[2019] UKUT 325 (TCC)

Appeal number: UT/2018/0037

INCOME TAX – penalty charged under paras 1 and 3, Schedule 55 Finance Act 2009 – whether taxpayer liable to a penalty for failure to submit a tax return under s.8(1) Taxes Management Act 1970 ("TMA") – appeal allowed by First-tier Tribunal on basis that penalties were invalid because the decision to require a return did not fall within the power in s.8(1)TMA – whether Tribunal had jurisdiction to consider that argument – whether Tribunal entitled to reduce penalty because of special circumstances.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

DAVID GOLDSMITH **Respondent**

TRIBUNAL: MR JUSTICE FANCOURT
JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 24 and 25 July 2019

Aparna Nathan QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

David Ewart QC and Rebecca Murray, Advocates to the Tribunal

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("FTT") (Judge Richard Thomas) released on 3 January 2018. Mr Goldsmith, the Respondent in the appeal to this Tribunal, appealed to the FTT against penalties imposed on him by the Appellants ("HMRC") in respect of his failure to deliver income tax returns for the tax years 2011-12 and 2012-13 by the due date.

2. The FTT's decision ("the Decision") was to allow the appeals against the penalties imposed on Mr Goldsmith. HMRC now appeal against the Decision with the permission of Judge Thomas.

The issues

3. In summary, the FTT decided that the penalties in respect of the late returns, imposed under paragraphs 1 and 3 of Schedule 55 to the Finance Act 2009 ("Schedule 55"), were invalid because the notices to file a tax return given to Mr Goldsmith were not given for the purpose set out in section 8(1) Taxes Management Act 1970 ("TMA"). The FTT further decided, in the alternative, that the penalties should be reduced to nil because HMRC's penalty decision was flawed and there were "special circumstances" within the meaning of paragraph 16 of Schedule 55.

4. In short, HMRC argue that the FTT erred in deciding that the notice to file did not fall within section 8(1) TMA because the FTT had no jurisdiction to consider that question and that, in any event, the notices were given for the purpose set out in the subsection. In addition, HMRC contend that the FTT also erred in holding that there were "special circumstances" warranting a reduction of the penalties to nil.

5. As well as penalties under paragraphs 1 and 3 of Schedule 55, HMRC also imposed daily penalties under paragraph 4 of Schedule 55. At the hearing before us, HMRC indicated that they were no longer pursuing their appeal in respect of the paragraph 4 penalties.

The hearing

6. Ms Aparna Nathan QC appeared for HMRC. Mr Goldsmith took no part in the proceedings before us. However, Mr David Ewart QC and Ms Rebecca Murray appeared as Advocates to the Upper Tribunal to provide assistance. We wish to express our thanks to them and to Ms Nathan QC for their helpful submissions.

The facts and the appeal

7. The full facts are set out at paras [29]-[60] of the Decision. We summarise briefly those that are material to this appeal.

8. Mr Goldsmith was an employee whose income tax payments in respect of his employment income were collected through the PAYE system. However, for each of the tax years 2011-2012 and 2012-2013 the PAYE deductions did not collect the full amount of income tax due. In each year, he received a PAYE calculation (a P800) advising him that he had underpaid tax for that year.

9. For the 2011-12 tax year, Mr Goldsmith was issued with a PAYE calculation on 16 September 2012 advising him that he had underpaid income tax by £624.60. Following some correspondence between the parties, on 12 July 2013 Mr Goldsmith and HMRC reached an agreement according to which Mr Goldsmith would pay off the underpayment by way of 33 instalments. After making the first three payments, the last of which was made on 24 October 2013, Mr Goldsmith failed to make any further payments or renegotiate any "time to pay" arrangement.

10. On 2 May 2014, HMRC sent him a notice, which purported to be given under section 8(1) TMA, requiring him to make a self-assessment return for the year 2011-12 by 9 August 2014.

11. Mr Goldsmith failed to deliver his 2011-12 return by the due date of 9 August 2014 and on 19 August 2014 he was issued with a notice of late filing penalty of £100 in accordance with paragraphs 1 and 3 of Schedule 55. He appealed this notice to HMRC who upheld the penalty.

12. On 10 November 2014, Mr Goldsmith filed his 2011-12 self-assessment return.

13. On 8 December 2014, Mr Goldsmith appealed the penalty notice to the FTT.

14. On 16 December 2014, Mr Goldsmith was issued with a notice of daily penalty assessment for £10 in accordance with paragraph 4 of Schedule 55 of FA 2009.

15. For the 2012-13 tax year, Mr Goldsmith received a PAYE calculation on 1 August 2013 indicating that he had underpaid income tax by £289.90.

16. HMRC sent Mr Goldsmith three 'unpaid tax' letters, the first of which was sent on 4 August 2013 and the last of which was sent on 8 December 2013.

17. On 20 March 2014 HMRC sent Mr Goldsmith a notice, which purported to be under section 8(1) TMA, requiring him to make a self-assessment return for the year 2012-13 by 27 June 2014.

18. Mr Goldsmith failed to deliver his 2012-13 return by the due date of 27 June 2014 and on 1 July 2014 a notice of late filing penalty for £100 was issued under paragraphs 1 and 3 Schedule 55 of the FA 2009.

19. On 8 December 2014, Mr Goldsmith appealed that penalty notice to the FTT.

20. The FTT directed that Mr Goldsmith's appeals were to be stayed until 60 days after the release of the Upper Tribunal's determination in *Donaldson* v *HMRC* [2014] UKUT 0536 (TCC). In *Donaldson* the taxpayer was challenging the nature of

HMRC's powers under Schedule 55 to impose penalties for the late filing of a return. The Upper Tribunal gave judgment in *Donaldson* on 2 December 2014 but it was subsequently appealed to the Court of Appeal and the stay on all similar appeals (including Mr Goldsmith's appeal) was extended until the Court of Appeal had decided the matter. The Court of Appeal dismissed the taxpayer's appeal in a decision given on 18 July 2016 ([2016] EWCA Civ 761). However, the stay on Mr Goldsmith's case was extended again while permission to appeal was sought from the Supreme Court. Permission was refused by the Supreme Court on 21 December 2016.

21. Following the final determination of *Donaldson*, the stay was lifted on Mr Goldsmith's appeal and on 7 March 2017 HMRC served their Statement of Case. The appeal was listed before the FTT under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 dealing with "default paper appeals" i.e. appeals that are determined on the papers without a hearing.

22. In his grounds of appeal to the FTT Mr Goldsmith claimed that he had not received the notices to file the returns and that this constituted a "reasonable excuse" in accordance with paragraph 23 of Schedule 55. HMRC's records showed that the notices were addressed to Mr Goldsmith's address on record and there was no record of those notices being returned to HMRC undelivered.

23. On 1 June 2017, the FTT issued a draft decision giving its view that HMRC had no power under section 8(1) TMA to issue notices to file for the purposes that they had done in this case. It followed therefore that, although the taxpayer's grounds of appeal were rejected, the penalties issued for late delivery of the self-assessment return were invalid. The Tribunal invited further submissions from HMRC before issuing its final decision.

24. HMRC made submissions on 30 June 2017 in which they argued that the FTT lacked jurisdiction to invalidate the penalties on the basis of the appropriateness of HMRC's decision to issue a notice under section 8(1) TMA requiring the submission of a self-assessment tax return. A subsequent oral hearing, convened at the request of HMRC, was held on 20 October 2017 at which HMRC, represented by Ms Nathan, made oral submissions.

25. The Decision, which is the subject of this appeal, was issued on 3 January 2018. Judge Thomas was unmoved by HMRC's submissions and confirmed, in a detailed and reasoned decision, why he considered that the notices to file were invalid. We summarise the Decision in paragraphs 36 to 75 below.

The legislation

26. The relevant legislation is as follows. The relevant statutory provisions are quoted as amended and in force in the tax years 2011-12 and 2012-13.

Notice requiring a taxpayer to file a self-assessment return

27. Section 8 TMA provides so far as material:

> "(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 a notice given to him by an officer of the Board-
>
> (a) to make and deliver to the officer …, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents relating to information contained in the return, as may reasonably be so required."

28. Section 9 TMA provides:

> "(1) Subject to subsections (1A) and (2), every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—
>
> (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 the 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 …
>
> …
>
> (2) A person shall not be required to comply with subsection (1) above if he makes and delivers his return for a year of assessment—
>
> (a) on or before the 31st October next following the year, or
>
> (b) where the notice under section 8 or 8A of this Act is given after the 31st August next following the year, within the period of two months beginning with the day on which the notice is given.
>
> (3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case—
>
> (a) make the assessment on his behalf on the basis of the information contained in the return, and
>
> (b) send him a copy of the assessment so made;
>
> ….
>
> (3A) An assessment under subsection (3) above is treated for the purposes of this Act as a self-assessment and as included in the return."

29. As section 9(1) TMA indicates, an assessment includes the amount in which the taxpayer is chargeable to tax. It also includes the amount payable by the taxpayer,

taking into account income tax deducted at source. For these purposes, income tax deducted at source means "income tax deducted or treated as deducted from any income or treated as paid on any income" (section 8(5) TMA). Thus Part 11 of Income Tax Earnings and Pensions Act 2003 ("ITEPA") (which sets out the PAYE provisions) does not constitute the exclusive machinery for the collection of tax on employment income given that section 9(1) TMA brings it expressly within the scope of the TMA.

30. Section 59B TMA, as amended, establishes a debt in respect of tax contained in a person's self-assessment:

> "59B(1) Subject to subsection (2) below, the difference between—
>
> (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
>
> (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section . . . 246D(1). . . . . of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005."

Penalties

31. Paragraphs 1 and 2 of Schedule 55 provide:

> "1 (1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out— (a) the circumstances in which a penalty is payable, and (b) subject to paragraphs 14 to 17, the amount of the penalty.
>
> (3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).
>
> (4) In this Schedule—
>
> "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;
>
> "penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

	Tax to which return etc relates	**Return or other document**
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970
…..	……	…….

2 (1) Paragraphs 3 to 6 apply in the case of—

(a) a return falling within any of items 1 to 5, 7 and 8 to 13 in the Table."

We have only reproduced here item 1 in the Table.

32. Paragraph 3 of Schedule 55 provides:

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

33. Paragraph 16 of Schedule 55 contains provisions in relation to "special circumstances" in the following terms:

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

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

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Appeals against penalties under Schedule 55:

34. Paragraphs 20-23 of Schedule 55 provide:

"20 (1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

21 (1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22 (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

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

(2) For the purposes of sub-paragraph (1)— (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control, (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

35. Section 49D TMA provides:

"(1) This section applies if notice of appeal has been given to HMRC.

(2) The appellant may notify the appeal to the tribunal.

(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.

(4) Subsections (2) and (3) do not apply in a case where—

(a) HMRC have given a notification of their view of the matter in question under section 49B, or

(b) HMRC have given a notification under section 49C in relation to the matter in question.

(5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H."

The Decision

Jurisdiction to examine the validity of the notices

36. The FTT recorded that Mr Goldsmith was not registered on HMRC's self-assessment computer system in the years to which the penalties relate. (Decision [9])

37. It then gave a detailed explanation of the development of the self-assessment income tax system and its relationship to taxpayers who were not within it (generally, those who only pay income tax under the PAYE system). This explained how underpayments of tax could arise for taxpayers who were within the PAYE system. For example, an employer could fail to operate the PAYE system correctly resulting in an under-deduction of tax. (Decision [10]-[24])

38. The FTT found that HMRC already knew the amounts in which Mr Goldsmith was chargeable to income tax. HMRC knew the lesser amount paid by him by way of income tax through PAYE deductions because they had issued a P800 and had asked Mr Goldsmith to pay the balance. The FTT reached this conclusion on the basis of HMRC's statement of the facts and the exhibits thereto in the papers provided to it. (Decision [89])

39. HMRC's purpose in serving the notice to file was, therefore, found not to be to obtain information that they did not know about Mr Goldsmith's income tax liability. Instead, HMRC's purpose was found to be to create an enforceable debt to the Crown. This was because one of the circumstances in which HMRC can enforce the payment of tax to which a person is chargeable is when tax is shown in a self-assessment; it becomes due and payable by virtue of section 59B TMA. (Decision [89]-[90])

40. In the light of this particular finding, it seemed to the FTT that it was arguable that the return might not have been issued for the purpose set out in section 8(1) TMA. (Decision [91])

41. It was against this background that Judge Thomas sent a draft of part of his decision to HMRC and asked if they wished to make submissions. HMRC made submissions but Judge Thomas informed them that their arguments had not changed his view. (Decision [91])

42. Consequently, HMRC asked for an oral hearing and the FTT outlined the submissions made by HMRC at that hearing. (Decision [95]-[103])

43. The FTT then referred (Decision [104]-[109]) to the decision of the Upper Tribunal (Nugee J and Judge Greenbank) in *Birkett & others v HMRC* [2017] UKUT 0089 ("*Birkett*") and the decision of the High Court (Sir Ross Cranston, sitting as a judge of the High Court) in *PML Accounting Ltd v HMRC* [2017] EWHC 733, [2017] STC 1091 (Admin) ("*PML*").

44. In relation to *PML* the FTT considered that it was clear that the validity of a Schedule 36 notice (i.e. a notice seeking information issued under Schedule 36 Finance Act 2008) could be examined by the FTT but only on an appeal under paragraph 29 of Schedule 36, i.e. an appeal against the notice itself and against any requirement in the notice.

45. The FTT noted that the point had not been considered in *Birkett* because there was no appeal against the notice. (Decision [109])

46. Next, the FTT (Decision [110]) referred to the decision of Goulding J in *B & S Displays Ltd v Special Commissioners and others* [1978] STC 331 ("*B & S*"). In *B & S* the Special Commissioners had held that certain information notices issued by HMRC (under section 20 TMA) were partly invalid because the period covered was not one for which a return has been issued but upheld the valid parts of those notices (i.e. they had severed the invalid parts). Goulding J dismissed all the grounds of appeal except that against the decision of the Special Commissioners to sever parts of the notices.

47. The FTT then (Decision [113]) referred to the decision of the Special Commissioners and the decision of Mummery J, on appeal, in *Kempton v Special Commissioners of Income Tax* [1992] STC 823 ("*Kempton*"). This involved a challenge to the validity of another section 20 TMA notice. The Special Commissioner decided that a person on whom a section 20 notice had been served may raise the question of the validity of the notice as a defence in penalty proceedings brought against him for failure to comply with the notice. The FTT observed (Decision [115]) that the Special Commissioner's decision as to validity was not challenged on appeal and that Mummery J considered and decided upon the question of validity of the notice.

48. Comparing the decisions in *B & S* and *Kempton*, on the one hand, and *PML*, on the other, the FTT (Decision [116]) considered that the major difference between them was that as regards a section 20 TMA notice there was no appeal possible against the issue of, or the requirements contained in, the notice, as there was in Schedule 36 FA 2008. The scheme of Schedule 36, referred to by Sir Ross Cranston

at [68] in *PML* was not present in section 20 TMA, when read with the relevant penalty provision in section 98 TMA.

49. The FTT (Decision [117]) then referred to the decision of Etherton J (as he then was) in *Sharkey v HMRC* [2006] EWHC 300 (Ch). This involved an appeal against the penalty for failure to comply with the notice issued under section 19A TMA. Etherton J considered that the issue was within his jurisdiction where the relevant grounds were that the penalty violated the appellant's human rights. Section 19A TMA did contain a provision allowing an appeal against the notice as well as a penalty for non-compliance.

50. HMRC's argument, that *PML* and *Birkett* had the effect of denying the FTT jurisdiction to consider the validity of the section 8 TMA notice to file (i.e. whether it was issued for the statutory purpose of establishing Mr Goldsmith's liability to tax) was rejected by the FTT (Decision [120]). The FTT observed that *B & S* and *Kempton* did not support HMRC's argument

51. As regards the "matter in question" this was defined in section 49I(1)(a) TMA as "the matter to which the appeal relates." The FTT noted (Decision [122]) that in *Birkett* the matter in question was said to be "whether a penalty is payable" where the appeal was under paragraph 47(a) of Schedule 36, referring to the decision of the Upper Tribunal at [38]-[39].

52. The FTT noted (Decision [123]) that Sir Ross Cranston in *PML* held at [65]-[67] that the matter in question was a narrow one and an appeal under paragraph 47(a) of Schedule 36 was limited to the question whether the recipient had failed to comply with the notice. That, however, had to be seen in the context of the following paragraph [68], where Sir Ross Cranston said that his view made sense within the scheme of Schedule 36, where a challenge to the validity of the notice could be and had to be made in an appeal against the notice itself (rather than in an appeal against penalties for failure to comply with the notice) (Decision [124]).

53. Furthermore, the FTT questioned (Decision [125]) whether the narrow view expressed by Sir Ross Cranston (i.e. the FTT could only consider whether the recipient had failed to comply with the notice) was what the Upper Tribunal in *Birkett* had in mind when characterising the FTT's jurisdiction – *Birkett* held that the FTT could not treat legitimate expectation of fair treatment as a ground of appeal or as a "matter in question".

54. The FTT (Decision [126]) did not read *Birkett* as saying that the validity of the penalty notice itself (as distinct from the validity of the information notice) could not be challenged on an appeal under paragraph 47(a).

55. In *Donaldson*, the FTT observed ((Decision [127]), the validity of a penalty notice under Schedule 55 was in issue. The Court of Appeal (and the Upper Tribunal) considered the validity of the penalty notice. The only grounds of appeal under Schedule 55 were the same as those considered in *PML*, i.e. paragraph 47 of Schedule 36.

56. The FTT then considered the phrase "the matter in question", noting (Decision [128]) that the expression had been introduced at the start of the Tribunal system on 1 April 2009. The FTT also observed that *B & S* had been decided on the pre-1978 law. Section 100B TMA:

> "An appeal may be brought against the determination of a penalty under section 100 above…."

57. The FTT observed that nothing in section 100B TMA limited the grounds upon which an appeal could be brought against the penalty, including a penalty for failure to file a return (Decision [132]). The FTT therefore found it surprising if the appeal provisions introduced in the Finance Acts of 2007, 2008 and 2009 following the HMRC Review of its penalty powers were intended to limit the grounds on which an appeal against the penalty may be made, at least on the grounds of invalidity. The FTT considered that there was no reason to think that Parliament, when it provided for "an appeal against the decision of HMRC that a penalty is payable", should be taken to have intended to interpret that phrase to be construed as narrowly as Sir Ross Cranston seemed to have done in *PML* (Decision [133]).

58. The FTT further noted (Decision [136]) that the view of Sir Ross Cranston in *PML*, taken to its logical conclusion, would mean that a penalty notice could not be contested on the basis that it was issued out of time, as that would not relate to the "matter in question" that he identified.

59. Accordingly, the FTT rejected HMRC's argument that Sir Ross Cranston's view expressed in *PML* of the only permitted "matter in question" was binding on it, at least when deciding an appeal against a penalty assessment under Schedule 55, whatever the position under Schedule 36 FA 2008 might have been (Decision [137]).

Were the penalty notices valid?

60. The FTT considered that it was entitled to ask whether, in the circumstances of the present appeal, the statutory requirements of section 8(1) TMA were met. The FTT concluded that the requirements had not been met (Decision [138]).

61. The question (Decision [139]) was whether the notices to file under section 8(1) TMA were issued "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"?

62. The FTT continued:

> "140. HMRC do not in their submission address the reason those words are in s 8(1) TMA following its substitution by s 178(1) FA 1994, but were not in s 8 as originally enacted. They must, under the rule of construction that Parliament should not be assumed to legislate for no reason, have a role to play. One possible reason is that Parliament thought that in a system where s 29 TMA (as it stood before amendment by FA 1994 for self-assessment) was no longer the only way of assessing a liability to tax and establishing a debt to the

> Crown, both for those getting returns and those within the PAYE system who had never been required to file, it was necessary to say something about the purposes of the return and the role of the self-assessment in replacing the s 29 TMA assessment and in itself leading to the establishment of a tax debt under s 59B TMA.
>
> 141. But, whatever the reason, [Mr Goldsmith's] circumstances do not fit the words. HMRC did not need a return to establish [Mr Goldsmith's] income or the amount of tax payable, as the PAYE system had done that, and the P800 had "assessed" it in the ordinary sense of that word. They said they needed a return to collect the tax that [Mr Goldsmith] had started to pay off but then stopped doing so.
>
> 142. There is a clear indication in legislation enacted in FA 1994 as part of the changes needed for self-assessment that Parliament intended to maintain and indeed strengthen the dual system of on the one hand "SA" taxpayers subject to the full panoply of Parts 2 to 5A of TMA and the majority who were subject only to the PAYE Regulations, and that accordingly a person in the appellant's position, as someone in the majority system was not to be regarded as within the SA system for any purpose. This legislation is in paragraph 1 Schedule 19 FA 1994 which substituted a completely new s 7 TMA for the version as originally enacted."

63. The FTT (Decision [156] (1)) thought that the reconciliation process followed by the issue of a P800 was a finalisation of a non-self-assessment taxpayer's tax liability. The result of the reconciliation was either that the correct amount of tax had been deducted under PAYE (in which case no further action was required) or tax was overpaid (in which case a repayment would be made) or tax was underpaid, which in the vast majority of cases was collected by "coding out" (i.e. by further deductions under the PAYE system). In a "very small minority" of cases, this was not possible and some other mechanism had to be found. The FTT said:

> "What I say is that HMRC have chosen a mechanism to collect which is not open to them and ignored the one which is."

64. Again, (Decision [156] (4)) the FTT continued:

> "… I do not suggest that the existence of alternative methods of collection affects the obligation to make a return. What I say is that the existence of those alternative methods shows not only that it is not necessary to issue a return to those whose tax can be collected by one of the alternative methods, but also that it is not possible to use a notice to file in place of the alternative methods."

65. The FTT went on to hold (Decision [158]) that the notices with which Mr Goldsmith was issued were not notices to file returns under section 8 TMA and that there was, therefore, no failure to file as set out in paragraph 1 of Schedule 55, having regard to Item 1 in the Table in that paragraph.

66. The FTT was influenced by comments of Lord Hodge JSC both in *R (De Silva) v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 74 at [12], [23] and [28] ("*De Silva*") and in *Cotter v HMRC* [2013] UKSC 69 at [24]-[25]

("*Cotter*"). The FTT did not regard these comments as decisive (Decision [162]) but noted the emphasis placed by Lord Hodge "on more than one occasion on the 'purpose' words."

67. Next, the FTT considered that it was inappropriate to use the self-assessment system in this case, although acknowledging that this was also not a deciding factor (Decision [163]-[172])). In the course of this discussion, the FTT noted the different consequences that could flow in respect of underpayments of tax collected through the PAYE system and the self-assessment system.

Reasonable excuse

68. In the alternative, the FTT considered whether Mr Goldsmith might be excused a penalty on the basis that he had a reasonable excuse for his failure to deliver his self-assessment tax returns. The FTT concluded (Decision [177]) that no reasonable excuse existed and neither party seeks to disturb this finding before us.

"Special circumstances"

69. Again, in the alternative, the FTT considered (Decision [178]-[190]) whether there existed "special circumstances" within the meaning of paragraph 16 of Schedule 55 that would justify a reduction in the amount of the penalty, noting that such a reduction could only be made if HMRC's decision was flawed in judicial review terms.

70. The FTT found (Decision [181]) that HMRC had not considered the circumstances in which the underpayments arose and whether the circumstances were unusual or out of the ordinary.

71. In the present case, HMRC had argued that the underpayment of tax arose because both of Mr Goldsmith's "employers" had used a code which gave the full personal allowance to Mr Goldsmith.

72. The FTT noted (Decision [183]) that Mr Goldsmith had been in receipt of Employment Support Allowance ("ESA"). The FTT considered that if HMRC had applied their minds to the PAYE issues in the present appeal they would or should have realised that something had gone wrong. Where taxable ESA is paid to a person who (unusually) continues in employment, as in the present case, the position would be reviewed with the effect that tax on the ESA would be collected by reducing the PAYE code number so that less than the full personal allowance was given.

73. Accordingly, the FTT concluded (Decision [184]) that an HMRC error had given rise to the underpayment. The FTT also noted that HMRC did not seem to have considered why the underpayment could not have been "coded out".[1]

74. The failure to consider these issues led the FTT to consider that HMRC's decision had been flawed because they had failed to take account of relevant matters (Decision [186]).

75. Considering the matter afresh, the FTT decided that, if it was wrong on the main jurisdiction issue, it would have reduced the penalty to nil on the grounds of "special circumstances".

The authorities

The exclusivity principle

76. The first issue to be considered concerns what has become known as the "exclusivity principle". In short, this requires a person seeking to impugn the decision of a public authority on public law grounds to do so by way of judicial review. HMRC's case is, essentially, that Mr Goldsmith is challenging the exercise of its discretion to require a tax return to be filed and as such can only do so by way of judicial review.

77. The principle (and the potential for exceptions to the principle) were set out by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 285:

> "…. it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis …"

78. The limitations on the exclusivity principle were explored in *Wandsworth LBC v Winder* [1985] 1 AC 461 ("*Wandsworth v Winder*"). In this case the defendant was a tenant of a council flat who was permitted to defend county court proceedings for

[1] At the hearing we were informed by Ms Nathan that Mr Goldsmith could not be "coded out" because he was no longer in employment, but it seems that this information was not placed before the FTT.

possession and arrears of rent by challenging the validity of council's resolutions to increase tenants' rents. Lord Fraser of Tullybelton said at 509-510:

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1, which was decided … a few months before Order 53 came into force ... I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in *Reg. v. Inland Revenue Commissioners, Ex parte Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, 647G 'The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not - indeed, cannot - either extend or diminish the substantive law. Its function is limited to ensuring "*ubi jus, ibi remedium*." … Nor, in my opinion, did section 31 of the Supreme Court Act 1981 … have the effect of limiting the rights of a defendant *sub silentio*. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows: 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.'"

79. The third authority is the decision of the Court of Appeal in *Pawlowski v Dunnington* [1999] STC 550 ("*Pawlowski*"), which concerned proceedings brought by the Inland Revenue in the County Court to recover tax due under an assessment. The defendant taxpayer was permitted to defend the action by raising a public law challenge to the assessment. Simon Brown LJ held that the instant case could not be distinguished from *Wandsworth v Winder* on the ground that, unlike in that case, there was no pre-existing private law relationship between the parties. He stated at 559:

> "As for the undoubted practical disadvantages which flow from raising a public law challenge like this by way of defence instead of judicial review, this too is an argument which *Winder* amply demonstrates (in the passage already cited) to be unavailable to the appellant. Indeed it seems to me plain that the disadvantages in that case were altogether greater than any which exist here. The decision there affected many third parties (tenants and ratepayers) and its challenge put at risk the whole basis of the council's financial administration over a period of

years. The present challenge concerns only a single taxpayer's liability although of course the point of principle is clearly one of great importance to the Revenue and would affect many cases."

80. The next decision is the County Court case of *HMRC v Woodgate* (County Court at Middlesbrough, 3 May 2018) ("*Woodgate*"). This case was cited with approval by the Upper Tribunal (Arnold J and Judge Cannan) in *Beadle v HMRC* [2019] UKUT 101 (TCC). In *Woodgate* the defendant applied to set aside a judgment in default which HMRC had obtained in respect of the sums specified in one APN, two PPNs and 13 penalty notices. HHJ Gargan held that the application should be refused on the basis that there was no realistic prospect of the defendant being able to raise public law challenges to the APN and PPN. The learned judge said:

"58. The starting point is that the APN/PPN regime has been designed by Parliament with the specific purpose of deterring or reducing the use of marketed tax avoidance schemes by taking away the residual cash flow benefit which would otherwise accrue even from taking part in schemes which were ultimately found not to create a tax advantage. As Arden LJ stated at §53 of her judgment in *Rowe*, Parliament has determined that the use of such schemes is anti-social behaviour, a matter which is quintessentially a question for Parliament. The validity of Parliament's objective, and the lawfulness of the scheme by which that object has been implemented, has been upheld in *Rowe* and *Walapu*. The recipient of an APN/PPN is obliged to pay HMRC the sum identified as the potential tax advantage by the later of (i) 90 days from the Notice being given or (ii) within 30 days of the taxpayer receiving HMRC's decision having considered any representations made on receipt of the Notice.

59. If taxpayers were allowed to raise public law issues by way of a defence to actions seeking payment of the monies claimed under APNs/PPNs then there would be no incentive for taxpayers to bring a public law challenge once HMRC had considered their representations. Any claims for judicial review would have to be brought promptly and would be determined fairly quickly. In this case, the claimant continued to correspond with HMRC for some time before HMRC issued proceedings. If permission to defend were to be given, it would probably be about 9 to 12 months before the issues could be tried. Throughout that period the taxpayer would continue to enjoy the cash-flow advantages of the tax avoidance scheme, contrary to the central objective of the statutory regime. Therefore, in my judgment, there is a considerable disadvantage to HMRC and the public generally in allowing public law issues to be raised by way of a defence.

60. I then turn to the nature of the rights that the claimant is seeking to protect. Self-evidently there is no contractual relationship between HMRC and the defendant. On the other hand, as in *Pawlowski*, the defendant has a legitimate expectation that he will not be required to pay more in tax than Parliament has laid down. Nevertheless, I consider that this case should be distinguished from *Pawlowski*. In *Pawlowski* the court was being asked to determine whether a tax payment was due. In this case, any sums payable under the APN/PPNs are interim payments only. Any monies paid will be returned to the

> defendant (together with interest) if he establishes that his tax avoidance scheme is valid. The APN/PPN system does not establish what tax is due, it merely determines where those funds sit pending the determination of the validity of the scheme. *Rowe* and *Walapu*[2] establish that it is legitimate for Parliament to legislate to ensure that the funds should sit with HMRC rather than the taxpayer. In my judgment, there is no reason why it is just or proportionate for the taxpayer to be allowed to raise public law issues in his defence in addition to being able (i) to make representations under the statutory scheme and (ii) to bring proceedings for judicial review."

Jurisdiction in penalty cases

81. There have been a number of recent decisions which have examined the jurisdiction of the FTT in the context of penalty cases. The FTT referred to those that had been decided by the date of the Decision. Specifically, some of these cases have considered whether the FTT, on an appeal against a penalty, has jurisdiction to consider the validity of a notice given by HMRC, the failure to comply with which has given rise to the penalty. The main authorities to which we were referred were as follows.

82. In *Birkett* the Upper Tribunal upheld daily penalties for continuing failure to comply with information notices where initial fixed penalties were under appeal. HMRC had opened enquiries into partnership tax returns and issued Schedule 36 information notices to the taxpayers. When the taxpayers failed to respond to the information notices HMRC charged initial penalties of £300. The taxpayers appealed these initial penalties, but the FTT misplaced the appeal papers and failed to notify HMRC. HMRC then issued daily penalties of £20 per day for continued failure to comply. The taxpayers appealed the daily penalties to the FTT on the grounds that they had a legitimate expectation that HMRC would defer them pending their appeal against the initial fixed penalties. The FTT rejected this appeal. The Upper Tribunal upheld the FTT's decision, summarising the relevant principles as follows:

> "**Relevant principles**
>
> 30. The principles that we understand to be derived from [the] authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* [3]at [36], *Noor* [4] at [25], *BT Trustees*[5] at [133].

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[2] *Walapu v HMRC* [2016] EWHC 658 (Admin), [2016] STC 1682 and *R (on the application of) Rowe v Revenue and Customs Commissioners* [2015] EWHC 2293 (Admin), [2015] BTC 27 at [146]-[147] (Simler J) referred to with apparent approval on appeal [2017] EWCA Civ 2105, [2018] 1 WLR 3039 at [38] (Arden LJ, as she then was)

[3] *HMRCv Hok Ltd* [2012] UKUT 363 (TCC)

[4] *HMRC v Abdul Noor* [2013] UKUT 71 (TCC)

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam*[6] at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

83. In *Birkett*, the FTT was exercising a jurisdiction under section 49D(3) TMA to decide appeals brought under paragraph 47 of Schedule 36 Finance Act 2008. Under section 49D(3), the FTT's jurisdiction was to decide "the matter in question". Under paragraph 48(3) of Schedule 36 the FTT was confined to either confirming or cancelling the penalty decision. The Upper Tribunal concluded at [38] that the matter in question on an appeal under paragraph 47(a) was whether "a penalty is payable by [the appellant] under paragraph 40." Thus the FTT's jurisdiction on appeal under paragraph 47(a) was limited to asking whether the statutory requirements for a penalty under paragraph 40(1) were met. It followed therefore that the FTT could not, on an appeal under paragraph 47(a) review the penalty decision of the HMRC officer on any

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[5] *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713

[6] *Oxfam v HMRC* [2009] EWHC 3078 (Ch)

other grounds. The appellant partnerships wished the FTT to review the decision on the grounds that it was unfair to issue the penalties because they had a legitimate expectation of deferring any further penalties. The Upper Tribunal approached the issue as a matter of construction of the relevant statutory provisions [40]. It held [39] that legitimate expectation was not an issue which went to the matter in question on an appeal under paragraph 47(a), which was limited to whether or not the statutory preconditions for imposing a daily penalty were met, and accordingly the FTT had no jurisdiction to consider it [43].

84. The next decision was that of the High Court and Court of Appeal in *PML*: [2019] 1 WLR 2428, [2019] STC 1. In that case HMRC served an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 requiring the claimant to provide certain information and documents by a specified time. The claimant informed HMRC that it wished to appeal against the information notice as it did not allow sufficient time for compliance. When HMRC agreed to extend the compliance date the claimant provided various documents. HMRC considered, however, that the claimant had not properly complied with the notice and imposed penalties on the claimant under paragraphs 39 and 40 of Schedule 36. The FTT allowed the claimant's appeal against the penalties under paragraph 47 of Schedule 36 holding that the information notice was invalid because it related to the tax position of the claimant's clients rather than that of the claimant itself. Therefore, the penalties were unenforceable. HMRC did not appeal that decision but subsequently refused to delete or surrender information derived from the claimant's documents (the documents having been returned to the claimant by HMRC). The claimant sought judicial review on the ground that the information notice was invalid, relying on the decision of the FTT.

85. In the High Court, Sir Ross Cranston held, so far as is material for present purposes, that the FTT had no jurisdiction to consider the validity of an information notice on an appeal against a penalty. In fact, the claimant's appeal against the information notice had been determined under section 54 TMA. Sir Ross Cranston gave a further reason, however, why the FTT had no jurisdiction to consider the validity of the notice. He considered that the statutory scheme contemplated that all questions of validity had to be decided before the Tribunal considered the matter of the penalty:

> "66. The Tribunal's jurisdiction is statutory. Section 49D TMA 1970 provides that the Tribunal's overall jurisdiction is to decide "the matter in question". The right to appeal a penalty set out in paragraph 47 of Schedule 36 of the 2008 Act is against "(a) a decision that a penalty is payable by that person under paragraph 39, 40.." or against the amount (not relevant in this case). Under paragraph 48(3) the Tribunal is limited to confirming or cancelling the decision. In a penalties appeal paragraph 39(1) of Schedule 36 applies "to a person who (a) fails to comply with an information notice" where there is liability to a penalty of £300. Paragraph 40(1) for daily default applies "if the failure or obstruction" continues.
>
> 67. Thus the issue on appeal whether a penalty is payable under both paragraph 39(1) and 40(1) is the narrow one of whether, in the former

> case, the person has failed to comply with the notice, and with the latter, whether the failure or obstruction has continued. The validity of the information notice which gives rise to the imposition of a penalty simply does not arise. As the Upper Tribunal in *Birkett* held at paragraph [42], the right of appeal against the officer's decision to impose a penalty "is simply a question of whether the requirements in para 40" – and by extension paragraph 39 – "have been satisfied".
>
> 68. In my view all this makes sense within the statutory scheme since any appeal against the validity of an information notice is decided at an earlier stage than the penalty appeal, and under separate statutory provisions. In this case if on the penalty appeal the Tribunal was to consider the validity of the information notice it would have had to be by way of a late appeal. The Tribunal rejected that course and, as explained earlier, a late appeal against the information notice was not possible in the circumstances of this case."

86. The Court of Appeal (Longmore, Peter Jackson LJJ, Henderson LJ dissenting on this point) approved the judge's comments in [68] above. Longmore LJ at [47] stated:

> "[47] This further reason [referring to [68] of Sir Ross Cranston's judgment] is, in my view, also correct. Although the judge did not spell it out, para 46 of Sch 36 (which precedes the right of appeal against penalty in para 47) expressly states that HMRC must assess any penalty within the period of 12 months from the date on which the taxpayer becomes liable to the penalty 'subject to sub-paragraph (3)'. That sub-paragraph then states:
>
> 'In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 and 40 must be made within the period of 12 months beginning with the latest of the following—
>
> (a) the date on which the person became liable to the penalty,
>
> (b) the end of the period in which notice of an appeal against the information notice could have been given, and
>
> (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.'
>
> It is therefore only after appeal rights in relation to the Notice have been exhausted (or not utilised) that any right to appeal against penalties can come into existence. This suggests very strongly that a tribunal considering an appeal against penalties has no jurisdiction to consider the validity of a notice which can only be determined by an appeal which has to be brought before any appeal against (or indeed any assessment of) a penalty can occur. It was no doubt partly for this reason that Mr Dootson [the HMRC officer] was concerned in December 2012 to establish whether there was to be any appeal against the Notice apart from time for compliance.
>
> [48] In coming to this conclusion I would not put the same weight as the judge did on *Birkett*'s case since that case merely held that the right of appeal, conferred by para 47 of Sch 36 in relation to a decision that

> a penalty is payable under paras 39, 40 or 40A of the schedule, did not extend to a potential public law challenge to an assessment under para 46 of the schedule but I certainly agree with the general point made in that determination that the ambit of an appeal under para 47 is a matter of statutory construction. For the reasons I have given the correct construction of the schedule is that all questions of validity must be determined before any appeal against penalty is decided.
>
> …
>
> [51] In my view, therefore, the second reason given by the judge for saying that the tribunal had no jurisdiction to consider the validity of the Notice is also correct and I would reject ground 3 of the appeal."

87. Finally, we were referred to the decision of the Upper Tribunal (Arnold J and Judge Cannan) in *Beadle v HMRC* [2019] STC 1042. The taxpayer was a partner in a partnership involved in a film financing tax avoidance scheme. HMRC opened enquiries into the partnership's tax affairs and eventually issued a closure notice reducing the partnership's tax losses to nil. In October 2014, HMRC issued the taxpayer with a Partner Payment Notice ('PPN'). The taxpayer made representations against the validity of the PPN on the basis, *inter alia*, that the amount of understated tax specified in the notice was not due as a matter of law. HMRC rejected the representations and the PPN was confirmed. The taxpayer did not make an application for judicial review of the decision to issue the PPN. In July 2015, a penalty notice was issued to the taxpayer in respect of non-payment of the PPN and, at this stage, the taxpayer paid the sum demanded by the PPN in full. Thereafter, the taxpayer appealed the penalty for late payment of the amount due under the PPN. Before the FTT the taxpayer contended that the underlying PPN was not lawfully issued by HMRC and that the payment required by the PPN was excessive. The FTT held that it had no jurisdiction to entertain the taxpayer's contention because it did not have jurisdiction when considering an appeal against a penalty notice for non-payment of a PPN to entertain challenges to the underlying PPN.

88. On appeal, the Upper Tribunal upheld the decision of the FTT, stating:

> "[44] In our judgment [the FTT] was correct to hold in the present case that the FTT had no jurisdiction to entertain the Appellant's challenge to the PPN for the following reasons. First, we accept that the authorities establish the exception or limit to the exception to the exclusivity principle which we have stated in para [30] above, but we do not accept counsel for the Appellant's argument that the availability of a defence to enforcement action on public law grounds can only be excluded by express statutory language. In our judgment, the availability of such a defence can also be excluded by necessary implication from the statutory scheme. This is in effect what the Divisional Court and the House of Lords respectively concluded in *Plymouth City Council v Quietlynn Ltd* [1987] 2 All ER 1040, [1988] QB 114 and *R v Wicks* [1997] 2 All ER 801, [1998] AC 92 as analysed by the House of Lords in *Boddington*; and see also *Birkett (t/a The Orchards Residential Home, Dunmore Residential Home, Kingland House Residential Home, The Firs Residential Home, Merry Hall*

Residential Home) v Revenue and Customs Comrs [2017] UKUT 89 (TCC) at [30] (Upper Tribunal).

> [45] Secondly, in the present case we consider that the statutory scheme concerning PPNs and penalty notices does by necessary implication exclude the possibility of a challenge by the taxpayer to a PPN on public law grounds in the context of an appeal to the FTT against a penalty notice. This is for two reasons. The first is the fact that Parliament has provided rights of appeal against the underlying tax assessment and against a penalty notice, but not against a PPN. In the case of a PPN, Parliament has only provided a right to make representations (within a specified time limit) which HMRC are required to consider. In our view, the absence of a right of appeal against PPNs is a clear indication that Parliament does not intend taxpayers to be able to challenge PPNs on appeal to the FTT. If taxpayers cannot do so directly, then it would be very odd to permit them to do so indirectly by way of an appeal against a penalty. The second reason, which reinforces the first, is that permitting such a challenge would be contrary to the design and purpose of the PPN regime, as to which we agree with the observations of Judge Gargan we have quoted above."

Discussion

Ground 1 and 2 – Jurisdiction to review legitimacy of notices to file returns

89. In the present case Mr Goldsmith has been charged a penalty under paragraph 1(1) Schedule 55, which provides:

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

90. The Table specifies a "[r]eturn under section 8(1)(a) of TMA 1970" and the "filing date" is defined in paragraph 1(4):

> "(4) In this Schedule—
>
> "filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;"

91. Section 8 TMA provides so far as material:

> "(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 a notice given to him by an officer of the Board-
>
> (a) to make and deliver to the officer […], a return containing such information as may reasonably be required in pursuance of the notice, and

92. Therefore, if the notice ("the notice to file") given to Mr Goldsmith by HMRC, requiring him to complete a self-assessment return, was not a valid notice then Mr

Goldsmith was not required to deliver a return under section 8(1)(a) TMA. Consequently, Mr Goldsmith would not have failed to make or deliver a return "under section 8(1)(a) of TMA" – a precondition to the liability to a penalty under paragraphs 1 and 3 Schedule 55.

93. The threshold question, however, is whether the FTT had jurisdiction to consider whether the notice to file was invalid.

94. The consistent view expressed in *Birkett*, *PML* (in the High Court and Court of Appeal) and *Beadle* is that determining the jurisdiction of the FTT is a matter of statutory construction. We therefore now turn to consider the relevant jurisdictional statutory provisions.

95. First, the appeal to the FTT was brought under paragraph 20 of Schedule 55. Paragraph 20(1) provides that a taxpayer "may appeal against the decision of HMRC that a penalty is payable". Paragraph 20(2) provides that a taxpayer "may appeal against a decision of HMRC as to the amount of a penalty payable." In short, paragraph 20(1) is concerned with the incidence of liability and paragraph 20(2) deals with the quantum of the penalty.

96. Secondly, the powers of the FTT in dealing with a late filing appeal are set out in paragraph 22 of Schedule 55. On an appeal against the decision to issue a penalty, paragraph 22(1) says that the FTT may affirm or cancel HMRC's decision. On an appeal against the quantum of the penalty, paragraph 22(2) provides that the FTT may affirm HMRC's decision or substitute another decision that HMRC had power to make.

97. Thirdly, paragraph 21(1) Schedule 55 provides that an appeal under paragraph 20 of Schedule 55 (i.e. an appeal against a penalty issued under Schedule 55) is to be treated in the same way as an appeal against an assessment to the tax concerned. This, in turn, engages s. 49D(3) TMA, which provides:

> "(3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."[7]

On an appeal under paragraph 20(1), the matter in question is whether a penalty is payable by the person in question. The FTT can either decide that the penalty was payable or decide that it was not and cancel the penalty.

98. Ms Nathan submitted that the FTT had no jurisdiction to consider the circumstances in which it was appropriate for HMRC to issue a notice to file under section 8(1) TMA when hearing an appeal against the penalty notice under paragraphs 1 and 3 of Schedule 55. According to Ms Nathan, section 8(1) TMA conferred a discretion on HMRC. The exercise of that discretion could only be challenged by way of proceedings for judicial review. The FTT, as a creature of statute, had no judicial review jurisdiction. The language of paragraph 1 Schedule 55 did not warrant an

[7] There was some discussion in the Decision whether it was section 49D or section 49G that was engaged but it appears that nothing turns on this point.

enquiry into whether it was appropriate for a notice to file to be issued or even whether the notice was valid. Those provisions simply required that no section 8 TMA return had been submitted by the filing date. The provisions of paragraph 22 similarly did not afford the FTT the opportunity to substitute its decision on whether a notice to file under section 8(1) TMA should have been issued.

99. We reject these submissions in so far as they assert that the FTT could not review whether a valid notice to file had been given to the taxpayer.

100. As we have noted, the authorities require us to construe the relevant provisions of Schedule 55 and section 49D TMA in order to ascertain whether the FTT had jurisdiction to consider the validity of the notice to file. In order to determine the matter in question, namely whether a penalty is payable, the FTT has to be able to determine whether a taxpayer has failed to make a return under section 8(1)(a) TMA. That depends on a number of factual considerations, including whether or not a notice to file was served at all and, if so, whether it was validly served.

101. Given the absence of any statutory right to appeal the service of a section 8(1) TMA notice, we cannot see a proper basis for interpreting Schedule 55 as excluding from challenge the question whether a section 8(1) notice was validly served on the taxpayer. If, as HMRC accepts, it must prove that a notice was in fact served and time for compliance has expired, it follows that the taxpayer should be entitled to challenge the validity of the notice that gives rise to a penalty, including on the basis that it was not served for the prescribed statutory purpose. If not, the time for judicial review having by then expired, the taxpayer is effectively unable to appeal the penalty on the ground that no compliance with the purported notice was due. One would expect to see an unqualified right of appeal against the imposition of a penalty, absent some good reason in the statutory scheme for curtailing it.

102. Moreover, the consequence of HMRC's argument is that a taxpayer would have to start judicial review proceedings promptly after service of a notice to file, if minded to challenge the notice on any basis. That seems to us to be an improbable intention to impute to Parliament, given that the sums in issue will often (as here) be relatively small, the notice concerned only the individual taxpayer, and judicial review proceedings are relatively expensive as compared with an appeal to HMRC or the FTT. There is the additional problem that, in most cases, the time for issuing judicial review proceedings will have expired at or before the time at which the default in filing a tax return occurs.

103. The statutory context in *Birkett*, *PML* and *Beadle* was, in our judgment, different from the position in this appeal.

104. In *Birkett* the Upper Tribunal decided that the FTT's jurisdiction on an appeal under paragraph 47(a) Schedule 36 FA 2008 was limited to asking whether the statutory requirements for a penalty under paragraph 40(1) of Schedule 36 were met. In that case, the precondition was that a failure to comply with an information notice continued after the date on which a fixed penalty was imposed. Paragraph 29(1) of Schedule 36 provided a separate right of appeal against the information notice itself.

In those circumstances, the question in issue was a relatively narrow one of whether the preconditions were satisfied. On that basis, the jurisdiction did not extend to a potential public law challenge to the penalty assessment. As the Court of Appeal observed in *PML* at [48], this was all that *Birkett* decided. Thus, the legitimate expectation argument that the appellant had hoped to advance in *Birkett* was simply not one which was within the ambit of or contemplated by the statutory provisions conferring jurisdiction.

105. In the present case, however, there is no other statutory right to appeal against a notice to file and the relevant preconditions for a penalty under Schedule 55 are that the taxpayer has failed to deliver a return *under* section 8(1)(a) TMA by the filing date. In that context, the right of appeal must in our view extend to the validity of the notice to file, since in the absence of a valid notice there will have been no failure to make a return under section 8(1)(a). The present appeal raises no general point of public law. Instead, this case raises the question whether a notice to file has been issued for a purpose which is comprehended by the statutory wording.

106. In *PML* the Court of Appeal decided that the FTT, on an appeal against the penalty notice, did not have jurisdiction to consider the validity of the information notice with which the taxpayers had failed to comply. Longmore LJ (with whom Peter Jackson LJ concurred) considered that the scheme of legislation was that it was only after (earlier) appeal rights in relation to the validity of notice had been exhausted (or not utilised) that any right to appeal against penalties arose. Therefore, the legislative framework indicated that there was no scope for raising the validity of the information notice on a *subsequent* appeal against penalties. In the present case, there is no right of appeal against the issue of a notice to file under section 8(1)(a) TMA – the first time that Mr Goldsmith could challenge the issue of the notice to file (other than by way of judicial review) was on an appeal against a penalty for alleged non-compliance.

107. The position in *Beadle* was that the statutory scheme excluded, by necessary implication, the exception to the exclusivity principle. There was a right of appeal against the assessment and against the penalty but only a right to make representations in respect of the PPN. Moreover, to allow a challenge to the validity of the PPN on an appeal against the penalty would have frustrated Parliament's purpose in seeking to ensure that the tax was paid over to HMRC in advance. Again, in the present appeal the statutory framework is very different and it is hard to see how Parliament's purpose can be undermined by requiring HMRC to issue a notice to file for the purposes contemplated by the statutory wording in section 8(1)(a) TMA.

108. Thus, in our judgment, none of the considerations which dictated the result in those three cases apply in the present appeal. Instead, we consider that on a correct construction of the relevant statutory provisions the FTT did have jurisdiction to consider whether the notice to file had been issued for the statutory purpose.

109. A penalty is only payable under paragraphs 1 and 3 of Schedule 55 if a taxpayer has failed to make or deliver a "return *under* section 8(1)(a) TMA." Section 8(1)(a) TMA tells us that a return under that paragraph is one which a taxpayer is required to

make and deliver by a notice given to him by an HMRC officer "[f]or the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax…." We consider that Parliament intended the purposive wording in section 8(1)(a) TMA to have a substantive meaning, rather than constituting a mere descriptive preamble. On that basis, a return under section 8(1)(a) TMA can only be a return made in response to a valid notice to file, i.e. a notice to file which was issued for a permissible purpose. Thus, it is only the giving of a valid notice to file which creates a legal obligation to deliver a return and if no legal obligation exists there can be no failure in respect of which a penalty can be determined.

110. Paragraph 20 of Schedule 55, on its face, gives an unqualified right of appeal and it seems to us, on the basis of the approach to statutory construction in *Birkett*, that there would need to be a necessary implication from the statutory context, as in *Beadle*, before one could conclude that there was no right of appeal against a penalty on the grounds that the notice to file was invalid. Such a clear statutory context is required, in our view, because otherwise there would be no ability to challenge a notice to file which was defective on technical grounds (e.g. it was not given by an officer of the Board, it related to the wrong tax year or was not given to the taxpayer). HMRC must prove that these technical requirements have been satisfied. It is not sufficient that some of these matters might give rise to a reasonable excuse under paragraph 23 of Schedule 55 because the onus in that case falls on the taxpayer.

111. We accept that HMRC have a discretion conferred by section 8(1)(a) TMA whether to issue a notice to file. That statutory power, however, must be exercised for the stated statutory purposes. Whether the power has been exercised for the statutory purposes raises questions of fact and statutory interpretation, not general public law questions of reasonableness or legitimate expectation. Moreover, those questions, given the context, will be suitable for consideration by a specialist tribunal.

112. We referred the parties to a decision of the FTT in *Crawford v HMRC* (Judge Mosedale) [2018] UKFTT 0392 (TC) ("*Crawford*"). That case also dealt with a late filing penalty and addressed the question of whether the FTT had jurisdiction to consider the purpose for which the notice to file was issued. Judge Mosedale reached the conclusion at [47], for reasons similar to those which we have given, that as a matter of statutory construction the FTT did have jurisdiction.

113. Accordingly, we have concluded that the FTT did have jurisdiction to consider the purposes for which a notice to file was given in this case and we dismiss HMRC's appeal on the ground that it had no such jurisdiction.

Grounds1 and 2 – The statutory purpose

114. The relevant wording in section 8(1)(a) TMA is:

> "… 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…."

115. At [141] of the Decision the FTT held:

> "But … the appellant's circumstances do not fit the words. HMRC did not need a return to establish the appellant's income or the amount of tax payable, as the PAYE system had done that, and the P800 had "assessed" it in the ordinary sense of that word. They said they needed a return to collect the tax that the appellant had started to pay off but then stopped doing so."

116. Plainly, therefore, the FTT considered that the word "establishing" meant "calculating".

117. In *Crawford*, Judge Mosedale considered the meaning of "establishing" first by looking at a dictionary definition and then looking at the word in its statutory context:

> 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 which includes a self-assessment. 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 establishing 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.
>
> …
>
> 60. So, in conclusion, I am unable to agree with the decision in *Goldsmith* and I do not follow it.

118. Once *Crawford* had been drawn to the parties' attention Ms Nathan adopted it as part of her argument on Grounds 1 and 2

119. We respectfully agree with Judge Mosedale's analysis. Therefore, we conclude that, even though HMRC knew the amount of tax due from Mr Goldsmith's employment income and ESA and they served a notice to file in order to create a debt due from Mr Goldsmith pursuant to section 59B TMA, HMRC served a valid notice to file for the requisite statutory purpose of establishing the amounts in which Mr Goldsmith was chargeable to income tax for the relevant years of assessment.

120. We therefore, to the extent indicated in paragraph 119 above, allow HMRC's appeal on Grounds 1 and 2.

Ground 3 – Form P800

121. HMRC submitted that the FTT erred in law at [156] where it asserted that "a reconciliation process followed in many cases by a P800 is a finalisation of the non--SA taxpayer's tax liability."

122. We accept that a P800 is not a formal statutory assessment and see force in HMRC's submission. It seems to us, however, that the decision of the FTT does not turn on this point and we therefore do not consider it further.

Ground 4 – requirement to exhaust other collection methods

123. HMRC submitted that the FTT also erred in [156] when it stated that "HMRC have chosen a mechanism to collect which is not open to them and have ignored one which is."

124. Again, we do not think that the FTT's decision turned on this point. It is true that HMRC could have collected the tax from Mr Goldsmith in other ways (e.g. by an assessment under section 29 TMA) but this point was not material to the real reason for the FTT's decision, viz that HMRC did not issue a notice to file for the relevant statutory purpose.

Ground 5 – erroneous reliance on Da Silva and Cotter

125. HMRC also submitted that the FTT erred at in relying at [159]-161] upon the emphasis placed on the "purpose" wording in section 8(1)(a) TMA by Lord Hodge JSC in *Cotter* at [24]-[25] and in *De Silva* at [12], [23] and [28]-[29].

126. We consider, however, that the FTT was justified in referring to Lord Hodge's comments. It is true that those cases involved issues which were quite different from the instant appeal, but in our view the comments of Lord Hodge in *Cotter* and *De Silva* support the view that the "purpose" wording in section 8(1)(a) TMA was not simply a preamble with no operative effect. The FTT was not, as Miss Nathan argued, relying on Lord Hodge's comments to support the proposition that HMRC must exhaust all other avenues of establishing the amounts chargeable to tax before serving a notice to file.

127. We therefore reject Ground 5

Ground 6

128. HMRC argued that to the extent the FTT took account of the "prejudice which HMRC put on the taxpayer" its decision was erroneous. (Decision [163])

129. We accept Mr Ewart's suggestion that this did not form part of the reasoning which led the FTT to the conclusion that the notice to file was invalid. As the FTT itself commented at [163], this was not a deciding factor. It is therefore unnecessary for us to address this further.

Ground 7 – Special Circumstances

130. In our view, the question of a potential reduction in the penalty levied under paragraphs 1 and 3 of Schedule 55 does not arise in the present appeal and the FTT erred in deciding, in the alternative, that the penalty could be reduced to nil under paragraphs 16 and 22 of Schedule 55.

131. This is because Mr Goldsmith's appeal was made under paragraph 20(1) TMA, i.e. it was an appeal against a decision that a penalty was payable by Mr Goldsmith. Mr Goldsmith argued that he had never received the notice to file and therefore was not liable to a penalty. Moreover, Mr Goldsmith argued that he had not received the returns until June 2014. The FTT rejected both of these alleged defences at Decision [174]-[177].

132. Mr Goldsmith's appeal, therefore, was not against the amount of the penalty. It was not an appeal under paragraph 20(2) TMA: Mr Goldsmith's appeal was against liability under paragraph 20(1) and not against quantum under paragraph 20(2).

133. Paragraph 22 of Schedule 55(1) provides that on an appeal under paragraph 20(1) the FTT "may affirm or cancel HMRC's decision." On an appeal under paragraph 20(2) (i.e. an appeal against the amount of the penalty) the FTT may—

> "(a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make."

134. If the FTT decides to substitute its decision for that of HMRC then paragraph 22(3) provides that the FTT can rely on paragraph 16 (i.e. to reduce a penalty "because of special circumstances"):

> "(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed."

135. In other words, the reduction for "special circumstances" only applies where there is an appeal against quantum under paragraph 20(2). Thus, because the present appeal was plainly brought under paragraph 20(1) – against liability – the reduction for special circumstances is irrelevant.

136. For this reason, we allow HMRC's appeal on Ground 7.

Ground 8 – section 114 TMA

137. As we have indicated, Ms Nathan informed us that HMRC were not pursuing their appeal in respect of the daily penalties and therefore Ground 8 does not arise for decision.

Decision

138. For the reasons given above, in respect of Grounds 1 and 2 (to the extent indicated in paragraph 119 above) and Ground 7, we allow HMRC's appeal. The notices to file tax returns for the relevant tax years were valid and the fixed penalties were therefore incurred by Mr Goldsmith.

Costs

139. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE FANCOURT
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES
RELEASE DATE: 4 November 2019