior colleagues.

50. The Appellant stated that his work on cases could not be billed until they were finished under the statutory schemes. It would merely be a matter of chance if those fell at the same time as HMRC liabilities fell due so this was always a problem characteristic of the sector. There were often periods when he would receive nothing and have to dip into any funds saved to meet tax liabilities merely to live.

51. He believed that if a reasonable belief in the ability to trade out of the tax debt based on anticipated receipts did not constitute a reasonable excuse for late payment of taxes, the criminal Bar would have had to cease practice en masse. It would not be reasonable for them to continue.

52. In terms of the decision to take various steps to address the levels of the debts, he believed a number of points can be made. Firstly, the move between Chambers to road test access to private funded work was made in 2013. That was at a time when the aged debt levels were still high so there was a notional cushion that he could take advantage of whilst he sought to build up a private practice.

53. When that step did not provide the answer, he made the decision to seek paid employment which started in September 2014. On reflection, ironically, it must be recognised that that step caused his income to drop so it could be argued that he actually *decreased* his ability to meet the liability as opposed to continuing in practice. His move was to solve the financial difficulty of receiving very little regular money. Once achieved he was in receipt of a regular salary but of smaller earnings. He then had to augment that salary with continued work in practice and he could then apply those fees to the tax liability.

54. It took about 12 months to arrange the paid employment in such a way that made the co-existence of the two feasible. It was at that stage, in late 2014-2015, that he made the decision to free up capital by selling his house in the UK and move into rented accommodation. The house in France was also on the market but that was always going to take a long time to sell. The Appellant potentially would not have sold his house save for the pressure he was coming under from HMRC regarding bankruptcy and civil action which is evidenced in the correspondence and the contact notes. By late 2015 – 2017 the Appellant was applying sums from the sale of the UK and French properties.

55. The Appellant did resort to borrowing from family members in 2016 and again that was in this intermediate period. Soon after that his income from practice started to increase and sums were applied to the liability again from that time. His credit rating had been

undermined by the lack of payments being received on time so it was necessary to rebuild that at the same time. He believed that the tribunal should not look therefore at his recourse to selling property or taking family loans as confirmation that there was no reasonable belief that he would be able to settle the liability through 'trading out' of the situation. It was a more complex picture than that.

56. He believed that perhaps it was merely evidence of the failure of the government's payment systems that he decided to take the steps that he did. The Appellant had always held the belief that had he remained in practice and the agencies had paid he could have traded out of the situation without recourse to capital and family borrowing.

57. To demonstrate the point, he relied on the example of the period from January 2019 to January 2020 in which he paid off £92,000 of the tax liability, including the penalties which are the subject of this appeal, from income from fees in addition to maintaining the VAT payments due over that period.

58. The Appellant had reduced his salaried employment from full time to part time to accommodate the growth in his practice at the Bar. He believed that this provided evidence of the level of fees he could have earnt to reduce the tax liability or service an agreement with HMRC to reduce the tax liability if they had been minded to agree it.

59. He believed that the tribunal when considering the reasonableness of his excuse should have an eye to the reasonableness of the dealings of HMRC as the two were inextricably linked. He believed that there was no rational reason for HMRC to refuse the offers he made of lump sum payments (£70,000 and then £20,000 annually thereafter), they would have received their money and there was no risk of breaking monthly time to pay arrangements which could not address the problem. Instead they threatened bankruptcy and they would have received a fraction of the tax that he was able to pay.

60. The Appellant's belief was based on his expectation that government agencies should pay on time, or at least show some forbearance when their delays caused him to be unable to meet HMRC liabilities on time. He made no objection to the liability itself or the fact that interest was charged. This is so even though HMRC at one stage suggested that he should have expected otherwise on deciding which profession to enter, which seems irrational.

61. In conclusion the Appellant returned to his main point, that it is irrational and unreasonable for HMRC to penalise a tax payer for incapacity to pay when it is another government agency that is the cause of that incapacity. He believed that it was harsh for HMRC to state that this is all covered by the vagaries of business which allows them to pray in aid other government bodies' financial misfeasance and then criticise the taxpayer who falls victim to it.

62. He believed that the nature of the statutory schemes further lent credence to his reasonable belief that he could trade out of the situation. This is because these were not debts that would equate to "bad debts" in the commercial world. The realistic and reasonable expectation was that (1), the fees would be paid and (2), the Government agencies would conduct themselves in such a way as to honour their liabilities. Whilst it is accepted that the agencies were found wanting in the second aspect, in the main, they would pay fees due - save for in exceptional such as when he had to take the matter before a costs judge.

63. The Appellant properly and helpfully referred the tribunal to the case of *Timothy Raggatt v HMRC* [2018] UKUT 0412 (TCC) in which the Upper Tribunal considered the reasonable excuse of a barrister for late payment of tax due. He believed that this decision of the Upper Tribunal could be distinguished. In *Raggatt* the Appellant was arguing that the reduction in fees caused by austerity measures was a reasonable excuse for late payment as there had been a dramatic reduction in his fee income. This was not relied upon by the Appellant in his appeal. Had the payments been made in a timely fashion notwithstanding their reducing sums then there would have been no late payment and no outstanding liability.

Ancillary matters – allocation of payment and behaviour of HMRC

64. The Appellant identified instances when funds that have been paid had been applied or allocated to liabilities or the resolution of penalties which he believed were in piecemeal or in circumstances that are not easy to follow. Whilst he accepted as a matter of law that it is for HMRC to apply or allocate those sums at its discretion it is of note that if the funds paid are applied to penalties as opposed to the initial liability then that again indirectly exacerbated the problem.

65. The Appellant also believed that HMRC's allocation of payment had led to confusion and difficulties in the calculation of the correct amounts of the liability. One such inaccuracy in the calculation of sums on the application of the statutory demand to the extent of in excess of £19,000. It seems the only correct basis of for calculation of liability must be the self-assessment returns.

66. The Appellant believed that there has also been a reluctance on the part of HMRC to arrange a meeting to discuss the position. He stated that when he had offered meetings with HMRC, they had unilaterally declined to meet or to agree proposals for payment.

67. The Appellant also believed that there had also been instances of delay in this matter as a result of HMRC dealing with the appeal documentation in a less that efficient manner. One such example is the serving of appeals notices on the same day in respect of VAT and self-assessment only for the self-assessment team to lose the paperwork and not take things forward causing a delay of over 8 months.

Mr Kemp's evidence

68. The Appellant also relied on the evidence of his tax adviser and witness, Mr Andrew Kemp. Mr Kemp had acted as his advisor and representative when dealing with HMRC.

69. Mr Kemp provided a witness statement dated which HMRC did not seek to challenge. We accept that Mr Kemp honestly believed that the following matters were true. Whether or not they provide the Appellant with an objectively reasonable excuse, we will address later in this decision.

70. Mr Kemp stated that in the Appellant's case he had faced a number of difficulties that have been both complicated and persistent. They included:

    1) long and frequent delays in receiving information from HMRC, particularly replies to correspondence;

2) aspects of the issues in dispute inexplicably not being addressed by HMRC for periods, as with the self-assessment part of the enquiry. There appears to have been a suggestion that there was an authorisation issue for Mr Kemp to act yet HMRC had been communicating with him as the Appellant's agent for periods of time that can be measured in years;

3) receiving incorrect, incomplete and irreconcilable information on statements of account and calculations of interest, penalties and the allocation of payments. Examples include piecemeal application of sums paid towards the eldest debt, as expected, but also in satisfaction of penalties and interest. One such example is the document that was provided by HMRC responding to the Appellant's application to set aside the statutory demand;

4) a lack of understanding of and empathy for the points that the Appellant and he were trying to make as regards reasonable excuse in the unusual circumstances of this case as opposed to normal cash flow problems encountered in commercial enterprise;

5) Sometimes aggressive and unsympathetic handling of the case given the efforts that have been made to bring matters up to date, make current payments as they fall due and engage in a reasoned debate over payment terms and the making of lump sum payments towards the agreed debts. Indeed, the examples of the Appellant breaching time to pay agreements as a further bar to negotiated settlements appeared particularly harsh given it was the continued delays in payments from government agencies that caused those very breaches;

6) the appeal against late payment and interest thereon and against the imposition of surcharges centred in the main around the problem that self-employed members of the independent bar have in Mr Kemp's experience frequently suffered, that delays in payments by government agencies have adversely impacted upon an individual's cash flow and therefore ability to meet self-assessment and VAT liabilities. That problem has been exacerbated in this particular case by the repeated persistence of the delays as opposed to an isolated occurrence. He had seen a document created by the Appellant that recorded the various levels of aged debt that were experienced over the material periods; and

7) Mr Kemp had conducted a number of exchanges both in correspondence and over the telephone on behalf of the Appellant with representatives from HMRC from varying units including debt management and other dedicated teams. His experience of those exchanges has at times included representatives of HMRC indicating that it was the Appellant's own choice of area of legal practice that should have put him on notice of the risk of non-payment or late payment. This assertion, repeated in the statement of case, appears to be an unreasonable statement seeking to justify the taxation of an individual on the one hand whilst withholding the very means to meet that liability. Independent self-employed barristers are not able to sue for outstanding fees owed by the government agencies that engage them and so to liken this to the normal problems encountered in commerce seems to be unrealistic and unreasonable given the approaches taken in other cases in other sectors of business by HMRC in his experience.

71. At the hearing, Mr Kemp gave further unchallenged oral evidence which we accept. He stated that he and the Appellant had taken a number of steps to resolve the Appellant's tax liabilities. They had started talking to HMRC some years ago. He had never formed any view that the Appellant's business could not trade out of the position and matters got a

little better and worse. They seriously engaged in negotiations with HMRC to find a solution and at no point did it occur to him that there would be any issue about the Appellant's inability to trade out of his tax liabilities. It was just a question of how long it was going to take. Mr Kemp had experience of assisting and representing self-employed barristers and the difficulties the Appellant suffered were common across practitioners, many were in a similar position.

The Law

VAT Default Surcharges

72. Sections 59 and 71 of the Value Added Tax Act 1994 govern default surcharges and reasonable excuse:

> 59(1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period–
> (a)the Commissioners have not received that return, or
> (b)the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period, then that person shall be regarded for the purposes of this section as being in default in respect of that period.
> ……..
> 59(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that–
> (a)in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;
> (b)in relation to the second such period, the specified percentage is 5 per cent;
> (c)in relation to the third such period, the specified percentage is 10 per cent; and
> (d)in relation to each such period after the third, the specified percentage is 15 per cent.
> …….
> 59(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge–
> (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or
> (b) there is a reasonable excuse for the return or VAT not having been so despatched, he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).
>
> 71(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct–
> (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and
> (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.
> …….

73. The relevant provisions of the VAT default surcharge regime and the application of the reasonable excuse test are considered by Judge Guy Brannan in *Miles Water Engineering*

Ltd v Revenue & Customs Commissioners [2020] UKFTT 98 (TC) at [26]-[32] of the decision:

> '26. The VAT default surcharge regime is provided for by section 59 of the Value Added Tax Act 1994 ("VATA"). Under section 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. The Respondents may then serve a surcharge liability notice on the defaulting taxpayer, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in an assessment to a default surcharge at the prescribed percentage rate [an increasing rate of 2, 5, 10 and 15% of the VAT outstanding].
>
> 27. A taxpayer who is otherwise liable to a default surcharge may nevertheless escape liability if he can establish that he has a reasonable excuse for the return or the VAT not having been despatched in time (section 59(7) VATA). While HMRC must show that there has been a default giving rise to the surcharge assessed, the burden falls on the taxpayer to establish that it has a reasonable excuse.
>
> 28. Section 71(1)(a) VATA, however, provides that an insufficiency of funds to pay any VAT due is not a reasonable excuse for the purposes of section 59. The difficulty that a taxpayer faces in this regard was expressed by Nolan LJ in *Commissioners of Customs and Excise v Salevon* [1989] STC 907 when he said at 911: "… the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of "reasonable excuse" must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to it … to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian."
>
> 29. Nevertheless, as this indicates, the taxpayer's task in this respect is not insurmountable: the underlying cause of the insufficiency of funds may itself provide a reasonable excuse. This appears from the decision of the Court of Appeal in *Customs and Excise Commissioners v Steptoe* [1992] STC 757.
>
> 30. The relevant facts of *Steptoe* appear in the decision of Scott LJ. Mr Steptoe was an electrical contractor who did 95 per cent of his work for the London Borough of Redbridge. The Redbridge Council was virtually his only customer and was an extremely slow payer. He was late in paying VAT in several quarters starting with that ending in November 1986 and continuing up to the end of November 1988. The VAT Tribunal concluded that the conduct of the Council was such that Mr Steptoe had a reasonable excuse for three of the four default surcharges that had been imposed but not the fourth because by the time that was incurred the Council had mended its ways and he could not rely on the excuse that in the fourth period his accountants were responsible for the delay.
>
> 31. Scott LJ nevertheless concluded that Mr Steptoe did not have a reasonable excuse because late payment was not an unforeseeable event in the conduct by the taxpayer of his business, such that the taxpayer should have made arrangements to secure his cash flow. If his profit margins were so slim or his financial circumstances such that was unable to secure his cash

flow, he was nevertheless caught by what is now section 71(1)(a): "The reason for the insufficiency of funds is, in such a case, itself an insufficiency of funds."

32. Scott LJ was, however, in a minority. Lord Donaldson MR, and Nolan LJ upheld the Tribunal's decision, which had concluded in favour of Mr Steptoe. In doing so Lord Donaldson MR summarised the different approaches of Scott and Nolan LJJ in these terms ([1992] STC 757 at 770):

"The difficulty which then arises is that Parliament has not specified what underlying causes of an insufficiency of funds which lead to a default are to be regarded as reasonable or as not being reasonable. … Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Comrs v Salevon* Ltd [1989] STC 907, is saying that if the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds. Scott LJ on the other hand is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable."'

Self-Assessment

Late Filing penalties under Schedule 55 of the Finance Act 2009

74. The power to impose penalties for the late filing of a tax return in respect of which a notice to file was given pursuant to s 8 TMA 1970 is to be found in paragraph 1 to Schedule 55 to the Finance Act 2009 ("Schedule 55 FA 2009"). In essence, the regime provides for an initial penalty of £100 for failure to file a return on time followed by a further additional penalty if the failure continues for a period of 3 months from the initial penalty date, a further penalty if the failure continues for a period of 6 months, and a further penalty if the failure continues after the end of the period of 12 months from the date the initial penalty was imposed.

75. Paragraphs 1 to 6 of Schedule 55 set out the levels of the penalties.

'PENALTY FOR FAILURE TO MAKE RETURNS ETC 1

1— (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out— (a) the circumstances in which a penalty is payable, and (b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule— "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC; "penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table— (a) any reference to a return includes a reference to any other document specified in the Table, and (b) any reference to making a return includes a reference to delivering a return or to delivering any such document. Tax to which return etc relates Return or other document 7 1. Income tax or capital gains tax (a) Return under section 8(1)(a) of TMA 1970 … …

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUALRETURNS 2— Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table.

……

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

4— (1) P is liable to a penalty under this paragraph if (and only if)— (a) P's failure continues after the end of the period of 3 months beginning with the penalty date, (b) HMRC decide that such a penalty should be payable, and (c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)— (a) may be earlier than the date on which the notice is given, but (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a). …

……..

6 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

……..

Special Circumstances

76. Paragraph 16 of Schedule 55 FA 2009 permits a penalty to be reduced where "special circumstances" exist. It states as follows:

"(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule. 25 (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 30 reference to— (a) staying a penalty, and (b) agreeing a compromise in relation to proceedings for a penalty."

Reasonable Excuse

77. Paragraph 23 provides for the reasonable excuse defence to be available but an insufficiency of funds not to constitute such unless attributable to events outside a taxpayer's control:

"— (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."

Schedule 56 and late payment penalties

78. Schedule 56 of the Finance Act 2009 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). 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.

79. Paragraph 1(4) of Schedule 56 defines the date 31 days after the due date as the "penalty date". 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). The amount of all these penalties is, by virtue of paragraph 3 of Schedule 56, 5% of the unpaid tax to be charged after the tax is late by 30 days (the penalty date) and again 5 and 11 months after the penalty date (ie. 6 and 12 months after it is due).

80. Paragraphs 1-3 provide:

> '1—(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
>
> (2) Paragraphs 3 to 8 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraph 9, the amount of the penalty.
>
> 3—(1) This paragraph applies in the case of—
>
> (a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,
>
> (b) a payment of tax falling within item 2 or 4 which relates to a period of 6 months or more, and
>
> (c) a payment of tax falling within item 2 which is payable under regulations under section 688A of ITEPA 2003 (recovery from other persons of amounts due from managed service companies).
>
> (2) P is liable to a penalty of 5% of the unpaid tax.
>
> (3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.
>
> (4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.'

81. Paragraphs 9 and 16 of Schedule 56 provide for special circumstances and reasonable excuse in similar terms as paragraphs 16 and 23 of Schedule 55:

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

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

(a) ability to pay, 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.

……

16(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.’

Relevant authorities on Reasonable Excuse

82. In the recent case of *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC), the Upper Tribunal provided guidance to the FTT as to how the question of “reasonable excuse” should be approached in the context of the tax penalties legislation. That case concerned a penalty imposed for the late filing of a return, but the principles are the same where the penalty has been imposed because of a failure to pay tax on time.

83. At [69] to [74] of *Perrin* the Upper Tribunal stated:

‘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.'

84. In its final comments at [81], the Upper Tribunal summarised how the FTT can usefully approach the question of a "reasonable excuse" defence as follows:

> "81(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

85. The Upper Tribunal in *Timothy Raggatt v HMRC* [2018] UKUT 0412 (TCC) considered the application of *Perrin* and *Steptoe* and the reasonable excuse defence. The Upper Tribunal stated the following at [21]-[26]:

> '21. As referred to at [41] of *Perrin*, Jacob LJ in *Proctor and Gamble UK v Revenue & Customs* Commissioners [2009] EWCA Civ 407, observed at [9] that often a statutory test will require a multi-factorial assessment based on primary facts, and an appeal court should be slow to interfere with that overall assessment, commonly called a "value-judgment".
>
> 22. *Perrin* was a case where the FTT had to decide whether the appellant had a reasonable excuse for her failure to file her tax return on time. The Upper Tribunal observed at [43] that in deciding whether a reasonable excuse existed, the FTT was carrying out its own value judgment, applying its understanding of the concepts of "reasonable excuse" to the primary facts which it found.
>
> 23. The Upper Tribunal summarised the approach the FTT should take in carrying out its value judgment at [70] and [71] as follows: …..
>
> 24. The Upper Tribunal emphasised at [79] that the FTT's evaluation of the facts could only be overturned if it were satisfied that the FTT had plainly misapplied the correct test to the facts in reaching its conclusion. It observed at [80] that it does not matter whether it would reach a different conclusion from the FTT, the only question being whether the FTT was, as a matter of law, entitled to reach the conclusion that it did; the standard of "reasonableness" involving no question of principle but simply a matter of degree so that the Upper Tribunal should approach with great caution the matter of differing from the FTT in its evaluation of that standard.
>
> 25……..
>
> 26. The Upper Tribunal has also considered specifically the correct test for establishing a "reasonable excuse" where a late payment of tax has been caused by insufficiency of funds. In *ETB (2014) Limited v HMRC* [2016] UKUT 0424 (TCC) at [11] the Upper Tribunal referred to the judgment of the Court of Appeal in *Customs and Excise v Steptoe* [1992] STC

757). In that case, the Court of Appeal held that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency – the underlying cause of the taxpayer's default – might do so. The Upper Tribunal then summarised (at [15]) the test which emerges from the judgment of the majority of the Court of Appeal in *Steptoe* as follows:

"In summary, the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract the insufficiency."

86. The Upper Tribunal in *Raggatt* applied the principles of *Perrin* and *Steptoe* to the specific facts. It did so in the context of a barrister relying on a reduction in legal aid fees from publicly funded advocacy in the criminal courts following austerity measures from 2009. At [38]-[41] it stated:

'38. We agree that a prudent trader accounting for VAT under the cash accounting scheme would earmark amounts he or she receives in respect of VAT as payable to HMRC and if he fails to do so we would agree that he or she would normally struggle to establish a reasonable excuse defence on the grounds of delays in payment by customers which led to an insufficiency of funds. But that is very different to the present case. Mr Raggatt did not account for income tax on a cash basis. In common with many self-employed individuals, he paid tax by reference to profits shown in his accounts for the period after allowing for deductible expenses. His tax payments in respect of a particular item of income could fall due some time after he had actually received the amount in question or, in some cases, before he had received it.

39.That having been said, although there is no legal requirement on the part of a self-employed professional person to reserve for his or her tax liabilities, in our view, a person with such an episodic life would be well advised to take reasonable steps to make some provision for tax liabilities or to ensure that he or she has appropriate bank facilities available to meet his or her expected tax liabilities if he or she subsequently wishes to rely on a reasonable excuse defence. Taking such reasonable steps might not in the event prevent the taxpayer being able to deal with unforeseen events, but if it appears that the taxpayer did all that could be reasonably expected of someone in his or her position then the tribunal may well take a sympathetic view if nevertheless the taxpayer could not meet his or her liabilities when due.

40.In the current case, it is not clear to us that the reductions in Mr Raggatt's income from criminal legal aid (his only source of income in the relevant period) were such that he could not have (at least substantially) met his obligations had he made prudent reserves out of the years in which he was still receiving high levels of income. Mr Raggatt told us that the reductions in legal aid remuneration commenced in 2008, became much worse in 2010 following reforms implemented by the Coalition Government and much worse again in 2012, resulting in a 40% cut in real terms over the whole of that period. That is clearly an exceptional circumstance, and not one that has been faced by very many taxpayers even

during a period of austerity where many have seen their real incomes decline. We accept that he could not reasonably have foreseen that steep decline in 2008.

41.Nevertheless, as the schedule of Mr Raggatt's income over the three tax years preceding the two tax years in respect of which the penalties were charged, those tax years and the first year thereafter show, Mr Raggatt earned an average annual income of £190,788 over those six tax years, giving rise to an average annual tax payment of £70,342. His highest total income was £310,776, in respect of 2010/11, at a time when the cuts were beginning to bite quite significantly and his lowest was £123,308 in 2011/2012.In the year following that his total income rose to £245,981.It is therefore not clear to us, and we think it is implicit in the FTT's findings that it was not clear to them, why if Mr Raggatt had made prudent reservations for tax (which would necessarily be estimates) out of moneys he received in respect of those years when he was receiving higher levels of earnings, he would not have been in a position to have funds available to supplement the tax payments he was able to make out of the lower amounts of income that he was receiving in the years in which the payments fell due. By not making any provisions, which (as the FTT found) was consistent with his practice in the years before the legal aid cuts began to bite Mr Raggatt was taking a commercial risk that he would not have sums available to meet his tax liabilities when they fell due.'

Appellant's submissions

87. The Appellant agreed he had made late payments and that notices of penalties and surcharges were received. He did not dispute that HMRC had proved that the penalties were due subject to the issue of reasonable excuse.

88. The Appellant relied upon all the matters which he had advanced in evidence as to why he had a reasonable excuse for late payment which were a mixture of fact and legal submission. They are therefore not repeated here. In summary, his submission is that the insufficiency of funds was due to events beyond his control and resulted from government agencies failing to pay him fees due within a reasonable time.

89. The Appellant did not agree that there was correct allocation of payments by HMRC. It is not agreed that HMRC sums and calculations were always correct. An example being the sums quoted as due on the statutory demand did not match self-assessment returns.

90. The Appellant acknowledged that HMRC are correct that the relevant circumstances in the appeal in effect ended in July 2019. Since then all liabilities have been met, including the sums that are the subject of this appeal.

91. The Appellant submitted that HMRC had accepted the general proposition that the arms of Government namely the CPS and the Legal Aid Agency habitually settle fees of Barristers with significant delays and certainly outside any stated periods. There also seems to be no issue taken with the evidence produced regarding the Appellant's aged debt figure [as consolidated on page 181 of Bundle 2].

Authority relied upon and legal framework

92. The Appellant relied upon the authority of *Timothy Raggatt v. HMRC [2018] UKUT 0412 (TCC)* which contains an exposition of the relevant law regarding reasonable excuse and its construction.

93. He submitted that factually and legally there were some similarities to his case and some matters which distinguished it from his case. He submitted that tax liability has to be met on an irregular basis because his fees were not paid on a regular basis. Reasonable living expenses on a monthly basis can be exhausted and sometimes exceed the sums received in fees. As a matter of simple logic that means that any sums put aside with the intention of meeting future tax liabilities are exposed. The longer the delay in payment of fees, the harder it was for him to maintain sufficient funds.

94. The Appellant reminded the Tribunal that the relevant provision regarding "reasonable excuse" and the prohibition of considering "insufficiency of funds" also reads "unless attributable to events outside the taxpayer's control" - see paragraph 23 (2)(a) of Schedule 55 Finance Act 2009 SA and section 71 (1)(a) of the VAT Act 1994.
95. These provisions were the gateway to considering that the reasons *behind* insufficiency of funds can potentially establish a reasonable excuse and this is a settled approach.

Legal Test

96. The Appellant submitted that *Raggatt* accepted and endorsed *Perrin* as the correct exposition of the test for "reasonable excuse" as being an assessment of "what steps a reasonable person, wanting to comply with his tax obligations would take in a particular circumstance."

The Decision in Raggatt

97. The Appellant submitted that in *Raggatt* the Upper tribunal observed that it was merely seeking to decide whether the FTT had made a decision that was within a range of reasonable decisions as if so, it could not intervene even though another tribunal may have come to a different conclusion.

98. The Appellant in that case asserted that the cuts to Legal Aid funding combined with refusals by his bank to increase borrowing impacted upon his cash flow so as to cause financial difficulty.

99. The finding was in essence that the Appellant in *Raggatt* had relatively large sums of income (in excess of £200,000 per year in the periods in question) and had not been able to set aside monies to meet tax liability. The tribunal noted that he purchased a property after his divorce at the roughly the same time (see paras 41 & 42 of judgement). Mr Raggatt asserted that a refusal of a bank to extend an overdraft of £200,000 facility and the cuts to Legal Aid funding impacted upon cash flow. The tribunal declined to find "reasonable excuse" in those circumstances.

Distinguishing Raggatt

100. The Appellant submitted that the reduction in legal aid funding is clearly a forward-looking trading condition that a practitioner can make provision for. Hence it was not prayed in aid by the Appellant. Nor was a restriction on borrowing per se. He submitted that the sums involved in this appeal are significantly smaller in terms of income for a member of the junior bar practising in criminal legal aid and prosecution work.

Application of the reasonable excuse legal test to the appeal

101. The Appellant submitted that the delay in payment from the Legal Aid Authority and Crown Prosecution Service, should in itself establish a reasonable excuse as the reason for insufficiency of funds was out of the control of the taxpayer.

102. This is unlike normal commercial environments and should not be susceptible to HMRC considering it as such. He submitted that his was an exceptional position where an individual owes an organisation money and their main / sole source of income is another arm of that same organisation that delays payment. Members of the publicly funded Bar cannot sue for their fees. Further the large proportion of business is publicly funded and so attempts to use private work to support that is met with limited success.

103. The Appellant submitted that in a normal economic environment a trader would be able to part company from a bad payer. However, at the criminal bar there is a near monopoly with the Government as the customer. In commercial terms a supplier may also resort to legal redress to recover funds which cannot be done in this case. It is therefore inappropriate to use phrases such as "known payment risk" and "normal hazards of business" as HMRC had submitted. The lack of specific examination of the case by HMRC cannot be used by them to deny matters such as "special circumstances" as HMRC had in their skeleton argument when they view the trading conditions as the same as any general delay in payments.

104. The Appellant submitted that any fear that this would "open the floodgates" or be an unhelpful precedent for non-payment is defeated by the specific exceptional facts of the case.

105. Similarly, HMRC's observation that the Appellant had not applied bad debt relief is an acute demonstration of the anomaly. HMRC seem to be accepting that HM Government departments operate a system of poor payment for that label to be used. The debts were not "bad debts" as the money was paid, just months late.

106. The Appellant also relied upon the information and evidence he served in support of his appeal regarding his income and aged debt from the Bar. He submitted that this supported a reasonable belief at the time that he could have traded his way out of his tax debts ie. that the aged debt and future anticipated earnings would be sufficient to meet his tax debts. He also relied on his evidence that he managed to meet his tax obligations through a combination of receipt of aged debt, borrowing and release of capital through sale of two properties. However, he submitted that this issue alone is not determinative of the issue of 'reasonable excuse' which is a much broader test in law but it is one relevant factor to consider when considering the circumstances and experience of the particular taxpayer.

The ability of publicly funded barristers to recover their fees due

107. The Appellant submitted that barristers are in an unusual contractual arrangement with those who instruct them. Initially the position was that barristers receive an "honorarium" as opposed to a fee and this precluded the existence of a contractual relationship and consequently a right to sue for unpaid fees.

108. He submitted that the authority of *Simon Matthew Gwinnutt v Nicholas Frank Raymond George & Ryan* [2018] EWHC 2169 (Ch) is the latest exposition of the development of the law in this field. The High Court's decision was overturned in the Court of Appeal in [2019] WLR 237 but the relevant point here remains unaffected. The appeal concluded that non-contractual unpaid fees can vest in a trustee in bankruptcy as "property" for the purposes of insolvency.

109. Since the Courts and Legal Services Act 1991 barristers can enter into contracts. This normally means with solicitors and the normal practice is to invoke the standard terms and conditions as promoted by the Bar Council as advertised on Chambers' websites as the conditions through which private work is undertaken. That now would allow barristers to sue for unpaid fees in privately funded work. Until that time barristers in private practice could merely report the solicitors' firm to the Law Society and the Bar Council. The sanction was a "withdrawal of credit" declaration that meant any briefs had to accompanied with payment in advance as opposed to the usual rendering of a fee note (akin to an invoice) at the end of the case. It is still possible to undertake work in a "non-contractual" arrangement and the above authority seems to suggest that in that situation one could not sue for an unpaid fee.

110. However, the Appellant submitted that these principles are not the same for members of the bar undertaking publicly funded criminal work.

111. Defence work is payable through Regulations delegated by Section 2(3) of the Legal Aid Sentencing and Punishment of Offenders Act 2012. The current manifestation of the statutory instrument is the Criminal Legal Aid Remuneration Regulations 2013 (SI 2013/435) as amended. This is a statutory scheme that sets out the amounts payable in schedules and the framework for re-determination and appeals. This was the mechanism that he used to overturn the refusal to pay in the case of *R v Wright* and others which took over 12 months.

112. For prosecution work the advocate is paid under the arrangements of the Graduate Fee schemes (as created and subsequently amended from 2012 onwards). The Manual of Guidance for such fees makes no mention of a contractual relationship.

113. The Appellant submitted that criminal publicly funded work for the prosecution or defence is an arrangement covered by a statutory framework and not contractual, therefore there can be no recourse to suing for a money judgement debt. In essence, if one were to exhaust the remedy of applying to a costs judge to enforce the regulations cited above the next recourse would be to seek a declaration / order in the High Court. The sanction would then be for contempt if the government body did not comply. The Appellant had not found any authority where such a step was invoked.

Submissions regarding VAT and SA penalties schedule

114. The Appellant put HMRC to proof regarding the accuracy of the penalties set out in Appendices 1 and 2.

115. He accepted that the difference in principle between HMRC's new schedule of VAT defaults that was provided on the day of the hearing (Appendix 1) and the schedule that HMRC originally relied on is the removal of assessed figures from the totals.

116. He submitted that there does appear to be an issue regarding the due date for payment of and filing the returns. There are differing regimes depending on the method of payment

(be it cheque, BACS or faster payments). Similarly, the due dates for filing returns is quoted as 1 calendar month and 7 days after the end of the relevant period for online returns (again that may have been different for paper returns). The source for this is the Gov.uk return and payment deadline VAT calculator. All the Appellant's returns were filed online after July 2009.

117. The Appellant made submissions that HMRC's allocation of payments he had made towards settling his liabilities had made reconciliation of his liabilities extremely difficult. HMRC had appeared to have split sums paid and allocate them across liabilities. Whilst he understood that the reason is to apply to the oldest debts first there seems to be instances where HMRC applies some proportion to penalties and surcharges as opposed to tax debts which demonstrates the futility of the process in the context of his main submission.

118. The Appellant submitted that not only did government agencies fail to pay him on time, HMRC also charged him for interest on the liabilities but then penalties for not meeting the liabilities on time. HMRC had then applies funds he did pay to the penalties not the debts. The exercise of assessing tax and issuing surcharges on assessed figures and then having to re-calculate the surcharges on the basis of VAT paid also lends some complexity to the reconciliation attempt. An example being a payment of £7,500 made on the 9/8/10 that was applied as shown on the ledger at bundle 3 page 19 to certain surcharges (£204.47, £733.42, £621.47) but this does not agree with the allocation suggested at bundle 3, page 4 which included sums of £1,050.98, £733.44 DS and £5715.58. Another example of an error is the sum of £6,000 paid on the 24/12/13 as acknowledged by Mr Griffiths in his schedule (bundle 2, page 461) whereas it appears only as a sum of £4,023 on the self-assessment schedule of payments at bundle 4, page 4 and nowhere else.

HMRC's submissions

119. Ms James, on behalf of HMRC, submitted that the Appellant's grounds of appeal do not constitute a reasonable excuse for late filing of returns and payment of VAT or SA liabilities over such an extended period of ten years. HMRC submit that most of his grounds of appeal consist of a complaint with the Legal Aid and Crown Prosecution Service payment system.

120. She submitted that the lateness of a return or payment is a question of fact and once it occurs a penalty is due. The length of the delay is immaterial. A penalty applies even if the submission of the return and payment is one day late. The Appellant had ultimate responsibility for the timely submission of his VAT and SA returns and any tax due from them.

121. Section 71(1)(a) VATA 1994 (VAT) and paragraph 23(2)(a) of Schedule 55 FA 2009 (SA) and paragraph 16(2)(a) of Schedule 56 FA 2009 (SA) specifically exclude an insufficiency of funds from providing a reasonable excuse, but it has been established that the reasons for the insufficiency might themselves provide a reasonable excuse (for instance if they are for reasons outside a person's control).

122. Having considered the decision released by the Upper Tribunal in Perrin, specifically at paragraph 81, Ms James submitted that whether a person has a reasonable excuse depends on the particular circumstances in which the failure occurred as well as the particular

circumstances and abilities of the person concerned who failed in this obligation. The test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of the person met that standard.

123.Whilst HMRC had considered the circumstances that led to the Appellant's insufficiency of funds, Ms James submitted that he did not take appropriate or sufficient steps to ensure that he met his tax obligations. The Appellant has a long history of cash flow problems, exacerbated by the one same factor.

124. The Schedule of Defaults and Payments for each respective head of tax (Appendices 1 and 2) demonstrated that the Appellant's cash flow difficulties were continuous throughout the period. HMRC would have expected measures to have been put in place to ensure that he met his legal obligation to submit his returns and subsequent payments on time.

125. HMRC understood that the Appellant has been partially reliant on the Legal Aid Agency and the Crown Prosecution Service for payment. However, having traded since 1995, and after the passage of time since first being issued with a penalty (being a span of eleven years), HMRC submitted that this delay was within the established pattern of funding.

126. It would have been a known payment risk and within the normal hazards of the business for which provision could reasonably be expected to have been made in business planning. No detail had been offered by the Appellant as to what plans were in place to address or mitigate the impact of such delays that they have incurred as early 2007.

127. HMRC submit that the risk of potential financial consequences for late payment and/or submission of his VAT and SA would have been known to Mr Sellers as follows:

i. VAT: given the information printed on the Surcharge Liability Notices issued to Mr Sellers throughout the years and having been registered for VAT since 1996.

ii. SA: given the information printed on the Penalty Notices issued to Mr Sellers throughout the years and having been registered for SA since 1995.

128. Various statutory provisions provide that there is no liability to a penalty where the taxpayer contacts HMRC before the payment is late to arrange a payment deferment and this is agreed by HMRC and then the agreement is adhered to. This is commonly referred to as a Time to Pay (TTP) arrangement. As a matter of statutory construction, all these elements must be satisfied and if they are not all engaged, then the taxpayer remains liable to a penalty.

129. Ms James submitted that the penalties under appeal do not qualify for relief under their respective headings as no such arrangement was agreed prior to the relevant due date. The Appellant had previously benefitted from TTP arrangements, agreed in February 2010, December 2012 and February 2014 for his VAT, as a result of having cash flow problems due to late payment from Legal Aid and the Crown Prosecution Service. Ms James submitted HMRC have been understanding of the Appellant's circumstances, but they cannot facilitate ongoing funding issues.

Self-Assessed Income Tax and VAT – Reasonable Excuse and Special Circumstances

130. Ms James submitted that the Schedule of Defaults and Payments in Appendices 1 and 2 shows the statutory filing date for the relevant period. This does not include the discretionary seven-day extension for electronic filing and payment.

131. The Appellant has submitted his returns and payments electronically. Therefore, the extended filing and payment date has been used when determining whether the Appellant has submitted his return or paid late. The surcharges stand as they are.

132. Payment for the 09/09 VAT period is not shown in the Schedule of Payments as payment was received in full, in one payment on 11 November 2009.

133. She submitted that, the Appellant's VAT returns for 09/07, 06/10, 09/10, 03/11, 06/11, 09/11, 12/11, 06/12 and 12/14 VAT periods are late. The Appellant has not put forward an explanation as to why these returns were filed late.

Response to arguments on allocation

134. Ms James submitted that HMRC had allocated the Appellants payments reasonably and fairly in reply to the Appellant submission that "it then applies funds I do pay to the penalties not the debts".

135. She submitted that their systems will allocate the funds paid by a taxpayer to the oldest debt on file. If a taxpayer wants a payment allocated to a new debt, this is within their control. They would need to specify where they would like the payment allocated and make HMRC aware.

136. She submitted that HMRC assess tax and issue surcharges based on that assessment when a return is not received by the due date.

137. HMRC's ledgers may show different to what appears on the Schedule of Payments. This is because the HMRC system allocates the money to the oldest debt on file, however, whilst the Schedule of Payments is created, the Appeals Officer allocates the money to the oldest tax debt on file (not including surcharges or interest). This is to the Appellant's benefit and ensures that the surcharges would stand, even if payments were allocated to tax debts, disregarding surcharges and/or interest. For example, Mr Sellers requested a reallocation of certain payments on 15 April 2019 and HMRC completed this reallocation on 27 June 2019.

138. Ms James submitted that the Appellant had not received any penalties as a result of the misallocation of any payments for his VAT and SA. He has received them as he failed to make full payments and/or file his returns on time. She submitted that the Appellant has been advised that the allocation of payments is a point of issue between him and HMRC and that he can request reallocation of payments from HMRC.

139. Ms James submitted that it is not within the Tribunal's jurisdiction to reallocate such payments but HMRC accept that if the Tribunal remove any of the penalties based on reasonable excuse, this could potentially cause a reallocation of payments that may reduce or remove subsequent penalties, however, this a subsequent action after the Tribunal have concluded this appeal and decided on whether reasonable excuse has been established.

Reasonableness of HMRC's dealings with the Appellant

140. Ms James made submissions in reply to the Appellant's submission that the Tribunal "should have an eye to the reasonableness of the dealings of HMRC", and that there was "no rational reason for HMRC to refuse the offers" and that HMRC should "show some forbearance when their delays caused [him] to be unable to meet HMRC liabilities on time".

141. She submitted that the Legal Aid Agency, Crown Prosecution Service and HMRC are separate entities. The only thing in common being that they are a branch of the government. For example, HMRC have no control over the other departments' payment policies, as much as they have no control over a private company.

142. As a matter of statutory construction and fairness to other taxpayers, especially those whose main source of income may be from government agencies, who adhere to their tax responsibilities, she submitted that it is important that there is a consequence when a taxpayer habitually files their returns and makes payments late.

143. She submitted that HMRC agreed to time to pay arrangements in 2010, 2012 and 2014. HMRC submit that they cannot continue to facilitate ongoing funding issues. These issues span a period of ten years, affecting payment of both VAT and SA. If the Appellant had an issue with HMRC's handling of any offers being rejected, HMRC's view was that this is a matter for a separate complaint to be made to them and does not constitute a reasonable excuse nor is it pertinent to the consideration of whether the Appellant had any reasonable expectation.

144. The Appellant had alleged that he had a reasonable expectation that government agencies should pay on time. Ms James submitted that this expectation falls out of the

equation after a reasonable amount of time had passed. The Appellant's late payment issues had been ongoing for ten years and could reasonably be considered a pattern independent of any late receipt of publicly funded payments.

145. Ms James further submitted that the Appellant had not given a valid explanation for why these issues continued throughout all the periods despite operating his accounting on a cash basis for self-assessment from the 2013-14 tax year onwards.

Special circumstances and special reduction

146. Ms James submitted that the legislation contains a provision for special circumstances at Paragraph 16 of Schedule 55 FA 2009 and paragraph 9 of Schedule 56 FA 2009 which would allow for a special reduction of the self-assessment penalties. HMRC submitted that special circumstances do not apply in the Appellant's case. A delay in payment, including that from a government department, is a general circumstance that could apply to many taxpayers such as delays in payment from customers, other government departments, local authorities etc. and affect other individuals providing legal services. As such, HMRC submit the circumstances are not sufficiently exceptional to make it right to reduce any of the penalties.

Mitigation of Penalties

147. Ms James submitted that the legislation does not provide for mitigation of any of the penalties issued. Section 70 VATA 1994 refers to mitigation of VAT penalties but default surcharges are not included. The level of self-assessment penalties is set out in Schedule 55 FA 2009 and Schedule 56 FA 2009 and as such cannot be mitigated.

148. Regulation 40(2) of the VAT Regulations 1995 provides that "any person required to make a return shall pay" to HMRC "such amount of VAT as is payable by him in respect of the period to which the return relates not later than the last day on which he is required to make that return." There is a statutory obligation on a person required, to make a return and pay the VAT to HMRC.

149. Ms James submitted that HMRC have discretion to allow additional time for filing and payment by electronic means - Regulation 25A(20) VAT Regulations 1995. Under that discretion, HMRC allows a further seven days for filing and payment.

150. She submitted that the surcharges have been correctly issued in accordance with Section 59(4) VATA 1994 for the return and/or payment having been received by the Respondents after the due date for the respective periods.

Late filing of VAT returns

151. Ms James highlighted the point that the Appellant had not provided an explanation or reasonable excuse for why the VAT returns themselves were submitted late for periods 09/07, 06/10, 09/10, 03/11, 06/11, 09/11, 12/11, 06/12 and 12/14.

152. She made submissions on the VAT Flat Rate Scheme ('FRS') for barristers. She noted that from 7 May 2003 until the end of VAT period 09/10, the Appellant had been accounting for tax via the FRS. This scheme offers users the option to account for tax based on monies received during the relevant period. HMRC submitted that by the time the Appellant elected to request removal from the FRS, the pattern of payments from Legal Aid and the Crown Prosecution Service was well known and established, therefore enabling him to include any expected impact on cash flow within routine business planning.

153. She made submissions in relation to bad debt relief. She noted that HMRC's web pages advises taxpayers with regards to Bad Debts and how to reclaim the VAT (VAT Notice 700/18). HMRC submit that if the Appellant had 'Bad Debts' – outstanding debt in excess of

six months old and was accounting on an invoice basis, he could have claimed Bad Debt relief in respect of the VAT element, even pending resolution of actions taken to recover the outstanding amounts.

Self-Assessment Penalties

154. Ms James made submissions as to the statutory scheme which applies to the self-assessment penalties imposed. Section 8 TMA 1970 provides that a person is required to submit a return on notice to establish amounts on which a person is chargeable. Section 8(1D) the relevant filing dates are established being 31 October for a non-electronic return and the 31 January for an electronic return.

155. She submitted that the self-assessment late filing penalty for the Appellant's 2010-11 tax year has been issued in accordance with Paragraph 3 of Schedule 55 FA 2009, which provides that if a return is not received by the filing date, a penalty of £100 is payable. The Appellant had provided no explanation or reasonable excuse for why the return itself for the 2010-11 tax year was late.

156. In relation to late payment penalties, Ms James submitted that section 59B(4) TMA 1970 provides that, except for circumstances stated at 59B(3) which do not apply in this case, the balancing payment due date is on or before 31 January following the year of assessment. She submitted that the self-assessment late payment penalties have been correctly issued in accordance with Schedule 56 FA 2009 for the payments having been received by HMRC after the due date.

157. In relation to the cash basis for self-assessed income tax accounting, Ms James submitted that section 160 of the Income Tax Trading and Other Income Act ('ITTOIA') 2005 enables barristers and advocates, in the first seven years of practice, to calculate profits on a cash or fee notes delivered basis. For the tax year 2010-11 the Appellant declared a cash basis by completing the 'adjustment for change of accounting practice' box and for 2011-12 and 2012-13, the Appellant selected the 'special circumstances' box (there was no specific box for cash basis in these years) to declare his profits using the cash basis as a barrister.

158. She submitted that it is not clear why the Appellant continued to use the cash basis despite being registered since 1995. This is evidenced by the SA notes.

159. For the 2013-14 tax year and onwards, section 160 ITTOIA 2005 was repealed and replaced with Section 25A ITTOIA 2005. Section 25A enabled a person carrying on a trade to elect for the profits of the trade to be calculated on a cash basis instead of in accordance with generally accepted accounting practice. The Appellant's self-assessment returns for the tax years 2013/14, 2014-15, 2015/16 and 2016-17 show that they used a 'cash basis' to complete their self-assessment return.

160. Ms James submitted using the cash basis in accordance with either Section 160 or 25A ITTIOA 2005, means that monies declared will only be income actually received, not when it is earned. Therefore, it is not clear how late payment from clients caused the Appellant to pay late for the years 2010-11, 2011-12, 2012-13, 2013-14 2014-15, 2015-16 & 2016-17. HMRC submitted that this delay in payment should not have had any effect as the tax demanded will reflect what the Appellant declared that they were paid during the period of the return.

Conclusion

161. Ms James, for HMRC, submitted that no grounds had been provided which amounted to reasonable excuse to grant removal of any of the forty-one penalties. These were correctly

issued for consistent late payment and/or submission of his VAT and SA over a lengthy period.

162. HMRC respectfully submitted that the Tribunal dismiss the appeal in respect of all the surcharges and penalties issued to Mr Sellers, based on the above submissions.

Discussion and Decision

163. We are satisfied that HMRC have proved that the Appellant had been properly notified by HMRC of his obligations to file all the relevant VAT returns for the period 09/07 to 06/15 and self-assessment returns for the tax years 2010-11 to 2016-17 and make all the payments of both VAT and income tax due which are set out in Appendices 1 and 2. We are satisfied that the Appellant was properly notified of each surcharge and penalty that was imposed for late filing and payment. We are satisfied that the surcharges and penalties set out in the Appendices are properly calculated.

164. We are satisfied that the Appellant was late in filing the one self-assessment return for tax year 2010-2011 and the numerous VAT returns as set out in the Appendices. He has not put forward any reasonable excuse or special circumstances for his late filing of the self-assessment return (nor the VAT returns) and therefore paragraphs 23 and 16 of Schedule 55 to the Finance Act 2009 do not apply. We are satisfied that HMRC's decision is not flawed that there are no special circumstances that gives rise to any special reduction of the penalties. We are satisfied the appeal should be dismissed for the one late filing penalty in respect of the self-assessment return for the tax year 2010-2011 which was not filed by 31 January 2012.

165. We are satisfied that the Appellant made late payments of VAT and income tax on each date and that the penalties as set out in Appendices 1 and 2 were due and payable. We are also satisfied that the exercise of HMRC's discretion as to the allocation of payments made by the Appellant towards his liabilities is not within our jurisdiction in this appeal.

166. The central issue in this appeal is therefore whether the Appellant has a reasonable excuse for his late payment of VAT and income tax.

167. The starting point is that the burden is upon the Appellant to prove that he has a reasonable excuse for the late payment of his VAT and self-assessed income tax. An insufficiency of funds cannot constitute a reasonable excuse unless the underlying cause of the insufficiency a) itself constitutes a reasonable excuse (in relation to VAT) or b) is for reasons outside the Appellant's control (in relation to income tax). It is essentially the same test. This analysis flows from sections 59(7) and 71 VAT Act 1994 as interpreted in *Steptoe* and paragraph 16 of Schedule 56 to the FA 2009 as interpreted in *Perrin* and *Raggatt*.

VAT – reasonable excuse

168. We begin by considering the default surcharges for late payment of VAT from period 09/07 to 06/15. We have set out our findings above as to the objective facts relating to the Appellant's late payment of VAT and we accept the Appellant has honest subjective beliefs. The issue is whether those beliefs are objectively reasonable. We have made findings as to the Appellant's own experience and relevant attributes, his situation during the relevant time and the steps he took to remedy his position when in default.

169. We then are to apply the test set out at [81(3)] of Perrin:

> 'Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable

excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"'

170. We repeat the observation of Nolan LJ in *Salevon* in relation to VAT:

> 'the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of "reasonable excuse" must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to it … to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian.'

171. However a cash flow problem caused by events outside a person's control or not reasonably avoidable by the exercise of reasonable foresight or diligence might constitute a reasonable excuse as the majority judgments of the Court of Appeal in *Steptoe* were summarised by the Upper Tribunal at [26] in *Raggatt*:

> 'In summary, the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract the insufficiency.'

Distinctions between VAT and Income Tax

172. The Upper Tribunal at [38] of its decision in *Raggatt* made important distinctions between the payment of VAT and self-assessed income tax:

> 'We agree that a prudent trader accounting for VAT under the cash accounting scheme would earmark amounts he or she receives in respect of VAT as payable to HMRC and if he fails to do so we would agree that he or she would normally struggle to establish a reasonable excuse defence on the grounds of delays in payment by customers which led to an insufficiency of funds. But that is very different to the present case. Mr Raggatt did not account for income tax on a cash basis. In common with many self-employed individuals, he paid tax by reference to profits shown in his accounts for the period after allowing for deductible expenses. His tax payments in respect of a particular item of income could fall due some time after he had actually received the amount in question or, in some cases, before he had received it.'

173. There are number of further differences between accounting and paying for VAT as opposed to self-assessed income tax, not simply the differences between accounting on a cash basis and invoice basis.

174. For instance, there is the difference in the gap in time between the receipt of monies and paying the sums of each tax due. VAT tends to be payable on a quarterly basis (unless a business is registered for monthly payments) within a month of the quarter ending. Self-assessed income tax tends to be payable on an annual basis – with payment due by 31 January of the following year (with a potential balancing payment and payment on account for the following year to be paid on 31 July).

175. It tends to be easier to foresee the amount of VAT that will be become payable (or to be repaid) on the quarterly due date than the income tax to be paid the following January. This is because traders may be operating on the basis of a flat rate scheme and will know their quarterly sales and can quickly calculate the percentage flat rate addition or percentage repayable. Alternatively, they may be operating the normal VAT arrangements and accounting for VAT on a cash basis. They are more likely to be able to quickly calculate the total of output tax on all their sales from their sales invoices and receipts and be able to estimate the amount of input tax they are able to deduct based on the total of their purchase invoices and outgoings during the relevant period. VAT is therefore to be paid quarterly and close to the actual receipt of the monies. The trader's cash flow available is more likely to closely reflect receipts. A trader is more likely reasonably to foresee that they need a certain amount of money available regularly (monthly or quarterly depending on how they are registered) to discharge the tax due.

176. This is potentially a less demanding exercise than preparing annual accounts for self-assessment and attempting to estimate the income tax payable at the various rates, particularly if it is to be assessed on an invoice basis rather than a cash basis. It is less likely that a trader will be able to estimate as accurately the sum of income tax that they are likely to have to pay in the following January and which they may need to set aside in advance.

177. The sums of VAT which may be paid to HMRC by a trader in any quarter (assuming they are payment traders such as barristers are likely to be rather than repayment traders) are also likely to be smaller absolutely and relatively compared to those a higher rate income tax payer will pay on an annual basis. They are likely to be at most 20% of gross receipts for that quarter minus any deductible input tax. Not only will a self-assessed income tax payer need to account for income tax on a year's receipts but potentially also invoices raised (the invoice basis). For a higher rate income tax payer with an annual profit averaging around £100,000, as the Appellant had, their income tax liability may average around 33% of their profits.

178. The distinctions in sums payable are apparent from an examination of the table of annual income tax due for the Appellant set out above (the Appellant's income tax liabilities were on average about a third of his net income (profit)) compared to the VAT due as set out in Appendix 1 to this decision.

179. The distinctions between the two different taxes should have been apparent and reasonably foreseeable to an experienced trader such as the Appellant who had been accounting for VAT and self-assessed income tax for at least 10 years before his first VAT default in period 09/07.

180. The Appellant first made late payments of VAT in 2007. This was well before the issues with the late payment of fees that he relied on occurring from 2009. He provided no evidence of his aged debt at that time nor of suffering payment difficulties from the LSC or

CPS at the time. There is no suggestion that he was experiencing a high aged debt at this time as he did in 2010, 2012 and 2013 as is evidenced in the table.

181. The Appellant was accounting for VAT on a cash basis or through the flat rate scheme – ie. on his actual receipts – money received rather than on an invoice basis. By 2007 he had been in practice as a self-employed barrister for at least ten years and should reasonably have been well accustomed to setting aside the relevant and predictable amounts that would need to be repaid by way of VAT. His cashflow should have been reasonably foreseeable by this time and he should reasonably have accumulated sufficient aged debt from many previous quarters, the receipt of which should have assisted him in funding his then current obligations.

182. While we recognise the significant difficulties facing many members of the publicly funded criminal bar in terms of the level of fees they receive and delays they may experience in payment, we are not satisfied that these generic difficulties were the causes of the Appellant's late payment of VAT for most of the quarterly periods in question. The fact is that the sums of VAT to be paid in each quarter were from funds the Appellant had received and he could reasonably have foreseen the amounts he would have to repay and have avoided late payment by setting aside sufficient sums.

183. When one examines the schedule of late payments of VAT in Appendix 1 occurring between 09/07 and 06/15, on the vast majority of occasions the Appellant was late in paying by less than one month. This was a persistent and perennial problem that did not tie in with the two or three spikes of high aged debt but formed a consistent pattern. It does not suggest an isolated or specific cash flow difficulty with the outstanding payment of specific fees. Rather it suggests an inability to set aside sufficient funds and plan reasonably for the sums which needed to be repaid shortly thereafter. Furthermore, the amounts of VAT to be repaid were far smaller than the income tax debts, almost always less than £7,500 each quarter – so again the Appellant was not having to raise or arrange to pay very large lump sums.

184.The facts of *Steptoe* are rather different from those of the Appellant's case. The Appellant's pattern of late paying persisted for eight years rather than three or four quarters. During these periods his aged debt and cash flow remained fairly constant other than during the three spikes (as highlighted in bold in his schedule of aged debt). The slow payment of fees from the two government agencies was reasonably foreseeable and his inability to pay was reasonably avoidable because he had received the monies then due by way of VAT and should reasonably have set aside to meet his liabilities.

185. While the Appellant had significant aged debt, his cash flow was reasonably constant and so long as fees were paid within similar timescales, it was not so prejudicial if they were paid late so long as it was consistently late. This is because the Appellant had the benefit flow of monies received from earlier years in practice. The executive agencies which were to pay him were at least financially secure, being government agencies. The Appellant would have known that the government agencies would eventually pay him and there was very little bad debt which would need to be written off. Even though they may have paid slowly, it was for the large part predictably slowly except during the three periods of aged debt peaks where there appear to have been exceptional and unforeseen delays.

186. Therefore for all the reasons set out above, we are satisfied that for the vast majority of periods between 09/07 and 06/15 the Appellant had no arguably reasonable excuse for his late payment of VAT.

187. However, we do consider that further consideration needs to be given to the Appellant's late payment for VAT periods 06/10, 09/10, 09/12, 12/12 (although the surcharge for this period was cancelled), 06/13 and 12/13. These quarterly periods correspond to three periods of time in the schedule set out above where his aged debt was particularly high (as highlighted in bold) – the three peaks of aged debt in 2010, 2012 and 2013.

188. As demonstrated by the aged debt schedule set out above, the Appellant's aged debt during the three peaks was not only exceptionally high (between £40,000 and £80,000, representing somewhere between 40% and 80% of his profits for the year) but the peaks of debt were exceptionally high compared to his average aged debt over the years (the average being around £30,000). We accept the Appellant's evidence, although we have no independent evidence to corroborate it, that these spikes of aged debt were produced by particularly slow payment of fees outside the normal range that the Appellant had experienced over the years and which he did not subjectively foresee (because the delays appear to have been well above average and not predictable).

189. For these six quarterly periods we have considered whether the Appellant did have a reasonable excuse for late payment – whether late payment could have reasonably been avoided (and whether it could have objectively been foreseen).

190. On one view, the spikes of aged debt could not have reasonably been avoided because while the Appellant would have been used to the government agencies taking time to make payment, he did not have the usual range of options that a business might normally have if a major client was slow or late in making payment. The Appellant had a narrow range of options available to him. He had two paying 'clients' – the CPS or LSC – his public funders. While he had available to him some resources in order to chase payment – such as fees clerks who could at least have chased the relevant agencies, he could not sue through the normal civil debt procedures or threaten to sue these agencies for the speedier payment of fees as debts due. Technically the Appellant may have had the ability to enforce payment by the government agencies, in extreme cases, through legal action such as launching a judicial review of any breach of the relevant Regulation. However, this would have been an exceptional and costly option. We accept that the Appellant was somewhat hampered in his ability enforce the speedier payment of fees compared to a commercial organisation operating in the private sector. Further, he may reasonably have thought it commercially unwise to threaten litigation against his two sole and regular payment providers.

191. However, even for these six quarterly periods we are not satisfied that the Appellant's cash flow was so severely restricted by circumstances beyond his control so that he had a reasonable excuse for late payment of VAT in these quarters. We are satisfied that late payment could reasonably have been avoided. Even though the level of his aged debt at the points in time when those VAT returns were due for payment was so high as to be exceptional, late payment still could reasonably have been avoided. As we have set out above, by the time these periods occurred the Appellant was already an habitual and long-term defaulter in respect of VAT. He could reasonably have taken other steps to avoid late payment, such as setting aside sufficient sums of money as we set out below.

192. As a barrister, the Appellant benefitted from the concessions that allowed him to account for VAT either on a cash receipts basis or through the Flat-rate Scheme, which also enabled him to account for a fixed, net amount of VAT each quarter. Under the Flat Rate Scheme, the percentage was calculated to allow him an amount of input tax without the need to account for output tax and input tax separately. So, as well as being in the VAT Default Surcharge Regime since 2007 he was benefitting from collecting VAT but spending it

elsewhere in his business or his life, all the time taking the risk that he might have insufficient funds left to pay his VAT on time.

193. Even if the Appellant did (and could) not foresee that there might be exceptional delays in payments, it could still be reasonably foreseen that he might have insufficient funds to pay his VAT due on time if he did not set aside either the output tax he received on the payment of each invoice or the amount equivalent to the percentage of Flat Rate Addition.

194. The Appellant relies on the reasonable steps that he took from 2014 to reorder his financial affairs. He asks rhetorically, what else could he have reasonably done differently to avoid late payment? The answer, in respect of VAT, is that the Appellant should have reasonably set aside sufficient from his receipts to meet his forthcoming VAT liabilities. Indeed, as of 2007 and before the problems from 2009, he may well have been able to borrow to meet his anticipated liabilities if he did anticipate short term cash flow difficulties. As the Court of Appeal in *Salevon* and Upper Tribunal in *Raggatt* have noted, the VAT monies were in reality not the Appellant's to do with as he pleased, he should have been well aware that they were only an advance or interest free loan and if he spent them, he took the risk of being surcharged by HMRC for late payment. As the Appellant accepted, in the early years of practice he would set aside sufficient to pay for his tax liabilities. He had no problem with this in the first ten years of practice. He reasonably should have adjusted his outgoings and living expenses to anticipate his future liabilities.

195**.** We commend the Appellant for all the steps he took to meet his tax liabilities from HMRC and return to consider these in relation to Income Tax. However, he only took these steps from September 2014. By this time, he had been experiencing failure to meet VAT and income tax payment deadlines for a number of years (VAT failures for 7 years and income tax failures for over 2 years). We are that satisfied that a reasonable taxpayer, who wanted to comply with their tax obligations, would, in the same circumstances as the Appellant, have confronted the late payment issues more quickly and taken this ameliorating action sooner once it became clear they had a chronic problem with late payment of VAT and this had begun in 2007.

196. The distinctions between the Appellant's case and *Raggatt* has been addressed above. First Mr Raggatt paid sums on a property rather than paying his income tax, which the Appellant did not do. However, the more important distinction is that the Appellant in *Raggatt* was accounting for income tax on an invoice basis but made late payment which is rather different from the Appellant's VAT position. The Upper Tribunal made the point at [38] of its decision that the position in respect of VAT would have been rather different.

197. We should also address the Appellant's argument about the relationship between HMRC and the CPS/LSC as both being branches of the same government (an indivisible Crown). We reject this argument as having any bearing on the specific issues in this case. We are not satisfied that the fact that the Appellant was owed money from two executive agencies of government, the LSC or LAA and CPS, has any bearing on his obligations to repay tax to HMRC. There is no statutory or discretionary ability to set off monies owed to HMRC with monies owed by other government agencies. There is good reason why the normal accounting practice for each branch or agency of government should apply and no statutory or common law exception for crown debts.

198. Government agencies who have to disburse public funds, such as the CPS and LSC, have to operate under circumscribed payment procedures and are subject to stringent accounting procedures, even if these are different from commercial organisations. HMRC cannot be expected or required to bypass these procedures and offer credit or a set-off facility

to taxpayers who rely on public funds as opposed to private clients. Ultimately the argument of principle appeared to be a moral argument rather than legal argument, much as we understand why the Appellant feels as he does. Whether or not the length of time the government agencies took to pay the Appellant was reasonably foreseeable, and for most of the time it was, the Appellant could reasonably have avoided paying his VAT late throughout. The steps the Appellant took to remedy his defaults were admirable but too little too late. We have already addressed these issues above.

199. While we have real sympathy for the Appellant's predicament, the proven facts do not amount to an objectively reasonable excuse for the Appellant's defaults. We have taken into account his experience and other relevant attributes and the situation in which he found himself at the relevant time or times. What the Appellant did (or omitted to do or believed) was not objectively reasonable for a taxpayer in these circumstances. The insufficiency of funds to make VAT payments on time was reasonably avoidable. The cash flow problem was reasonably avoidable if the Appellant, having a proper regard for the fact that the VAT was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. As the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time does not constitute a reasonable excuse. Such foresight, diligence and regard would have avoided the insufficiency of funds - it would have been reasonable to expect the Appellant to take the action highlighted to counteract the insufficiency or to have found alternative funding.

200. For all these reasons, we are not satisfied that the Appellant had a reasonable excuse for late payment of his VAT throughout the periods in question. His insufficiency of funds to pay his VAT was not caused by events outside his control and was reasonably avoidable. Taking into account the Appellant's characteristics and experience, we consider that a reasonable taxpayer in his circumstances would reasonably have foreseen the need to set aside greater sums to meet forthcoming liabilities and reasonably have avoided paying the VAT due late. Therefore, in respect of all the VAT periods we are not satisfied that the Appellant had a reasonable excuse for late payment. We are satisfied that the Appellant should reasonably have been able to avoid late payment in relation to these VAT quarters and the surcharges should be confirmed.

Self-assessed income tax – reasonable excuse and special circumstances

201. Most of the points we have made above apply equally to the Appellant's late payment of self-assessed income tax for tax years 2010-11 to 2016-17. However, the position in relation to income tax is a little different from VAT for the reasons we have explained above.

202. The Appellant's difficulties with paying income tax only began in the tax year 10-11 with payment due on 31 January 2012. During the first few tax years in question 10-11 (payment due 31 January 2012) to 12-13 (payment due on 31 January 2014), the Appellant appears to have been accounting for self-assessed income tax on an invoice basis (although HMRC have suggested he was using an exceptional cash basis). Therefore, the distinctions we have set out above between cash accounting for VAT and invoice accounting in income tax apply. It is undisputed that from tax year 13-14 (payment due on 31 January 2015) to 16-17 (payment due on 31 January 2018) the Appellant began to account for income tax on a cash or receipts basis. This became available due to a change in the law. We consider there are differences between the two because there is even less excuse for late payment when accounting on a cash basis compared to an invoice basis.

203. We have already highlighted above that we have accepted the Appellant's account that he suffered exceptional issues with late payment by the government agencies during the tax years 2010-11, 2012-13 and 2013-14 where the three spikes of high aged debt have been highlighted. These spikes of aged debt were significant peaking at sums above from over £40,000 and up to £80,000. At these three times, the Appellant's aged debt was therefore around 40%-80% of his net profit for the years which averaged around £100,000 for the three tax years. The peaks were also exceptional compared to the Appellant's average age debt of around £30,000. Further, the peaks of aged debt were higher than his income tax liability for each of these years (averaging £36,000) and in tax year 2013-2014 the Appellant's aged debt of around £66,000 on 20 May 2013 exceeded his total profit for the year of around £61,000.

204. However, each of the three aged-debt peaks were resolved within six months (in the periods June to December 2010, September 2012 to March 2013 and May to November 2013) with the Appellant's aged debt then returning to its average level of around £30,000, a more reasonable percentage of his annual profit.

205. We accept that all three peaks of aged debt were not foreseeable nor reasonably avoidable and were due to events outside the Appellant's control, namely the unusual delays in the LSC, LAA or CPS paying his fees. We accept that the agencies were in effect the monopoly providers of money for the Appellant who had very little very control over this late payment and he was not able to exert significant pressure on the agencies through litigation (even if this had been commercially sensible to sue his major sources of income). We have accepted that the aged debt peaks undoubtedly had a knock-on effect on the cash flow available for the Appellant's ability to pay VAT due on time. However, we have not accepted that this provides a reasonable excuse for those periods of time because the Appellant could still have reasonably avoided making late payment of VAT.

206. We must now consider the same argument in respect of the Appellant's first late payment penalty for tax year 2011-12. The deadline for payment of £41,703.48 in income tax for that year was 31 January 2013 with a 30-day late payment penalty arising around 2 March 2013. Just before this deadline the Appellant's aged debt hit a peak of £40,247 on 1 December 2012 (around the same amount of money as the owed in tax). The peak of aged debt was not likely to have resolved until it we can see it reduced to £22,152 on 31 March 2013 after the deadline for payment and the penalty date, 30-days after this deadline. However, while we are satisfied on the balance of probabilities, we cannot be satisfied so that we are sure because we were not given the aged debt figures for the end of the intervening months - 31 December 2012, 31 January and 28 February 2013.

207. We have also taken into account that during this tax year, the Appellant was paying income tax on an invoice basis and making payments of tax in respect of sums billed in invoices even if not received. This distinguishes it from the late VAT payments. We also rely on all the other distinctions between accounting for and setting aside money for income tax as opposed to VAT which we have identified above as supporting there being a reasonable excuse. Therefore, we accept on balance that this peak of aged debt would have provided a reasonable excuse for the Appellant to make late payment of his self- assessed income tax on 31 January 2013 and the 30-day late payment penalty which would have arisen for non-payment of the 11-12 income tax year should be cancelled. The exceptional peak in aged debt was due to an insufficiency of funds for circumstances outside the Appellant's control which were not foreseeable. We are satisfied that the Appellant's late payment of income tax at this specific time was due to an insufficiency of funds for circumstances outside his

control. Late payment could not have been reasonably avoided for this first penalty within this tax-year only.

208. The position is different in relation to the other aged debt peaks. The Appellant's aged debt peak in June and September 2010 was resolved by 1 December 2010 (with it declining to only £11,006) and that of May-November 2013 was resolved by 20 January 2014 (reducing to around the average level of £32,484). These two peaks presented the Appellant the six-month periods of not foreseeable cashflow difficulties which we have considered above in relation to the Appellant's inability to make VAT payments.

209. However, these two peaks of aged debt were resolved before the 31 January income tax payment deadlines for the relevant tax years. The Appellant must have received an increase in payments from the two agencies to reduce his aged debt to its historical average of around £30,000 before the 31 January income tax deadlines. Therefore, by the time of the deadline for payment for tax year 09-10 on 31 January 2011 and that for tax year 12-13 on 31 January 2014, the Appellant should reasonably have received reasonable cash flow from which to set aside sufficient funds to make payment of his self-assessed income tax for these two years.

210. We are therefore not satisfied that the Appellant has a reasonable excuse for late payment of income tax for these two tax years.

211. The same applies to all the other tax years in question – there was no exceptional cash flow difficulty in these years. Many of the points that we have set out above in relation to VAT continue to apply. The Appellant had been in practice for many years and would reasonably have been able to anticipate an average level of aged debt which he had built up over time. So long as payment was made after a consistent (even if long) period by the two government agencies, even if there were long delays between billing and payment, then the cash flow would have remained steady and the Appellant should not reasonably have suffered unforeseeable or unavoidable cash flow difficulties. Only the unusually long payment delays experienced during the three aged debt peaks would not be foreseen. Even so, that does not mean that late payment could reasonably have been avoided. We have already set out above the reasonable alternative steps the Appellant could have taken at a much earlier date to avoid late payment.

212. Therefore we are not satisfied that the Appellant has a reasonable excuse for late payment of self-assessed income tax other than for one penalty in the one tax year we have identified. We are not satisfied that the Appellant has a reasonable excuse for late payment for all the remaining tax years for similar reasons to those set out above in relation to VAT. We have also taken into account that from tax years 13-14 onwards, the Appellant had returned to cash accounting for income tax so was only paying tax on receipts received.

213. Furthermore, the Appellant had been within the self-assessment since the 1996 and had sufficient notice over a number of years that he was experiencing difficulties in meeting his VAT obligations. Income tax payment difficulties had occurred since the payment deadline of 31 January 2012 for tax year 10-11. Other than the three six-month peaks of aged debt identified, the Appellant's aged debt was on average around £30,000, which was not an unmanageable percentage of his profits and not an unreasonable percentage of his income tax due.

214. We commend the Applicant for taking the steps he did from September 2014 to reduce his financial difficulties and improve his cash flow as set out in detail above: seeking paid employment from September 2014, selling two properties between 2015 and 2017 and borrowing from family members in 2016.

215. However, before this time ie. from 2012 onwards, the Appellant should reasonably have been alert to his income tax payment difficulties (on top of his VAT payment difficulties he experienced from 2007). From 2012 the Appellant should reasonably have set aside more of his receipts from his practice at the bar, from his new sources of income or from borrowing or disposal of assets and reduced his outgoings and living expenses to prevent the problems reoccurring. He was on notice he had to take serious measures to rectify his financial problems and if what he had done was not sufficient to meet his tax obligations from 2012, he should reasonably have taken further measures at this stage or earlier to prevent them reoccurring. The Appellant had a reasonable amount of notice and should reasonably have taken the steps he later took from September 2014 to 2017 from a much earlier date in order to reduce his financial difficulties. What the Appellant did was commendable but it in the circumstances of his ever-increasing tax debt, it was too little, too late.

216. It is apparent from the Appellant's evidence that in fact he did not resolve his financial difficulties purely from 'trading out' of the problem, even if it was reasonable of him to believe that he might have done. Ultimately the obstacles to settling his outstanding tax obligations were not merely cash flow difficulties but involved a reorganisation of his finances. This required a new source of salaried income, the sale of assets (properties) and borrowing from family. The Appellant should reasonably have taken more significant and earlier action from 2012 to prevent the late payments of income tax reoccurring in later years.

217. We are satisfied that the Appellant should reasonably have appreciated that cash flow difficulties were not the sole cause of his problem meeting tax obligations. During the relevant years he should reasonably have set aside more of his received income as savings for his tax liability and spent less on his living expenses so as to meet his tax obligations on time. If he was unable to do this, having had reasonable notice of an ongoing problem, he should have taken the steps that he eventually did, many years earlier, accepting he was receiving insufficient to fund his tax from self-employed practice and that this was not simply a matter of cashflow and delayed payment.

218. We are satisfied that the Appellant should reasonably have realised that the aged debt spikes resulting from slow payment were not the sole or fundamental source of the problem in him paying his tax liabilities. Another significant problem was the Appellant having insufficient earnings to meet his normal living expenditure and tax obligations – this was not simply a cash flow problem. There was a schedule of the self-assessment payments within the bundle which shows that when each tax return was due for payment he was still paying off the previous year's tax liabilities. Tax liabilities for year 11-12 were still being paid in 2014 and 2015, 12-13 in 2016, 13-14 in 2017 and so on. When the Appellant received funds and paid monies to HMRC it was not the aged debt spikes that meant he was late paying, so much as the fact that, from 2011-12 onwards, he was falling so far behind he could not pay his tax debts and his new tax liabilities as they fell due. In fact, the Appellant did not begin to have payments allocated to the 11-12 return until April 2013 because payments were going towards the 10-11 year until then.

219. The Appellant gave us no real evidence of his lifestyle and extent of his normal living expenses and whether these were commensurate with his income or whether he took steps to reduce them during the relevant year. The Appellant had accumulated aged debt over the years and could expect this to carry forward on a regular basis. Therefore, the delays in receiving payment become less prejudicial to his ability to settle his tax obligations. If the time period for his fees to be paid remained fairly constant, even if payment was slow, the

aged debt and income received would remain fairly constant over the years. During times when his aged debt was constant, the Appellant's received income should have mirrored his billings and there should not have been unreasonable cash flow difficulties. While the Appellant was accounting for income tax on an invoice basis for some of the years, he had been in practice for several years and the problem emerged only after about 10 years of practice. By this time the Appellant had accumulated enough aged debt to expect regular, even if delayed, receipts. Only in periods where the delay was exceptional and beyond the norm would exceptional delays in payment be unforeseeable and cause him difficulties with meeting his tax obligations, even if late payment could reasonably have been avoided.

220. We are satisfied that the Appellant should either have set aside more of his receipts for his income tax obligations and reduced his living expenses if necessary. If that was not possible, he should reasonably have accepted by mid-2012 that his continued practice at the Bar in the same way was not economically viable and taken more radical action such as the action he later took from September 2014 - such as moving into a different specialism or employment, realising assets and taking out loans. The action the Appellant took, admirable as it was from September 2014, was too late and allowed his tax debts to drift out of control. As the judgments in *Steptoe* and *Raggatt* make clear, taxpayers take the risk in utilising gross monies received for their own purposes, which effectively include an interest free loan of the tax due in income tax or VAT, so that when the tax becomes due they may no longer have sufficient sums available to settle their obligations.

221. The Appellant had ongoing difficulties paying his taxes on time from 2007 and we would have expected a reasonable taxpayer to have made sure they put plans into place to make sure future tax liabilities were met on time. The Appellant was aware of consequences of his failure to pay taxes on time as outlined in various notices sent throughout the year to him by HMRC. He attempted to arrange agreement to time to pay arrangements with HMRC as early as 2010 but HMRC were reasonably entitled to reject putting in place any further TTPs once the Appellant had failed to satisfy the terms of the original agreements.

222. For those reasons we confirm all but one of the late payment penalties.

Special Circumstances

223. We are not satisfied that there were any special or exceptional circumstances which applied to the Appellant, which would enable any special reduction in the penalties imposed for late payment of income tax except for the very limited circumstances which we have identified above which represent a reasonable excuse. We are satisfied that it was reasonable for HMRC to come the conclusion there were no special circumstances enabling a special reduction in penalties and their decision was not flawed.

Late filing penalty

224. As we have stated above, the Appellant did not put forward any reasonable excuse for his late filing of his self-assessment return for tax year 10-11 which was due to be filed on 31 January 2012. The late filing penalty is therefore confirmed.

Conclusion

225. We repeat that the Appellant was an honest and open witness who went out of his way to help the Tribunal. We are grateful him to all for the all the assistance he gave us. His integrity is not in question. We recognise that he has suffered payment difficulties and struggled financially during the relevant years as have many at the publicly funded bar. We have real sympathy for the toll this has taken on him personally. There is also no doubt that

Def No	Period	Due Date*	Amount Paid by Due Date	Amount Paid After Due Date £	Date payment received + method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document issued	Surcharge issued date	Rate	Amount £0.00

he was well intentioned throughout this period, wanting to meet his tax liabilities, and that the matters in question have caused him significant stress.

226. The Appellant has taken admirable steps to resolve his ongoing financial difficulties. Much to his credit, the Appellant has in recent years made active changes to improve his financial situation and settled all his tax liabilities. We recognise the Appellant's belief that there are real difficulties caused by payment delays and reduction in funding across the publicly funded criminal bar as a whole. Whilst recognising the strength of his belief, our findings are limited to the very specific facts of the Appellant's case and are not intended to be of any general application.

227. The appeal is dismissed but with one exception. For the reasons set out above, we cancel the 30-day late payment penalty for the 2011-12 self-assessment tax-year period identified above. This is on the basis we are satisfied the Appellant had a reasonable excuse for this specific late payment. We confirm all the other VAT default surcharges and late filing and payment penalties. This is on the basis that we are not satisfied the Appellant had a reasonable excuse for his late filing and payment on the vast majority of occasions.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

228. 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.

RUPERT JONES
TRIBUNAL JUDGE

Release date: 27 JANUARY 2021

APPENDIX 1 - Schedule of Defaults and Payments - VAT Default Surcharges

	Period Dates		£							%	
09/07											
1	01/07/17 – 30/09/17	31/10/2007	0	4869.99	12/11/2007 Cheque	12/11/2007	4869.99	V160	30/11/2007	0	**FD - SLN**
03/08											
2	01/01/08 – 31/03/08	30/04/2008	0	3367.28	09/05/2008 BACS	07/05/2008	3367.28	V161	16/05/2008	2	0
12/08											
3	01/10/08 – 31/12/08	31/01/2009	0	6994.35	See Attached	05/02/2009	6994.35	V161	13/02/2008	5	0
09/09											
4	01/07/09 – 30/09/09	31/10/2009	0	2044.71	11/11/2009 BACS	05/11/2009	2044.71	V162	13/11/2009	10	204.47
12/09											
5	01/10/09 – 31/12/09	31/01/2010	0	4143.18	See Attached	05/01/2010	4143.18	V162	12/02/2010	15	621.47
03/10											
6	01/01/10 – 31/03/10	30/04/2010	0	5715.58	See Attached	04/05/2010	5715.58	V162	14/05/2010	15	733.44
06/10							6388	V166	13/08/2010	15	
7	01/04/10 – 30/06/10	31/07/2010	0	1633.26	See Attached	16/08/2010	1633.26	V163a	17/08/2010	15	244.98
09/10							1705	V166	12/11/2	15	

8	01/07/10 – 30/09/10	31/10/2010	0	9297.6	See Attached	23/11/2010			010		
							9297.6	V163	24/11/2010	15	1394.64
03/11							6991	V166	13/05/2011	15	
9	01/01/11 – 31/03/11	30/04/2011	0	9626.97	See Attached	25/05/2011	9626.97	V163	25/05/2011	15	1444.04
06/11							10439	V166	12/08/2011	15	
10	01/04/11 – 30/06/11	31/07/2011	0	6906.1	See Attached	19/10/2011	6906.1	V163a	19/10/2011	15	1035.91
09/11							6979	V166	11/11/2011	15	
11	01/07/11 – 30/09/11	31/10/2011	0	5802.84	See Attached	03/05/2012	5802.84	V163a	03/05/2012	15	870.42
12/11							7084	V166	17/02/2012	15	
12	01/10/11 – 31/12/11	31/01/2012	0	3373.4	See Attached	03/05/2012	3373.4	V163a	03/05/2012	15	506.01
03/12											
13	01/01/12 – 31/03/12	30/04/2012	0	4073.08	See Attached	03/05/2012	4073.08	V162	18/05/2012	15	610.96
06/12							4225	V166	17/08/2012	15	
14	01/04/12 – 30/06/12	31/07/2012	0	4392.36	See Attached	26/09/2012	4392.36	V163	26/09/2012	15	658.85
09/12											

15	01/07/12 – 30/09/12	31/10/2012	0	4555.57	See Attached	23/10/2012	4555.57	V162	16/11/2012	15	683.33
12/12 16	01/10/12 – 31/12/12	31/01/2013	0	10697	See Attached	20/01/2013	10696.97	V162 Removed by letter	15/02/2013 17/04/2013	15 -	-
03/13 17	01/01/13 – 31/03/13	30/04/2013	0	2319.35	See Attached	27/04/2013	4282.07	V162	17/05/2013	15	642.31
06/13 18	01/04/13 – 30/06/13	31/07/2013	0	**O/S**	**O/S**	17/07/2013	3133.03	V162	16/08/2013	15	469.95
09/13 19	01/07/13 – 30/09/13	31/10/2013	0	**O/S**	**O/S**	30/10/2013	5305.78	V162	15/11/2013	15	795.86
12/13 20	01/10/13 – 31/12/13	31/01/2014	0	**O/S**	**O/S**	22/01/2014	7400.86	V162	14/02/2014	15	1110.12
03/14 21	01/01/14 – 31/03/14	30/04/2014	0	1984.29	15/05/2014 FPS	01/05/2014	1984.29	V162	16/05/2014	15	297.64
09/14 22											

	01/07/14 – 30/09/14	31/10/2014	4199.89	0	07/11/2014 FPS	07/11/2014	4199.89	V162 Removed by letter	14/11/2014 13/01/2015	15 -	-
12/14 23	01/10/14 – 31/12/14	31/01/2015	0	5900.16	10/02/2015 FPS	09/02/2015	5900.16	V162	13/02/2015	15	885.02
06/15 24	01/04/15 – 30/06/15	31/07/2015	2500 861.52	0 0	06/08/2015 07/08/2015 2xFPS	06/08/2015	3361.52	V162 Removed by letter	14/08/2015 01/03/2018	15 -	-
										Total	**£13,209.42**

Appendix 2 - Self-assessment Income Tax - Schedule of Penalties and Payments

No	**Tax year**	**Due Date**	**Date Return Received**				
				Penalties			
	Tax year dates			**Type**		**Amount**	**Date issued**
2010-11				1	Late filing	£100.00	14/02/2012
1	06/04/10 – 05/04/11	31/01/2012	06/03/2012	2	30 days late payment	£1,631.00	15/05/2012
				3	6 months late payment	£1,559.00	04/09/2012
				4	12 months late payment	£209.00	19/02/2013
2011-12	06/04/11 – 05/04/12	31/01/2013	28/01/2013	5	30 days late payment	£2,085.00	19/03/2013

2				6	6 months late payment	£1,569.00	14/08/2013
				7	12 months late payment	£1,018.00	25/02/2014
2012-13	06/04/12 – 05/04/13	31/01/2014	30/01/2014	8	30 days late payment	£2,328.00	13/05/2014
3				9	6 months late payment	£2,328.00	18/08/2014
				10	12 months late payment	£2,328.00	24/02/2015
13-14	06/04/13 – 05/04/14	31/01/2015	18/12/2014	11	30 days late payment	£971.00	17/03/2015
4				12	6 months late payment	£971.00	14/08/2015
				13	12 months late payment	£948.00	23/02/2016
14-15	06/04/14 – 05/04/15	31/01/2016	26/01/2016	14	30 days late payment	£1,415.00	15/03/2016
5				15	6 months late payment	£1,415.00	12/08/2016
				16	12 months late payment	£1,415.00	21/02/2017
15-16	06/04/15 – 05/04/16	31/01/2017	26/01/2017	17	30 days late payment	£487.00	14/03/2017
6				18	6 months late payment	£487.00	29/08/2017
				19	12 months late payment	£123.00	20/02/2018

16-17	06/04/16 – 05/04/17	31/01/2018	25/01/2018	20	30 days late payment	£972.00	13/03/2018
7							
					TOTAL	**£24,359.00**	