



Neutral Citation: [2024] UKFTT 958 (TC)

Case Number: TC09339

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2024/00468

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

Heard on: 15 August 2024

Judgment date: 24 October 2024

Before

**TRIBUNAL JUDGE ROSA PETTIFER
JANE SHILLAKER**

Between

SHADI FARDJADNIA

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr James Little

For the Respondents: Ms Antonia Garvey litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was video using the Cloud Video Platform. The Tribunal, Ms Fardjadnia (the **Appellant**), Mr Little and Ms Garvey attended remotely. A face to face hearing was not held because it was not expedient to do so. We were referred to: an amended document bundle of 150 pages; a legislation and authorities bundle of 151 pages; and an amended Statement of Reasons dated 14 May 2024 of 24 pages.
2. 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.
3. At the outset we would like to note that we are very sympathetic to the Appellant's circumstances and are grateful to her for explaining them to us so candidly when we know that this was difficult for her, and also to Mr Little for his assistance to the Tribunal and the Appellant in presenting the Appellant's case.
4. For the reasons given below we dismiss the appeal.

BACKGROUND

5. This appeal concerns penalties for the late filing of a self assessment tax return for the tax year ending 5 April 2022 pursuant to Schedule 55 Finance Act 2009 (**Schedule 55**). The penalties are as follows:

| Tax year ending 5 April | Date of Penalty | Legislation | Description | Amount (£) |
|--------------------------------|------------------------|-------------------------|-----------------------------|-------------------|
| 2022 | 14/02/2023 | Paragraph 3 Schedule 55 | Initial late filing penalty | £100 |
| 2022 | 15/08/2023 | Paragraph 4 Schedule 55 | Daily late filing penalty | £900 |
| 2022 | 15/08/2023 | Paragraph 5 Schedule 55 | 6 Month late filing penalty | £300 |
| | | Total | | £1,300 |

(together the **Penalties**).

6. HMRC say that the Appellant did not make or deliver her online self assessment tax return for the tax year ending 5 April 2022 (the **Return**) until 12 October 2023, 254 days after the deadline of 31 January 2023 for online self assessment tax returns. Further that she has no reasonable excuse for the delay, nor do any special circumstances exist. Consequently, the Appellant is liable to the Penalties.
7. The Appellant says that she made the Return close to but before the deadline of 31 January 2023 and the reason that HMRC's online system did not record that fact was due to a technical/system error of HMRC's online system. Further that her particular circumstances

meant that she did not realise for months that she was being penalised for not filing the Return. Therefore she is not liable for the Penalties and if she is she has a reasonable excuse.

THE ISSUES

8. The issues between the parties are:

- (1) Whether the Appellant did not make or deliver the Return until 12 October 2023?
- (2) If the Return was not made or delivered until 12 October 2023 does the Appellant have a reasonable excuse for the late making or delivering of the Return?
- (3) Are there are special circumstances that warrant a reduction in the Penalties?

9. There was no dispute between the parties as to whether the notices for the Penalties dated 14 February 2023 and 15 August 2023 were valid ie met the requirements of paragraph 4(1)(c) and paragraph 18 Schedule 55.

THE LAW

Legislation

The requirement to file and electronic communication

10. For the purposes of income tax s8(1)(a) Taxes Management Act 1970 (the **TMA**) requires a person, where notice is given by '*an officer of the board*', to file a return to enable HMRC to establish the amount of income tax due from that person. For the tax year ending 5 April 2022 the deadline for filing such a return was 31 January 2023 for electronically filed returns or 31 October 2022 for non-electronically filed returns, see s8(1D) TMA.

11. A combination of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282), Directions of HMRC made under those regulations and s103 Finance Act 2020 permit HMRC to do various things electronically as long as a taxpayer has consented. Those things include giving the notice required under s8(1)(a) TMA to file a return and giving notice of a penalty assessment pursuant to paragraph 18 Schedule 55 to the secure mailbox in the Appellant's online personal tax account (**PTA**).

12. r6 Income and Corporation Taxes (Electronic Communications) Regulations 2003 provides:

(1) A document certified by an officer of the Board to be a printed-out version of any information delivered by means of electronic communications under these Regulations on any occasion shall be evidence, unless the contrary is proved, that that information—

(a) was delivered by means of electronic communications on that occasion; and

(b) constitutes the entirety of what was delivered on that occasion.

(2) A document purporting to be a certificate given in accordance with paragraph (1) shall be presumed to be such a certificate unless the contrary is proved.

The penalty scheme

13. Schedule 55 provides a penalty scheme for various failures by a person to make or deliver a return or deliver a document in accordance with the 'filing date'. Paragraph 1(1) Schedule 55 provides:

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.

The table is set out at paragraph 1(5) Schedule 55 and item 1 in that table is:

(a) Return under section 8(1)(a) of TMA 1970

and paragraph 1(4) Schedule 55 tells us:

"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.

14. Paragraph 2 Schedule 55 applies paragraphs 3 – 6 Schedule 55 to various items, including item 1, in the table set out at paragraph 1(5) Schedule 55. Relevant to this appeal are paragraphs 3, 4 and 5 which provide:

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).

5 (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 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

15. Paragraph 18(1) Schedule 55 provides:

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

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

16. Reasonable excuse is provided by paragraph 23 Schedule 55:

23 (1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a return—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count for the purposes of paragraphs 13B(2), 13C, 13G(2) and 13H.

(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.

17. Special circumstances are provided by paragraph 16 Schedule 55:

16 (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.

Appeal provisions

18. Paragraph 20 Schedule 55 provides the right of appeal:

- (1) *P may appeal against a decision of HMRC that a penalty is payable by P.*
- (2) *P may appeal against a decision of HMRC as to the amount of a penalty payable by P.*

19. Paragraph 21 Schedule 55 and s49G(3) TMA permits the Appellant to bring a late appeal if the Tribunal gives permission where HMRC have made an offer of a statutory review.

20. Paragraph 22 Schedule 55 provides:

- (1) *On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.*
- (2) *On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—*
 - (a) *affirm HMRC's decision, or*
 - (b) *substitute for HMRC's decision another decision that HMRC had power to make.*
- (3) *If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—*
 - (a) *to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or*
 - (b) *to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.*
- (4) *In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.*
- (5) *In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).*

Burden of proof

21. It is for HMRC to show that the Appellant is liable for the Penalties and that they have been correctly issued.

22. It is for the Appellant to show that she has a reasonable excuse or that a special circumstance exists.

23. The standard of proof for all issues is the balance of probabilities.

Case law

24. In *Christine Perrin v HMRC* [2018] UKUT 0156 (*Perrin*) the Upper Tribunal considered reasonable excuse pursuant to Schedule 55 and provided the following:

81. When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

- (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.

25. In *Barry Edwards v HMRC* [2019] UKUT 131 the Upper Tribunal considered special circumstances pursuant to paragraph 16 Schedule 55 (*Barry Edwards*).

26. Various cases that establish that this Tribunal has no inherent supervisory jurisdiction, see for example *Hok Ltd v HMRC* [2012] UKUT 363 and *Abdul Noor v HMRC* [2013] UKUT 71.

27. In *Tui UK Ltd v Griffiths* [2023] UKSC 48 the Supreme Court considered the scope of the rule, based on fairness, that a party should challenge by cross-examination evidence that it wishes to impugn or call in question.

LATE APPEAL

28. It was common ground that the Appellant’s appeal was late. The reason for this lateness was because the Appellant sent her appeal to HMRC rather than the Tribunal. In the context of this case there was not a significant delay before the Appellant submitted her appeal to the Tribunal and HMRC did not object to the Appellant’s appeal being late. Therefore, in these circumstances, we grant permission for the Appellant to bring a late appeal.

FACTS NOT IN DISPUTE

29. The following facts were not in dispute:

(1) On 15 January 2022 the Appellant signed up to paperless communication with HMRC, consequently HMRC could communicate with the Appellant as set out at paragraph 11 above.

(2) On 6 April 2022 HMRC issued a notice to file a self assessment tax return to the secure mailbox in the Appellant’s PTA.

(3) On 10 April 2022 HMRC issued a generic email alert to the Appellant’s verified email address.

(4) On 14 February 2023 the Respondents issued a notice of penalty assessment of £100 pursuant to paragraph 3 Schedule 55 to the secure mailbox in the Appellant’s PTA.

- (5) On 16 February 2023 HMRC issued a generic email alert to the Appellant's verified email address.
- (6) On 15 August 2023 the Respondents issued a notice of penalty assessment:
 - (a) of £900 calculated at £10 per day for 90 days pursuant to paragraph 4 Schedule 55; and
 - (b) of £300 pursuant to paragraph 5 Schedule 55;to the secure mailbox in the Appellant's PTA.
- (7) On 23 August 2023 HMRC issued a generic email alert to the Appellant's verified email address.
- (8) That the Return was not recorded in HMRC's online system until 12 October 2023.
- (9) Following an appeal of the Penalties to HMRC and further correspondence between the parties (including an offer from HMRC of a statutory review) the Appellant appealed the Penalties to the Tribunal on 23 January 2024.

The amended document bundle contained a certificate under r6 Income and Corporation Taxes (Electronic Communications) Regulations 2003 for items (2) – (7) above.

EVIDENCE AND SUBMISSIONS

For the Appellant

30. The Appellant gave witness evidence during the hearing. First she explained that: she suffers from and is on medication for anxiety (and offered to provide medical evidence about her medication); she grew up in Iran where she believed that the government was against her especially as she was a woman; she returns to Iran every year; her fear of Iranian government and institutions has transferred to the government and institutions in the UK and consequently contact with HMRC triggers her anxiety; her anxiety combined with English not being her first language gives rise to feelings of 'blind panic' and misunderstanding when dealing with HMRC. The Appellant also explained whenever she is dealing with situations that make her anxious she buries her head in the sand.

31. Mr Little in presenting the Appellant's case also gave evidence. Mr Little explained that the Appellant had approached him about her tax affairs in late summer 2023. Further that it had taken some time for the Appellant to approach him as she was not naturally open and trusting. On investigation he understood that HMRC's position was that the Appellant had not filed the Return and had charged her associated penalties. Mr Little asked the Appellant about this and it was clear that she was not aware of HMRC's position. Mr Little immediately offered to help the Appellant and has done so ever since. Mr Little confirmed that he had been the Appellant's partner since October 2020.

32. Mr Little explained that his first action in helping the Appellant was to make contact with HMRC. Together they called HMRC twice on 11 October 2023. First by calling 0300 200 3310 at 15:15 a screenshot from Mr Little's phone shows that this call lasted 1hour 32 minutes. The amended document bundle contained a transcript of that call that neither the Appellant nor Mr Little disputed. The transcript of that call records that Mr Little explained to HMRC that the Appellant thought that she had filed the Return. The adviser on that call advises the Appellant to call the online helpdesk on 03000 200 3600 on the basis that they may be able to locate the Return. Further, to file the Return in order to prevent the Appellant from becoming liable to more penalties.

33. Mr Little went on to describe the second phone call to the online helpdesk at 16:48 on 11 October 2023. A screenshot from Mr Little's phone shows that this call lasted 19 minutes. Again the amended document bundle contains a transcript of that phone call which Mr Little was clear that neither he nor the Appellant disputed. The transcript records a discussion with the adviser who accepts that on occasions the online system can fail. The transcript does not contain discussion of any particular failure of the online system. We set out relevant details of this call at paragraph 45 below.

34. After hearing from Mr Little we heard again from the Appellant. The Appellant explained that she had her own business as a personal trainer and had always been anxious about making a mistake, we understood her to mean when she was dealing with HMRC. Therefore whenever she saw penalties she simply paid them. She reiterated that she was an anxious person and that there were a lot of problems in Iran.

35. In response to a question from the Tribunal about the Appellant's previous use of a tax agent Mr Little explained that the previous tax agent had been an acquaintance of the Appellant's sister whose services were no longer available at the times relevant to the Return. Further that it was very expensive to employ a tax agent. It was unclear for which years the Appellant had been able to rely on the tax agent. The Tribunal asked the Appellant whether she had considered seeking further advice and the Appellant explained that she had decided to do the Return for herself as she believed it would be easy for a sole trader who was a personal trainer.

36. Ms Garvey only put one question to the Appellant in cross-examination and did not put any to Mr Little. Ms Garvey's question was why had the Appellant not highlighted her medical evidence before. The Appellant replied: that she was not used to this process; her medical history was personal and not something she generally wished to share; and that she had not been confident to disclose her medical records previously but she was now willing to disclose them in relation to her medication.

37. After HMRC's submissions the Tribunal asked the Appellant whether when she filed the Return she recorded her self employed income. The Appellant replied that she had done it like you normally do. The Appellant was adamant that she filed the Return and indicated that she had done it in the last few days before the deadline of 31 January 2023 but was not clear about on what day. She also repeated that she had just kept paying the penalties without thinking.

38. The amended document bundle contained the Appellant's 'Further Appeal to the Respondents' dated 16 October 2023. That encloses a screen shot of a document which includes the following:

As you have made a change to your return, the submission receipt reference number has changed.

The submission receipt reference number is designed to provide you with proof of submission of the correct return. It will be printed on every copy of your return and will change every time you amend your return prior to submission.

We recommend that you:

- *print and save a copy of your return after submitting it, so that your copy will match the copy that HM Revenue and customs has received; and*
- *save the submission receipt after you have successfully submitted your return. The receipt is proof of your submission.*

[our emphasis.]

Mr Little did not take us to this document during the hearing although Ms Garvey did. The correspondence from the Appellant to HMRC that included this screenshot provides:

I resubmitted my 2021/22 Tax Return online on 12/10/2023. When I submitted it I received an online message of which I attach a screenshot. This stated that a change had been made to my tax return and as such the submission receipt reference number had changed. I take this as proof that a previous Tax Return for 2021/22 had been submitted online, even if it does not appear on your system.

The text we have emphasised makes it very clear that a change to the submission receipt reference number just means that you have amended your return prior to submission. Therefore, we do not consider that the screenshot supports the Appellant's case in the way that she seeks and place no weight on it for the Appellant.

For HMRC

Preliminary points

Weight to be placed on HMRC's documents

39. HMRC adduced no witness evidence but relied exclusively on the documents filed with its Statement of Reasons pursuant to the Tribunal's directions of 29 January 2024. Ms Garvey made at times extensive submissions on those documents. It is important to be clear about the status of the documents and of Ms Garvey's submissions. There was no dispute between the parties about the authenticity of the documents. Any dispute between the parties was about what the documents proved. Therefore, the documents were in evidence before the Tribunal. However, some of the documents spoke for themselves and did not require much or any amplification or explanation but some documents required detailed submissions from Ms Garvey in order for us to understand what HMRC say they showed. Submissions are not subject to cross-examination by the other party and this formed part of our decision as to what weight, if any, to attach to HMRC's documents. There were a number of documents that HMRC took us to (which the Appellant did not seek to rely on) where either one or a combination of the following factors were present: Ms Garvey's submissions were extensive; the document or part of it required witness evidence to be properly understood; or there was a difference between the parties as to what the documents showed. Consequently, we placed no weight on a number of HMRC's documents or parts of them: given that we have found for HMRC without them (and so they do not form part of our decision) we do not set out our reasons in relation to each document or part of them in this decision.

Documents relating to the Appellant's interactions with HMRC's online system

40. HMRC relied extensively on documents relating to the Appellant's interactions with HMRC's online system. The first is listed in the index to the amended document bundle as 'Online Sessions History' an untitled and undated 3 page document with columns headed: DateTime [sic], Name, Type, Role, Nino and SaUTR. Ms Garvey says that these are a complete list of the Appellant's 'Sessions Journeys' on HMRC's online system from 2 January 2018 to 1 February 2024. Ms Garvey did not explain the genesis of the Online Sessions History

document. However: it is a straightforward list that clearly identifies the Appellant; it was easily understood once minimal context was provided; the Appellant made no objection either directly or indirectly to the authenticity of the document; and Ms Garvey took us to several documents relating to ‘Session Journeys’ where the dates and times matched the details in the ‘Online Session History’ document. Therefore, we accept that it is a complete list of the Appellant’s ‘Session Journeys’ on HMRC’s online system for the period identified.

41. The second type of document are entitled ‘GOV.UK Customer Insight Platform’ the first page of which clearly identifies the Appellant, the next page is headed ‘Session journey’ and provides dates and times in the headings. What follows are columns headed Time, Vi... (we cannot see the rest of the word) and URL, the columns are then filled in with what are essentially ‘strings’ of information. We refer to these documents as **Session Journeys**. Ms Garvey explained that the Session Journey documents showed the detail of the Appellant’s interactions with HMRC’s online system. Ms Garvey spent time, in submissions, taking us through particular ‘strings’ in these documents and some of them required more of Ms Garvey’s time than others. Again there was no explanation of the genesis of these documents nor any witness evidence about what the detail of these documents provided. However, the documents all clearly identify the Appellant and the Appellant made no objection to the submission that they represented the detail of her interactions with HMRC’s online system. Therefore, we accept the broad principle that they reflect the detail of the Appellant’s interactions with HMRC’s online system. We placed no weight on a number of or part of the Session Journeys for the reasons set out at paragraph 39 above. We discuss below where we accept Ms Garvey’s submissions on what these interactions show.

42. The third type of document are also entitled ‘GOV.UK Customer Insight Platform’ the first page of which clearly identifies the Appellant. They also have a ‘Session journey’ section which provides dates and times. But rather than going on to provide strings of information the documents detail ‘Notable Events’. Again there was no explanation of the genesis of these documents nor any witness evidence about what the detail of these documents provided. However, the documents all clearly identify the Appellant and the Appellant made no objection to the submission that they represented the notable events of her interactions with HMRC’s online system as recorded by that system. Therefore, we accept that they confirm what notable events were recorded as occurring in a particular Session Journey.

Whether the Appellant submitted the Return but a technical/system failure meant that it was not recorded in HMRC’s systems on or around 31 January 2023

11 October 2023 phone calls

43. Ms Garvey took us to the transcripts of the two phone calls that the Appellant and Mr Little made to HMRC on 11 October 2023. When doing so Ms Garvey quite properly and fully acknowledged and apologised for HMRC’s initial denial that the second phone call took place.

44. During the first phone call the adviser, the Appellant and Mr Little look at the Appellant’s PTA. The adviser explains that from what they can see the Return has not been filed or it has been filed late. From the transcript it is clear at that point that the Appellant and Mr Little thought that the Return had been filed. The adviser gives the Appellant and Mr Little the number of the ‘online helpdesk services’ on the basis that they will be able to further check whether the Return had been filed.

45. Ms Garvey also took us to the transcript of the second call on 11 October 2023. The second adviser explains that they have checked both of their systems and they cannot locate the Return. Mr Little asks: “*can I ask, is there any, any way someone can complete a return online, but there to be an error, has this happened before, um, on any occasion, where, you*

know, someone's adamant they filed a return online but for some reason it doesn't register?" The adviser makes three comments on this point: (i) initially "Um, y, uh, so w, usually when, w, when you submit a return, usually (Unintelligible, voice breaking up) it comes on the system and if there's an error, it usually shows why, uh, usually tells on the system, if the self-assessment team have, um, er, the reason why the, um, on the return, if there was a error, or, on the, if there was a error or anything on it, where usually, but on her account I can see on here, it's not showing any returns at all."; (ii) after Mr Little repeats his question "You can't, um, so, (Unintelligible), it does happen but, it doesn't happen very often..."; and after Mr Little seeks confirmation of the answer he has been given "Yes, it can happen, but not very often it happens. (Speaking over each other). Right, uh, that's okay."

46. Ms Garvey makes the point that two separate HMRC advisers confirmed HMRC's position on 11 October 2023, that the Return had not been received at that point. Further, that the comments about system failures were generic.

28 January 2022, 17 January 2023 and 24 January 2023

47. Ms Garvey also took us to the Session Journeys for 17 and 24 January 2023. She submits that various things are happening but there are no 'strings' that refer to self employment in contrast with the 'strings' shown for: the Session Journey for 28 January 2022 when the 20/21 return was successfully filed, reflected by the Notable Events for 28 January 2022; and the Session Journey for 12 October 2023 when the Return was successfully filed, reflected by the Notable Events for 12 October 2023. Therefore Ms Garvey says, the Return was not complete with the Appellant's self-employed income and so not in a position to be correctly filed by 31 January 2023.

48. We have set out the careful approach we are taking to Ms Garvey's submissions on what the Session Journeys and associated 'strings' show, see paragraph 39 above. However, we accept the proposition that it is useful to compare the 28 January 2022 Session Journey with the Session Journeys from 17 and 24 January 2023. We accept that the latter two have no 'strings' that refer to self-employment and we note that the former 'strings' (for 28 January 2022) mention self-employment at least 37 times with 18 entries appearing as submitted. We also went on to consider the Session Journey from 12 October 2023 and note that it shows at least 58 strings mentioning self-employment with at least 25 strings showing as submitted.

49. Ms Garvey also submits that the fact that the Appellant was able to access HMRC's online system as shown by the session journeys for 17 and 24 January 2023 means that we can infer that there were no technical/system failures.

Service availability document

50. Ms Garvey took us to a print out of a webpage titled *Self Assessment: service availability and issues*. It says that it was updated on 28 March 2023. This webpage lists various periods from 12 November 2019 to 28 March 2023 with corresponding entries about service availability. There is only one entry for 2023 which states *Planned downtime from 11:45pm on Wednesday 5 April 2023 to 2:30am on Thursday 6 April 2023 has been added*. There are 10 entries shown on the print out and all but one dated 19 November 2019 are described as planned or scheduled maintenance (albeit this entry relates to future dates – 21 and 22 November 2019).

Reasonable excuse

The Appellant's English and previous contact with HMRC

51. Ms Garvey took us to two documents that showed the Appellant had previously contacted HMRC in relation to late filing penalties arising from her 16/17 self assessment tax return, both submitted in 2019. We were also taken to a document entitled 'SA Notes' (which we understand to be Self Assessment Notes') that includes the note *TP TEL IN* and from which it is clear that the Appellant had been told how to and gone on to successfully challenge those penalties. Ms Garvey says that these documents show that the Appellant or someone acting on her behalf was able to articulate the Appellant's position to successfully appeal the penalties.

52. The SA Notes document also records that on 11 February 2022 the *TP called re explanation of statement and advices on how to pay* and on 1 February 2022 *webchat – query re calculation send amendments issued still not in receipt of takes 72 hours*. Ms Garvey says that these entries are in relation to the Appellant's 20/21 self assessment tax return and again shows that the Appellant was aware of how to contact HMRC via the telephone and webchat in relation to any queries she had.

The Appellant's position that she did not understand for months that she was being penalised for failing to file the Return

53. Ms Garvey pointed to the numerous communications from HMRC listed at paragraph 29 above, and says simply that the Appellant was aware of the Penalties.

Fear of government institutions in the UK including HMRC

54. Ms Garvey made submissions that the generic email alert from HMRC was not a document that could instil fear in someone. However, immediately after that submission she said that she was empathetic to the fact that the Appellant found communication with HMRC scary and difficult. Therefore, we do not consider that Ms Garvey maintained the submission that the Appellant did not have a fear of government institutions in the UK including HMRC.

55. The 15 August 2023 penalty notice provides:

If you need extra support

We can help you if you have health issues or personal circumstances that make it difficult for you to deal with us.

Get help from HMRC if you need extra support.

HMRC's case is that although the Appellant is fearful of and suffers anxiety as a result of interacting with HMRC, seeing a document that provides this information encourages asking for help from HMRC or to seek help from a trusted person.

FINDINGS OF FACT AND DISCUSSION

Preliminary points

56. During the hearing Mr Little made, and HMRC did not object to, the very general submission that it was unreasonable to impose the Penalties of £1,300 on a small trader such as the Appellant. As established by case law this Tribunal does not have a general supervisory jurisdiction and so cannot in Schedule 55 penalty appeals consider questions of reasonableness

in a general sense, see paragraph 26 above. However, we can and do consider it in the specific context of special circumstances.

57. Part of the Appellant's case was that she had always previously been a compliant taxpayer which we accept. We considered that fact in our deliberations but in the circumstances of this case it does not alter the conclusions we reach below.

The Appellant and Mr Little's evidence

58. We found both the Appellant and Mr Little to be honest and open witnesses and apart from the specific points we identify HMRC did not challenge the Appellant's or Mr Little's evidence. Therefore, we accept the Appellant and Mr Little's evidence at paragraphs 30 – 37 above that was not challenged by HMRC, and make detailed findings where it was challenged by HMRC.

Whether the Appellant failed to make or deliver the Return by 31 January 2023 due to a technical/system error

59. It is common ground between the parties and is borne out by HMRC's documentary evidence that HMRC's systems do not show that the Return was made until 12 October 2023. The Appellant says that this is because there was a technical/system error which meant her making of the Return was not recorded on HMRC's systems. The evidence we heard from the Appellant on this point was brief: in particular she was adamant that she made the Return see paragraph 37 above. HMRC maintain by reference to documents in evidence that the Appellant simply did not make the Return until 12 October 2023, they say that the Return was not ready to be made by 31 January 2023 and there was no technical/system error. This evidential conflict was not put to the Appellant in cross-examination. Consequently we considered the principles set out in *Tui UK Ltd v Griffiths* [2023] UKSC 48 at [70] and considered the fairness of the hearing given that HMRC did not challenge by cross-examination evidence that it wished to impugn or call into question. What the Appellant did or did not do in relation to filing the Return on or around 31 January 2023 is a material point to which only the Appellant had first hand knowledge. However: HMRC's detailed position that this was not the case and the reasons why has been clear since the service of their Statement of Reasons on 25 March 2024 (the Statement of Reasons were amended but those amendments were not material to this point) and so the Appellant had ample notice of it; and the other evidence that HMRC relied upon had been disclosed to the Appellant on 25 March 2024. Therefore, in all the circumstances we consider that the hearing remains fair if we proceed to weigh all the evidence relating to whether or not the Appellant filed the Return on or before 31 January 2023 and to make a finding accordingly.

60. We set out at paragraph 40 above that we accept that we have a complete list of the Appellant's interactions with HMRC's online system. Further at paragraph 48 that the Session Journeys for 17 and 24 January 2023 do not feature any self-employment 'strings' in contrast with the Session Journeys for 28 January 2022 and 12 October 2023. Ms Garvey says that this shows that the Return was not in a position to be correctly made in January 2023 because it could not have contained any information about the Appellant's self-employed income (which it is common ground between the parties that the Appellant needed to declare in the Return). Therefore, the Appellant's recollection of completing and making the Return is not correct. Ms Garvey also says that there were no recorded technical/system errors and the Appellant was able to access HMRC's online systems and so there was no other sort of technical/system error. This must be weighed against the Appellant's evidence that she made the Return and that there was an unspecified technical/system error (which HMRC have admitted is possible) that the

Appellant was unaware of at the time that meant that the information she entered was never recorded on HMRC's systems. The Appellant's position was that she had made a properly completed (so including self-employed income) as opposed to an incomplete self assessment tax return.

61. HMRC's evidence clearly shows that the Appellant was accessing HMRC's online system successfully on 17 and 24 January 2023. We do not consider it likely, even if there was a technical/system error, that if the Appellant had been completing the Return so that it was ready for submission the Session Journeys for 17 and 24 January 2023 would have no 'strings' at all in relation to self-employment. We also note that the Appellant has not supplied a submission receipt or any other documentary evidence (eg screen shots, a submission receipt reference from when she says she filed the Return, or a copy of the fully completed Return from January 2023) to support her position that she made the Return on or before 31 January 2023.

62. The evidence at paragraph 50 above shows that when the Appellant says she made the Return there was no planned maintenance that could have led to a technical/system error. Insofar as any unexpected technical/system error, it is true that the HMRC adviser accepts that there can be technical/system errors that result in filed self assessment tax returns not being recorded on HMRC's online system (see paragraph 45 above). However, it is a very general admission and there is no specific evidence before us to support a conclusion that this was an issue in January 2023 and/or one that affected the Appellant. We also consider it inherently unlikely that the Appellant would have no idea whatsoever at the time that there had been a technical/system error. Especially as she was successfully accessing HMRC's online system on 17 and 24 January 2023 (and we accept that these were her only interactions with HMRC's online system in January 2023).

63. Therefore, on the balance of probabilities we find that HMRC have shown that the Return was not ready to be made in January 2023 and there was no technical/system error that could have affected the Appellant's making of the Return. For those reasons we also find on a balance of probabilities that HMRC have shown that the Return was not submitted before the deadline of 31 January 2023 and that the Appellant's recollection that she submitted the Return is incorrect. Consequently, the Appellant is liable for the full amount of the Penalties subject to establishing that a reasonable excuse or special circumstances exist.

Reasonable excuse

64. We will consider the question of whether the Appellant has a reasonable excuse following the approach in *Perrin* set out at paragraph 24 above.

What facts the Appellant asserts gives rise to a reasonable excuse

65. The Appellant says that she was unaware that HMRC were treating the Return as late. This was because she had either filed the Return on time and a technical/system error meant that it had not reached HMRC or that she had an honest belief that she had filed it on time. Further that her belief persisted despite the multiple pieces of correspondence from HMRC, see paragraph 29 above, because of her particular circumstances see paragraphs 30, 31 and 34 above.

Which facts are proven

66. We set out above why we have found that the Appellant did not submit the Return on time and that there was no technical/system error that meant it had not been recorded on HMRC's online system.

67. Mr Little's evidence was that the Appellant did not realise that HMRC were treating the Return as late until after he began helping her. The Appellant's evidence was that she kept on paying the penalties 'without thinking'. Both Mr Little and the Appellant explained that this was the case despite the correspondence from HMRC because the Appellant's particular circumstances described at paragraphs 30, 31 and 34 above meant that she simply 'buried her hand in the sand' and did not meaningfully engage with the correspondence from HMRC. HMRC say that the Appellant had received the correspondence listed at paragraph 29 above and consequently that the Appellant knew about the penalties. Again HMRC did not put this evidential conflict to the Appellant in cross examination and so we considered the principles set out in *Tui UK Ltd v Griffiths* [2023] UKSC 48 at [70]. Our reasoning is very similar to that set out at paragraph 59 above. What the Appellant believed is a material point to which only the Appellant had first hand knowledge. However: HMRC's detailed position has been clear since the service of their Statement of Reasons on 25 March 2024 (the Statement of Reasons were amended but those amendments were not material to this point) and so the Appellant had ample notice of it and the evidence that HMRC relied upon had been disclosed to the Appellant on 25 March 2024. Therefore, in all the circumstances we consider that the hearing remains fair if we proceed to weigh all the evidence relating to whether or not the Appellant believed that she had filed the Return on time.

68. We note that the evidence in relation to the late filing penalties for the Appellant's 15/16 self assessment tax return (see paragraph 51 above) shows that when the Appellant or someone helping her realised that she had been charged penalties that she did not think should be imposed they promptly appealed them. We see a similar approach in relation to the Penalties: the Return was filed the day after the phone calls with HMRC that clarified to Mr Little and the Appellant that HMRC's position was that it had not been filed; and on the next day a further appeal to HMRC was prepared on the basis that the Appellant had filed the Return on time. The point being that the Appellant or someone helping her generally took action to rectify the situation and/or appeal a penalty once they realised there was an issue and what that issue was. Therefore, we find that on a balance of probabilities the Appellant has shown that she had an honest but mistaken belief that she had filed the Return on time.

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

69. For the reasons set out above we have found that the Return was not submitted on time and crucially that the self-employment information had not been completed before 31 January 2023. The evidence about when the Appellant started completing self assessment tax returns without any assistance was not completely clear: most favourable to the Appellant would be that the Return was the first time she had completed a self assessment tax return without assistance. Even if this was the case, it is a basic point that for a self assessment tax return to be complete where there is self employed income to declare, that self-employed information must be included in the self assessment tax return or it is not capable of being properly made. Further, the Appellant was not completely new to self assessment tax returns. We do not consider it objectively reasonable for a person even in the Appellant's particular circumstances (see paragraphs 30, 31 and 34 above) with previous experience of self assessment tax returns

to believe that they had submitted a completed a self assessment tax return when they had not entered their self employed income. We remain of this view even if the Appellant had always had help previously in completing her self assessment tax returns. Therefore in the absence of this essential information from the Return, we do not consider that the Appellant's failure to file the Return as a result of her honest belief that that she had filed it on time was objectively reasonable.

70. If we are wrong and the Appellant's honest belief does amount to a reasonable excuse, we consider that that reasonable excuse ended on 14 February 2023 when HMRC issued the paragraph 3 Schedule 55 penalty notice for late filing of the Return.

When any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time

71. The Appellant remedied the default on 12 October 2023 which we accept was shortly after she understood the Return was late following enlisting Mr Little's support in late summer 2023. 12 October 2023 was 240 days after the reasonable excuse ended on 14 February 2023. In our view, an objectively reasonable taxpayer aware of their own ongoing particular circumstances (including their tendency to 'bury their head in the sand', see paragraphs 30, 31 and 34 above) completing their self assessment tax return (particularly if this was their first time doing so) would have enlisted support from a trusted person or contacted HMRC at the beginning of the process and certainly before late summer 2023. This would ensure that they would be able to meaningfully engage with any correspondence from HMRC. In this case that would have meant that the Appellant would have understood that HMRC's position was that the Return had not been filed shortly after 14 February 2023 rather than in or around October 2023 (approximately 8 months later). Therefore, even if there was a reasonable excuse, the Appellant has not persuaded us that she remedied the failure to file the Return without unreasonable delay.

Special circumstances

72. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of '*special circumstances*'. Special circumstances is undefined except that, under paragraph 16(2) Schedule 55, it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

73. The Upper Tribunal in *Barry Edwards* [at 72 – 74] confirmed that the phrase special circumstances in paragraph 16 Schedule 55 should not be given a restrictive meaning

74. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. Pursuant to paragraph 22(3)(b) Schedule 55 the Tribunal may rely on paragraph 16 Schedule 55 if they think HMRC's decision was '*flawed when considered in the light of the principles applicable in proceedings for judicial review*'.

75. HMRC considered the Appellant's grounds of appeal and concluded that her circumstances do not amount to special circumstances which would merit a reduction of the penalties. There is nothing before us to, nor do our findings of fact, suggest that this conclusion is flawed. Given the amounts of the Penalties are prescribed by primary legislation pursuant to a penalty regime that has been found by the Upper Tribunal to be proportionate even where no tax is due (see p86 *Barry Edwards*) this conclusion also applies to Mr Little's submission on reasonableness set out at paragraph 56 above. Therefore we are not permitted to reduce the penalties.

CONCLUSION

76. For the reasons given the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

77. 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.

**ROSA PETTIFER
TRIBUNAL JUDGE**

Release date: 24 October 2024