Neutral Citation Number: **[2023] UKUT 113 (TCC)**

Case No: UT/2020/000246

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
On appeal from the First-tier Tribunal (Tax Chamber)
[2020] UKFTT 199 (TC)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17 May 2023

PROCEDURE (i) automated notices requiring returns – effect of s 103 FA 2020, (ii) whether service provisions of s 115 TMA 1970 are the only means of giving notice of penalty assessments PENALTIES (i) whether computation of tax geared penalties under paras 5 and 6 Schedule 55 FA 2009 should take into account prepayments of tax, (ii) scope of "special circumstances" justifying penalty reduction

Appeal allowed in part

Before :

MR JUSTICE FANCOURT
UPPER TRIBUNAL JUDGE TILAKAPALA

- -

Between :

Peter Marano	**Appellant**
- and -	
Commissioners for HM Revenue & Customs	**Respondents**

- -
- -

Representation

For the Appellant: Keith Gordon, Counsel instructed by RSM UK Tax

For the Respondents: Sadiya Choudhury, Counsel instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

Hearing date: 7 February 2023

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DECISION

1. This is an appeal by the taxpayer, Mr Marano, from a decision of the First-tier Tribunal ("FTT") dated 23 April 2020 ("the Decision"), which confirmed a discovery assessment in the amount of £5,744,219 and upheld a series of penalties issued under Schedule 55 to the Finance Act 2009 ("Sched 55") for the failure by Mr Marano to file a self-assessment tax return for the tax year 2012-13.

2. The penalties issued by HMRC upheld by the FTT included two large "tax-geared" penalties, issued on 14 March 2017 under Sched 55 paras 5 and 6, for continuing default in filing six and twelve months after the penalty date. By 2017, Mr Marano had belatedly filed a tax return, too late to be assessed as such but which enabled HMRC to calculate and issue a discovery assessment. This assessment was based on a taxable capital gain, which Mr Marano's accountants had previously disclosed to HMRC and which Mr Marano had in fact voluntarily paid during the 2012/13 tax year. Penalty assessments in the aggregate sum of £574,422 were then issued, representing 5% of the discovery assessment under each of Sched 55 paras 5 and 6. The penalty assessment did not take account of the voluntary prepayment, or of payments on account of his 2012/13 tax liability in the sum of £29,993.69 made under s.59A TMA. The FTT decided that the voluntary disclosure and prepayment did not amount to special circumstances under Sched 55 para 16 justifying a reduction in the amount of the penalties.

3. Permission to appeal was granted by Upper Tribunal Judge Jonathan Richards on 1 December 2020, there were four grounds of appeal that were argued before us, raising the following issues:

i) Whether a valid notice to file a tax return had been issued to Mr Marano by an officer of HMRC for the tax year in question, in accordance with s.8 TMA, and the penalty assessments had been validly issued on behalf of HMRC under Sched 55 para 18. These both turn on the same issue about the necessary degree of involvement of an individual officer of HMRC in issuing the notices. The FTT held that some authorisation by an officer of HMRC could be inferred from the known facts and that the notices had been validly issued.

ii) Whether the penalty notices issued on 3 March 2015 and 14 March 2017 and received by Mr Marano had been properly given to him, as they were not served personally or left at or sent by post to his usual or last-known place of residence or business. This is an issue about whether the service provisions set out in s.115 TMA are the only permitted means of giving notice of such assessments. The FTT found as a fact that the s.8 notice was sent to the last-known place of residence and held that the penalty notices were validly given to Mr Marano at a different address, pursuant to the terms of reg. 75 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, or alternatively were sufficiently given to Mr Marano as a result of his receiving the notices indirectly, which it found as a fact that he did.

iii) Whether the "tax-geared" penalties under Sched 55 paras 5 and 6 should be based on the amount of tax that would have been due (in the sense of being then outstanding and payable) had an accurate return been filed on the filing date, or on the amount of the liability for tax that would have been shown for the tax year in question in the return (with the consequence that any voluntary payment and payments on account for that tax year would not be deducted in calculating the amount of the penalty). The FTT held that it was the latter, so that Mr Marano's voluntary payment and payments on account, exceeding the amount that would have been shown on a return, were irrelevant in calculating the amount of the penalties.

iv) Whether, if the issue in Ground (iii) above was correctly decided by the FTT, the FTT was nevertheless wrong to hold that "special circumstances" justifying a reduction in the amount of the penalty could not include the fact of early notification of the tax liability accompanied by a voluntary payment on account of the amount of the liability, and to reject an argument of disproportionality based on the large amount of the penalties.

4. Given the circumscribed nature of the issues live on this appeal, it is unnecessary to set out at any length the factual background to the penalty assessments and the FTT decision. The material facts, as found by the FTT – to which there is no challenge on appeal – will be addressed under each of the separate grounds of appeal.

Ground 1: insufficient evidence of authorisation by HMRC officer

5. A notice to file a self-assessment tax return for 2012-13 (in the form of a full return) was sent to Mr Marano at his last-known residential address on 6 April 2013. That fact was disputed before the FTT but the FTT's finding adverse to Mr Marano is not challenged on appeal. The FTT's finding was made on the basis of HMRC's microfiche record of sending a return to the right address, an internal return summary on Mr Marano's taxpayer account, and an eventual admission by Mr Marano that he had received a return for 2012/13.

6. The issue on this appeal relating to the notice to file is whether the notice in the form of the full return was given to Mr Marano "by an officer of the Board" within the meaning of s.8 TMA. Previous decisions of the FTT and this Tribunal, culminating in *Rogers and Shaw v HMRC* [2019] UKUT 406 (TCC), establish that there must be sufficient evidence of authorisation by an officer of HMRC. What is sufficient depends on whether the issue is disputed by the taxpayer.

7. The same issue in substance is raised in relation to all the penalty assessments that were notified to Mr Marano, albeit the language of the relevant statutory provision under Sched 55 is somewhat different.

8. In view of legislative change (in the form of s.103 of the Finance Act 2020) that came into force after the Decision but with retrospective effect, the precise questions that the FTT decided have been overtaken by a new legal test. However, as there is dispute about what that new test amounts to and the pre-existing law is important background, we will deal first with the basis on which the FTT decided the issues. We then turn to deal with the new test under s.103 at [32] below.

9. Mr Marano had expressly put HMRC to proof of sufficient involvement of an officer of HMRC in the process, but HMRC did not file evidence relating to that issue until after the decision in the *Rogers and Shaw* case, shortly before the FTT hearing. No objection was taken to the late evidence and the FTT heard argument and decided the point.

10. The evidence before the FTT relating to the s.8 notice was limited to a microfiche record of sending of a full return and a record of Mr Marano's tax affairs in HMRC's self-assessment system. The microfiche was described in the supplementary witness statement of Louise McGovern dated 7 January 2019 as a printed record of a computer output, and as being "maintained in all cases where a Notice to Complete a Tax return is issued automatically by the computer in line with default HMRC Retention of CY6+1". The microfiche shows a date of 6 April 2013, Mr Marano's name and residential address, and his unique taxpayer reference number. The computer record of Mr Marano's self-assessment return for 2012/13 records a full return as having been issued on 6 April 2013. It was agreed that the full return was received by Mr Marano. Despite HMRC having been put to proof of officer involvement, nothing was said in the evidence on behalf of HMRC to explain in what way or ways any officer was involved in or authorised sending out the full return on 6 April 2013.

11. The evidence relating to the issued penalty assessments was essentially the same: a microfiche record showing the addressee, the address and the amount of the assessment, and a screen shot of a computer record of Mr Marano's 2012-13 self-assessment showing the assessed penalties. The evidence in Ms McGovern's first witness statement was that the two 2017 "tax-geared" late

filing penalties were "raised automatically in self-assessment" and "issued by the self-assessment system" based upon the discovery assessment issued by HMRC in March 2017. There was therefore no evidence of the involvement of any officer of HMRC in making the penalty assessments.

12. The FTT nevertheless concluded, in agreement with HMRC's litigator, that "the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems" ([126]); an officer of HMRC was simply any or all members of HMRC's staff appointed for the purposes of exercising the Commissioners' functions, and so included any staff who program HMRC's computers. The FTT then stated:

> "129. We have found as facts that a full return, including a Notice to File, was issued to Mr Marano, and that its issuance and posting was recorded by HMRC's systems. The only reasonable conclusions from that evidence are that the return was issued because HMRC's system was programmed to carry out that task, and that the programme was authorised by HMRC officers, as defined.
>
> 130. As Mr Vallis said, the alternative would be that HMRC's computer system had been either (a) programmed by persons other than HMRC staff, or (b) programmed without any human intervention. There is no evidence that HMRC's computer system had been hacked, and it is not reasonable or credible to find that in 2013 HMRC's computer system was being controlled

by some sort of artificial intelligence, capable of deciding its own parameters without the need for a human being to programme it."

13. The FTT therefore inferred from the evidence before it, to the effect that computers had issued the full return and had recorded doing so, that HMRC's computers were used and that HMRC officers programmed them so that the return was sent to Mr Marano.

14. In relation to the penalty assessments, the FTT pointed out that it was not necessary to provide evidence that an HMRC officer personally decided to issue penalties in the individual case but that a generic policy decision would suffice. It then pointed out that the quantum of the penalties was fixed by statutory provisions and not a matter for decision by HMRC and said at [145]:

> "There is no dispute that the penalties actually issued by HMRC's computer system accurately reflect those provisions. The only reasonable conclusion is that HMRC staff designed the computer programs which implement the legislation. As Mr Vallis said, the alternative would be for us to find that HMRC's computer had been hacked, or the computer was writing its own programs, but nevertheless still managed to ensure that the penalties actually issued reflect the statutory requirements."

15. It is notable that in both extracts from the Decision the FTT assumed that it was HMRC's computer system that sent out the notices. However, the evidence in *Rogers and Shaw* was that certain functions were outsourced by HMRC. Although that was not evidence before the FTT, it nevertheless illustrates that it was not a safe assumption for the FTT to make.

16. In *Rogers and Shaw v HMRC*, this Tribunal rejected an argument that a notice to file had to be signed by a named officer or that it had to be made clear in evidence that a particular named officer was giving the notice. It said at [32]:

> "In our judgment, properly construed, s.8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC. Therefore, if a police constable, for example, purported to require a taxpayer to submit a tax return that would not be a lawful request under s.8 (unless the police constable happened also to be an officer of HMRC). Instead, the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer."

17. The FTT's decision in *Rogers and Shaw* had gone procedurally wrong, in that the FTT took the point about absence of evidence of officer involvement in writing its decision, without the point having been raised and without HMRC having had an opportunity to address it. The evidence before the FTT in that case was similar to the evidence in this case, comprising extracts from computer records, namely a return summary, indicating that a notice to file was issued, and a computer record of its being sent to the appellant at his address. The FTT held that that was insufficient to prove officer involvement and therefore allowed the taxpayer's appeal.

18. The Upper Tribunal (Zacaroli J and Judge Jonathan Richards) allowed the further appeal, but on the basis of much fuller evidence about how HMRC's automated computer system for sending out s.8 notices worked. It confirmed

that HMRC must prove that a valid s.8 notice was served and quoted a paragraph from its previous decision in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) before explaining the requirement for sufficient evidence:

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

50. It follows that, if HMRC fail to provide any evidence at all to the effect that a s.8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.

51. Where HMRC have given some evidence that a s.8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s.8 notice. Evidence to the effect that HMRC's systems record a s.8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s.8 notice was actually sent, and may not itself demonstrate the address to

which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC), if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s.8 notice as having been sent to an unspecified address."

19. Although this passage is addressing the issue of whether a s.8 notice was sent and served, the context and the rest of the decision in *Rogers and Shaw* shows that the principle is applicable too where the issue is whether "an officer of the Board" gave a s.8 notice to the taxpayer. Having reviewed the fuller evidence about officer control of its automated systems that HMRC adduced on the appeal, the Upper Tribunal said:

> "The taxpayers also argued that HMRC's evidence did not even demonstrate that HMRC officers generally had authorised the giving of s.8 notices (since the actual selection exercise was performed by computer and hard copy notices were physically despatched by Communisis). We reject those submissions. HMRC officers decided on applicable criteria and taxpayers meeting those criteria received s.8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified. Nor does it matter that Communisis physically sent out hard copy s.8 notices. The legislation does

not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a s.8 notice, leaving the implementation of that decision to administrative staff and contractors."

20. The evidence before the FTT in this case, which we have already described, falls well short of the evidence adduced before the Upper Tribunal in *Rogers and Shaw*. It is what the Upper Tribunal in that case characterised as weak evidence that a s.8 notice had been sent, which was insufficient where the fact of sending was challenged by the taxpayer. Since the microfiche and self-assessment return record purport to record the sending of a full return by automated process, that evidence is even weaker evidence that the sending of a full return was authorised by an HMRC officer, or officers generally. It says nothing about how the decision to send a full return to Mr Marano was taken.

21. The FTT nevertheless concluded that "the only reasonable conclusion from the evidence before us is that HMRC officers approved and authorised the issuance of Notices to File in 2012-13, using the parameters and machinery in existence at that time, and that the officers required that the issuance of the Notices be recorded within HMRC's computer systems". In our view, that inferential conclusion could not properly be drawn from the primary evidence, which was that HMRC had a computerised record of a s.8 notice having been sent. It was no more than speculation about how the automated system was set up and operated, or alternatively an assumption that HMRC officers had control over its own systems and so had authorised what was done.

22. We agree with Mr Gordon that an inferential conclusion of fact has to be soundly based on primary facts found or admitted: it cannot just be an assumption. There was no evidence before the FTT on this occasion capable of justifying the inference that officers of HMRC decided the criteria on the basis of which computers were programmed to give effect to them, resulting in the service of the full return on Mr Marano. We are unclear how the FTT managed to reject the possibility, posited by Mr Vallis, that the computer had been programmed by persons other than HMRC staff; or indeed that the function had been outsourced.

23. So far as the penalty assessments are concerned, the statutory provision is different and is found in Sched 55 para 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.

This therefore does not refer to an officer of HMRC directly. "HMRC", as referred to in para 18(1), is defined as meaning Her Majesty's Revenue and Customs: Sched 55 para 27(3). Pursuant to Interpretation Act 1978 s.5 and Sched 1, Her Majesty's Revenue and Customs has the meaning given by Commissioners for Revenue and Customs Act 2005 ("CRCA") s.4, which reads, so far as material:

> "(1) The Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs."

Pursuant to Interpretation Act 1978, s.10, all statutory references to Her Late Majesty are now to be construed as a reference to His Majesty the King.

24. In accordance with these rather tortuous compound definitions, "HMRC" in Sched 55 para 18(1) therefore means the Commissioners and officers of Revenue and Customs. The Upper Tribunal held in the *Rogers and Shaw* case that there was no distinction, in the context of penalty assessments based on s.8 notices, between functions delegated to an officer of HMRC and decisions to be taken by HMRC:

> "We therefore do not see the 'clear distinction' for which the taxpayers argue. On the contrary, "the Commissioners" (or "HMRC") and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax." ([35])

25. Accordingly, the assessment of a penalty under Sched 55 para 18 and the notification of the assessment had to be proved to have been done under the authority of an officer (or Commissioner) of HMRC.

26. The evidence that led the FTT to conclude that officers authorised the penalty assessments was the copy of the microfiche record of posting and the self-assessment return record for Mr Marano, showing the dates and amounts of the penalty assessments. The FTT said that the fact that the amount of the penalty had been correctly calculated (on HMRC's interpretation of Sched 55) was

evidence that officers of HMRC must have programmed the computer that sent out the assessment.

27. The question on appeal is whether it was proper for the FTT to infer from the primary facts that the penalties were assessed and notified under the authority of an officer of HMRC. It did so on the basis that it could be inferred that HMRC staff designed the computer programs, and that it was not reasonable to infer that the computer had been hacked or had written its own programme. However, there was no evidence about whose computers produced the outputs that were recorded in HMRC's data.

28. In our judgment, design of the relevant computer programs by an officer of HMRC was not the only reasonable inference to be drawn from the evidence. It was a reasonable possibility that a consultant had been provided with the necessary inputs to create an automated program to send out penalty assessments, and that this had been done by someone on behalf of HMRC without authority to decide the applicable criteria for sending out penalty assessments. The automated system might have been outsourced and run by a third party, with HMRC having access to it. Whether in any such circumstances there was sufficient officer authorisation of the input criteria or control over the operation of the system would be likely to depend on the particular facts.

29. The very slight evidential material was in our judgment insufficient to enable the FTT to draw the inference that it did, on a contested factual issue of whether an officer authorised assessment and notification of the penalties. Each individual appeal of this kind must be decided on the evidence that HMRC

places before the FTT, not on the basis of the FTT's experience or an understanding gained from evidence adduced in other appeals.

30. Had the applicable law remained the same as it was when the FTT made its decision, we would for the reasons given respectfully have disagreed with the conclusions reached in the Decision on whether HMRC had proved that an officer or officers authorised the sending of the full return or the making and sending of the penalty assessments.

31. However, on 22 July 2020 s.103 of the Finance Act 2020 became law and it thereupon had full retrospective effect, subject to certain transitional provisions that do not apply in this case. The material parts of the section are:

> "(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).
>
> (2) Accordingly, it follows that HMRC may (among other things)—
>
> > (a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return) …..
>
> (3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or where the function is conferred on an officer of a particular kind, an officer of that kind).
>
> (4) In this section—

"HMRC" means Her Majesty's Revenue and Customs;

references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment."

(5) This section is treated as always having been in force.

……."

The remaining sub-paragraphs of subsection (2) include various determinations, assessments or notices under enactments relating to taxation, but the power conferred by s.103 is not limited to those cases: they are non-exclusive examples, probably referred to because in terms they confer powers on "an officer of the Board" or "an officer of Revenue and Customs".

32. It can be inferred from the reference to the use of computers and the retroactive effect that the section has, that it was intended to validate existing or previous automated functions carried on by HMRC, and to remove the focus on whether an officer, or a specified kind of officer, carried out the function in question. How much further than that it goes is in dispute on this appeal. Mr Marano submits that it does not dispense with the need for HMRC to prove by evidence that the automated functions were carried out under the authority of an officer of HMRC. HMRC submit that there is no longer a requirement to prove the authority of an officer or Commissioner: all that is required is to prove that HMRC issued or sent the notice.

33. Part of the background to the section is a series of cases determined by the FTT in which taxpayers challenged penalty assessments on the basis that HMRC had

failed to prove that an officer authorised the notice to file: *Rogers v HMRC* [2018] UKFTT 312 (TC); *Shaw v HMRC* [2018] UKFTT 381 (TC) and *Smith v HMRC* [2018] UKFTT 461 (TC). The *Rogers* and *Shaw* cases went on appeal to the Upper Tribunal, which published its decision on 30 December 2019 and emphasised the need for proof that automated notices were issued under the authority of an officer. In other cases heard by the FTT in 2018, the issue was whether penalty assessments under Sched 55 and penalties issued under s.100 TMA issued by a computer were invalid because they were not issued by a human being, or by a named officer of HMRC. There were therefore different types of challenge raised in these appeals, not simply a challenge to the use of computers.

34. On 31 October 2019, the Financial Secretary to the Treasury made a written ministerial statement announcing the legislation later enacted in the form of s. 103:

> "The Government is committed to doing what is necessary to protect the Exchequer, maintain fairness in the tax system and give certainty to taxpayers. Therefore, the Government is announcing today that legislation will be brought forward in the next Finance Bill to put the meaning of the law in relation to automation of tax notices beyond doubt. Specifically, that legislation will put beyond doubt that HMRC's use of large-scale automated processes to give certain statutory notices, and to carry out certain functions is, and always has been, fully authorised by tax administration law. This measure will have effect both prospectively and retrospectively."

35. A Technical Note issued by HMRC on the same day noted that it had long used automated processes to carry out routine tasks, where it would be impractical and unnecessary for individual decisions to be made; and that these practices had been challenged in the courts on the basis that they were not justified by legislation.

36. The legislation was introduced as clause 100 of the Finance Bill 2020, and the published Explanatory Notes on the clause stated:

> "8. HMRC has historically used automated processes to carry out repetitive, labour intensive administrative tasks, including issuing certain statutory notices. This reduces costs and creates efficiencies.
>
> 9. To avoid any doubt, this clause confirms that the rules already in place work as they are widely understood to work and as they have been applied historically over many years.
>
> 10. It makes clear that any function capable of being done by an individual officer may be done by HMRC, using a computer or other means, with the same legal effect.
>
> 11. Action resulting from, and as a consequence of, automated notices can therefore take place without ambiguity.
>
> 12. The clause will help to ensure that the tax system applies fairly to all and that tax payers will have certainty over their tax affairs."

37. The statement, note and the Explanatory Notes are all admissible as aids to identify the contextual scene of s.103 and the mischief at which it is aimed: see

Westminster City Council v National Asylum Support Service [2002] UKHL 38 at [5], and *Christianuyi v HMRC* [2019] EWCA Civ 474 as an example of the use for that purpose of consultation documents published by HM Treasury and HMRC.

38. The mischief that the legislation was intended to remedy is doubt about the validity of fully automated functions, as used by HMRC in 2019 and previously, on the basis that they were not functions performed by an officer of HMRC.

39. Mr Gordon, on behalf of Mr Marano, submitted that s.103 does not remove the need for HMRC to prove that the notices were authorised by an officer or Commissioner of HMRC. He pointed out the importance of s.103(4), which by defining "HMRC" as "Her Majesty's Revenue and Customs" brings in the definition from s.4 CRCA and means that what is being referred to is the officers and Commissioners of Revenue and Customs, i.e. a group of individual persons, not a body with separate identity. He explained the apparently circular effect of interpreting HMRC in that way by pointing out that it authorised Commissioners to take steps that previously only officers were authorised to do, and there might be good reasons for that. But the important point was, he said, that by reason of the definitional provisions it was not departing from the need for individuals employed by HMRC to perform or authorise functions. There was no longer doubt, as a result of s.103, that they could use computers or other automation to perform the function, but there still needed to be officer (or Commissioner) authorisation, as decided in *Rogers and Shaw* under the old law. Accordingly, HMRC still had to adduce *evidence* to prove that officers had

decided the criteria to apply and had authorised the system that would give effect to them. The evidence in this case failed to do so.

40. On behalf of HMRC, Ms Choudhury accepted that the effect of s.103 is not that HMRC can perform functions on a fully automated basis, without human involvement. She submitted that there needs to be human involvement, in the sense of a human emanation of HMRC, but that s.103 "does away with the need to prove that a human was involved". She submitted that the section introduces a "limited deeming", which enables a notice issued by an automated process to be treated as issued by HMRC and therefore to be valid. The relevant question therefore is whether the notice has been issued by HMRC and it is unnecessary to receive evidence of officer involvement in the process. However, she then submitted that it was necessary to have evidence not just that the notice was sent out by HMRC's computer but that it was programmed to HMRC's instruction. We observe that if this were right the appeal would have to be allowed, because there was no such evidence before the FTT, nor could those facts be inferred from the limited evidence that was before it. HMRC submitted nevertheless that the evidence of Mr Marano's self-assessment record for 2012/13 was sufficient to prove that HMRC sent the full return and issued the penalty assessments.

41. We start by considering the natural meaning of the language of the section, bearing in mind the identified mischief. The following points arise.

    i) First, the intended effect of s.103 is very broad and general: HMRC may do "anything capable of being done by an officer of Revenue and Customs". The examples given in subsection (2) are non-exclusive.

ii) Second, there is to be no distinction between the effect of things done by HMRC and things done by an officer, or by an officer of a particular kind: subsection (3).

iii) Third, subsections (1) and (3) draw a clear conceptual distinction between an officer (or officers) of Revenue and Customs and "HMRC" itself, and between an officer performing a function and HMRC doing it. If "HMRC" here means little more than the aggregate of the officers of HMRC it would be virtually meaningless.

42. We are unimpressed by Mr Gordon's argument that the purpose of referring to HMRC was to import the definition in s.4 CRCA and thereby extend the range of those on whom statutory functions are conferred so as to include the Commissioners. It seems to us that the Commissioners would impliedly have the necessary authority to act in any event, but there is nothing in the background to this enactment to suggest that problems were being caused by challenges to the ability of Commissioners to discharge functions of officers. If indeed that was the intended purpose of the section, it is obvious that very much clearer and simpler language would have been used to achieve it. In our view, HMRC is being referred to here as the body or department itself, albeit a body comprised of the Commissioners and officers of Revenue and Customs. That is because it is recognised that notices, determinations and assessments are sent out on a fully automated basis in the name of HMRC, not in the name or with the specific authority of an officer. The words in parenthesis, "whether by means involving the use of a computer or otherwise" indicate the intended effect

of the legislative change. They are obviously not there merely to permit an officer of HMRC to use a computer to assist them with their work.

43. A fourth point is that the section goes further than stating that an act capable of being done by an officer may be done by HMRC and that it has the same effect: it also provides that something only capable of being done by an officer of a particular kind may be done by HMRC and has the same effect. Even on Mr Gordon's argument, that would mean that officers and Commissioners of Revenue and Customs generally and not only specified officers are capable of authorising that action. The section on any view therefore makes a more far-reaching change than merely precluding an argument that fully-automated functions are unauthorised by statute. That conclusion suggests that a restrictive interpretation of the section – which would leave HMRC having to prove in every appeal that an officer of Revenue and Customs provided the criteria for and authorised the establishment and use of the automated function – is unlikely to be the right interpretation. The more likely interpretation is that Parliament intended to validate the exercise of functions by HMRC in its own name, including its fully automated functions.

44. As far as we are aware, the issue of the true meaning and effect of s 103 has been before the Upper Tribunal on only one previous occasion to date: in *Assem Allam v HMRC* [2021] UKUT 291 (TCC). In that appeal, the validity of closure notices issued by HMRC were challenged based on alleged invalidity of automated notices to file sent to Dr Allam for two tax years. Closure notices are issued by HMRC under s.28A TMA at the conclusion of an inquiry into a return under s.9A TMA, but the inquiry is (subject to s.12D TMA) only valid if

the notices to file are validly sent. In that appeal, Ms Choudhury appeared for HMRC and is recorded as arguing that automated notices to file are valid without any requirement to prove that an officer of HMRC decided the criteria for receipt of such notices, provided that it is accepted or proved that HMRC issued the notice.

45. The Upper Tribunal (Edwin Johnson J and Judge Jonathan Cannan) said at [36]:

> "We are satisfied that Parliament intended to validate all the notices referred to in s 103(2) where they are issued by HMRC as a department, including such notices issued using a computer. The reference to HMRC in this context is plainly to HMRC as a department. It is difficult to see what useful purpose Mr Ridgeway's narrow construction would serve. There has been no suggestion that individual Commissioners have exercised the functions of officers of HMRC in circumstances where there has been doubt as to their power to do so. If, as Mr Ridgeway submits, Parliament simply intended to authorise individual Commissioners to carry out the statutory function of officers of HMRC then it would have said so in much more straightforward language. It would not have used the term "HMRC" in s 103(1) before going on to define HMRC as "Her Majesty's Revenue and Customs". It would simply have referred to "a Commissioner of Her Majesty's Revenue and Customs".

The Tribunal then referred to the Explanatory Notes with the Finance Bill 2020 – to the extent that these explained the contextual scene and background to the legislation and cast light on the mischief – to support its conclusion.

46. We are far from persuaded that the decision in *Assem Allam* on the construction of s.103 was wrong. Mr Gordon said that it was obviously wrong and had failed to take into account s.103(4). However, the argument based on s.103(4) is recorded in [31] and answered in the paragraph that we have set out above. The effect of that decision and our own preferred construction of s.103 is that a notice issued by HMRC, whether by automated computer function or otherwise, is as valid as if issued by an officer of HMRC. It is therefore no longer necessary, as it was in *Rogers and Shaw*, for HMRC to adduce evidence that an officer of HMRC authorised the criteria for and the establishment and use of an automated computer to send notices to file or penalty assessments. What is required is for HMRC to prove that the notice was its notice. In most cases, that is likely to be accepted by the taxpayer and to be obvious on the face of the notice and, if not, will be corroborated by HMRC's records of a notice having been sent or an assessment or determination made and sent. That of course does not preclude a taxpayer from raising a case that the notice it has received is not a genuine HMRC notice, or that it was invalid for any other reason.

47. In this appeal, there was no dispute that Mr Marano received the full return at his residential address but (oddly) there remained a dispute as to whether HMRC had issued the notice. Unsurprisingly, the FTT said at [112] that the only possible conclusion was that the notice (contained in the full return) was correctly issued and served. There was ultimately no dispute that Mr Marano received the penalty assessments, in the case of the 2017 assessments via a firm referred to in the Decision as PCP, of 76 New Cavendish Street, London. The question of whether they were validly served on him is considered under Ground 2 below.

48. It is not the case, therefore, that Mr Marano challenges the authenticity of the s.8 notice or the notices of penalty assessment, or (save for the s.8 notice) that they had been issued and sent by or on behalf of HMRC. The challenge was based on the validity of HMRC's notices given the absence of evidence of involvement or authorisation by an officer. Had it been disputed that these notices emanated from HMRC, we would have held that the microfiche record of the computer output held by HMRC and its own computer record of Mr Marano's self-assessment (together with Mr Marano's receipt of the notices) are sufficient evidence that HMRC issued and sent the notices to Mr Marano or caused them to be issued and sent. It is inherently improbable that HMRC would have a record on its self-assessment system of notices having been issued and of the correct amount of the penalties assessed unless HMRC issued the notices.

Conclusion on Ground 1

49. For these reasons, we dismiss Mr Marano's appeal on issue 1, on the basis of the retrospective effect of s.103.

Ground 2: Improper notification of the tax related penalties

50. Sched 55 para 18(1)(b) requires HMRC to notify a taxpayer of a penalty assessment. We have set out its provisions at [23] above.

51. The two tax-geared penalty notices, issued on 3 March 2015 and 14 March 2017 respectively, were addressed to Mr Marano not at his personal address but at the registered address (as published on the Companies House website) of a limited liability partnership ("the LLP") of which he was a member.

52. The FTT found that Mr Marano was likely to have received both penalty notices as they were forwarded to him by the firm of accountants that occupied the premises given as the LLP's registered address. It was not disputed that Mr Marano was also informed of the penalty notices by his accountants, who in their capacity as his tax agent had received copies of them from HMRC.

53. The issue for us to determine on this appeal is whether the penalties were properly "notified" to Mr Marano, as required under Sched 55 para 18 for the purpose of the penalty assessment provisions.

54. The FTT held that the penalties were validly notified as the notices had been sent to the address published for Mr Marano on the Companies House website, which was a valid address for service under section 1140 of the Companies Act 2006 as modified by regulation 75 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009. ("the LLP Regulations"). In summary it found that the effect of these provisions is that a document may be validly served on an LLP member if sent to the LLP's registered address even if unrelated to partnership business. This was because the Companies Act service provisions, as modified, apply "whatever the purpose of the document in question".

55. The FTT also referred to *Albert House Property Finance PCC Ltd v HMRC* [2019] UKFTT at [165] and noted the case law principle that a statutory provision about giving notice to a taxpayer must be interpreted so as to give effect to its purpose, namely whether the taxpayer has been notified, and so "actual notice and/or knowledge of HMRC's decision is sufficient for notice to

have been given, even if the notice or information has not been given directly to the taxpayer".

56. Mr Gordon on behalf of Mr Marano contends that sending the notices to the LLP address did not satisfy the statutory requirements for notification under the Taxes Acts. His reasoning was as follows:

i) bar express statutory authority to the contrary a notice to be given to a taxpayer must be given personally;

ii) s.115(2) TMA (s. 115(2)) relaxes these rules by making provision for postal service and setting out which addresses may be used;

iii) bar any other statutory exceptions, s.115(2) is exhaustive – there are no other ways in which service of notices under the Taxes Acts can be made; and

iv) the LLP Regulations, contrary to the FTT decision, do not represent a statutory exception to the rule in s.115(2).

57. S.115(2) TMA provides, so far as relevant, that:

> "Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person-
>
> (a) at his usual or last known place of residence, or his place of business or employment, or
>
> (b) in the case of a company, at any other prescribed place, and in the case of a liquidator of a company, at his address for the purposes of the liquidation or any other prescribed place."

Discussion on Ground 2

58. Our starting point here is the wording of Sched 55 para 18. As drafted (see [23] above) there are two requirements for notification. The first is that P must be notified by HMRC. The second is that the notice must state the period in respect of which the penalty is issued.

59. We note the FTT's reference to the consideration of case law principles relating to notification set out in the FTT judgment in *Albert House*, a decision upheld subsequently by this Tribunal (see *Albert House Property Finance PCC Ltd v HMRC* [2020] UKUT 0373 (TCC)).

60. The case concerned Finance Act 2003, Sched 10 para 37(4)(b) which, so far as relevant, requires HMRC to "give the appellant notice in writing" of their objection to the withdrawal of their appeals. The relevant issue to be determined was whether HMRC had "notified" the appellants of HMRC's objection to the withdrawal of their appeals.

61. HMRC had written to the Tribunal with their objection but had failed to write to the appellants (although it was not disputed that the Tribunal had passed the information on to the appellants). The appellants claimed that HMRC's failure to notify them directly meant that HMRC had not objected to the appeals.

62. The FTT (and on appeal this Tribunal) considered several cases involving a range of notification and service provisions which included: notices of enquiry, notices of assessment, partner payment notices, and service of a document list.

63. We do not intend to set out the analysis of the cases as that has been done by the FTT and this Tribunal in *Albert House*. But, in summary the key principles which can be drawn from those cases are:

(i) The starting point, as with any statutory provision, is a consideration of the terms, context and purpose of the relevant provision: *HMRC v Raftaopoulou* [2018] EWCA Civ 818 per David Richards LJ at [33].

(ii) Some provisions are likely to have different interpretations to others; there is no one standard interpretation that will fit all notification provisions.

(iii) There may be situations where a provision requires a particular or special formality for the giving of notice: per Lady Smith in *R (Spring Salmon and Seafood Ltd) v IRC* [2004] STC 444 at [32] and per David Richards LJ in *Raftaopoulou* at [36].

(iv) There is also a category of cases where the purpose of service of a notice can be recognised as being simply to see to it that the recipient is informed.

(v) As long as the statutory purpose has been achieved, a failure to follow the literal wording of the provision does not invalidate a notice: *Hastie & Jenkerson v McMahon* [1990] 1 WLR 1575 and *Ralux N.v./S.a. v Spencer Mason* (The Times 18 May 1989).

(vi) When considering whether the statutory purpose has been achieved it is necessary to look at the question from the perspective of the taxpayer, HMRC's intentions in giving the notice are not relevant: see *R (Sword Services Ltd) v HMRC* [2016] EWHC 1473 and *Flaxmode Ltd v HMRC* [2008] STC (SCD) 666.

(vii)The reality of a situation should be taken into account and, in cases where notification requires no particular formality, evidence of actual notice having

been received or of a taxpayer being made clearly aware of the subject matter of the notification directly or indirectly, may be sufficient for notice of it to have been given, even if the notice has not been given directly to the taxpayer (*Sword Services*).

64. Although none of these cases involved consideration of notices of tax penalties, and the consequences of receiving a penalty notice are not the same as, for example, receiving notice of an enquiry, we consider that they provide useful guidance in relation to interpreting notification provisions generally.

65. Taking this approach, and considering Sched 55 para 18, its purpose is to ensure that once HMRC makes a penalty assessment, the taxpayer is made aware of two facts: first, that they have been so assessed and second, the period to which that assessment relates. This then enables the taxpayer to consider their position and determine how to react, including whether to appeal. There is nothing in the wording of Sched 55 para 18 or its context to indicate that any special formality is required in order for a penalty notice to be valid, provided that the notification conveys the required information.

66. We then consider whether the statutory purpose of notification was achieved.

67. There is no dispute as to Mr Marano's awareness of the penalty notices. As we have already mentioned, the FTT found that he was likely to have been forwarded the penalty notices and it was not disputed that his accountants had received copies and informed Mr Marano accordingly.

68. We conclude, therefore, that Mr Marano was notified of the penalty notices (albeit partly by indirect transmission of the HMRC correspondence) within the meaning and for the purpose of Sched 55 para 18.

69. The FTT recorded the argument based on *Albert House* but decided the issue against Mr Marano under the LLP Regulations. Mr Marano's appeal against that decision treats s.115(2) as a statutory exception to a principle that personal service of a notice from HMRC to a taxpayer is required. We are unable to accept his argument. No such principle is to be found in s.115 and no authority for the assertion was cited by Mr Gordon. It would be flatly contrary to the principles explained in *Albert House*, which we have summarised above.

70. The provisions of s.115 are permissive, not mandatory. The word "may" is used repeatedly in subsections (1) and (2). It clearly means "may", not "must", where used in subsection (2). This is because subsection (1) contains other service options for service on a person, and because Parliament cannot have intended that a notice or document given to a taxpayer by HMRC must be sent by post. The purpose of subsection (2) is to engage the presumption of due service in Interpretation Act 1978, s.7 where a notice is sent by prepaid post to a prescribed address. Other methods of service are permitted, but the risk of non-delivery is then on the sender rather than the recipient.

71. We therefore reject the first three steps in Mr Gordon's argument on this ground of appeal. It follows that there is no need for us to decide whether the FTT was correct in its interpretation of the LLP regulations. The penalty notices were notified to Mr Marano regardless of the answer to that.

<u>Conclusion on Ground 2</u>

72. For these reasons we dismiss Mr Marano's appeal on Ground 2 on the basis of the improper notification of the tax-geared penalties.

Ground 3 – should the tax-geared penalties take into account tax already paid?

73. The tax-geared penalties were imposed under Sched 55 paras 5 and 6, which provide as follows:

> "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.
>
> 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.
>
> (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
>
> ….
>
> (5) In any case not falling within sub-paragraph (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."

The "failure" referred to in paras 5(1) and 6(1) is the failure to make or deliver a return on or before the filing date (Sched 55 para 1).

74. Sched 55 para 24, which is headed "Determination of penalty geared to tax liability where no return made", provides (so far as relevant) as follows:

"24(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC's information and belief, and

(b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return)."

75. The issue is whether in determining for the purposes of paras 5 and 6 "any liability to tax which would have been shown in the return in question" account is to be taken of payments on account of tax made by a taxpayer.

76. The FTT held that the natural reading of paras 5 and 6, in the light of the definition in para 24(1), is that the penalties are to be based on what is "shown in the return" not on

the amount of tax found to be payable by the taxpayer after recognising payments on account.

77. In reaching its conclusion the FTT considered the statutory wording and the scheme of the legislative provisions in Sched 55, including consideration of the mischief intended to be addressed by the provisions.

78. Mr Gordon on behalf of Mr Marano argues that the FTT's conclusion was incorrect for a number of reasons.

79. His primary argument is that the FTT misread the definition, in para 24(1), of the phrase "liability to tax which would have been shown in a return" by failing to focus on the requirement for the tax in question to be what would have been "due or payable" on the date on which the return should have been filed. In essence his argument is that these words have a particular meaning in the context of the administration of tax generally and in the context of the TMA.

80. We were referred to *Whitney v IRC* (1925) 10 TC 88, in which Lord Dunedin outlined what he saw as the three stages in the imposition of a tax. These are: the declaration of liability; the assessment to tax, which establishes what the person liable has to pay; and then recovery – to the extent that the tax is not paid. In his speech, Lord Dunedin referred to how "assessment particularises the exact sum which a person liable has to pay". Mr Gordon sees this as indicating that in determining what is "due and payable" by a taxpayer, account should be taken of the overall facts including payments on account.

81. Mr Gordon went on to explain what he saw as the particular meaning of the words "due" and "payable" within the context of the TMA, the terms being consistent again

with amounts of tax unpaid rather than a taxpayer's generic liability for a tax year. We were taken specifically to Parts VA and VI of that Act, which are headed respectively "Payment of Tax" and "Collection and Recovery", and which Mr Gordon explained make it clear that references to tax being due or payable exclude payments of tax which have been made on account.

82. Other points made by Mr Gordon included the following:

(i) The FTT gave undue weight to the words "shown in the return" which, though used in para 18, are not used in the para 24(1) definition.

(ii) The FTT was wrong to see para 24(2) as support for its interpretation of the phrase "due and payable".

(iii) The FTT was wrong to dismiss the relevance of the TMA and its use of the words "due" and "payable", given that the TMA and Sched 55 are intended to operate in tandem.

(iv) The FTT did not fully understand the pre-Sched 55 regime – under which the provisions which qualified penalties by reference to the tax liability were similarly worded. In particular, under former s.93(9) TMA, it was accepted that penalties could be avoided by paying the tax due by the date on which the return was due.

(v) The FTT gave undue consideration to pre-legislative materials – which, given the clarity of the statutory language, was not justified.

Discussion on Ground 3

83. In our judgment, Mr Gordon's interpretation of Sched 55 para 24 places undue focus on the words "due" and "payable" to the exclusion of the rest of the wording in that

paragraph, and particularly by seeking to deny the words "shown in the return in question" in Sched 55 paras 5(2) and 6(5) any significance.

84. We consider it clear that the definition in para 24(1) of "a liability to tax which would have been shown in a return" requires, on a natural reading, an analysis of what would appear on a hypothetical tax return. The hypothetical return for this purpose being the return that would have been submitted by the taxpayer had they submitted their return on the correct filing date for the tax year in question. The words "shown to be due and payable" in para 24(1) clearly connote the amount shown to be due and payable in the hypothetical tax return.

85. We agree with the FTT that the amount "shown in a return" is not, necessarily, the same as the amount of tax which is "due" and/or "payable" by the taxpayer for the period covered by that return.

86. As well as being the natural reading of the definition, this interpretation is consistent with the intention of Sched 55, which is to penalise failure "to make or deliver a return … on or before the filing date". It is not surprising, given that intention, for the tax-geared penalty for failure to be set by reference to the tax amounts shown (or which would have been shown) in the return in question. This is in contrast to Sched 56, which penalises failure to pay tax on time and which provides (see paras 3(3) and 3(4)) for the tax-geared penalties to be computed by reference to any amount of the tax which is "unpaid" after the end of the relevant period. The difference in language is striking. If liability under Sched 55 was nevertheless by reference to the amount of tax unpaid, there would be duplicated liability under Scheds 55 and 56 in many cases.

87. This approach is consistent also with the architecture of the self-assessment tax return system itself. We note here the provisions of s. 9 TMA, one of the core provisions governing submission of self-assessment tax returns. This provides that a self-assessment return must include:

> "9(1)
>
> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for that year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source".

88. As well as containing in (b) another definition of "payable" (a point noted by Ms Choudhury), this makes it clear that the sums shown in a tax return are determined by reference only to items included in that return, with an exception being made for withholding tax suffered.

89. With that introduction, we go on to consider Mr Gordon's various arguments.

The FTT's failure to focus on the requirement for the tax in question be "due or payable"or to take into account the particular meaning given to those words in the context of tax administration generally and in the context of the TMA

90. Although the words "due" and "payable" might have a particular interpretation in other tax contexts, we agree with the FTT that there is no basis for those interpretations to be imported into Sched 55 paras 5 and 6.

91. The definition in para 24(1) is, as a matter of interpretation, clear and self-contained, the use of the words "shown in a return" and "shown to be" requiring attention to be paid to the content of a hypothetical tax return (or under para 24(2) to the actual return) and not to the amount of tax that might actually be payable by the taxpayer. In the three-stage process in *Whitney*, this would be the "liability" stage rather than the "assessment" stage.

92. Mr Gordon took us to Parts VA and VI of the TMA. However, we do not agree that they help his arguments. Both parts operate only once a taxpayer's liability has been determined. For Part VI this is self-evident - as that Part deals specifically with collection and recovery. For Part VA this was made clear by the Court of Appeal in *Hoey v HMRC* [2022] 1 WLR 4113.

93. In that case (which considered, *inter alia*, whether a PAYE credit formed part of the amounts payable under an assessment), the Court described clearly how the provisions in sections 59A and 59B TMA (the key provisions of Part VI) operate. A helpful explanation was given of how the adjustments required as a result of the interaction between the two sections operate only after the assessment stage under sections 8 and 9 TMA (the sections under which a taxpayer is required to prepare his or her personal tax return):

> "As for section 59B of TMA, it is clear from the structure of the TMA, the position of sections 59A and 59B within that structure (in a section dealing with payments, after assessments and appeals, but before

collection and recovery) and its language, that the adjustments in section 59B do not form part of or take place at the assessment stage under sections 8 and 9 of TMA. To conclude otherwise would mean that section 59B simply replicates the calculation in sections 8(1) and 9(1)(b), and we can see no reason for it to do so. Rather, section 59B takes the assessment as a starting point (referring back to the "chargeable" and "payable" amounts as defined in section 8(1AA)(a) and (b) and 9(1)(a) and (b) of TMA, consistently with the assessment stage having been completed) and transforms a taxpayer's "liability to tax" (at the assessment stage) into an amount to be paid (a debt due) to HMRC by stipulating certain adjustments to the amounts to be paid. The absence of any cross reference in sections 8 and 9 to section 59B provides further support for this conclusion. So far as the PAYE credit is concerned, the adjustments made by section 59B operate as a set off against the taxpayer's (already assessed) liability to tax, rather than being deducted at the assessment stage to assess what the liability is. Section 59A provides for payments on account of the debt due and plainly operates at that later collection stage. In other words, sections 59A and 59B do not concern or have effect at the assessment stage. They concern the collection stage." [123]

94. It is s. 59B TMA that requires any payment on account to be deducted from the amount of the liability in a self-assessment return. Such payments are not deducted at the earlier stage, unlike PAYE deductions.

The FTT were wrong to regard paragraph 24(2) as support for their interpretation of section 24(1)

95. Mr Gordon contends that para 24(2) is not support for the FTT's interpretation of para 24(1) as excluding payments made on account of tax, nor does it change his preferred analysis, which requires attention to be given to what would actually be due and payable by a taxpayer.

96. We disagree. In our judgment para 24(2) provides that where a penalty has been determined in circumstances where no return has been submitted then, should a return for the period be submitted subsequently, the penalty must be recomputed to reflect what is shown on the actual return. This is, as we see it, just a mechanical provision ensuring that an actual return covering the penalty period will take precedence over a hypothetical one for that period.

97. However, para 24(2)(b) expressly states that if the penalty is re-assessed it is done "by reference to the amount of tax shown to be due and payable *in that return*", subject to any amendments or corrections. This supports the reading of para 24(1) as referring to the amount that would have been shown to be due and payable in a hypothetical return.

98. We agree, however, that the particular reason why the FTT thought that para 24(2) supported HMRC's case, namely that there was no express provision in relation to payments on account, is not persuasive. There is no such provision in para 24(1) either, and the words "subject to any amendments or corrections to the return" simply reflect that there is an actual return under para 24(2) that may have to be corrected by HMRC.

The relevance of the previous, similarly worded, statutory provisions (section 93(7) and (9) TMA 1970)

99. The provisions referred to are in the now repealed s. 93 TMA (failure to make return for income tax and capital gains tax) and in particular sections 93(7) and (9) TMA. They stated:

> "(7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.
>
> (9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment."

100. We do not regard these historical provisions as relevant in determining the application of the current penalty system in Sched 55, save for the point that Sched 55 and Sched 56 provide a more onerous regime for those who fail to file returns and pay their tax than previously existed.

101. The wording of s.93 TMA is materially different from the wording of the current provisions in Sched 55, which quantify the penalty by reference to the tax liability. There is also no reference in the relevant provisions of Sched 55 to the amount payable under s.59B TMA. As we have already noted, the mechanics of s.59B upon which s.93(9) relied are not relevant to Sched 55 paras 5 and 6.

The FTT gave undue consideration to pre-legislative materials notwithstanding the limitations on recourse to such materials.

102. Mr Gordon objects to what he saw as undue consideration placed by the FTT on pre-legislative materials, in this case the Finance Bill Explanatory Notes for Sched 55 and the consultation documents referred to in those notes.

103. We have already noted that Explanatory Notes to a statute can in certain circumstances be admissible aids to construction of that statute and that weight can be given to a consultation document or cognate material that underpin a statute, when interpreting it.

104. However, in the present case it is not necessary to consider the appropriateness of the consideration given to these materials by the FTT. The FTT made it clear [191] that it had reached its decision on the basis of the natural reading of paras 5 and 6 in the light of the definition in para 24, as do we.

Conclusion on Ground 3

105. It follows that we dismiss Mr Marano's appeal on Ground 3.

Ground 4 – failure by the FTT to consider relevant factors in deciding whether there are special circumstances justifying a reduction in the penalties

106. Sched 55 para 16 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.
>
> (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".

107. Para 22(3) allows the FTT or this Tribunal to substitute its own decisions for HMRC's, relying on para 16, but it can only do so to a different extent if it considers HMRC's decision in respect of the application of para 16 to be flawed in light of the principles applicable in proceedings for judicial review.

108. The FTT found that HMRC's decision was flawed [224] and it went on to substitute that with its own decision. We consider that the FTT was right to do so.

109. Mr Gordon however claims that the FTT's conclusions were also flawed, as it failed to take into account three factors that should have been taken into account. These factors were: the fact that the tax in issue had been paid early by Mr Marano ("Factor 1"), the fact that HMRC had been made aware of the quantum

of the capital gain long before the tax return in question was due ("Factor 2"), and the size of the penalties ("Factor 3").

Discussion on Ground 4

110. The principles applicable in proceedings for judicial review are well established. It follows that the FTT's failure to include the three Factors may render its decision flawed if any of those Factors are relevant considerations.

111. The term "special circumstances" is not defined (the legislation simply lists in para 16(2) two specific exclusions) but has been considered judicially on several occasions, in various contexts. In *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC), this Tribunal cited and agreed with the statement made by Judge Vos in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UK FTT 0744 (TC) at [101] and [102]:

> "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
>
> 102. It is clear that, in enacting paragraph 16 of Schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is

whether HMRC (or, where appropriate the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

112. Judge Vos added (as cited in the FTT decision) at [225] that:

> *"*The right approach for the Tribunal is to look at all the relevant circumstances and consider whether, in the particular case in question those circumstances are special. I see no reason to limit this to circumstances which ... operate on the particular taxpayer in question as opposed to those which could affect a larger number of taxpayers. It is up to HMRC or, where relevant, the Tribunal to decide based on all of the facts of the particular case whether the circumstances in question are, in that case, special.*"*

113. It is, accordingly, for HMRC or the tribunal to assess the particular facts of a case and having considered those facts to then determine, in its discretion but subject to the two exclusions in para 16(2), whether special circumstances justify reduction in the amount of the penalty.

114. Turning to the question of whether the FTT failed to take into account relevant considerations when remaking HMRC's decision we look at each of the Factors raised by Mr Gordon.

Factor 1 – early payment of the tax in issue

115. The FTT dismissed this in the following terms:

> "The penalties imposed under Sch 55 are for late filing of the return; whether or not a person has paid the related tax is not relevant. In Edwards

the taxpayer had no tax liability at all, and the UT found that having no liability was not a special circumstance, see [86] of that judgment, cited at [218]. Furthermore, the reason Mr Marano paid before the due date was to obtain a tax reduction in the US" [229].

116. Three reasons were given here; the purpose of the legislation, the decision in *Barry Edwards*, and the motive for Mr Marano's early payment (his desire to obtain a US tax benefit).

117. Respectfully, we disagree with the FTT's dismissal of early payment as irrelevant and see this as an error of law.

118. First, we consider that the FTT incorrectly regarded *Barry Edwards* as authority for the proposition that early payment cannot be a special circumstance or a factor to be taken into account in determining whether special circumstances exist.

119. *Barry Edwards* concerned a taxpayer with no tax liability at all and the appeal focused on the proportionality of the penalties imposed (in that case the statutory minimum of £1,300) in those circumstances. This Tribunal noted at [76] that "the only matter advanced as constituting special circumstances is the fact that the penalties are disproportionate in the light of the amount of tax due.".

120. We see the fact that Mr Marano made an early payment of the tax due as distinct from the question as to the proportionality of the tax payable and the size of the penalty levied. *Barry Edwards* does not provide support for the FTT to treat early and full payment as irrelevant. It is also not a factor which is excluded from consideration by para 16(2).

121. In refusing permission to appeal on this point, the FTT emphasised that the penalties were for late filing and so the question of payment or non-payment was irrelevant. Although it is clear that the penalties are for late filing and so the payment of tax is (as we have held) irrelevant to the quantification of the penalty under paras 5 and 6, it does not follow that it is irrelevant to a different issue, namely the question of whether special circumstances exist to justify a discretionary reduction of that penalty under para 16. The relevance of early payment of the tax due must be considered in the light of the fact that the penalty is imposed for late or non-filing of the return, but that does not mean that the FTT should have refused to take it into account at all.

122. We note also the additional reason given by the FTT for dismissing early payment as a factor, which is that Mr Marano only paid the tax early in order to obtain a US tax benefit. We cannot determine what weight was put on this fact by the FTT. We agree, however, with Mr Gordon that this fact cannot be sufficient to justify dismissing early payment as a factor if it is otherwise relevant. The motive for early payment is of no consequence to HMRC and does not alter the fact that early payment was made.

123. What weight is to be given to such a factor in determining whether special circumstances justify a penalty reduction is for HMRC or the FTT to decide. It clearly cannot justify rescinding the penalty, otherwise Sched 55 would have no effect separate from Sched 56, but what if any reduction is appropriate is a matter for properly exercised discretion.

Factor 2 – HMRC's awareness of the quantum of the capital gain long before the tax return in question was due

124. The FTT refused to take this factor into account on the basis that it was not raised during the hearing, and on the basis that:

> "The penalty is for failing to file a return; merely informing HMRC of a liability by letter before the issuance of a return is not a special circumstance which would justify reducing a penalty imposed because the taxpayer subsequently fails to file the return" [31]

125. We accept Mr Gordon's contention that this factor was raised in the original hearing and is not new. This is clear in extracted paragraphs from Mr Gordon's skeleton argument before the FTT, in which he asked the FTT to recognise that HMRC were expressly told about the CGT liability in December 2012 but failed to take that information into account.

126. For the same reasons given in relation to the FTT's dismissal of the early payment of tax as a factor, we consider that the FTT was wrong to dismiss this fact in its entirety as being irrelevant, particularly as notification was followed by full payment.

Factor 3 - the size of the penalty

127. Mr Gordon argued before the FTT that HMRC's decision in relation to the penalties was flawed as, so far as relevant, "no reasonable decision maker could have decided that the penalties were proportionate". The FTT dismissed this in the following terms "unsustainable, see Edwards at [86]." [223]

128. The FTT's reasoning for dismissing proportionality as a factor to be taken into account appears to rely entirely on the decision in *Barry Edwards*.

129. We do not see *Barry Edwards* as authority for the proposition that a penalty in excess of the minimum penalty can never be disproportionate (and therefore a special circumstance) for the purposes of Sched 55.

130. In that case, this Tribunal was determining a specific question in the context of particular circumstances, that question being:

> "whether the amounts of the penalty imposed [in this case] for failure to file self-assessment returns on time in circumstances where no tax is payable is a relevant circumstance that HMRC should have taken into account when considering whether there were special circumstances in this particular case which justified a reduction in the penalty" [67].

131. The Tribunal found, taking into account the aim of Sched 55 and the design of the penalty regime, that:

> "there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear" [85].

132. On this basis the Tribunal concluded that:

> "A penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax liability is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of

paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in penalty" [86].

133. It seems to us that a key element of the case was that no tax was payable and, therefore, the penalties imposed were at the statutory minimum level.

134. In its discussion of proportionality, the Tribunal referred to its previous consideration of the same question (albeit in relation to the VAT default surcharge regime) in *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC), acknowledging at [82] that the principles identified in that case applied equally to Sched 55.

135. The VAT surcharge scheme provides for penalties to be levied on a fixed percentage basis (by reference to outstanding VAT) for failure, in certain circumstances, to deliver VAT returns (see s.59 of the VAT Act 1994 and, in particular, the "*specified percentage*" provisions in s.59(5)).

136. In *Total Technology* the Tribunal considered that the percentage-based penalty approach meant that there was in effect no maximum penalty or upper limit on penalties. When considering proportionality in the context of that penalty regime, the Tribunal saw this as a flaw in the legislation, noting that any analysis of proportionality would have to take into account the absolute amount of the penalty (see [93] of that case).

137. Ultimately, the Tribunal did not need to consider where the upper limit on penalties should be – as the actual penalty in question (£4,260) could not in its view be regarded as "not merely harsh but plainly unfair" (as per Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 729 (at [26])). It is, however,

clear that the Tribunal considered itself able to find the penalty disproportionate had the circumstances warranted it. The Tribunal also made it clear that in determining proportionality it was necessary to consider both the individual penalty and the penalty regime itself, commenting that "even if …. the architecture, as we have called it, of the regime is unobjectionable, it remains necessary that the resulting penalty in a particular case is proportionate to the gravity of the infringement" [77].

138. It follows that although *Barry Edwards* states that proportionality cannot be a special circumstance in cases where there is no liability and a minimum penalty is levied, proportionality might, where a tax-geared penalty is levied, be a special circumstance depending on the particular facts of that case.

139. We find therefore that the FTT was incorrect on the basis of *Barry Edwards* to dismiss the size of the penalties as a factor to be taken into account in determining whether special circumstances existed.

Conclusion on Ground 4

140. We find that the FTT erred in law in its determination of whether "special circumstances" existed for the purpose of Sched 55 para 16 by failing to take into account three relevant considerations: the fact that Mr Marano had paid the tax early, the fact that HMRC had been notified in detail as to the tax liability some time before the return was due, and the size of the penalty.

141. We are satisfied that had the error not been made and the three Factors taken into account, there might have been a difference in the decision reached by the FTT. On that basis we consider that the decision should be set aside.

142. We emphasise here that while we consider the materiality of the error as sufficient to set aside the decision on the basis that it might have been different, it is entirely possible that a tribunal might reach the same decision as originally reached by the FTT.

143. Under section 12(2) of the Tribunal Courts and Enforcement Act 2007, where a decision of the FTT is set aside we must either remit the case to the FTT with directions for its reconsideration or remake the decision ourselves.

144. Mr Gordon has invited us to remake the decision. We consider, taking into account the possible need for additional fact finding, that it is appropriate for that task to be undertaken by the FTT.

145. We also consider that the matter should be determined before a new panel. This is not in any way a criticism of the original FTT panel but is simply to avoid any concern that a dispassionate observer would consider the panel to be subconsciously influenced by its earlier decision (see *Revive Corporation Limited v HMRC* [2020] UKUT 320 TC (at [42])).

146. We, therefore, remit the matter back to the FTT with the following directions:

i) The remitted appeal must be heard by a differently constituted tribunal (to be selected by the FTT President);

ii) The FTT shall consider the single issue of whether for the purposes of Sched 55 para 16, special circumstances exist which justify a reduction in the tax-geared penalties imposed on Mr Marano, and if so the FTT shall redetermine the amount of those penalties accordingly;

iii) The FTT shall take into account as relevant facts in its determination of whether special circumstances exist Factors 1-3 (as we have defined them in this

judgment), although the weight to be given to those factors shall be a matter entirely for the FTT to determine; and

iv) The FTT shall make whatever directions it sees fit in respect of the format of the hearing, such as the manner and timing of submissions from the parties on the significance of Factors 1-3.

Disposition

147. We have dismissed three of the four grounds of appeal argued before us. Those that have been dismissed are:

Ground 1 – the insufficiency of authorisation by an HMRC officer of Mr Marano's notice to file a self-assessment return and penalty notices.

Ground 2 – the inadequate notification of the tax-geared penalty notices.

Ground 3 – whether the tax geared penalties should take into account the tax already paid by Mr Marano.

148. We have upheld Ground 4 – the failure by the FTT to take into account relevant considerations when determining whether there were special circumstances justifying a reduction in the amount of the tax geared penalties.

149. Mr Marano's appeal is, therefore, allowed on Ground 4 only. The appeal is remitted for a decision by a new FTT panel in accordance with our directions above at [146].

Mr Justice Fancourt

Judge Vimal Tilakapala

Release date: 18 May 2023