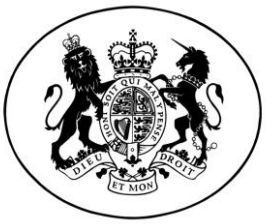

# TC06594

**Appeal number: TC/2013/04195**

***PENALITES – late filing and late payment – whether Tribunal should follow* Goldsmith *– no – whether Tribunal should follow* Patel *– case stayed in part; otherwise appeal determined, part allowed part dismissed.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**STUART KIRK CRAWFORD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE**

**Sitting in public at Taylor House, Rosebery Avenue, London on 2 March 2018 with written submissions from the parties on 16 March and 13 April 2018**

**The appellant did not appear and was not represented at the hearing but written submissions were provided by Raffingers.**

**Ms L McLaughlin, HMRC officer, for the Respondents**

## DECISION

*Non-attendance of the appellant*

1. Although the start of the hearing was slightly delayed to give the appellant time to attend, he did not attend and nor did any one else on his behalf.

2. I was satisfied that he knew of the time and place of the hearing as he had been sent a correct notice of hearing letter and in any event his representatives had written to the Tribunal referring to the notice of hearing letter.

3. The question was therefore whether it was in the interests of justice to proceed in his absence. The appellant and his advisers had consistently informed the Tribunal that they would not attend this, nor the earlier adjourned, hearings and that they wished it to proceed in his absence. Moreover, I had the benefit of his written representations. I decided it was in the interests of justice to proceed with the hearing.

*The appeal*

4. The appellant appealed against various late filing and late payment penalties as follows:

| Penalty | Amount in £ | Date imposed | |
|---|---|---|---|
| **2009/10** | | | |
| 1st penalty late filing | 100 | 15/2/11 | S 93 TMA |
| 2nd penalty late filing | 100 | 22/8/11 | Ditto |
| 1st Surcharge | 875 | 6/11/12 | S 59C TMA 70 |
| 2nd Surcharge | 875 | 6/11/12 | Ditto |
| | | | |
| **2010/11** | | | |
| Daily penalties | 900 | 8/1/13 | Sch 55 FA 2009 |
| 6 month late filing | 1,408 | 22/1/13 | Ditto |
| 6 month late filing | 300 | 8/1/13 | Ditto |
| 12 months late filing | 1,708 | 19/2/13 | Ditto |
| 30 day late payment | 1,708 | 22/1/13 | Sch 56 FA 2009 |
| 6 months late payment | 1,708 | 22/1/13 | Ditto |
| | 9,682 | | |

'TMA' = Taxes Management Act 1970; 'FA 2009' = Finance Act 2009.

5. The appeal was lodged on 15 April 2013 against two HMRC decisions dated 20 May 2013. The appeal was stayed behind the case of *Donaldson* in which the validity of daily penalties was challenged, as it was of relevance to this appeal which was in part against daily penalties. The appeal was released from the stay after the Court of Appeal dismissed the appeal in *Donaldson* [2016] EWCA Civ 761. Originally listed for hearing in late 2017, it was adjourned until March 2018.

## Withdrawal of 10/11 late filing penalties

6. At the hearing, Ms Laughlin withdraw the late filing penalties levied on the appellant in respect of tax year 2010/11. In other words, she withdrew the first four penalties listed under 10/11 in the above table totalling £4,316 leaving £5,366 in dispute.

7. The reason she withdrew them was an entry on Mr Crawford's SA notes. 'SA Notes' are HMRC's internal computer based recording system of interaction by HMRC and the taxpayer in respect of the taxpayer's self-assessment. The relevant entries in the SA Notes were (as they often are) somewhat cryptic. On 14 June 2012, there was a reference to cancellation of an 'SA penalty'; on 20 June a reference to cancellation of 'SA return' and an SA789 being posted to Mr Crawford; on 26 September of the same year it referred to the 'NIL return' being in error as taxpayer had substantial potential tax liability.

8. My understanding is that Ms McLaughlin read these notes as meaning that the notice to file for 2010/11, shown in HMRC's records as issued on 6 April 2011, had been cancelled in June 2012 and then reinstated in September 2012. In these circumstances, she did not wish to defend the late filing penalties in respect of the return for 2010/11 which was actually filed in early 2013, which was not long after (HMRC say) the notice to file was reinstated.

9. As the late filing penalties for 10/11 were withdrawn, I have no decision to make on them. The appeal is allowed in respect of them. That left a question mark over the 2010/11 late *payment* penalties. Ms McLaughlin asked for permission to make submissions after the hearing on whether or not the late payment penalties for 2010/11 were still valid.

10. I gave permission, subject to the appellant having the right of reply. In Ms Laughlin's post-hearing submissions, she maintained HMRC's defence to the 2010/11 late payment penalties on the basis they were independent of any notice to file being served. The appellant did not agree. I return to this at §§82-102 below.

## Findings of Fact

11. As I have said, the appellant did not attend the hearing but HMRC did not challenge his written evidence save in respect of two issues I will refer to below.

12. From his written evidence, I find that the appellant had a well-paid job with Credit Suisse for some years until 3 December 2008 when his employment was abruptly terminated the day before he was expecting to be awarded a large year-end bonus. The loss of his job and bonus caused him great stress and anxiety, and he became depressed.

13. I find that in early 2009 he left the UK to live in a cottage he owned in France, only returning to his home (I will refer to it as 'Quarry Road') for occasional visits in order to 'catch up' with friends and the solicitors undertaking his unfair dismissal claim against Credit Suisse. Other than that, he left Quarry Road uninhabited so that builders could carry out major renovation works. This was the position until

September 2012 when he returned. He has no recollection of putting in place mail forwarding arrangements during his absence and did not notify HMRC of a change of address. It was also his evidence that on his periodic visits to Quarry Road he found post put to one side by the builders, but on other occasions discovered it in building skips or just lying in the front garden.

14. The first point of contention was that HMRC did not accept that Quarry Road was in the possession of builders before 4 April 2011 because the planning permission provided by the appellant was dated 4 April 2011. There may have been an explanation for this discrepancy but the appellant was not in the hearing to give it. It did not seem to be a material point to me in any event as, on the appellant's own admission, he was very careless with his post: at no point did he make any effort to ensure post sent to Quarry Road reached him, despite no longer living there, despite at some stage having builders in, and despite knowing that the post was sometimes thrown away or blown into the garden.

15. The second point of contention was that it was his position that his careless attitude to his post was a symptom of the stress and depression he suffered at the time. While this may well have been so, I agree with HMRC that he has not shown that his mental condition at the time was such that he was incapable of acting rationally. There was no medical evidence and I find from his other evidence that he was (a) able to give instructions throughout 2009-2011 to the solicitors who were pursuing his unfair dismissal claim against Credit Suisse (and he returned to the UK on a number of occasions in order to give instructions); (b) he was able to give instructions to professionals and builders in the same period in connection with the major renovations at Quarry Road; (c) he was a member of an LLP throughout this period, albeit one that did not require his active involvement; and (d) (from the evidence of his SA notes) he contacted HMRC in 2010 with respect to a penalty imposed in 2009.

16. The appellant's unfair dismissal claim resulted in him receiving payments from Credit Suisse in both tax years 2009/10 and 2010/11. Mr Crawford assumed that the correct amount of tax would be deducted under PAYE. He has now accepted that there were under-deductions of tax. He blames Credit Suisse for failing to properly operate PAYE.

17. Mr Crawford filed a paper tax return on 31 January 2013 in respect of YE 2009/10 and had two days earlier filed (electronically) his return for 2010/11. Because of the underpayments of tax arising out of the payments from Credit Suisse, both of these returns showed extra tax owing (in addition to what he had already paid for those years) of £17,134.22 for 2009/10 and for £34,170.42 for 2010/11.

18. HMRC accept that the appellant paid £34,169.92 on 12 February 2013 and £17,135.82 3 days later and I find this is proved by the statement of account produced by HMRC. It was not in dispute in any event.

19. Shortly after filing his returns, Mr Crawford filed appeals against the penalties with HMRC.

**Were notices to file validly issued?**

*As a question of fact*

20. It is for HMRC to establish that the penalties were properly imposed; late filing penalties are only properly imposed if the taxpayer has been given notice to file under s 8 Taxes Management Act 1970 ('TMA'). The appellant does not accept that he was given notices to file. The original notice to file for 2010/11 is, as I have explained above, irrelevant to the question of late *filing* penalties as HMRC's own evidence indicates it was withdrawn and they do not defend the late filing penalties for that year. I revert to it when considering the late payment penalties for 2010/11 below.

21. In respect of the notice to file for 2009/10, it is for HMRC to prove that it was posted. The evidence that it was posted was a computer printout from HMRC's internal system. That records a blank tax return (which I find was a notice to file within s 8 as it requires the return to be completed and submitted) was sent to the appellant on 6 April 2010. The printout does not record the address to which it was sent. In the absence of any rebuttal evidence, I consider that this is sufficient to prove it was posted.

22. I accept HMRC's case that it would have been sent to the address which was at that time held on HMRC's systems as the appellant's address. I find, from a computer printout produced by HMRC, that that address was the Quarry Road address, which was recorded as the appellant's address from March 2007 to December 2012. The appellant does not dispute this in any event.

23. S 115(2) Taxes Management Act 1970 provides that HMRC may serve a notice on a taxpayer at 'his usual or last known place of residence'. Mr Crawford appears to accept, and I find, that the Quarry Road address was his last known place of residence at the time in issue. In particular, Mr Crawford has not suggested that he notified his change of address to HMRC nor that anyone else did so on his behalf.

24. Letters which are proved to have been posted are deemed to have arrived in the ordinary course of post unless the contrary is proved: s 7 Interpretation Act 1978. I find that the contrary has not been proved. Indeed, the evidence suggests that the letters did arrive and were lost, ignored or unopened because Mr Crawford was not living at the property at the time and the property was either empty or in the possession of builders and Mr Crawford had made no arrangements to ensure he still continued to receive his post.

*As a question of law*

25. The appellant does not accept that HMRC should have issued him with notices to file. He says that he had ceased working and HMRC should have assumed that any severance payment from his previous employer would have tax accounted for under PAYE. It is wrong, says Raffingers on behalf of the appellant, for HMRC to issue a return for the purpose of collecting a PAYE underpayment, and for authority for this proposition cites the case of *Melanie O'Neill* [2016] UKFTT 866 (TC).

26. In that decision, Judge Richard Thomas concluded that the penalties imposed were disproportionate (§33-34) but he went on to say:

> [37] Had it been necessary to do so I would have considered that the return for 2012-13 was not issued for the purpose that a return may be issued as set out in s 8(1) TMA, as HMRC already knew the taxpayer's income from the P800 and were not issuing the return to find it out but to enforce a debt that they should have sought to collect in other ways.

The judge had already pointed out at §§28-30 that HMRC might have been able to collect the tax via the taxpayer's tax code or by assessment.

27. Judge Richard Thomas considered the matter in much more detail after full representations from counsel on behalf of HMRC in the case of *David Goldsmith* [2018] UKFTT 5. He came to the same conclusion which was that (a) he could consider whether the statutory requirements of s 8(1) were met ([138]) and (b) they were not met because HMRC could have collected the underpaid tax through a different and less onerous means and should have done so. He concluded that therefore the notice to file was invalid: [156-158].

28. Judge Richard Thomas' decision is not binding on this Tribunal and I have to consider the matter afresh.

*Can the Tribunal consider the legality of a notice to file?*

29. S 8 Taxes Management Act 1970 provides:

> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by notice given to him by an officer of the Board -
>
> (a) to make and deliver to the officer…a return…..

30. S 9 provides that a return must include a self-assessment. While s 9(2) provides an exception where returns are filed before a particular date, leaving it to HMRC to carry out the assessment, such returns are treated as if they contained a self-assessment. The effect of a self-assessment to tax is to render the taxpayer liable to pay the tax as provided by s 59B TMA 70.

31. It seems to me that there are a number of issues here. Firstly, there is the relatively straightforward issue of timing. This is an appeal against late filing penalties, not against HMRC's decision to issue a notice to file. Is it too late to challenge the decision to issue a notice to file?

32. Secondly, s 8(1) gives HMRC a discretion, not an obligation, to issue a taxpayer with a notice to file. This is clear as it uses the word 'may'. Does this Tribunal have the jurisdiction to review HMRC's discretionary decision to issue a notice to file? Judge Richard Thomas in *Goldsmith*, in so far as he considered this, did not suggest that the Tribunal did have such discretion: his conclusion at [172] appears to have

been that HMRC's decision in preferring to issue a notice to file rather than pursue other methods of collection was not unlawful.

33. Thirdly, the power to issue a notice to file is stated by s 8(1) only to be for 'the purpose of establishing the amounts' to which a taxpayer is chargeable for income tax and CGT. Is the notice to file invalid if it is issued for a different purpose and if so, does the Tribunal have the jurisdiction to consider the purpose for which a notice to file was issued? Judge Richard Thomas in *Goldsmith* concluded that it did [139], and he concluded that the notice to file in that case was invalid as it was issued, in his opinion, for a purpose other than the purpose for which HMRC were entitled to issue it [141, 158, 172, 201]

*The timing issue*

34. The answer to the first question seems straightforward. The recent decision in *PML* [2017] EWHC 733 (Admin) implies at [60-61] that the validity of an information notice could be challenged in an appeal against the information notice but not in an appeal against a penalty imposed for failure to comply with the information notice because the taxpayer had had a right to appeal the issue of the information notice. In other words, a litigant cannot have two bites of the same cherry. A taxpayer who does not challenge the information notice when it is issued, despite his right of appeal, is taken to have accepted its validity. He can't then challenge it if and when he appeals against penalties for not complying with it.

35. There is no right of appeal against a notice to file a tax return so the ruling in *PML* is not relevant. The first opportunity the appellant had to challenge the validity of a notice to file is in an appeal against a penalty imposed for failure to file a return in response to that notice. So, if the FTT can consider its validity, it would be in the appeal against the late filing penalty. Therefore, in so far as Mr Crawford can challenge the validity of the notice to file, these proceedings against the penalties for non-compliance are the time to do it.

*Can the Tribunal review HMRC's discretionary decision to issue a notice to file?*

36. The second question is more complex. There have been many pronouncements on the extent to which the Tribunal has jurisdiction to consider what is normally referred to as public law issues, by which is meant the legality (or validity) of something done by a public body (such as HMRC). One of the more recent is the Upper Tribunal decision in *Birkett* [2017] UKUT 89 (TCC) where the Upper Tribunal reviewed the case law in this area. It said (in summary) that the FTT, as a statutory body, has no inherent jurisdiction to consider the legality of what HMRC has done, but it has jurisdiction to apply public law concepts to resolve issues within its jurisdiction if the relevant statute in issue intended it to do so [30].

37. In that case, it decided that the statute imposing the penalty in issue only intended the Tribunal to consider whether the taxpayer was liable to a penalty (and in what amount) and did not confer jurisdiction to consider HMRC's discretionary decision to impose the penalty: [38-39].

38. While, as was made clear in *Birkett,* determining the extent of the Tribunal's jurisdiction is a matter of construction of the particular statutory provisions at issue, it seems to me that as a general rule it is unlikely that Parliament would have intended the Tribunal to have jurisdiction to consider the exercise of HMRC's discretion other than where this is clearly stated.

39. Here the right of appeal is (s 100B TMA) against 'the determination of a penalty' and the Tribunal is given jurisdiction to decide whether a 'penalty has been incurred'. A late filing penalty has not been incurred if there was no notice to file because a precondition to liability to file a self assessment tax return is that a notice to file was 'given to him' by HMRC (s 8(1) TMA). So it is not obvious from the statutory wording itself whether Parliament intended the Tribunal to consider the legality of HMRC's exercise of discretion in deciding to issue a notice to file. My view would be as stated above that, without clear wording, and there is none here, I do not think s 100B should be interpreted as giving the FTT jurisdiction to consider the exercise of HMRC's discretion.

40. However, for the purpose of deciding this appeal, I do not need to reach a conclusion on this matter. And that is because even if the FTT had jurisdiction to consider HMRC's exercise of discretion, I have not been satisfied that what HMRC did was unlawful. While HMRC had the choice of how to collect the underpayment of tax in this case (by issuing a self assessment return or issuing a discovery assessment), I see no arguable case for saying that by choosing the self assessment route HMRC's choice was *unlawful.*

41. While the Judge in *Goldsmith* had concerns that issuing a notice to file a self-assessment return was a sledgehammer to crack a nut where the underpayment was only about one hundred pounds, and the taxpayer unused to the self-assessment regime, that is not true here. The underpayment was far more significant (§17), Mr Crawford was used to being in the self-assessment regime, and it makes sense to require self-assessment of better paid taxpayers as (it seems to me) they are the ones more likely to have other sources of income (eg interest and dividends). Moreover, a self-assessment has advantages over discovery assessments: where there is no suggestion of evasion by the taxpayer (and there is none here), requiring a self-assessment seems to me to be a much less confrontational method of collecting unpaid tax than issuing a discovery assessment, as well as carrying the advantage that it will capture all sources of income. I did not understand 'coding out' the underpayment (ie deducting the unpaid tax from current income in the PAYE system) to be an option here: Mr Crawford's case was that he had no PAYE income at the time and the amounts concerned were too large in any event. Even if coding out was a possibility, I do not see how it could be said that HMRC's decision to issue a notice to file in this case was unlawful: a self-assessment return captures all sources of income. Coding out would only deal with known underpayments.

42. I make no comment on whether the issue of the self-assessments returns in *Goldsmith* was unlawful in the public law sense; the case is under appeal although strictly it was not decided on this point in any event. Whether or not unlawful, and whether or not the Judge's criticism in *O'Neill* and *Goldsmith* were a motivating factor, it seems from a statement issued by HMRC and reported at the end of

*Goldsmith*, HMRC will not issue full self-assessment returns in such cases in the future.

*Can the Tribunal consider the purpose for which the notice to file was issued?*

43. In giving the Tribunal jurisdiction to consider the appellant's liability to the penalty for late filing, it seems implicit that the Tribunal can consider whether a notice to file (on which liability to the penalty depends) was validly served on the taxpayer. The validity of a notice to file depends on a number of factors, such as whether it was posted to the taxpayer's usual or last known place of residence. It is accepted that the Tribunal can consider such issues, and I have done here.

44. At [66-68] the Judge in *PML* implied (obiter) that statutory interpretation of the jurisdiction conferred on the Tribunal under the legislation at issue in that appeal was that the Tribunal could only consider whether there was non-compliance with an information notice and not whether the information notice was valid. However, this view was clearly influenced by the fact that the taxpayer was given a right to appeal against an information notice.

45. It seems to me that where there is a right to appeal against a penalty, it is implicit that it is a right to appeal whether that penalty is payable in law; and a penalty for non-compliance is not validly imposed where there is no non-compliance. There is no non-compliance where there is no underlying obligation: if the notice to file was invalid, it was not a notice to file and there was no obligation to comply with it.

46. However, as I have said, s 8(1) provides a person can be required to make a self-assessment tax return '[f]or the purpose of establishing the amounts in which [he] is chargeable to' income tax and CGT. It seems to me (and to the Judge in *Goldsmith)* that a notice to file issued to a taxpayer for any other purpose is not a notice to file under s 8(1). If it is not a notice to file under s 8(1), a person is not liable to a penalty under s93 for failing to comply with it and under s 100B the Tribunal must allow the appeal as 'no penalty has been incurred'.

47. Therefore, applying *Birkett,* it seems that the Tribunal, as a matter of statutory construction, does have jurisdiction to consider the purpose for which a notice to file was issued.

48. What I am less clear about is where the burden of proof would lie. Is it for HMRC to prove that its purpose in doing so was to 'establish' the taxpayer's liability to income tax and CGT, or is it for the taxpayer to prove that that was not the purpose? As I have said, the burden of proof lies on HMRC to prove that the conditions for liability to a penalty were met; for instance, HMRC must prove that they served the notice to file. That taxpayer does not have to prove that it was not. But it seems to me that there might be some 'presumption of regularity' such that it is assumed that HMRC has issued the notice to file for the statutory purpose unless the appellant can prove that it has not.

49. I do not need to resolve this issue here: whichever way the burden of proof lies, for the reasons given below, it makes no difference to the outcome of the question of whether the notices to file in this case were issued for their statutory purpose.

*What is the statutory purpose?*

50. To decide that issue I have to know:

(a) What HMRC's purpose was; and

(b) What the statute allows as a purpose.

51. S 8 permits HMRC to issue a self-assessment tax return 'for the purpose of establishing the amounts in which a person is chargeable' to income tax/CGT. In *O'Neill* and *Goldsmith* it appeared to be assumed that 'establish' meant calculate. It appeared agreed by the parties that in those cases, HMRC knew the amount of the underpayment of tax but wanted to ensure it could be collected by forcing the taxpayer to self-assess it. Self-assessment creates an enforceable debt.

52. I was unable to find a discussion of the meaning of 'establish' in those decisions so I revert to first principles. Statutory construction would require the tribunal to look at the word in its context. A dictionary definition may be helpful but is unlikely to be as helpful as looking at the word in the context in which it is actually used.

53. But looking at the dictionary definitions first, I find a draft addition to the OED suggests that a 'weakened' use of the word 'establish' is with the meaning 'to determine or ascertain; find out'. Actual definitions given in the OED include 'to place beyond dispute', and other definitions convey the idea of making something secure or permanent. The conclusion from the dictionary is that it is not a normal use of 'establish' for it to mean no more than 'calculate'; its normal meaning would be closer to the idea of securing, or making permanent or final, what is calculated.

54. Looking at the word in its context requires looking at what a notice to file does. A notice to file requires a person to make a return <u>which includes a self-assessment.</u> A person is not merely required to make a calculation of the tax which he owes, but to assess himself to that tax (s 9). The effect of a self-assessment is to create a debt to HMRC: s 59B TMA. While I am aware that for certain taxpayers, s 9(2) TMA does not require them to undertake the self-assessment, their return nevertheless results in an enforceable self-assessment because that is what s 9(3) and (3A) provide.

55. It seems to me that a self-assessment return does two things:

(a) It calculates the taxpayer's tax liability; and

(b) It assesses and makes enforceable by HMRC that liability.

56. 'Establish' should be understood in its context: if a self-assessment return does those two things, then a notice to file (which requires a self-assessment return to be made) should be seen as requiring the taxpayer to do those things. So where s 8 says '[f]or the purpose of <u>establishing</u> the amounts in which a person is chargeable to

income tax' it should be read as referring to the effect of a self-assessment return. It should not be read merely as:

> 'for the purpose of calculating the amounts in which a person is chargeable to income tax…'

But as

> 'for the purpose of calculating and assessing the amounts in which a person is chargeable to income tax….'

57. That is in any event closer to the dictionary definition of 'establish' where, as I have said, its more common meaning is to 'make secure' or 'settle' or 'make permanent'. These meanings are closer to 'assess' than to 'calculate'. An assessment fixes or settles a person with liability to the tax as calculated.

58. Moreover, it seems to me that 'establish' must not only be read as including *assessment* as well as *calculation* of tax, a notice to file issued simply to assess a known liability to tax would also be within the meaning of 'establish' as a self-assessment return secures/fixes/makes permanent the liability to tax by making it an enforceable debt.

59. Raffinger's case was that HMRC issued Mr Crawford with the notices to file to force him to self-assess himself to create an enforceable liability to pay a known underpayment of tax. Even if it is accepted that either they have proved this, or that it is for HMRC to prove otherwise, I would find that the notice to file was issued for a purpose within s 8(1). It was issued to establish (in the sense of fix, settle, make permanent and assess) Mr Crawford's liability to tax.

*Conclusion*

60. That was also true in the cases of *O'Neill* and *Goldsmith*. So, in conclusion, I am unable to agree with the decision in *Goldsmith* and I do not follow it. While I consider I have jurisdiction to decide whether or not the notice to file were issued for its statutory purpose, I find that the 9/10 notice to file was so issued in this case. It was a valid notice to file and I find it was served on the taxpayer on 6 April 2010 (§21).

61. It is accepted that Mr Crawford only filed his 09/10 tax return on 31 January 2013 when it was due to be filed on 31 January 2011. It was therefore late and HMRC have proved he was liable to a penalty. The remaining question is whether the appellant has a reasonable excuse for late filing.

*Test for reasonable excuse*

62. The applicable legislation provides at s 118(2) Taxes Management Act 1970 that a person is deemed not to have failed to have complied with an obligation under that Act if he had a reasonable excuse.

63. In the recent Upper Tribunal case of *Perrin* [2018] UKUT 156 (TCC), the test for whether there is a reasonable excuse has been expressed as follows:

> [63] From this, it is clear that in the criminal sphere there is a long line of the highest authority to the effect that the concept of "reasonable excuse" includes a requirement that the excuse in question should be objectively reasonable. We see no reason why different rules should apply when considering the same concept in a tax context.
>
> ….
>
> [71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times…..

64. I consider whether the appellant has a reasonable excuse for the late filing of his 09/10 tax return.

*Findings*

65. The appellant was deemed to have received the 09/10 notice to file but I accept that in practice he either never saw it or ignored it. His explanation for this is that he was not acting rationally; he was suffering with stress and depression.

66. While I accept that a failure to act rationally arising from mental health condition can be a reasonable excuse, I do not accept that such stress and depression from which the appellant suffered made his behaviour objectively reasonable. In particular, there is no medical evidence to establish that it was so severe he was unable to act rationally; moreover, Mr Crawford's own evidence shows that it was not so severe that he was unable to act rationally and in his own interests: see §15.

67. In other words, in so far as it was his case that he had a reasonable excuse for not filing a tax return because he was unaware of the obligation to file one, I do not accept it was a reasonable excuse because the reason he was unaware of his obligation to file was his *unreasonable* behaviour over his post, which I do not consider is excused by his mental state at the time.

68. In so far as he was suggesting it was a reasonable excuse not to file his self-assessment tax return because it was his case that he was not expecting to have to do so because he was no longer employed, without income and expecting Credit Suisse to operate PAYE properly, I do not accept that these reasons singly or combined amount to a reasonable excuse. In the appellant's circumstances, a reasonable taxpayer intending to fulfil his legal obligations would have filed a tax return in response to a notice to file, whatever his expectations were.

69. I do not accept, therefore, that Mr Crawford had a reasonable excuse for his failure to file his 9/10 tax return by the due date. The appeal against the two penalties of £100 is dismissed.

**Did the appellant fail to pay tax by the due date?**

70. The facts of this appeal span a change in penalty legislation. The 2009/10 late payment penalties were imposed under the Taxes Management Act; the 2010/11 late payment penalties were imposed under Schedule 56 of the Finance Act 2009. I will deal separately with the two statutory regimes.

71. Nevertheless, under either penalty regime, it is s 59B TMA which still sets out when income tax is payable. There are rules on when tax is due to be paid where the taxpayer files a self-assessment return: otherwise the due date is 30 days after the date of the assessment (s 59B(6)).

*The old penalty regime*

72. The old penalty regime was repealed when Schedule 56 Finance Act 2009 was introduced, but the repeal had no effect in respect of amounts of tax payable in respect of tax year 2009/10 (SI 2011/702 article 20). In other words, s 59C TMA 70 was (and is) in force in respect of tax due for 2009/10.

73. The penalties in this case were imposed under s 59C(2) and (3):

> (2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.
>
> (3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

74. There is no dispute on the amount of tax payable. That was shown on Mr Crawford's self-assessment return filed on 31 January 2013. There is also no dispute over when it was paid: for both years it was paid in two tranches between 12 and 15 February 2013. It appeared to be accepted that £875 was correctly calculated as 5% of the unpaid tax for 9/10.

75. The Tribunal's jurisdiction in an appeal against a s 59C TMA penalty is set out at s 59C and appears curiously limited:

> (7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.
>
> (8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.
>
> (9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—
>
> (*a*) if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(*b*) if it does not so appear, confirm the imposition of the surcharge.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

76. Taken at face value, this only gives the Tribunal jurisdiction to consider whether the taxpayer had a reasonable excuse for paying the tax late; it does not give the Tribunal jurisdiction to consider whether the penalty was properly imposed, and in particular whether the due date for payment had passed before payment.

77. Proceeding on the assumption that s 59C(9) was intended to expand, and not limit, the Tribunal's jurisdiction and that it is implicit in the right of appeal that the Tribunal has jurisdiction to consider whether the penalty was incurred at all, I first consider <u>when</u> the tax was due to be paid.

78. S 59B TMA sets out when income tax is payable. I have found that a notice to file was validly served on Mr Crawford on 6 April 2010 (§60). S 59B(4) sets out that in such a case that tax is due on or before 31 January next following the year of assessment. In this case, that was 31 January 2011. The tax was not paid until slightly over 2 years late.

79. Mr Crawford was therefore liable to the two surcharges each for £875 unless I am satisfied that he had a reasonable excuse for his late payment. I consider reasonable excuse below.

*The new penalty regime*

80. The new penalty regime is set out in Schedule 56 of Finance Act 2009. This applied to the 2010/11 years onwards.

81. Again, there is no dispute over the amount of tax payable. It is the amount shown on Mr Crawford's self-assessment for 2010/11 filed on 29 January 2013. The tax was paid in two tranches on 12-15 February 2013.

82. Sch 56 paragraph 13 gives the taxpayer the right to appeal against a decision of HMRC that 'a penalty is payable' and the Tribunal has power to cancel HMRC's decision. It seems to me that the Tribunal does have the jurisdiction to consider whether the tax was paid late. That requires me to calculate when (and if) the tax was due to be paid.

83. S 59B sets out when tax is due to be paid. The rules containing the 'normal' date of payment are in (3) and (4). However, by s 59B(1) they only apply to make payable the difference between the amount of tax shown as payable 'in a person's self-assessment under section 9…' and the amounts of tax already paid. S 59B(3) provides a due date for payment which only applies where a notice to file has been issued after a certain date; 'in any other case' the due date is 31 January after the year of assessment. The critical point here is that it appears that tax is only due under s 59B where a notice to file was issued or if the tax was assessed.

*Was tax due for 10/11 under s 59B at all?*

84. This is a far more complex question than might first appear. Mr Crawford filed a self-assessment return for 10/11 on 23 January 2013. But was it a self-assessment under s 9 TMA, as required by s 59B(1)? S 9 provides that 'every return under s 8…shall include a self-assessment' so it seems that a s 9 self-assessment is one made in a return under s 8 TMA (as one would expect). A return under s 8 is one which is in response to a notice to file.

85. Assuming that I have set out a correct interpretation of the law in the immediately preceding paragraph, was Mr Crawford's self-assessment for 10/11 in response to a notice to file? Ms McLaughlin accepted that the original notice to file of 6 April 2011 was withdrawn by HMRC in June 2012 (see §8). Therefore, unless there was a replacement notice to file, Mr Crawford's 10/11 return was not filed, it appears, under s 8 TMA.

86. While Ms McLaughlin did not address this point in her submissions, it seems it is her position that HMRC reissued a notice to file in September 2012 as the SA notes for 26 September 2012 said:

> '10/11 ITR captured as nil in error…the NIL return has been cancelled.'

Raffingers also read this somewhat cryptic note (their letter of 21/11/17) as a decision by HMRC to reinstate the 10/11 return, but I consider this acceptance stops short of being an acceptance that a notice to file was reissued. There is no other evidence which supports the re-issue of the notice to file: the 'SA return' printout for 10/11 does not record it; it only records the original notice to file. And while Mr Crawford did file his 10/11 tax return, it does not appear that he did so in response to a notice to file as his case is that he never received the notices to file as he did not live at Quarry Road. In their final submissions, Raffingers say (without any specifics) that they consider that the tax return was not properly issued.

87. HMRC have the burden of proof to establish that the penalty was properly imposed and so they must satisfy me that notice to file was re-issued: they have not done so.

88. Having failed to do so I have to consider the law in more detail. This particular issue has been considered at least twice by the FTT recently: in *Wood* [2018] UKFTT 74 (TC) and in *Patel & Patel* [2018] UKFTT 185 (TC). *Patel & Patel* contains a thorough analysis of the law. It was decided after thorough representations from Counsel. Both FTT judges concluded that a self-assessment return which was submitted without a notice to file being received were not self-assessments within the meaning of s 8.

89. That seems to me to be a logical, but problematic, conclusion to reach on the wording of the sections. It is problematic because taxpayers, obliged to notify their chargeability to income tax under s 7 TMA, know that HMRC will respond by issuing them with a notice to file: they therefore take the practical step of anticipating this by simply filing a tax return, rather than merely notifying chargeability to income tax.

Having received the 'voluntary' tax return, HMRC don't then take the seemingly pointless step of issuing a notice to file (often in the form of a blank tax return); in any event, a notice to file given after receipt of the tax return would not appear to make the tax return qualify as one under s 8 as it was not filed in response to the notice to file.

90. If *Wood* and *Patel & Patel* are correct, HMRC's only in response to a 'voluntary' tax return would be to issue a notice to file in response to one and demand that the taxpayer re-submit the return: this seems a pointless waste of everyone's time. Are these decisions right to say that a taxpayer is not prevented in a legal sense ('estopped') from relying on HMRC's failure to serve a notice to file in defence to a claim that the tax return is not a tax return within the meaning of s 8 TMA in circumstances where the taxpayer's own actions in anticipating the requirement to file (by filing a voluntary tax return instead of merely notifying chargeability) led to HMRC's failure to serve a notice to file?

91. At [120] of *Patel* Judge Brannan was concerned there was merely passive acquiescence by the taxpayers rather than an active representation that their 'voluntary' tax returns were returns under s 8. However, it seems to me that filing a self-assessment tax return is an active representation that a notice to file was received (or at least to be treated as received) because otherwise there would be no liability to file a return.

*How to determine the appeal against the 10/11 late payment penalties?*

92. *Patel and Patel* have the permission of the hearing judge to lodge an appeal to the Upper Tribunal. It seems the only fair thing to do (albeit I am reluctant to do it bearing in mind how long this appeal has already been stayed) is to stay my decision on whether or not tax for 2010/11 was paid late pending the outcome of those appeals. This is because HMRC have failed to prove that they served a notice to file for 10/11 so, either (option A) the Judges in *Wood* and *Patel*, (and myself at §83) are wrong to say that a notice to file is necessary for an obligation to pay the tax to arise on Mr Crawford and/or Mr Crawford is estopped from saying he did not receive a notice to file, or (option B) we are right and Mr Crawford is not estopped from denying receipt of the notice to file. If Option B is correct, Mr Crawford cannot be penalised for paying his 10/11 tax late as he was not obliged to pay it at all. But if Option A is correct, then it seems to me that the late payment penalties for 10/11 are due.

93. My reasoning on Option B is as follows. Assuming that s 59B applies because either a notice to file is not necessary for liability to pay tax to arise or because Mr Crawford is estopped from denying receipt of a notice to file, then the tax would have been due on 31 January 2012. This is because S 59B(3) applies in cases where a taxpayer gives notification of chargeability within 6 months of the end of the tax year: I had no evidence that Mr Crawford gave notice to HMRC of his chargeability to income tax for 2010/11 before the filing of his tax return in early 2013, which was considerably more than 6 months after 5 April 2011. His SA Notes show that there was no communication between Mr Crawford and HMRC from December 2010 to (at the earliest) May 2012. That would (if Option B is right) put Mr Crawford into s

59B(4) as 'any other case' which provides that the tax is due on or before 31 January next following the year of assessment. In this case, that would be 31 January 2012.

94. I note that S59B(4ZA) applies where notice of liability was given by the taxpayer after a withdrawal of a notice to file; but even if that section is applicable here, its effect is to give the same due date as the normal rule in s 59B(4). In other words, because s 59B(3) does not apply, the due date is set out in 59B(4) and would be 31 January 2012 if Option B was right.

95. The tax was therefore paid just over one year late *if* s 59B(1) applies. So the outcome of this appeal against the 10/11 late payment penalties depends on whether or not the reasoning in *Patel & Patel* was correct unless I would allow the appeal for other reasons in any event. And I go on to consider that.

**Does the appellant have a reasonable excuse for his failure to pay tax by the due date for either year?**

96. Both the old and new regime give a defence of reasonable excuse and I have already considered what that means as a matter of law.

97. In letters to HMRC Mr Crawford advanced reasons for non-payment which were (a) he didn't receive the notices to file; (b) he didn't know he owed any tax; (c) he believed Credit Suisse would have operated PAYE correctly and (d) shortage of funds.

98. It seems to me that it was more likely than not that the same reason for the late filing caused the late payment. What he was saying is that he was depressed and stressed and acted in such a way that he either did not receive, or ignored, the notices to file; had he not acted in this manner, he would have received and responded to the notices to file and filed his tax returns. Had he done so in a timely fashion he would have known he had a tax liability before the due date for payment.

99. A separate claim to reasonable excuse would appear to be that he was not expecting a tax liability because he assumed that Credit Suisse would operate PAYE correctly.

100. For the reasons given above I do not accept that any of these reasons are a reasonable excuse for the late payment of tax in 9/10 or 10/11. Whatever mistaken assumptions he made about Credit Suisse's ability to operate PAYE correctly, had he acted reasonably he would have filed his tax return on time and would have known that he had a tax liability to pay by the due date. His failure to act reasonably in respect of his post is not a reasonable excuse for the reasons given at §§65-68.

101. So far as his excuse was that he was short of funds, this is not a reasonable excuse as Mr Crawford has not proved he was short of funds. In any event, I would not accept it, of itself, as a reasonable excuse: only the reason underlying the shortage of funds could be a reasonable excuse and here Mr Crawford has given me no explanation of why he considered himself short of funds.

102. In conclusion, I do not accept he had a reasonable excuse for the late payment of tax for either years 9/10 or 10/11.

## Special circumstances

103. I only have jurisdiction under Sch 56 to consider special circumstances so I can not consider this in respect of the late payment penalties for 2009/10. However, while it appears HMRC failed to consider special circumstances at all so that their decision was flawed, allowing me to substitute my own decision, I do not consider that there are any special circumstances. I will not reduce the penalty for special circumstances.

## Overall conclusion

104. The outcome of this hearing is as follows:

(1) The appeal against the late filing penalties for 09/10 (total £200) is DISMISSED for reasons given at §§20-68;

(2) The appeal against the late filing penalties for 10/11 (total £4,316) is ALLOWED for reasons given at §9;

(3) The appeal against the late payment penalties for 09/10 (total £1,750) is DISMISSED for reasons given at §§72-79 and §97-103;

(4) The appeal against the late payment penalties for 10/11 (total £3,416) is STAYED pending final determination of *Patel and Patel;* albeit (for the reasons given at §§97-103) it is finally concluded against the appellant in respect of all matters save the question of whether a notice to file had to be issued for liability to arise under s 59B and/or whether it is open to the appellant to advance the case that a notice to file was not issued as explained above at §§84-96). Either party can make a reasoned application at any time for the stay to be lifted.

105. 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.

**BARBARA MOSEDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 JULY 2018**