[2019] UKFTT 137 (TC)

TC07003

Appeal number: TC/2018/07468

INCOME TAX – penalties for late delivery of tax return – whether reasonable excuse: in part, on basis that appellant's registration for self-assessment was made by HMRC without her knowledge – whether special circumstances: yes – HMRC failed to take into account relevant matters – rest of penalties reduced to nil.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SARAH HALLBERG **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 12 February 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 6 November 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 November 2018 and the appellant's reply dated 16 January 2019.

DECISION

1. This is an appeal by Mrs Sarah Hallberg ("the appellant") against penalties of £1,300 assessed on her for her failure to deliver an income tax return for the tax year 2016-17 by the deadline.

Facts

2. The appellant was, HMRC's records indicate, issued with a notice to file an income tax return for the tax year 2016-17 on 6 April 2017. That notice required the appellant to deliver the return by 31 October 2017 if filed in paper form or by 31 January 2018 if filed electronically ("the due date").

3. HMRC's records indicate that on 13 February 2018 they issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

4. HMRC's records indicate that on 31 July 2018 they issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

5. HMRC's records indicate that on 10 August 2018 they issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

6. The return was filed electronically on 15 August 2018.

7. On 14 August 2018 the appellant's accountants KLM Associates ("KLM") notified the appellant's appeal to HMRC against all the penalties. In their letter they said that their client, the appellant, spoke to the HMRC helpline "some time ago" and was told she did not have to file a tax return unless any tax was due over and above her PAYE liability, and they would therefore cancel the notice to file and the late filing penalty.

8. Mr Pritchard, the proprietor of KLM, added that he had spoke to the "Agent Helpline" that day and had been told that because the appellant was a director and received income from business then HMRC have "involuntarily" registered the appellant for self-assessment.

9. On 12 September 2018 HMRC wrote to the appellant rejecting the appeals as they said that she had shown no reasonable excuse for the failure to file on time. If a notice to file was received the recipient must file it. Their records show that a notice to file was issued on 30 April 2017. HMRC's records also show that "you registered as a Company Director as of 01/09/2016." They informed her that she could provide further information, request a review or notify her appeal to the Tribunal, all to be done by 12 October 2018.

10. On 12 September 2018 HMRC also wrote to KLM, but this letter refers to "Your agent, KLM Associates, …" and refers to KLM not having a reasonable excuse.

11. On 17 September 2018 the appellant requested a review of HMRC's decisions and enclosed a form SA634. This was sent with a covering letter from KLM Associates which said that a reasonable excuse was not required if HMRC have told a person they

were not required to complete a return. Mr Pritchard also said that just because a person is a director that does not oblige her to register for self-assessment. He had many clients who had been taken out of self-assessment when it was shown they had no tax liability.

12. On 18 October 2018 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld. In the course of that conclusion letter the review officer, Mrs Sarah Wright, said:

> "Your agent has explained that you should not need to complete a return just because of your directorship.
>
> Where an SA return does not need to be completed for the reason of the directorship alone. Providing their affairs do not otherwise require them to complete one, we do not need a return from directors of companies which
>
> - Are set up for charitable purposes, or
> - Are neither profit making nor trading, and
> - Do not make payments in any way or provide any company benefits for the directors"

13. Mrs Wright took issue with the accountant's statement about the content of the phone call the appellant made to HMRC, referring to the notes made about the conversation. According to Mrs Wright the notes said that the appellant was told that if her tax affairs were simple then a return may not be needed, but the notes do not mention cancelling the return and that the appellant was advised to complete it.

14. There was therefore no reasonable excuse. As to a special reduction Mrs Wright said she had carefully considered all of the information, but she made explicit reference to the following.

> "You contact[ed] HMRC's helpline and were advised that no return was needed and the return would be cancelled.
>
> It is factually incorrect that you have a legal obligation to register for Self-Assessment when you are a director."

15. But despite making these statements Mrs Wright held that there were no special circumstances.

16. A copy of her letter was sent to KLM Associates.

17. On 22 October 2018 KLM Associates disputed certain statement made in the review conclusion letter, and referred to s 7 TMA which Mrs Wright had not mentioned when saying that certain directors do not need to make a return. Mr Pritchard referred also to the case "Alexander Steel (TC06717)" and included notes on the case as an appendix.

18. As the appellant's affairs were as simple as they can get, "100% PAYE and no dividends", she should not have been required to compete a return and it should be cancelled along with penalties. The return now filed shows £0.00 due.

19. He also said that the appellant had phoned HMRC when she received the £100 penalty and asked if HMRC really wanted a return. The response gave her reason to believe her affairs were simple and no return was therefore necessary, thus denying her

the chance of submitting the return and so avoiding further penalties. If any intelligent person had been told that if they did not file a return then the fines could increase to £1,900 (*sic*) they would have arranged for the return to be submitted forthwith.

20. On 2 November 2018 Mrs Wright replied refusing to enter into any dialogue as a "customer" is only entitled to have the decision reviewed once.

21. On 6 November 2018 the appellant notified her appeals to the Tribunal. The grounds of appeal are:

(1) The appellant told HMRC when she received a reminder to file a tax return that she was subject to PAYE and her dividend income was below the tax free level, and says she was told that she did not need to complete and deliver a return and that they could cancel "it".

(2) She believed that they were cancelling the obligation to file, but when she received penalties of £1,200 she sought help and appealed.

(3) Her return shows no tax to pay.

(4) She did not apply for or notify her liability to complete a return. HMRC must have put her into the system on what she believes were false pretences. She refers to s 7 TMA and the case of *Alexander Steele v HMRC* [2018] UKFTT 547 (TC) (my decision as it happens).

The law in brief

22. The law imposing these penalties is in Schedule 55 Finance Act 2009 and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraph 5 (fixed or tax geared penalty after 6 months). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed.

HMRC's submissions

23. The appellant registered for self-assessment on 15 September 2016 "as a company director from 1 September 2016". A self-assessment record was created on 16 September 2016 because the appellant *voluntarily* [my emphasis] completed the SA1 registering herself for self-assessment.

24. The appellant did not contact HMRC again until 18 May 2018 after she received a reminder to complete her return to query why she was required to complete a return. As that was 19 months without any contact she was not acting as a prudent person, exercising foresight or showing due diligence and had no proper regard for her responsibilities under the Tax Acts.

25. No reasonable excuse existed.

26. *Alexander Steele* turns on its own facts and does not alter the fact that the penalties in this case were properly imposed.

The appellant's reply

27. Mr Pritchard made the following points.

28. His client was not voluntarily put into self-assessment. It was, as he had said before, involuntary and it was done purely because the appellant was a director of Engineered Power Control Solutions Ltd. Her tax affairs did not warrant her completing a self-assessment.

29. His client had "already" stated that she could not recall seeing all of the penalty notices and reminders and as HMRC do not keep copies it is one word against another. The presumption of innocence should apply given HMRC's refusal, in an age of fantastic memory capability, to keep copies.

30. The appellant made a call before 31 January 2017 to check if she had to complete the 2017 return. At no point was she advised that she must complete a return or that fines of up to £1,900 could become due.

31. HMRC's documents exhibited to the Statement of Case says that her "start date" was "01/09/2016" yet the company was only formed on 16 September. This shows that she was involuntarily forced into self-assessment.

32. The appellant had never completed an application to register for self-assessment and he asked for HMRC for proof. It was his belief that as soon as a company is registered at Companies House HMRC are notified in order to open tax records and that they "involuntarily" opened a self-assessment record. The dates they gave for doing this predated the existence of the company. They could not produce even a copy of the SA1 they say she completed online.

33. HMRC's attitude to case law and *Alexander Steele* in particular is "quite incredible".

34. As well as having a reasonable excuse there were special circumstances, in that HMRC failed in its duty of care to tell the appellant to file her return immediately to avoid penalties.

35. He reiterated that he had many clients who had had tax return notices cancelled and directors who had been taken out of self-assessment.

Discussion

36. There are a number of contested matters of fact in this case which I deal with here.

Service of notices etc

37. The appellant says that she cannot recall receiving all notices and reminders. HMRC counter this by saying that nothing was returned to them, the address they used was the one on file and that s 7 Interpretation Act 1978 ("IA78") applies.

38. First I make the point that reminders are not sent under any provision of law and so s 7 IA78 cannot apply to them. In any case failure to send them does not deny an intended recipient of any rights.

39. The crucial documents are the notice to file and the penalty notices. The difficulty for the appellant is that HMRC have put forward evidence that suggests that it is at least highly probable that a notice to file and the penalty notices were issued and were sent to the last known address, but even if I were to take the line that they had not proved

that they had been sent and received, the appellant does not deny receiving them: she merely cannot recall. And given that the appellant, through KLM Associates, had admitted to receiving the £100 penalty notice and the later ones, the issue is only relevant to the notice to file. In my view on the balance of probabilities the notice was issued to the appellant at her address and therefore is valid.

The phone call(s) to HMRC

40. The SA Notes exhibited by HMRC show that the only phone call recorded there was on 18 May 2018. In fact two calls are shown, or at least conversations with two different people within HMRC in two different offices. In one with an officer in a processing role the note (no 2) says "advised on lfp for 16/17".

41. HMRC have exhibited what they say is a transcript of this call. Unfortunately it does not show any date or time of the call nor the PID number of the officer. But what it shows is that at some date or other an officer of HMRC told the appellant, among other things that:

(1) She was enquiring as to the reason they were requesting a tax return from her.

(2) HMRC had set her up in self assessment as "we received notification she was a company director in that year".

(3) She had to fill in a return even though she says she was a director in name only and was only paid under PAYE.

(4) She was advised to appeal the late filing penalty on record of £100.

42. From the last matter I find that the call must have been after February 2017, and given the wording on the SA Note No 2 I find that this was a transcript of that conversation referred to in that note.

43. In the other call that day with an officer in a collection role the note (no 3) says:

> "Tp didn't realise SA rtrn req for 17, adv her two employments are both PAYE. SA Note adv tp registered a director 1/9/16. Warm handover to PTOps to conf."

44. I assume the first sentence is what the appellant told HMRC. I cannot be sure because this SA Note like most others used the all purpose term in HMRC (and elsewhere) "advise" when they mean merely "tell" or "say" or "inform" and the notes usually show no subject. Thus I think what the appellant was saying was that she did not know why she was being penalised for not filing a return or being told by reminders, penalty notices etc to file one, especially as her only two sources of income were both within PAYE. The second sentence does have a subject for the "advising", an SA Note. Given that there are only three SA Notes listed by that day and no signs of redaction, the SA Note concerned must be that of 16 September 2016 (no 4 – SA Notes are numbered from the latest backwards) which says:

> "KANA SA1 received and processed on 15/09/2016. SA Record created automatically by CESA – Company Director – start date 01/09/2016".

45. I discuss this note later in the context of a discussion about whether the appellant was involuntarily registered for self-assessment. But given this content Note 3 could mean two things: either that the officer told (advised) the appellant the content of Note 4 or that the officer took note of what Note 4 said and as a result executed a warm

handover to PTOps for confirmation. Given that that SA Note is specifically given as the subject heading for "adv", contrary to the normal use of no heading when it is the officer who is doing the "advising", I incline to the latter view. "PTOps" I take to be the technical advice team on Personal Tax Operational matters. The SA Note does not reveal what a warm handover is or why it was made, or that any confirmation was given.

46. HMRC point out that neither the SA note nor the transcript of the call referred to in Note 2 tell the appellant that she need not file a return or that the notice to file would be cancelled.

47. In his reply to the statement of case Mr Pritchard said that the appellant called the Helpline before the filing deadline, ie 31 January 2018. Indeed in his letter of 17 September 2018 to the case officer (J Hunt) he says:

> "You acknowledge that Mrs Hallberg contacted your helpline when she was sent a notice to complete a tax return prior to the penalty deadline."

48. What the officer actually said was that KLM Associates told HMRC that the appellant had contacted the Self-Assessment Helpline some time ago and was told she didn't have to complete a return. That is a reference to KLM's letter of 14 August 2018 which says that.

49. The only other evidence I have on the question of the calls is in the Notice of Appeal where at Box 17 the appellant said that she phoned the helpline when she received a reminder to complete a self-assessment return. But in Box 18 she says

> "whilst I recognise I did not contact HMRC until the late filing penalty of £100 was issued …"

50. And in his letter of 22 October to Mrs Wright Mr Pritchard says in the first full paragraph on page 2 that which Box 18 says.

51. I find that despite what Mr Pritchard says, the appellant's first contact with HMRC was after the deadline and was the phone call of 18 May 2018. The case officer handling the appeal did not "acknowledge" that the appellant contacted the helpline before the deadline: they were repeating what Mr Pritchard told them. And it seems to me that the wording in box 18 in the Notice of Appeal is either the appellant herself giving a true statement or it is Mr Pritchard's wording, in which case there are two irreconcilable statements by him in consecutive boxes.

"Involuntary" registration

52. This is a mysterious matter. Repeating SA Note 4:

> "KANA SA1 received and processed on 15/09/2016. SA Record created automatically by CESA – Company Director – start date 01/09/2016".

53. Mr Pritchard says in his letter of 14 August 2018 (the letter of appeal to HMRC) that the Agent Helpline told him that HMRC had "involuntarily" registered the appellant for self-assessment. He repeated this in response to the Statement of Case.

54. He later pointed out that the "start date" of 1 September 2016 was an impossibility as the company was not registered until 16 September (and he produced the certificate

of registration to that effect). I have examined the publicly available information on the company on the Companies House website[1].

55. This shows that the application to register the company was made electronically on 15 September 2016, and that its directors are the appellant and her husband and they each own 1 share of the 2 issued shares.

56. Mr Pritchard says in his response to paragraph 56 of the Statement of Case that "this point is factually incorrect". The point in paragraph 56 is:

> "Mrs Hallberg registered for self-assessment on 15 September 2016, as a company director from 1 September 2016. … A generic copy of the SA1 is at **folio 55-57**."

57. At paragraph 57 the Statement of Case says:

> "Mrs Hallberg voluntarily completed the SA1 registering herself for self-assessment"

58. Mr Pritchard says that his client had never completed an application to register for self-assessment "and we would ask HMRC to provide proof of same" (none was forthcoming). He added that they believed that as soon as a company is registered at Companies House HMRC are notified in order to open tax records and that HMRC involuntarily opened a self-assessment record. He then pointed out the disparity in dates and remarked that all HMRC can produce is a generic (uncompleted) SA1.

59. SA Note 4 says an SA1 was received on 15 September 2016. This is the day the application to incorporate was made to Companies House. I find it difficult to believe that the appellant herself would have sent an SA1 to HMRC on the day before the company was incorporated. But if she didn't send it, who did? And how did they know what information to put in it? As I do not have the actual details the best I can do is look at the generic form. What is compulsorily required is:

(1) Name (first name and surname only)

(2) Date of birth

(3) Home address

(4) Date moved to this address

(5) Daytime phone number

(6) Email address

60. There are boxes about the reason for registering, but it is not compulsory to choose one. But from what HMRC say I assume it is "I'm a company director" and "Date appointed as company director".

61. The obvious candidates for the sender of the SA1 are the appellant, her husband and Companies House. If it was Companies House then the question is whether that body would have the compulsory information from the application to incorporate. From the Form IN01 available on the website I can see that items (1), (2) and (3) are common to both forms. Item (5) is voluntary and is the phone number of the "presenter" of the application. The email address of the applicant would be clear to Companies

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[1] https://beta.companieshouse.gov.uk/company/10380041 (accessed 16 February 2019)

House. Thus the only information Companies House would not have is that at (4). However if it were the case that the SA1 comes from Companies House then it is obviously possible for HMRC to override the mandatory nature of item (4).

62. What is more telling though is that on the Companies House website[2] it says:

> "You can also use this service to:
>
> - register for Corporation Tax
> - register for PAYE, to tell HMRC you're employing staff (including yourself if you're the only director)".

63. The website explains how a company can register itself for CT and PAYE as an employer, but there is no indication that the process is automatic and done by transfer of information from Companies House to HMRC.

64. There are other possibilities for who sent the SA1. It might be the company formation agent. It might be, if that is not the same person, an organisation which acts as an employment intermediary to the company of which the Hallbergs are the sole directors and shareholders. There does not obviously seem to be anything which would permit HMRC to determine that the SA1 was coming from the person whose details are given.

65. Having weighed up all the evidence and the probabilities it is in my view more likely than not that the SA1 was not sent by the appellant or on her behalf. It was not then "voluntary" in the sense used by Mr Pritchard. I base this view on the appellant's evidence that she was unaware coupled with her lack of knowledge or understanding that she was required to file a return or why, the unlikelihood that she would send an SA1 on the day before incorporation, the fact that it said that she was a director from 1 September, ie before incorporation, and the lack of any safeguards in the SA1 process to stop anyone with the requisite information successfully lodging an SA1.

66. The legal effect of that is the appellant did not notify liability under s 7 TMA that she was chargeable to tax. And on the basis of the information she has given she was not liable to notify and Mr Pritchard's reliance on *Anthony Steele* is well placed.

Do these findings give the appellant a reasonable excuse?

67. On the basis of my findings of fact, the appellant was served with a notice to file a return. In *Goldsmith v HMRC* [2018] UKFTT 5 (TC) I held that a notice to file a return cannot be validly given if the purpose of serving the return is to enable an enforceable tax debt to be collected[3]. That is not the case here. HMRC have a discretion to issue a notice to file and one of the criteria they use is that the person concerned is a director of a company which is not a charity or, if Mrs Wright is to be believed, is not profit making and in both cases no payments of any kind are made and no benefits are given to the persons. I think she misinterprets HMRC's policy as the non-charity criterion is that the body is a "not for profit" organisation, otherwise the criterion would be impossible to police requiring as it would a look into the future.

[2] https://www.gov.uk/limited-company-formation/register-your-company?step-by-step-nav=37e4c035-b25c-4289-b85c-c6d36d11a763 (accessed 16 February 2019)

[3] My decision in *Goldsmith* was appealed against by HMRC and the appeal is due to be heard by the Upper Tribunal in July 2019.

68. Being a director of a commercial company is a rational criterion because as the statement of case points out there are many ways in which a company can reward its directors, especially a closely controlled company and HMRC should be in a position to find out what is paid by way of income or capital gain to the directors in control.

69. Where HMRC go wrong is in equating registering for self-assessment with a requirement to notify liability. Statements such as that there is a need to register because a person is a director are wrong, and that is what I pointed out in *Anthony Steele*. I note here, although it is not relevant to this case, that HMRC recently announced a change of policy about this criterion. The details were given in HMRC's Agent Update 69 published on 12 December 2018[4] and HMRC's page on its website "Check if you need to send a Self Assessment tax return" was also changed just before then. The article in Agent Update 69 uses the weasel word "clarify" about HMRC's position rather than "reverse" or "change" but does say that company directors with income taxed at source and with no further tax to pay do not need to complete a tax return. It also refers to (but not explicitly) s 8B TMA which allows HMRC to withdraw a notice to file (whether requested by the taxpayer or not).

70. But that does not make the previous criterion in any way wrong, and certainly not amenable to be struck down by this Tribunal. If the actions of HMRC in issuing a notice to file were irrational then the only remedy is judicial review.

71. It follows from this discussion that the appellant cannot put forward as an acceptable reasonable excuse for her failure to file by 31 January 2018 that she should not have been served with a notice to file.

72. There is however a notable matter about HMRC's communications with the appellant before 31 January 2018, and that is that apart from issuing a notice to file there was no other communication. HMRC list the various documents sent to the appellant up until her appeal but these include nothing before 31 January 2018. And when I bear in mind my finding that the appellant did not herself register for self-assessment and couple that with HMRC's admission that no relevant information was given to her apart from the notice to file given nine months before the return deadline, then HMRC's strictures about the appellant's imprudence, irresponsibility and lack of diligence in being silent for 19 months look even more inappropriate than they usually do.

73. Another stricture statements of case in these late return penalty cases frequently give is one reproving the appellant for their failure because they are an experienced user of HMRC systems to file returns. This is not reproduced here so I assume that the appellant was for 2016-17 a "first time filer". Certainly no SA Notes covering any period before September 2016 have been put in evidence. I mention this because in several paper cases I have dealt with over the past year or so there has been evidence that HMRC will often cancel penalties where the appellant is a first time filer.

74. In my view, taking the matters I have set out above into account, the appellant in this case had a reasonable excuse for not filing her return by the deadline of 31 January 2018. This is partly because notices to file are sent to taxpayers very shortly after the year end requiring action in nine months time and do not demand attention as they do

[4] So says an article on "Accounting Web" https://www.accountingweb.co.uk/tax/hmrc-policy/hmrc-changes-guidance-for-directors-returns. The date is not shown on Update 69.

not seek to collect any money from the recipient. Experienced return filers simply know that they must make a return by 31 January or are told by their accountant. First time filers in that position without an accountant (KLM did not act for the appellant until after 31 January 2018) do not have this innate knowledge of the law, a knowledge that makes any plea of ignorance of the law in relation to filing of income tax returns a vain one.

75. However a reasonable excuse cannot be relied on beyond a point where it ceases to be reasonable, unless the failure it excuses is remedied with a reasonable time after the cessation. Irrespective of whether the appellant actually received the penalty notice issued in February, and I find that she did, she received something that made her contact HMRC in May 2018. At that point any reasonable excuse ceased and she should have made her return within a short period thereafter (as it is not difficult to file the kind of return she did file). Thus I would expect her to have filed by at the latest 31 May 2018.

76. It follows from this that I cancel any liability to daily penalties in the amount of £310 as they run from 1 May but I do not cancel any other daily penalties, nor the 6 month penalty, on account of the appellant having a reasonable excuse.

Were there special circumstances?

77. I can only intervene and make a special reduction if HMRC's decision on this question (if any) was flawed in the judicial review sense. HMRC's only decision was made by Mrs Wright, the review officer. She said that she had taken into account two matters, namely that:

> (1) You [the appellant] contacted HMRC's helpline and were advised that no return was needed and the return would be cancelled.
>
> (2) It is factually incorrect that you have a legal obligation to register for Self-Assessment when you are a director.

78. She does not explain why those circumstances were not special by reference to what she said were the criteria, that they must be "uncommon or exceptional". The statement of case seeks to expand on these criteria by saying that in *other* contexts "special" has been held to mean "exceptional, abnormal or unusual" or "something out of the ordinary run of events" and that the special circumstances must also apply to the particular individual and not be general circumstances.

79. In fact the case they cite for the latter proposition is a case from this Tribunal, so it is hardly *another* context. I am not bound to follow it. And as for the cases cited in what are genuinely other contexts, even if it is proper to treat cases on other contexts are capable of being read across to Schedule 55 FA 2009, Judge Aleksander has shown convincingly in *Krzysztof Pokorowski v HMRC* [2019] UKFTT 85 (TC) that HMRC are relying on a minority decision for the proposition they quote.

80. I have held that statement (1) by Mrs Wright was not in fact the case, but nonetheless her statement admitting that the appellant was advised (sorry – told) that no return was needed is wholly inconsistent with her saying that there were no special circumstances where HMRC nonetheless proceeded to seek to uphold £1,600 of penalties for a failure to do that which they said she had no need to do. The logical consequence of her statement is that HMRC should have accepted what she said was a request under s 8B TMA to withdraw the notice to file and a request under paragraph

17A Schedule 55 to cancel the penalty. It is irrational for her to uphold the penalty on the basis that there were no special circumstances.

81. As to Mrs Wright's acceptance that it is factually incorrect that a director has an obligation per se to notify liability, that is simply a recognition of an undeniable truth. But it doesn't of itself mean her decision was flawed.

82. What I have written in §80 and §81 was my immediate reaction to the statement of case. But what Mrs Wright said is so at odds with other statements made by her that it occurred to me to wonder whether she meant what she said. I have come to the conclusion that what she said should have been in reported speech, ie she was putting forward what the appellant had said and she was taking into account those statements made by the appellant to judge whether they amounted to special circumstances.

83. There are still problems though if this is what Mrs Wright did. If the appellant's account in (1) was true then that looks like there was a special circumstance namely that an officer of HMRC had accepted a s 8B TMA request but had not acted on it. But there is nothing to suggest that Mrs Wright made any attempt to check the SA Notes or obtain a transcript of that call to see if there as substance in what the appellant said. As to point (2) made by the appellant, then Mrs Wright did address this in connection with her consideration of the appellant's "reasonable excuse" and I agree that this difference of opinion about the law does not amount to a special circumstance.

84. What Mrs Wright undoubtedly did fail to take into account was something that was definitely unusual (and so fell within HMRC's criteria for the existence of special circumstances) and was that the appellant was saying with some conviction that she was "involuntarily" registered for self-assessment. She cannot say that it was not something that had been brought to HMRC's attention. Mr Pritchard mentions the "involuntary" registration in his letter of appeal of 14 August 2017 (third paragraph) and at greater length in his letter of 17 September to HMRC in which he requests a review for his client.

85. It is undoubtedly unusual that a person can be made subject to an obligation that they were unaware of and did not arise because of any failure by them to meet the requirements of the law, in this case s 7 TMA. Mrs Wright's failure to consider this point is another reason why her decision was flawed.

86. Given these failures I can remake her decision. In my view the failure by the review officer to take into account the points made by Mr Pritchard about the involuntary nature of the appellant's voluntary registration was a special circumstance.

87. I have considered whether this special circumstance would also enable me to reduce the penalties which I have upheld on the grounds that there was no reasonable excuse. Had I not found that there was a reasonable excuse for the initial penalty and £310 of the daily penalties I would certainly have reduced them to nil. But as the appellant was undoubtedly informed on 18 July 2018 of her obligation to file a return and did not do so within a reasonable time, can the special circumstance that her registration was involuntary and unknown to her make a difference? I think it can. With the knowledge that registration was involuntary HMRC should have used s 8B TMA to remove the requirement to file and should have cancelled all the penalties under paragraph 17A Schedule 55 FA 2009. I therefore cancel the remaining £590 daily penalty and the £300 6 month penalty.

88. I cannot leave the subject of special circumstances without pointing out something else Mrs Wright (and to my knowledge other review officers) did. In her conclusion letter in her paragraphs about special circumstances, after she had set out what she did take into account and her conclusion that there were on that account no special circumstances, she said:

> "Please let me know if you think there are any other circumstances you have either not told me about or you believe we should take into account."

89. Mr Pritchard did this in his letter of 22 October 2018 and in particular disagreed with her statements about directors' responsibilities to register for self-assessment.

90. On 2 November 2018 Mrs Wright replied refusing to enter into any dialogue as a "customer" is only entitled to have the decision reviewed once! That decision not to engage was itself arguably flawed in judicial review terms.

91. The statement of case makes no mention of this refusal by HMRC to consider representations that had specifically been invited.

Decision

92. Under paragraph 20(1) Schedule 55 FA 2009 I cancel the initial penalty of £100, daily penalties of £900 and a six month penalty of £300.

93. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 26 FEBRUARY 2019