**[2019] UKUT 131 (TCC)**
**Appeal number: UT/2017/0172**

***INCOME TAX – Late filing penalties – whether FTT erred in finding notice to file self-assessment return sent – whether proportionality of penalties in comparison to the amount of tax due amounted to special circumstances – para 16 Sch 55 FA 2009***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**BARRY EDWARDS** **Appellant**

**- and -**

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

**TRIBUNAL: The Hon. Mr Justice Nugee**
**Judge Timothy Herrington**

**Sitting in public at The Royal Courts of Justice, Rolls Buildings, London EC4 on 19 February 2019**

**Michael Ripley, Counsel, instructed by Brown Rudnick LLP, Solicitors, for the Appellant**

**Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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DECISION

## Introduction

1. This is the appeal of the appellant (**"Mr Edwards"**) from the decision (**"the Decision"**) of the First-tier Tribunal (**"FTT"**) (Judge Philip Gillett and Helen Myerscough) released on 18 October 2017. The FTT dismissed Mr Edwards's appeal against penalties charged by the Respondents (**"HMRC"**) for the late filing of individual tax returns. The matters under appeal were late filing penalties pursuant to Schedule 55 of the Finance Act 2009 as follows:

(1) Tax year 2010/11 – penalties totalling £1,300 (plus interest) comprising an automatic late filing penalty of £100 imposed on 14 February 2012, a further penalty (calculated at £10 per day in relation to the period to 14 May 2012) totalling £900 imposed on 7 August 2012 and a further penalty of £300 imposed on 7 August 2012 for failure to file a return within 6 months of the first penalty;

(2) Tax year 2012/13 – penalties totalling £1,600 (plus interest) comprising an automatic late filing penalty of £100 imposed on 18 February 2014, a further penalty (calculated at £10 per day in relation to the period to 27 June 2014) totalling £900 imposed on 18 August 2014, a further penalty of £300 imposed on 18 August 2014 for failure to file a return within 6 months of the first penalty and a further penalty of £300 imposed on 24 February 2015 for failure to file a return within 12 months of the first penalty; and

(3) Tax year 2013/14 – penalties totalling £980 (plus interest) comprising an automatic late filing penalty of £100 imposed on 18 February 2015 and a further penalty (calculated at £10 per day in relation to the period to 27 June 2014) totalling £880 imposed on 28 July 2015.

2. HMRC's tax calculations for the years in question show that no income tax was due from Mr Edwards for any of the years in question.

3. Although, as we discuss in more detail later, there is a dispute between the parties as to what issues were properly before the FTT, the FTT dismissed Mr Edwards's appeal against all of the penalties set out above on the following basis:

(1) The question as to whether any particular taxpayer should be required to file a tax return is entirely a matter for HMRC and accordingly Mr Edwards's contention that he should not have been required to file a tax return in the first place is not a relevant issue in considering whether the penalties have been lawfully raised;

(2) HMRC did issue notices to Mr Edwards to file a tax return for the years in question and also served the necessary notices in order for the daily penalties imposed to be valid; and

(3) The FTT's powers on an appeal do not include any general power to reduce a penalty on the grounds that the penalty concerned is disproportionate in comparison with the amount of tax involved.

4. Mr Edwards applied for permission to appeal against the Decision on the grounds that the FTT erred in relation to its findings summarised at [3](1) and (3) above. On 28 December 2017 Judge Herrington refused permission in relation to the first of those grounds but granted permission in relation to the second.

5. Subsequent to permission having been granted, Mr Edwards secured pro bono representation before the Upper Tribunal, having represented himself before the FTT. He then applied to add a further ground of appeal, namely, that the FTT was not entitled to find as a fact that notices to file self-assessment returns had been sent to Mr Edwards for any of the relevant tax years.

6. HMRC opposed that application on the basis that the proposed further ground had not been a ground of appeal before the FTT until the hearing itself and it was not arguable that there was any perversity as to the conclusion reached by the FTT on the issue in question. On 18 July 2018 Judge Herrington directed that the application be heard at the beginning of the hearing of the substantive appeal, with argument on the ground being heard at the substantive hearing if permission were granted.

**The proceedings before the FTT and the Decision**

7. Because of the objections raised by HMRC to Mr Edwards's application to amend his grounds of appeal, it is necessary to look in some detail at the basis on which the appeal was argued before the FTT both before and at the hearing of the appeal and at the evidence that was available to the FTT.

8. Mr Edwards gave notice of appeal to the FTT online on 19 June 2017. The process is designed to be user-friendly and as informal as possible bearing in mind that in most penalty appeals the appellant will be unrepresented. The online form uses plain English and is informal in style. For example, it asks, "What is your dispute about?" to which Mr Edwards answered, "penalty or surcharge" and then gave the amount in dispute.

9. As his grounds of appeal, Mr Edwards attached a document described as a "Statement of Case". In a covering letter to that document and in the statement of case itself, the emphasis was on Mr Edwards's contentions that he should not have been registered for self-assessment in the first place and consequently the penalties should never have been raised. Mr Edwards made no specific contention that he had not received the notices to file for any of the tax years in question, but he did say that he had seen the various reminders that HMRC had sent regarding the non-payment of the penalties which they had assessed. There was however a general assertion that "HMRC should not be requesting penalties and interests, [sic] if they are not due." Mr Edwards also attached copies of the earlier correspondence he had had with HMRC when he initially appealed to HMRC against the penalties in which he implicitly raised the proportionality point, that is that it was disproportionate to impose penalties where no tax was in fact due.

10. On 21 June 2017 a clerk of the FTT wrote separately to Mr Edwards and HMRC informing them that the case had been assigned to proceed under the basic category, as is usual for penalty appeals of this type. Appeals assigned to the basic category are determined with a minimum of formality. In particular, no directions are made for the filing of any further pleadings or witness statements. These appeals are determined on a "turn up and talk basis" so that HMRC was directed to produce a bundle of documents and authorities comprising its decision notice, the notice of appeal, all relevant correspondence between the parties, any other documents relating to the appeal in its possession and any legislation or case law on which it relied.

11. Mr Edwards was informed that the appeal would proceed straight to a hearing and was asked to send copies of any documents not previously sent to HMRC to the FTT and HMRC so that they were received at least 14 days before the hearing. He was warned that if he did not do so, the FTT might refuse to let him rely on them at the hearing. He was also told that he should "bring with [him] to the hearing any person you want to say something to the tribunal in support of your case", thus anticipating that witness evidence would be admitted without the need for there to be a formal witness statement or any notice to HMRC of the evidence that might be led.

12. We have a copy of the material which, in accordance with the directions made by the FTT, was provided by HMRC at the hearing. As well as the various decision notices, the notice of appeal and correspondence between the parties, HMRC, presumably in response to the direction that it provide copies of all other documents relating to the appeal in its possession, did provide copies of computer entries relating to Mr Edwards's self-assessment record for the tax years in question. These records, which were stated to be as of 15 August 2017, purported to contain details of when notice to file returns were issued and their due dates as well as the dates on which the relevant returns were filed. As is usual with these records, they always record that the return was issued on 6 April in the relevant tax year, which is the first day of the tax year, but it is well known that in practice notices to file are issued in batches during the early part of the tax year.

13. HMRC also provided a copy of what are described as "SA Notes" being a record in note form of the various actions taken by HMRC in relation to Mr Edwards's self-assessment account and the dates on which those actions were taken. The records cover the period from the opening of the account in 2002 up to May 2017, just before Mr Edwards filed his notice of appeal with the FTT. Among the matters recorded are a change of address in 2012, and the interactions between Mr Edwards and HMRC after penalty notices had been issued and he had informed them that he did not realise that he had to file tax returns and be within the self-assessment system.

14. There was also material demonstrating the address held on file for Mr Edwards, although the latest information held in that regard records Mr Edwards's address as at 1 May 2012 rather than any later date. The FTT does not record in the Decision any contention from Mr Edwards that the address so held was incorrect in respect of any period after 1 May 2012.

15. The hearing of the appeal before the FTT took place on 7 September 2017, Mr Edwards appearing in person and an officer, Mr Hopkins, representing HMRC. The Decision was released on 18 October 2017.

16. At [3] of the Decision the FTT summarises the grounds of appeal. However, as summarised, they go beyond the contentions made by Mr Edwards in his statement of case and the correspondence with HMRC when he initially made his appeal to them. In particular, the FTT records a contention by Mr Edwards that he had no recollection of receiving any notices to file a tax return nor of actually filing any tax returns.

17. It must be assumed that Mr Hopkins made no objection to that ground of appeal being argued at the hearing as there is no record of such in the Decision. Therefore, albeit informally, which is consistent with the way that basic cases are conducted in the FTT, it must be assumed that the FTT permitted the ground to be argued in addition to the other grounds specified by Mr Edwards in his statement of case which accompanied his notice of appeal.

18. The way in which the FTT dealt with the evidence before it was not entirely satisfactory. Under the heading "Facts" at [4] the FTT stated:

> "The facts of the case according to HMRC are as follows: …"

followed by a recitation of the events occurring in respect of Mr Edwards's self-assessment account, as recorded in the material referred to at [12] to [14] above.

19. In particular, the FTT recorded that notices to file self-assessment returns were sent on 6 April in each of the relevant years and the dates on which returns were eventually made. The FTT did not, however, expressly make any findings of fact on HMRC's evidence at this point in the Decision and, in particular, it did not say whether or not it accepted that such evidence was sufficient to demonstrate that notices to file were sent to Mr Edwards at his correct address, although it does record that HMRC has no record of any post being returned undelivered.

20. However, at [9] of the Decision, the FTT said this in relation to Mr Edwards's contention that he did not receive any notices to file a return:

> "As stated above, Mr Edwards was certain that he had never received a notice to file a tax return but did acknowledge that if he had received one he would probably have thrown it away. Likewise, he did not recall filing a tax return but, according to HMRC, tax returns were eventually filed for all 3 years in question."

21. At [10] the FTT records an acknowledgement by Mr Edwards that he had received the various penalty notices. It then made the following finding at [11]:

> "We therefore find as a matter of fact, on the balance of probabilities, that HMRC did issue notices to file a tax return for the years in question and that they also served the notices which are required to be served…. in order for daily penalties to be valid. We also find that returns were filed on the dates stated by HMRC."

22. The FTT dealt very briefly with the proportionality question at [22] as follows:

> "Mr Edwards has also argued that the penalties are disproportionate in comparison with the amount of tax involved. However, the Tribunal's powers on an appeal are set out in para 22 of Sch 55 Finance Act 2009 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Therefore, for reasons similar to those set out in *HMRC v Bosher*, [2013] UKUT 01479 (TCC), we do not consider that we have a separate power to consider the proportionality or otherwise of the penalties."

23. In its decision refusing permission to appeal to the Upper Tribunal, the FTT cast further light on its finding that HMRC had sent Mr Edwards notices to file. It said:

> "We found as a matter of fact that HMRC had served the proper notices on Mr Edwards, requiring him to file a tax return for the years in question and although Mr Edwards initially denied receiving these notices he did acknowledge that if he had received the notices he would probably have thrown them away. In addition he also denied filing any tax returns, but in fact all three tax returns in question were filed, albeit late, so his memory was perhaps inaccurate in this regard."

**Relevant statutory provisions**

24. Section 8 Taxes Management Act 1970 (**"TMA 1970"**) sets out the circumstances in which HMRC can notify taxpayers that they are required to complete a tax return. Insofar as relevant it provides that:

> "(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 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.
>
> (1AA) For the purposes of subsection (1) above–
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source.
>
> …

(1D) A return under this section for a year of assessment (Year 1) must be delivered –

(a) in the case of a non-electronic return, on or before 31st October in Year 2

(b) in the case of an electronic return, on or before 31st January in Year 2."

25. The power to impose penalties for the late filing of a tax return in respect of which a notice to file was given pursuant to s 8 TMA 1970 is to be found in paragraph 1 to Schedule 55 to the Finance Act 2009 (**"Schedule 55 FA 2009"**). Paragraphs 3 to 6 of that Schedule set out the levels of the penalties. Those provisions, so far as relevant, are set out in the Annex to this decision.

26. In essence, the regime provides for an initial penalty of £100 for failure to file a return on time followed by a further additional penalty if the failure continues for a period of 3 months from the initial penalty date, a further penalty if the failure continues for a period of 6 months, and a further penalty if the failure continues after the end of the period of 12 months from the date the initial penalty was imposed. The cumulative effect of these penalties, as was the case with Mr Edwards in respect of the 2012/13 tax year, can result in a maximum sum of £1,600 being payable in respect of the failure in question, regardless as to whether any tax is payable in respect of the tax year in question.

27. Paragraph 16 of Schedule 55 FA 2009 permits a penalty to be reduced where "special circumstances" exist. It states as follows:

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

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

(a) ability to pay, or

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

(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."

28. Paragraphs 20 to 23 of Schedule 55 FA 2009 set out the rights of appeal against penalties. Those provisions, so far as relevant, are set out in the Annex to this Decision.

29. In particular, paragraph 22(3) allows the FTT or the Upper Tribunal to substitute its own decision for HMRC's relying on paragraph 16, but it can only do so to a different extent if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was "flawed" in light of the principles of judicial review.

**Application for permission to appeal on further ground**

30. As mentioned at [5] above, Mr Edwards has applied for permission to add a further ground of appeal, namely, that the FTT was not entitled to find as a fact that notices to file self-assessment returns had been sent to Mr Edwards for any of the relevant tax years. We must therefore determine whether or not to permit this ground to be argued.

31. HMRC object to the ground being argued for two reasons. First, they contend that Mr Edwards never properly raised the notice to file issue prior to the hearing in the FTT. In particular, the issue was not clearly raised in his notice of appeal to the FTT. Mr Carey relies on Rule 20(1)(f) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which requires an appellant's notice of appeal to set out the grounds for making the appeal.

32. Mr Carey submits that as the notice to file issue was not raised in Mr Edwards's notice of appeal HMRC was not under an obligation to deal with the issue or lead evidence which demonstrated that the relevant notices to file had been sent to Mr Edwards. If, at the time that he made his appeal, Mr Edwards genuinely believed that he did not receive any notice to file he had the opportunity to say so in his notice of appeal which would have been a trigger for HMRC to realise that the question was an issue in dispute. Mr Carey submits that although the FTT felt it was able to deal with the issue during the hearing, the issue cannot now be raised on appeal to the Upper Tribunal because that would significantly prejudice HMRC.

33. Secondly, HMRC contend that in any event the finding of the FTT that notices to file were issued was not perverse because there was sufficient evidence before the FTT on which it could properly make the finding it did at [9] of the Decision and therefore the ground was not arguable.

34. The test for whether an appellant should be permitted to raise on appeal a point that was not raised before the FTT is as set out at [40] of the Upper Tribunal's decision in *Manduca v HMRC* [2015] UKUT 262 (TCC) where the Tribunal summarised the effect of previous authorities as follows:

> (1) the test is that the court or tribunal must be satisfied that the other party will not be at risk of prejudice if the new point is allowed to be argued because it might have adduced other evidence at trial, or otherwise conducted the case differently; and
>
> (2) permission to raise a new point should not be given lightly unless there is a point of law which does not involve any further evidence, and which involves little variation in the case which the party has already had to meet.

35. In our view Mr Edwards should be permitted to argue the notice to file issue for the following reasons.

36. First, the point was fairly and squarely before the FTT and it was dealt with at the hearing without any objection from HMRC. Consistently with the informal nature of FTT proceedings in basic cases, which we have alluded to above, the FTT appears

in effect to have made a case management decision during the course of the hearing that it would permit the notice to file issue to be argued, thereby in effect permitting Mr Edwards's notice of appeal to be amended.

37. It would have been open to HMRC to object to the point being argued at the point at which Mr Edwards started to raise the issue, but it is obvious from the Decision that that course was not taken. If it had been, the FTT would have had to have considered all the relevant circumstances, including in particular whether there was any prejudice to HMRC in allowing the point to be argued.

38. Two other points are relevant to this issue. First, as is well known and accepted by HMRC, consistently with the requirements of Article 6 of the European Convention on Human Rights (right to a fair trial), penalty appeals are treated as criminal for Article 6 purposes and HMRC bear the onus of proving the several facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof. One of those matters is whether a notice to file has been sent, because a taxpayer cannot be in breach of the requirement to file a self-assessment return unless he has been sent a notice to file such a return in accordance with the requirements of s 8 TMA 1970. If the appellant disputes a fact which HMRC must prove to justify the imposition of a penalty, it is for HMRC to prove that factual prerequisite. This principle was recently restated by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TC) where it said at [69]:

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

39. Secondly, in any event, as described at [13] and [14] above, HMRC did include in the bundle of documents it provided for the hearing evidence that related to the notice to file issue. That is consistent with its obligation, as set out in the FTT's letter of 21 June 2017 referred to at [10] above, that HMRC provide in the bundle all documents relating to the appeal which were in its possession.

40. Thirdly, the point involves a short point of law, namely whether it was open to the FTT to make the finding it did on the notice to file issue on the basis of the evidence before it, and it was not necessary for any further evidence to be adduced to deal with that point. Bearing in mind our comments as to the burden borne by HMRC, there would be no variation as to the case which HMRC had to meet, because the issue had been dealt with before the FTT.

41. Finally, in view of the manner in which the FTT approached the evidence on the notice to file issue in the Decision, as summarised above, we are satisfied that Mr Edwards has an arguable case on the issue.

42. Accordingly, we grant permission for the notice to file issue to be argued on this appeal.

**Grounds of Appeal and issues to be determined**

43. As a consequence of our decision to permit Mr Edwards to argue the notice to file issue Mr Edwards has two grounds of appeal for us to consider as follows:

(1) The FTT was not entitled to find as a fact that notices to file had been sent to Mr Edwards for any of the relevant tax years and therefore HMRC had not discharged their burden of demonstrating that there had been any failure for which a penalty was due; and

(2) The penalties imposed were disproportionate in the context of the amount of tax due and neither HMRC nor the FTT considered whether that was a relevant circumstance which should have been taken into account in determining whether it was right to reduce the penalties because of special circumstances pursuant to the power given to that effect in Paragraph 16(1) to Schedule 55 FA 2009.

44. The first ground of appeal amounts to a challenge to the FTT's findings of fact on the notice to file issue. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides that a party to a case before the FTT only has a right of appeal to the Upper Tribunal on a point of law arising from the FTT's decision. There cannot be an appeal on a pure question of fact which is decided by the FTT. However, a tribunal may arrive at a finding of fact in a way which discloses an error of law. That is clear from *Edwards v Bairstow* [1956] AC 14 in which Viscount Simonds referred to making a finding, without any evidence or upon a view of the facts which could not be supported, as involving an error of law: see at page 29. In the same case, Lord Radcliffe, at page 36, regarded cases where there was no evidence to support a finding or where the evidence contradicted the finding or where the only reasonable conclusion contradicted the finding, as cases involving errors of law.

45. In this case there clearly was evidence before the FTT which related to the notice to file issue, being not only the material provided by HMRC in the hearing bundle relating to Mr Edwards's self-assessment record which we have referred to at [12] to [14] above but also Mr Edwards's oral evidence at the hearing. In our view, therefore Mr Edwards can only succeed on this ground if he is able to satisfy us that this evidence contradicted the FTT's finding or where the only reasonable conclusion that could be drawn from the evidence was that no notices to file were sent to Mr Edwards in respect of the relevant tax year.

46. As far as the second issue is concerned, Mr Edwards contends that HMRC only considered the reasons given by Mr Edwards for not filing his return on time when giving consideration to the special circumstances issue. He contends that whether the level of penalty was proportionate in the light of the tax due was a relevant circumstance which ought to have been taken into account in considering whether the penalty should be reduced because of special circumstances and HMRC did not appear to have taken that issue into account. That, Mr Edwards contends, meant that

HMRC's decision was flawed. HMRC contend that the proportionality of the penalty to the amount of tax involved imposed cannot amount to special circumstances because Parliament has specified what the penalty should be where a taxpayer has failed to file a self-assessment on time. Furthermore, the amount of the penalty is the same for every taxpayer and therefore cannot be exceptional and specific to Mr Edwards.

## Discussion

### *Ground 1: The Notice to File issue*

47. Mr Ripley submitted that HMRC needed to demonstrate to the FTT that notices to file answering the statutory description in s 8 TMA 1970 have been properly addressed and sent to Mr Edwards. However, HMRC did not produce any copies of the notices to file nor did they produce any witness evidence explaining that valid notices to file had been properly issued but could not be produced for some reason. The FTT appear to have accepted HMRC's factual case merely on the basis of an assertion by HMRC's representative at the hearing.

48. As regards the material referred to at [12] to [14] above, Mr Ripley submits that none of this demonstrates that notices to file were sent or, if they were, that they were sent to the correct address for the following reasons. There was no evidence before the FTT explaining the various screenshots which the material comprised. In particular, there is no evidence of the specific dates on which the notices to file were sent, the fact that the system records that returns were received does not demonstrate that notices to file were in fact sent, and, even if they were, there is no evidence to demonstrate the address to which they were sent. There was nothing to indicate that such address was still valid for the last two of the three tax years to which this appeal relates. In essence, the SA Notes merely evidence the contact that HMRC have had with Mr Edwards over the years.

49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.

50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:

> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."

51. The FTT also made the following observations at [14] to [16] with which we would agree:

> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
>
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
>
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."

52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.

53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:

> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."

54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal".

55. Mr Ripley submitted that the position was the same in this case, that is that the FTT was not entitled to draw an inference from the material provided by HMRC that the relevant notices to file had been sent.

56. We accept that on its own the material before the FTT would not have enabled the FTT properly to draw the necessary inference that notices to file were sent to Mr Edwards. However, there was other evidence available to the FTT on the notice to file issue, namely the oral evidence that Mr Edwards gave at the hearing, as well as the entries in HMRC's records recording its interactions with Mr Edwards, and in particular the sending of penalty notices and the subsequent communications with Mr Edwards in relation to those notices. Mr Edwards did not dispute the fact that he was sent the various penalty notices and reminders, as recorded by the FTT at [10] of the Decision.

57. It is clear from [9] and [11] of the Decision that the FTT drew an inference from the fact that Mr Edwards acknowledged that he would have thrown away any notice to file that he received, had received the penalty notices, and had failed to remember that he had in fact filed his tax returns that it was more likely than not that he did in fact receive notices to file. It is also clear from the FTT's decision refusing permission to appeal, as referred to at [23] above, that its finding that Mr Edwards's memory as regards his filing of his tax returns had been inaccurate raised the question whether it could likewise be inaccurate as regards his receiving notices to file, which was clearly also a matter to be weighed in the balance.

58. It would have been better had the FTT at that point in the Decision also referred to the SA Notes and indicated what weight it put on that evidence when considered alongside Mr Edwards's oral evidence when coming to its conclusion. Furthermore, as we have previously observed, it was unsatisfactory for the FTT to have simply recorded that evidence without making specific findings on it. However, in our view, the FTT must have had the evidence in mind when it came to its conclusions on the notice to file issue at [11] of the Decision.

59. We have found deficiencies in the manner in which the FTT reasoned its decision, but we cannot say that those deficiencies are such that they amount to a material error of law on the basis of which we should set aside its decision. It is clear to us that there was sufficient evidence before the FTT as a whole from which it could properly have drawn an inference, on the balance of probabilities, that notices to file were sent to Mr Edwards in respect of each of the tax years in question. Therefore, we cannot say that the evidence before the FTT contradicted its findings nor could we say that the only reasonable conclusion that could be drawn from the evidence was that no notices to file were sent to Mr Edwards in respect of the relevant tax years.

60. We therefore determine the notice to file issue in favour of HMRC.

***Ground 2: The Proportionality Issue***

61. Mr Ripley referred to HMRC's letter dated 1 March 2017 to Mr Edwards where HMRC said:

> "I've considered the reasons you've given for not filing your return on time. I don't think they are special circumstances. So we can't reduce your penalties."

62. As Mr Ripley correctly observed, HMRC only refer to having considered the reasons for not filing the relevant return on time. Therefore, they do not appear to have considered the level of the penalty in light of the tax due which, Mr Ripley submitted, was a relevant circumstance which ought to have been taken into account.

63. Mr Ripley also submits that in the FTT proceedings, neither HMRC nor the FTT appear to have considered whether a special reduction might be appropriate. Instead, the FTT held that it was simply unable to reduce the penalties on the basis of the reasoning in *Bosher v HMRC* [2013] UKUT 01479 (TCC): see [22] of the Decision. Mr Ripley submits that reasoning was erroneous because the legislation then governing the penalties with which *Bosher* was concerned contained a specific power for HMRC to mitigate the penalties. That power was absent in the case of penalties imposed pursuant to Schedule 55 FA 2009, but in relation to those penalties, the FTT has specifically been given the power to reduce a penalty by reason of special circumstances, which could include the question as to whether the penalty was disproportionate.

64. *Bosher* was a case which concerned the imposition of penalties of £54,100 on the taxpayer in respect of numerous failures to file on time monthly returns due under the construction industry scheme (CIS). Those penalties comprised a large number of fixed £100 penalties imposed pursuant to s 98A(2)(a) of the TMA 1970 and a smaller number of variable 13 months penalties imposed pursuant to s 98(2)(b) TMA 1970. Those penalties were subject to a specific power of HMRC set out in s 102 TMA 1970 to mitigate the penalties concerned and indeed HMRC offered to reduce the penalties in that case. The taxpayer refused the offer and appealed against the penalties. The FTT held that although the jurisdiction of the FTT was limited, as regards the amount of the penalty imposed, to determining whether the penalties had been correctly imposed, s 3 of the Human Rights Act 1998 permitted it to read the word "incorrect" in such a way as to include penalties which were disproportionate and therefore a breach of the right to peaceful enjoyment of possessions contained in Article 1 of the First Protocol to the European Convention on Human Rights (A1P1). The FTT determined that the penalties were disproportionate and reduced them.

65. The Upper Tribunal decided that the FTT had no jurisdiction to reduce the penalties in this way. It held that the legislation did not provide for a right of appeal against the amount allowed by way of mitigation by exercise by HMRC of its statutory power in s 102 TMA 1970. Therefore, the FTT had no jurisdiction to consider whether the penalties were disproportionate. If the taxpayer considered that the penalties, once mitigated, were not proportionate and infringed his rights under A1P1 he could challenge HMRC's decision by way of judicial review. The Upper Tribunal said that Parliament had imposed a fixed penalty for monthly defaults in failing to make returns and given power to HMRC to mitigate any penalty with no provision for an appeal against a decision on mitigation. It went on to say that it would be entirely contrary to a fundamental feature of that scheme if the FTT were to be able to impose its own view of the appropriate amount of the penalty at the date of determination at a time before mitigation had been considered by HMRC under s 102.

66. We agree with Mr Ripley that the reasoning of *Bosher* is not applicable in relation to the question as to whether a penalty imposed pursuant to Schedule 55 to FA 2009 is disproportionate. Under paragraph 16 of that Schedule, the FTT has, in contrast to penalties imposed under s 98A TMA 1970 in respect of the CIS scheme, been given a limited power to consider whether there are special circumstances which would justify a reduction in the amount of the penalty. It is in the context of that specific jurisdiction that the question of proportionality must be considered. We did not take Mr Carey to argue to the contrary. It is therefore clear that the FTT erred by determining that it had no general power to reduce a penalty on the grounds that it is disproportionate on the basis of the reasoning of the Upper Tribunal in *Bosher*.

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

68. There are many appeals in the FTT where the question as to whether there are special circumstances justifying a reduction in the amount of a penalty has been considered. Accordingly, from time to time the FTT has made general observations about what might constitute special circumstances. In many of those decisions, reference is made to *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] AC 707 where Viscount Dilhorne (in a rather different context to that with which we are concerned) suggested at page 739E that:

> "For circumstances to be special [they] must be exceptional, abnormal or unusual..."

69. In *Warren v HMRC* [2012] UKFTT 57, the FTT put a gloss on the meaning of "special". It said at [54] that:

> "The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

70. In *Welland v HMRC* [2017] UKFTT 0870 the FTT likewise did not confine the meaning to circumstances which did not affect many taxpayers. After referring to the passage in *Warren* cited above, the FTT said at [125]:

> "What was said in *Warren* seems right, if very general. … In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions."

71. By contrast, in *Collis v HMRC* [2011] UKFTT 588 the FTT said at [40] that:

> "to be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves."

72. In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase. In support of that approach the FTT referred to the observation made by Lord Reid in *Crabtree v Hinchcliffe* at page 731D-E when considering the scope of "special circumstances" as follows:

> "the respondent argues that this provision has a very limited application… I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it".

73. The FTT then said this at [101] and [102]:

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

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.

75. *Advanced Scaffolding* concerned the imposition of a large number of fixed penalties for the late filing of CIS returns which are now within the scope of Schedule 55 FA 2009 with the result that (unlike the position in *Bosher* under the previous legislation**)** a penalty may be reduced for special circumstances pursuant to the power in paragraph 16 of that Schedule**.** The FTT did not accept that the absolute amount of the penalty in that case was disproportionate. It concluded at [112] that proportionality on its own could not be a special circumstance for the purposes of Schedule 55 because Parliament had clearly provided for a scheme of penalties where there is a minimum penalty even where no tax is due and that it cannot therefore have intended that this fact on its own would be a special circumstance which would justify

a reduction in the amount of penalties. It did, however, decide, having considered all the facts of the case, that it was right to reduce the penalties in question, having regard to the fact that there were multiple defaults leading to multiple penalties deriving from a single, genuine mistake from an appellant who had a good compliance record and where the failings were not significant.

76. In the case of Mr Edwards, the only matter advanced as constituting special circumstances is the fact that the penalties are disproportionate in the light of the amount of tax due.

77. Mr Ripley submits that on the facts of this case the penalties are disproportionate so that their imposition infringes the right to protection of property afforded by A1P1 which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

78. A1P1 does, as it states clearly, permit the state to enforce laws to secure the payment of taxes or penalties. It is well established however that any interference with property which is justified on those grounds must satisfy the requirement of proportionality, that is that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

79. The Upper Tribunal has previously considered the question of proportionality in the context of the VAT default surcharge regime in *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). In that case the Upper Tribunal referred at [11] to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing proportionality in the context of a scheme which imposed significant penalties on lorry drivers and haulage companies who intentionally or negligently allowed clandestine immigrant entry into the United Kingdom as follows:

> "…. it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference."

80. The Upper Tribunal made further observations on Simon Brown LJ's judgment at [53] to [55] as follows:

> "53. It is, however, important also to read what Simon Brown LJ said about proportionality later in his judgment. He referred at [51] to the speech of Lord Steyn in *R (Daly) v SoS for the Home Department* [2001] 2 AC 532 at [27], referring to the three-stage test adopted by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 in relation to determining whether a limitation (by an act, rule or decision) is arbitrary or excessive: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".
>
> 54. Then, at [52] Simon Brown LJ said this:
>
> > "It is further implicit in the concept of proportionality, however, that not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned."
>
> 55. He went on to cite from *James* at [50]:
>
> > "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive' burden."
>
> adding that that principle seemed to him to be of the first importance."

81. In the light of these observations, the Upper Tribunal considered that the VAT default surcharge regime was a proportionate response to the aim of ensuring submission of returns and payment of tax by the due date: see [82] and [99] of the judgment. It did however recognise at [99] that a tribunal may need to assess whether the penalty in any particular case is disproportionate but did not find it to be so on the facts of that particular case, which had resulted in a substantial surcharge being imposed on the taxpayer notwithstanding the fact that its VAT payment was received only one day late. In coming to that conclusion, the Upper Tribunal said that the penalty may be seen by some as harsh but did not consider it to be regarded as plainly unfair: see [103] of the decision.

82. In our view, the principles identified in *Total Technology* are equally applicable in this case. In considering whether the imposition of a significant penalty for failure to file a return in circumstances where no tax is due infringes the taxpayer's A1P1 rights it is necessary to determine the aim of the penalty regime, and whether the aim is a legitimate aim in the public interest. It is then necessary to determine whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, ascertained by establishing whether there is a fair balance struck between the public interest and the requirements of the protection of individual's fundamental rights.

83. Mr Ripley submitted that the reason for issuing a notice to file under s 8 TMA 1970 is for the particular purpose provided by s 8(1) namely, to establish 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 tax for that year. In the present case, the tax returns did not alter or affect Mr Edwards's income tax or capital gains tax position for the relevant tax years. Mr Edwards did not self assess any tax payable for the tax years in question. The only consequence of HMRC issuing notices to file to Mr Edwards (if they were so issued) was to expose him to penalties, which is not the purpose for which Parliament has permitted taxpayers to be asked to complete a tax return.

84. However, we were referred to HMRC's guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due. A taxpayer who does not think he should be within the self-assessment regime when he receives a notice to file because as a matter of course he will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to the notice. That is precisely what ultimately happened in this case.

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

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately

found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

87. Therefore, in this particular case, HMRC's decision as regards special circumstances was not flawed. As Mr Edwards's contention that it was disproportionate to impose penalties concerned in circumstances where no tax was due does not amount to a special circumstance, HMRC did not fail to take into account a relevant matter in making its decision. Since that was the only basis on which Mr Edwards contended that there were special circumstances justifying a reduction in the penalty, the proportionality issue must be determined in this case in favour of HMRC.

**Disposition**

88. The appeal is dismissed.

89. We are extremely grateful to Mr Ripley and his instructing solicitors, Brown Rudnick, who agreed at the instigation of the Tribunal to act pro bono for Mr Edwards, thus enabling the important issues arising in this case to be fully argued.

**MR JUSTICE NUGEE** **JUDGE TIMOTHY HERRINGTON**

**UPPER TRIBUNAL JUDGES**
**RELEASE DATE: 1 May 2019**

## ANNEX

**Relevant provisions of Schedule 55 to the Finance Act 2009**

*Penalty for failure to make returns etc*

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)).

…

| | *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<br>(b) … |

…

*Amount of penalty: occasional returns and annual returns*

2 Paragraphs 3 to 6 apply in the case of a return falling within any of items 1… in the Table.

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

4(1) P is liable to a penalty under this paragraph if (and only if)—

(a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

5(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

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

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

(b) £300.

6(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

…

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

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

(b) £300.

…

*Special reduction*

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

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

(a) ability to pay, or

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

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

(a) staying a penalty, and

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

…

*Appeal*

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)).