[2014] UKUT 0536 (TCC)

Tribunal ref: FTC/98/2013

PENALTIES — late submission of income tax returns — FA 2009 Sch 55 — daily penalties — whether correctly notified in accordance with FA 2009 Sch 55 para 4(1)(c) — yes — appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

KEITH DONALDSON **Respondent**

Tribunal: Hon Mr Justice Warren
Judge Colin Bishopp

Sitting in public in London on 10 and 11 July 2014

Mr Richard Vallat, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants

The respondent did not appear and was not represented

Miss Rebecca Murray, counsel, appeared *pro bono* as Advocate to the Tribunal

DECISION

Introduction

1. On 22 May 2013 the First-tier Tribunal ("the F-tT") (Judge Barbara Mosedale and Mr Richard Thomas) released their decision ([2013] UKFTT 317 (TC)) relating to the appeals of Mr Robert Morgan and the present respondent, Mr Keith Donaldson, against various penalties for the late filing of their income tax returns. The F-tT had earlier directed that the appeals be heard together, since they raised similar issues in respect of the relatively new penalty regime introduced by Sch 55 of the Finance Act 2009. The present appellants, HMRC, had imposed on each of Mr Morgan and Mr Donaldson penalties of £100 pursuant to para 3 of Sch 55 on the ground that their returns were filed (as they conceded) after the prescribed date, and further penalties, commonly referred to as "daily penalties", pursuant to para 4 of Sch 55 because their respective returns remained outstanding (as was also conceded) more than three months later.

2. Mr Morgan did not dispute the £100 penalty. His appeal against the daily penalties imposed on him was allowed, in part because the F-tT were satisfied that, even if they were wrong in their other findings, there were special circumstances in his case, within the meaning of para 16 of Sch 55, sufficient to reduce the penalties to nil. Although HMRC disagree with some of the F-tT's reasoning, they do not dispute the finding of special circumstances, and there is no appeal in Mr Morgan's case as there would be no purpose to it.

3. Mr Donaldson appealed against the £100 penalty and the daily penalties, amounting to £900, imposed on him, as well as a further penalty of £300 imposed in accordance with para 5 of Sch 55 because his return was more than six months late. His appeals against the £100 and £300 penalties were dismissed since the F-tT did not accept that he had a reasonable excuse for the late filing of his return, and did not find special circumstances in his case, and there is no challenge by Mr Donaldson to that part of the F-tT's decision. HMRC seek to attack, in this appeal, the F-tT's conclusions about the daily penalties. The two issues which remained, once lateness was conceded and reasonable excuse and special circumstances were discarded, were whether the penalties had been properly imposed, and whether the notice which para 4 requires (a requirement to which we come at para 12 below) had been given to the taxpayers.

4. Judge Mosedale took the view that the daily penalties, in both Mr Morgan's and Mr Donaldson's cases, had been correctly imposed, for reasons she gave within the body of the decision, while Mr Thomas took the contrary view, and provided an appendix to the decision setting out his reasons for his different conclusion on that point. The question about which they differed was whether daily penalties could properly be imposed by a computer implementing a decision made in advance by HMRC. Judge Mosedale's conclusion prevails: see the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, art 8. The F-tT's decision on that point is, therefore, that the imposition of daily penalties by that means satisfies the statutory requirements. The F-tT concluded, unanimously, that proper notice of the penalties had not been given to either Mr Morgan or Mr Donaldson, and allowed their appeals against those penalties on that ground—thus the finding of special circumstances amounted to an additional ground for allowing Mr Morgan's appeal.

5. Permission to appeal to this tribunal against the F-tT's conclusion that proper notice of the daily penalties had not been given was granted by Judge Mosedale, in respect of Mr Donaldson's appeal. As HMRC succeeded, albeit by virtue of art 8 of the 2008 Order, in satisfying the F-tT that the penalties had been correctly imposed there is no appeal, nor is there any cross-appeal, before us in relation to that issue. For that reason we have not thought it appropriate, since it is not necessary to our decision, to determine whether or not Judge Mosedale was correct on that point, but as para 4 of Sch 55 deals with both the imposition of daily penalties and the giving of notice it is not possible to deal with the latter without at least touching on the former.

6. After he had served his notice of appeal to the F-tT Mr Donaldson took no further part in that appeal, and he has similarly taken no part in the appeal to this tribunal. We had, however, the benefit of submissions from Miss Rebecca Murray, who appeared *pro bono* as advocate to the tribunal, and we are most grateful to her for agreeing to do so. HMRC were represented before us by Mr Richard Vallat. We express our thanks to both counsel for the clarity of their submissions.

7. Schedule 55 contains what is evidently intended to be a comprehensive code for the imposition of penalties on taxpayers who fail to file various types of return on time. Paragraph 1(1) provides that

> "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."

8. The same paragraph makes it clear that, with a limitation of no relevance here, a taxpayer may become liable to more than one of the penalties the Schedule imposes.

9. An income tax return is one of those specified in the Table to which para 1 refers. The "filing date" is defined by para 1(4) as "the date by which [the return] is required to be made or delivered to HMRC", and there is no dispute that in this case, in which the return related to the 2010-11 tax year, that date was (by operation of s 8(1D) of the Taxes Management Act 1970) 31 October 2011 if Mr Donaldson submitted his return on paper, or 31 January 2012 if he submitted it online. The F-tT found that Mr Donaldson's return was submitted, on paper, on 1 May 2012. It was therefore late by six months and one day.

10. Paragraph 2 applies the terms of paras 3 to 6 of the Schedule to taxpayers who submit late returns. Paragraph 3 provides simply that "P is liable to a penalty under this paragraph of £100" but when it is read with para 1(1) it is plain that a para 3 penalty is due from any taxpayer who files a return after the filing date; thus the fact that Mr Donaldson did not submit his paper return on or before 31 October 2011 has, without more, the consequence that on 1 November 2011 he became liable to a penalty of £100. Paragraph 5 similarly imposes a penalty immediately the period of six months from the filing date has expired, although in this case the penalty is greater, and may be geared to the tax due from P:

> "(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."

11. The "penalty date" is defined by para 1(4) of the Schedule as the day after the filing date; thus the six-month period in Mr Donaldson's case began on 1 November 2011 and ended on 30 April 2012. As Mr Donaldson's return showed that he owed no tax, the six-month penalty was correctly imposed in accordance with sub-para (2)(b). Paragraph 6 of the Schedule imposes a further penalty if the return is 12 months late, but as it is not relevant in this case we shall not deal with it save to observe that the amount of the penalty is the same as that for a return which is six months late, unless HMRC conclude that the failure to submit the return is attributable to a deliberate intention to withhold information, in which case much higher penalties may be imposed.

12. Paragraph 4 of the Schedule, which deals with the (in this case intermediate) period from three to six months after the penalty date, is in rather more complex terms:

"(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).

(3) The date specified in the notice under sub-paragraph 1(c)—

(a) may be earlier than the date on which the notice is given, but

(b) may not be earlier than the end of the period mentioned in sub-paragraph 1(a)."

13. It is this provision which introduces the two requirements which are the subject of controversy: that HMRC decide that a penalty should be payable; and that they give notice to P.

14. Although we have adopted (and will continue to adopt in what follows) the commonly-used term "daily penalties" it is worth pointing out that para 4(1) refers to "a penalty" and that, consistently with the use of the singular, para 4(2) does not impose a separate penalty for each day of continuing default, but only one penalty calculated at the rate of £10 per day for the period over which the default persists up to a maximum of 90 days.

15. In practice, the penalties for which paras 3, 4 and 5 provide are imposed by computer, as the F-tT explained in their decision. In summary, HMRC made a policy decision, in advance of the coming into force of Sch 55, that in addition to the initial £100 and six-month penalties which a defaulting taxpayer incurs automatically, daily penalties should be imposed on all taxpayers whose returns

are sufficiently late. It is HMRC's computer which determines, without human intervention in any individual case, whether a defaulting taxpayer has incurred a penalty in accordance with any one or more of paras 3, 4 and 5, which calculates the amount of the penalty or penalties by reference to the nature—paper or online—of the return, the length of the period of lateness and, in the case of six-month penalties, the amount of tax outstanding, and which generates the notification or notifications to the taxpayer of the penalty or penalties he has incurred. A slightly different practice was adopted in relation to those whose returns were more than 12 months late, because of the possibility that enhanced penalties might be imposed, as we have mentioned.

16. Because HMRC cannot know before he does so whether a taxpayer will submit an income tax return on paper or online—there is no obligation on a taxpayer to notify HMRC in advance of the type of return he intends to submit, nor to file the same kind of return in successive years—no penalty is imposed on 1 November; but if no return of either type has been received before 1 February, the initial penalty of £100 is plainly triggered, and the computer produces a "Notice of penalty assessment", identified as SA326D, to the taxpayer. It seems from the F-tT's decision that so many such penalties are incurred that the notifications have to be produced in batches throughout February of each year. We shall deal with the terms of the notification, which are of some importance, later. Similarly, if the return has not been received before 1 May, the taxpayer has exposed himself to daily penalties but HMRC cannot know at that stage whether, as in Mr Donaldson's case, he has already incurred the maximum penalty of £900 (*ie* 90 days at £10 per day) and is now additionally liable to a six-month penalty or, as would be the position of a taxpayer who eventually makes an online return, the 90-day period has only just begun. It is not until 90 days after 30 April, *ie* 29 July, if the return is then still outstanding, that it can be known for certain that the taxpayer has incurred the maximum penalty of £900. If the return is submitted in the meantime the process by which the computer calculates the penalty, by reference to the type of return and the length of the delay, is triggered.

17. The F-tT were required to decide whether that process—of policy decision implemented entirely automatically by computer—meets the requirement of para 4(1)(b) that "HMRC decide that such a penalty should be payable". As we have said, Judge Mosedale decided that it did, while Mr Thomas took the view that it did not. For the reasons we have given that point is not before us, but the process we have described is relevant to the question on which HMRC do appeal, namely whether the requirement of para 4(1)(c), that in the case of daily penalties "HMRC give notice to P specifying the date from which the penalty is payable" is satisfied.

The F-tT's decision

18. The F-tT's decision sets out the nature of the communications sent to taxpayers such as Mr Donaldson. It was not suggested by Mr Donaldson in his notice of appeal that he had not received any of the documents sent to him by HMRC, and the F-tT proceeded on the assumption that he had indeed received them. At [9] and [12] the F-tT found that Mr Donaldson was sent, in April 2011, a blank paper return relating to the 2010-11 tax year, which required him to submit either that paper return, duly completed, by 31 October 2011 or instead to submit

an online return by 31 January 2012. It is recorded at [9] that the blank paper return warned of the risk of penalties, including daily penalties, if the return was late. HMRC did not, however, contend before the F-tT, and do not contend before us, that the warning was given in terms which satisfy para 4(1)(c).

19. The F-tT also found that on an unknown date between 18 December 2011 and 6 January 2012—and therefore before the last date for submitting an online return—Mr Donaldson (in common with many other taxpayers) was sent a reminder which also referred to the fact that a late return exposed the taxpayer to penalties. This document, referred to by the F-tT as "the SA Reminder", was intended to prompt those who had not yet done so to submit a return—by now only the submission of an online return would insulate the taxpayer from a penalty, a fact which the reminder highlighted. It also included the following paragraph:

> "If we still haven't received your online tax return by 30 April (31 January if you're filing a paper one) a £10 daily penalty will be charged every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days, starting from 1 February for paper tax returns or 1 May for online tax returns."

20. Mr Donaldson did not respond to the SA Reminder, and in February 2012 he was sent one of the SA326D notices to which we referred at para 16 above. It informed him that he had incurred the initial £100 penalty, and prompted him to file the return without further delay "to avoid further penalties". It added that:

> "If your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding.
>
> Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns."

21. HMRC do not argue that any further notice was sent to Mr Donaldson warning him of the risk that he would suffer penalties. He did, however, receive a document headed "Notice of penalty assessment", after his return had been filed, informing him that he had incurred additional penalties—additional, that is, to the £100 penalty already imposed—totalling £1,200, of which a breakdown was also provided: £900 in daily penalties, at the rate of "£10 a day for a maximum of 90 days" and a six-month penalty of £300. The period in respect of which the daily penalties had been imposed was not identified, and Mr Vallat accepted before us that for this reason the "Notice of penalty assessment" could not constitute notice within the meaning of sub-para 4(1)(c). We will need to say more about this notice later.

22. The F-tT began their examination of para 4(1)(c) by considering the proper approach to its interpretation. At [57] they said:

> "We think this legislation should be interpreted purposively. It seems obvious that the purpose of small, *daily* penalties was to encourage compliance by making it more expensive each day the taxpayer delays in filing his return. This is particularly the case when the legislation provides for the taxpayer to be given notice of the date from which the daily penalties would start. We also take into account that the penalty is significantly greater (£900 if charged for the full 90 days) than the first one-off penalty and larger than the minimum six month penalty (of £300), which again suggests that

> Parliament intended taxpayers to be given notice before the daily penalties started accruing so that they would be encouraged to file in order to avoid this very substantial liability." (original emphasis)

23. The F-tT went on to conclude, at [62], that the fact that sub-para (3) provides for notice to be given after the start of the period does not affect that conclusion because it is designed, as an explanatory note to the legislation makes clear, to cater for those cases, particularly of stamp duty land tax and inheritance tax, in which HMRC cannot know that a return is due at all until it is submitted; thus its operation is to be confined to cases of that kind, and it has no application to cases in which HMRC know that a return is due. The F-tT revisited this point at [79] to [84], as a factor which would arise if they were to decide that the SA326D (which, in the events which happened, was sent to Mr Donaldson after he had begun to incur daily penalties) was a valid notice, but the SA Reminder was not. However, as the point did not in fact arise because of their other conclusions they did not determine it.

24. The F-tT then considered whether either of the documents—the SA Reminder and the SA326D notice—satisfied para 4(1)(c), as they had interpreted it. At [64] they observed, as we have above, that when they were sent, HMRC still did not know (since Mr Donaldson had not filed a return at all) whether daily penalties would run from 1 February or 1 May, and they therefore mentioned both dates on the notices, attaching them respectively to paper and online returns. The F-tT recognised that there was no practical alternative to that course, in the light of Parliament's clearly expressed intention that those filing online should be given longer to do so than those submitting paper returns, and at [67] they accepted that, in principle, a notice specifying two dates in the alternative was capable of meeting the statutory requirement.

25. They then examined the two notices, though in reverse chronological order. The first of the two sentences within the SA326D notice which we have set out above, they found, did not satisfy para 4(1)(c) because it did not specify a starting date for the penalties. The second sentence, they said at [69],

> "by itself is not notice either because it uses the word 'can' rather than 'will'. It could simply be read as a warning: daily penalties could be so charged: it does not mean that they will be so charged."

26. The combination of the two sentences together, they found, still did not meet the statutory requirement. They were ambiguous, because of the use of different verbs with different meanings: "will" in the first, and "can" in the second. They were in the "small print" of the notice, and the recipient's attention was not adequately drawn to them. The combination of those factors disqualified the SA326D notice as sufficient notice for the purposes of para 4(1)(c), since "Parliament intended taxpayers to be given clear warning that they would be liable to daily penalties from a specified date" and that clear warning was not provided.

27. The F-tT's reasoning in respect of the SA Reminder was similar. The relevant passage was, again, in the "small print" of a document which dealt with several other matters, and by its use of the words "will" and "can" it did not make it clear whether penalties would be charged, or only could be charged. At [73] the F-tT said:

> "It fell short of being the clear and unambiguous statement we consider Parliament had in mind when it required 'notice' to be given to taxpayers before daily penalties could be charged."

28. The F-tT also found it significant (see [74]) that although para 4(1) requires only the giving of one notice, HMRC had sent two documents, and were themselves unclear which was the notice that para 4(1)(c) requires. They were, the F-tT concluded, warnings rather than notices within the meaning of the legislation, and were therefore insufficient. Mr Donaldson's appeal against the daily penalties was therefore allowed.

Submissions

29. Mr Vallat's core argument is that the F-tT's interpretation of the wording of the two documents is wrong. Their natural meaning, he says, is that penalties will be charged if the return has not been submitted by a date which the taxpayer can readily identify once he has decided whether he will submit a paper or online return. The text makes it clear that HMRC will charge daily penalties if the return has not been submitted by that date, and it does so unambiguously; the word "will" cannot be interpreted in any other way. The use of the word "can" in relation to the period for which the penalties may be imposed does not convert the "will" of the preceding sentence into "may" or in some other way qualify it; it merely reflects the fact that if the taxpayer does submit his return before the expiry of the 90 days, he will be charged a penalty calculated by reference only to those days for which his return remains outstanding. Read fairly and as a whole, the meaning of both of the documents is perfectly clear.

30. If that argument is accepted in respect of the SA Reminder, the F-tT's further conclusion that save in exceptional cases notice must be given in advance falls away, because the SA Reminder was sent in advance; but, says Mr Vallat, the conclusion is wrong in any event. There is nothing in the legislation which limits para 4(3) to exceptional cases or to particular types of tax, and there is no basis upon which the F-tT could import such a limitation. The words of the statute must be interpreted as they stand, and not by reference to extraneous material, even an explanatory note. The deterrent effect of a penalty is not dependent on the taxpayer's knowing in advance the precise date from which it will be payable; the mere fact that he knows that if he does not take certain action he will be exposed to a penalty is enough. The plain reason for the requirement that the taxpayer should know the date from which the penalties have been imposed is that he should be in a position to check whether the correct amount has been charged, and no more. For that purpose advance notification is unnecessary.

31. Miss Murray began with an analysis of the elaborate structure of para 4, which is to be contrasted with the simplicity of paras 3 and 5. Those paragraphs provide that if a taxpayer submits a return at a time later than the specified date he is liable to a penalty: there is no additional requirement. Paragraph 4, however, imports a three-stage process: there must first be a failure by the taxpayer to submit his return within the three months following the filing date (sub-para (a)), followed by a decision of HMRC to impose a penalty (sub-para (b)) and then notice to the taxpayer of the starting date for the daily penalties (sub-para (c)). That sequential structure has two consequences. First, default alone is not enough, because there must in addition be a decision followed by a notice. The second

consequence follows from the first: the F-tT was wrong to conclude that advance notice of the penalty was obligatory, since there can be no decision to impose a penalty until a default has occurred, and no notice specifying a starting date until that decision has been taken. What was sent out in advance therefore amounted to no more than a forewarning; the requirement of sub-para 4(1)(c), viewed against the background of the sequential process, is that a taxpayer must be told that he has become liable to a penalty. Informing him, in advance, of the penalty he will, or may, incur if he fails to submit his return by a certain date and HMRC then decide that a penalty is payable cannot satisfy the statutory requirement.

32. It follows, therefore, that irrespective of the correctness of the F-tT's conclusions about sub-para 4(1)(b), HMRC had failed to comply with sub-para 4(1)(c). The SA Reminder was sent to Mr Donaldson before there was a default within sub-para 4(1)(a), and it did not specify the date from which a penalty was payable (rather than might be payable) because it could not do so until there had been both a default and a decision. The form SA326D was sent to Mr Donaldson after he had, as it happens, begun to incur daily penalties, but it too did not represent compliance with sub-para 4(1)(c), since there was at that time no decision that a penalty was payable, and there could not be such a decision, nor could a starting date be determined, because HMRC did not know when they sent the form whether Mr Donaldson would eventually submit a paper or an online return.

33. For completeness we should add that Miss Murray made some observations about whether the use of a computer to implement a policy decision made in advance complies with the requirement of sub-para 4(1)(b), to which Mr Vallat responded while arguing that we should not determine the point. For the reasons we have given we shall not do so, and in what follows we have assumed, without such determination, that Judge Mosedale was correct on the point.

Discussion

34. It is plain from what we have already said that in order to succeed in this appeal HMRC must show (since no other document might serve the purpose) that either the SA Reminder or the form SA326D is a sufficient notice, satisfying the requirement of para 4(1)(c) that "HMRC give notice to P specifying the date from which the penalty is payable". It is apparent from the F-tT's decision and from the submissions we heard that a critical question is, when must, or may, HMRC serve the notice on P? If the F-tT were right, and the notice is intended to inform P that he is in danger of incurring daily penalties, it follows that it must ordinarily be served on him in advance; but if Miss Murray's argument is to be preferred, far from the notice representing a warning, it can be served only after P has defaulted and the decision has been taken to penalise him. If, instead, Mr Vallat is right, the timing is unimportant and the notice may be served before or after the default has occurred and, in the events which happened, one notice—the SA reminder—was sent to Mr Donaldson before he began to incur daily penalties and the other—the form SA326D—after he had begun to do so.

35. We consider that the realistic alternative constructions of para 4 are those suggested by Mr Vallat and by Miss Murray, and that at which the F-tT arrived is to be rejected. It cannot be right, we consider, that as a matter of construction of para 4, HMRC's power to back-date a notice under para 4(3) is available only in

exceptional circumstances. There is no principle of statutory construction which would permit the implication of such a qualification. The power is clearly available in some cases (see para 23 above) which we do not consider can be described as exceptional. Rather, the structure of the provision allows for a back-dated notice in all cases. But that is a power which HMRC do not ordinarily perceive the need to exercise since they see the SA Reminder, which is of course given in advance, as a notice within para 4.

36. In choosing between the rival approaches, we need to consider the impact, if any, of para 18(1) of Sch 55 since that provision appears to overlap to some extent with para 4(1). It is in these terms:

> "Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed."

37. Paragraph 18 applies to all penalties imposed under Sch 55. It lays down the formal process by which a penalty which has arisen (whether automatically or following a decision by HMRC) becomes a liability which HMRC is able to enforce. Without the assessment for which sub-para (a) provides, and the notification to P which sub-para (b) requires there would be no mechanism for recovery of the penalty. The combination of assessment and notification engages para 18(2), which provides that a penalty under Sch 55 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued. It can be seen therefore that para 18 focuses on a penalty which has arisen and the amount of which is known and, in cases where the penalty accrues over a period of time, that period is known.

38. We observe in passing that the sample notification of assessment produced to us does not appear to comply with para 18(1)(c), since it does not identify, as that provision requires, the period in respect of which the penalty has been assessed. We recognise that the sample may not be representative of the document actually sent to a typical taxpayer, but as Mr Vallat agreed (see para 21 above) that the notification sent to Mr Donaldson did not identify the period for which daily penalties had been imposed on him it seems to us that, even if he had been given sufficient notice for the purposes of para 4, and the assessment to daily penalties was consequently valid, the notification to him of the penalties he had incurred, including the fixed penalties, was not. This point is not, however, before us and we shall not address it further.

39. It follows from our analysis of the para 18(1)(c) notice that, if it is properly given, it fulfils the function which Mr Vallat suggested might be performed by the notice required by para 4(1)(c), that is to inform P of the amount of the penalty or penalties he has incurred and, so far as relevant, the periods in respect of which they have been incurred. We therefore reject his suggestion, as it seems to us improbable that the draftsman intended that there should be two notices performing the same function. We must therefore look for some other purpose for a para 4(1)(c) notice.

40. It seems to us that, both on Mr Vallat's approach and on Miss Murray's approach, one purpose, at least, of a para 4 notice is to give the taxpayer warning that, if he does not file his return, he will suffer the daily penalties. On Mr Vallat's approach, that notice can be given before any penalty is incurred so that the taxpayer is reminded of his obligation to file and informed of the further consequence (*ie* in addition to the £100 penalty) which *will* occur if he does not file before the end of the three-month period. He can take steps to avoid the whole penalty by filing his return. This is a sensible and coherent result.

41. On Miss Murray's approach, the taxpayer cannot be given such a notice before the end of the three-month period so that HMRC have to wait until the day after the end of that period before making their decision to impose daily penalties for as long, up to 90 days, as the default may continue. The taxpayer could be given an informal, non-statutory, warning before the three-month period has expired but HMRC do not have to give such a warning and to do so would not be without significant additional administrative cost (additional cost because a para 4 notice would then have to be served after the end of the three-month period). Further, para 4(3) allows, as a matter of construction and as we have explained, for back-dating in all cases and not only in exceptional cases. So, on Miss Murray's approach, HMRC have to wait until after the end of the three-month period before they can impose a penalty and make a decision, but when they do so, they have the power to impose the daily penalty starting on the day after the expiry of the three-month period.

42. We do not consider that Miss Murray's approach produces a sensible and coherent result. Even if that is putting it too high, we certainly consider that Mr Vallat's approach is preferable. While we accept that at first reading para 4(1) suggests a chronological sequence, closer examination shows that the draftsman has gone no further than to make the three requirements cumulative. In particular there is no express or implicit impediment to the making of the decision, or the giving of the notice, before the default has occurred, and we can see no reason why there should be any such impediment. True it is that, if the notice is given in advance, the penalty will run from a future date and will only arise if the taxpayer does not file within the three-month period. On Mr Vallat's approach, the notice is in that sense conditional. But equally a notice given after the end of the three-month period is conditional in the sense the daily penalties will accrue only so long as the taxpayer does not file his return; and, indeed, if the notice specifies a start date under para 4(3) later than the date on which the notice is given, the penalty may not arise at all. For this reason, we reject Miss Murray's approach.

43. A further reason for rejecting her approach is that it proceeds from the apparent assumption that the use in para 4(1)(b) of the phrase "HMRC decide that such a penalty should be payable" implies a discretion to be exercised in the individual case after default. We do not think it can have been within the contemplation of the draftsman that HMRC should be required to make a decision on a taxpayer-by-taxpayer basis, since he must have been aware that it would be impractical to exercise a discretion (meaning a discretion exercised in respect of each taxpayer individually, rather than in relation to defaulting taxpayers as a body) in that way. Rather, we think, this provision too contemplates what HMRC have in fact done, that is decide in advance that all taxpayers who default for more than three months should suffer daily penalties. In other words, what was

contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers who default for the requisite period, or none; and if that is so the purpose of the notice is to inform taxpayers who are in danger of incurring daily penalties that HMRC have decided to impose them. That conclusion is, in our judgment, the only one which explains why there is a difference between the automatic imposition of para 3, 5 and 6 penalties and the more elaborate imposition of para 4 penalties: the former are to be imposed in every case of default, the latter only if HMRC so decide.

44. In our view, therefore, the SA Reminder and the SA326D are, in principle, each capable of being a notice given under para 4 and neither is disqualified from that status simply because (as the SA Reminder always, and the SA326D sometimes, is) it was given before the end of the three-month period.

45. The F-tT held that neither the SA Reminder nor the SA326D were valid notices under para 4, because they considered that what the legislation demanded was clear notice of what would happen if the default continued for a sufficiently long time, whereas what was provided was no more than a warning of what might occur.

46. We disagree with the F-tT on this point, and accept Mr Vallat's argument that there is no real ambiguity in either document. Although there is some confusion in both the form SA326D and the SA Reminder between a single penalty calculated at £10 per day and individual penalties of £10 per day, we regard the phrases "a £10 daily penalty will be charged", used in the SA Reminder, and "we will charge you a penalty", used in the form SA326D, as unequivocal statements of HMRC's intention. We do not accept that a reasonable taxpayer, receiving such a notice, could read the statement that "Daily penalties can be charged for a maximum of 90 days" as meaning anything other than that there is a limit of 90 days on the period for which such penalties may be charged (or, more accurately, on the number of days over which the penalty might accumulate). We do not see how it could realistically be interpreted as an indication, despite HMRC's clear statement that they "will" charge such penalties, that in fact they merely might do so. In our judgment the F-tT's approach was excessively pedantic; on a fair reading there can be no real doubt about the message communicated.

47. We are also not persuaded that the message was in what the F-tT described as the "small print", as a matter of fact. The sample documents produced to us do not bear out that conclusion. But even if the F-tT were right as a matter of fact, we do not think it makes any difference to the outcome of this appeal. The requirement is that notice be given. It must, plainly, be legible; but we do not think any further requirement, such as minimum font size or particular position within the document, can be added judicially.

48. For completeness we should say that we agree with Mr Vallat and the F-tT that the use of a single notice with different starting dates for the imposition of a penalty, dependent on the taxpayer's choice whether to file his return online or on paper, does not offend para 4(1)(c). We do not consider that there is any ambiguity in the wording used.

Conclusions and disposition

49. We are satisfied that both of the relevant notices sent to Mr Donaldson, in the SA Reminder and the form SA326D, satisfied the requirements of para 4(1)(c) of Sch 55 to the Finance Act 2009. HMRC therefore succeed in this appeal, and the penalty of £900 imposed on Mr Donaldson pursuant to para 4 of Sch 55 is accordingly restored.

50. We add, in order to avoid any doubt, that we have assumed without deciding the point that Judge Mosedale was right to conclude that the penalties were properly imposed, and that what we have said about the para 18(1)(c) notice is a matter of observation rather than of decision.

Mr Justice Warren
Chamber President

Colin Bishopp
Upper Tribunal Judge

Release date 2 December 2014