[2019] UKUT 0406 (TCC)

Appeal number: UT/2018/0142
UT/2018/0144

INCOME TAX– Penalties for late filing – Whether notice to file had to be issued by identified "flesh and blood" officer – no – whether Tribunal has jurisdiction to consider validity of notice to file in penalty appeal – yes - whether procedural unfairness in FTT taking a point without inviting submissions – yes – appeal allowed and decision remade.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
NIGEL ROGERS **CRAIG SHAW**	**Respondents**

TRIBUNAL **MR JUSTICE ZACAROLI**
JUDGE JONATHAN RICHARDS

Sitting in public at The Rolls Building, Fetter Lane, London on 18 and 19 November 2019

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

Richard Vallat QC and Rebecca Murray instructed by Pinsent Masons for the Respondents

DECISION

1. The Respondents ("HMRC") appeal against two decisions of the First-tier Tribunal (Tax Chamber) (the "FTT"). The decision in Mr Rogers' appeal was reported at [2018] UKFTT 312 (TC); Mr Shaw's appeal was reported at [2018] UKFTT 381 (TC). Both appeals were concerned with penalties for the late filing of self-assessment returns. We record our gratitude to Mr Vallat QC, Ms Murray and Pinsent Masons for acting on a *pro bono* basis for the taxpayers before this Tribunal (the taxpayers having been unrepresented before the FTT).

2. The overall scheme of the legislation was not in dispute (although specific aspects of it were). Section 8 of the Taxes Management Act 1970 ("TMA") contains a power for taxpayers to be given notice requiring them to file a self-assessment return in the following terms:

> **8 Personal return**
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him **by an officer of the Board**—
>
> > (a) to make and deliver to the officer, …, a return containing such information as may reasonably be required in pursuance of the notice, and
> >
> > (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
> >
> > [emphasis added as the taxpayers argue that it is highly significant that the notice must be given "by an officer of the Board"]

3. Schedule 55 of the Finance Act 2009 ("Schedule 55") imposes penalties for the late filing of returns. Paragraph 1 of Schedule 55 provides, so far as relevant, as follows:

> **1 Penalty for failure to make returns etc**
>
> (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.

4. Therefore, the documents and returns whose late or non-submission are penalised are set out in the "Table". Row 1 of that Table specifies the following document or return in relation to income tax or capital gains tax:

> (a) Return under section 8(1)(a) of TMA 1970

5. It follows that a failure to submit a "return under section 8(1)(a) of TMA 1970" on time or at all is capable of attracting a penalty. So far as relevant to this appeal, the following penalties apply to such a failure:

> (1) Paragraph 3 of Schedule 55 imposes a fixed £100 penalty for missing the applicable filing deadline.
>
> (2) Paragraph 4 of Schedule 55 imposes daily penalties of £10 per day where the return is more than 3 months late. Certain conditions must be satisfied before those daily penalties can be imposed, and HMRC must also make a decision to impose them. Daily penalties cannot total more than £900.
>
> (3) Paragraph 5 of Schedule 55 imposes a further penalty if the return is more than 6 months late. That penalty is the greater of £300 and 5% of any liability to tax which would have been shown in the return in question.

6. Paragraph 23 of Schedule 55 provides for taxpayers to be excused liability for a penalty if they have a "reasonable excuse":

> **23 Reasonable excuse**
>
> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1)—
>
> (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
>
> (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

The decisions under appeal

7. HMRC charged both taxpayers a combination of the penalties described at [5] above and the taxpayers appealed to the FTT. Both appeals were categorised as "default paper" appeals in accordance with the FTT's rules of procedure (the "FTT Rules"). That meant that, since neither taxpayer nor HMRC requested an oral hearing, the FTT was entitled to, and did, dispose of both appeals without a hearing.

8. The decisions both followed a similar format and reached similar conclusions. We will therefore refer only to the FTT's decision in Mr Rogers' appeal (the "Decision"), making reference to the decision in Mr Shaw's appeal only to the extent that there is a relevant difference.

9. The FTT started by considering the applicable law. At [8(1)] it directed itself that:

> The burden of establishing that the appellant is prima facie liable to the penalties which must be assessed and notified in accordance with the law lies with HMRC. It is for them to prove each and every factual matter said to justify the imposition of the penalties on this particular taxpayer.

10. It then considered what particular factual matters HMRC were required to prove concluding, in the following passages, that HMRC needed to show that Mr Rogers had been required to submit a return in a notice given "by an officer of the Board" and that, if they could not demonstrate this, the penalties they had imposed would not be due:

> (7) When considering the validity of a penalty assessment and notification I need to consider whether a notice to file under section 8(1)(a) TMA 1970 has been lawfully given to the appellant by an officer of the Board (see *Barry Lennon v HMRC* [2018] UKFTT 0220) at [21-40].
>
> (8) If no valid notice to file has been lawfully given then there can be no failure to make or deliver a return etc "under" section 8(1)(a) of TMA 1970 as is required by Schedule 55.
>
> (9) If no valid notice to file has been lawfully given, then any return submitted by a taxpayer is a voluntary return. It has been held in the cases of *Wood (DJ Wood v HMRC* [2018] UKFTT 0074) and *Patel* (*Shiva Patel and Ushma Patel v HMRC* [2018] UKFTT 0185) that where a voluntary return has been submitted but there has been no notice to file given to a taxpayer, there is no valid notice under section 8(1)(a). And so penalties (*Wood*) and the opening of an enquiry and its closure by a closure notice (*Patel*) were not valid.

11. The FTT directed itself as to what it meant for a notice to be given "by an officer of the Board" as follows:

> (11) The phrase "given to him by an officer of the Board" means what it says. I would expect any such notice to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words there must be evidence that the named officer has signed the notice or it must be otherwise made clear that he is "giving" it.

12. The FTT gave further reasons for its conclusion that a specific HMRC officer needed to be named in the notice in the following passages of the Decision:

> (12) Under paragraph 4 of Schedule 55, daily penalties for late filing can only be imposed on a taxpayer if "HMRC" have decided to impose the penalty and given notice to a taxpayer specifying the date from which the penalty is [payable].
>
> (13) In *Donaldson* (*Donaldson v HMRC* [2016] EWCA Civ 761) HMRC's case was that there was no requirement for an officer of the Board to make that decision.

> (14) The provisions of paragraph 4 which identify "HMRC" are to be contrasted with those of section 100 TMA 1970 which permit an "officer of the Board" to make a penalty determination. This is a decision by a real "flesh and blood" officer, and not by HMRC as a collective body. Nor is it a computerised decision.
>
> (15) The provisions of section 8 TMA 1970 are more akin to section 100 TMA 1970 than to paragraph 4 of Schedule 55. In my view a particular officer must be identified in the notice as the person giving the notice to file under section 8 TMA 1970.

13. In the "Discussion" section of the Decision, the FTT applied its view of the law to the facts. At [9] it identified the following documents in the bundle as having some bearing on the question whether a notice to file had been given by an officer of the Board:

> (1) an extract from HMRC's computer records entitled "Return Summary" which purports to indicate that a notice to file for the tax year 2015/2016 was issued on 6 April 2016.
>
> (2) an extract from HMRC's computer records indicating that a notice to file was sent to the appellant at his address …; and
>
> (3) a generic copy of a notice to file comprising a letter (pro forma) dated 6 April 2016 but with no addressee or signature (or indeed signature block).

14. The FTT observed that HMRC had not even asserted in their Statement of Case that a notice under s8(1)(a) of TMA had been given by an officer of the Board and still less did the Statement of Case identify a specific officer who was said to have given the notice (see [10] and [10(2)]). It noted that the "generic" copy of the notice to file contained no signature block ([10(1)]) and that HMRC's computer records did not identify a specific officer said to have given the notice ([10(3)]). It also observed that the generic notice stated that "we are sending you this letter" and that, a penalty could be imposed if "we don't receive your tax return by the deadline" and, while it did not say so in terms, clearly considered that a notice given by an officer of the Board might be expected to use "I" rather than "we" in these contexts ([10(4)]. It contrasted the generic notice with other correspondence from HMRC also contained in the documents bundle that either contained a signature block ([10(5)]) used a formulation based on "I" rather than "we" ([10(6)] or which identified a specific HMRC officer ([10(7)].

15. On the basis of this evidence, the FTT decided that HMRC had not discharged their burden of proving that notice was given by an officer of the Board, and that this was sufficient to allow the appeal. Having reached that conclusion, it made no findings as to whether Mr Rogers had a "reasonable excuse" ([14]). Nor did it expressly, or by implication, make findings on the factual question whether any notice under s8 of TMA (whether valid or invalid) was actually given to Mr Rogers.

The grounds of appeal and the Respondents' Notices

HMRC's grounds of appeal

16. With permission of the FTT, HMRC appeal against both decisions on the following grounds:

> (1) The FTT had no jurisdiction, in the taxpayers' appeals against penalties imposed under Schedule 55, to consider whether a valid notice under s8 of TMA had been issued.
>
> (2) The FTT wrongly applied a literal interpretation of s8 of TMA by concluding that it required an officer to be identified when a notice to file under s8 was issued.
>
> (3) The FTT was wrong to conclude that s8(1) of TMA required a notice to file to be issued by a "flesh and blood" officer rather than a computer.
>
> (4) Even if it had the requisite jurisdiction, the FTT should not have considered whether a notice under s8 of TMA was issued, or validly issued, because that was not a pleaded ground of challenge in the taxpayers' Notices of Appeal and was not, therefore, in dispute between the parties. HMRC were denied procedural fairness by the FTT considering a matter that was not in dispute.

The Respondents' Notices and the applications to amend them

17. In their Responses to HMRC's appeals served under Rule 24 of the Upper Tribunal Rules (the "Respondents' Notices"), both taxpayers argued that the FTT's decisions should be upheld for the reasons that the FTT gave. They also argued that the taxpayers were both entitled to the defence of "reasonable excuse" set out in paragraph 23 of Schedule 55 and so were not liable to the penalties as charged.

18. In their skeleton arguments, the taxpayers renewed a prior application to amend their Respondents' Notices to include the following additional arguments:

> (1) That s8 of TMA only permits an officer of HMRC to give a notice to file for the statutory purpose of "establishing the amounts to which a person is chargeable to income tax and capital gains tax". HMRC did not issue their notices for the requisite purpose and so the notice was invalid, and penalties flowing from a failure to comply with it are not due.
>
> (2) The evidence before the FTT did not establish that either taxpayer was sent a notice to file (valid or invalid) for the 2015-16 tax year and that, since HMRC did not demonstrate that central fact, the penalties charged must necessarily be set aside.

Discussion of HMRC's Appeal

Ground 1 – Scope of the FTT's jurisdiction

19. The Upper Tribunal (Fancourt J and Judge Brannan) has recently considered the scope of the FTT's jurisdiction to consider the validity of notices under s8 of TMA in *HMRC v Goldsmith* [2019] UKUT 325 (TCC). In that case, the taxpayer wished to argue that a notice HMRC had given did not meet the requirements of s8 because it was not given "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". Therefore, the taxpayer argued, he could not be liable to a penalty under Schedule 55 for a failure to comply with that notice.

20. After conducting a detailed survey of authorities on the scope of the FTT's jurisdiction, the Upper Tribunal concluded that the FTT did have jurisdiction, in an appeal against Schedule 55 penalties, to decide that the penalties should be discharged because HMRC did not have the requisite "purpose" for issuing a notice under s8.

21. The essence of the Upper Tribunal's conclusion in *Goldsmith* on the question of jurisdiction was that:

> (1) Schedule 55 penalises a failure to deliver a "return under section 8(1)(a) of TMA 1970" with the result that:
>
> > … if the notice ("the notice to file") given to Mr Goldsmith by HMRC, requiring him to complete a self-assessment return, was not a valid notice then Mr Goldsmith was not required to deliver a return under section 8(1)(a) TMA. Consequently, Mr Goldsmith would not have failed to make or deliver a return "under section 8(1)(a) of TMA" – a precondition to the liability to a penalty under paragraphs 1 and 3 Schedule 55.
>
> (2) The Tribunal's statutory powers under Schedule 55 and s49D of TMA gave it power to determine "the matter in question". That necessarily extended to considering the question whether a valid notice under s8 of TMA had been given because:
>
> > In order to determine the matter in question, namely whether a penalty is payable, the FTT has to be able to determine whether a taxpayer has failed to make a return under section 8(1)(a) TMA. That depends on a number of factual considerations, including whether or not a notice to file was served at all and, if so, whether it was validly served.

22. The Upper Tribunal was reinforced in its conclusion by a consideration of the consequences that would flow if a taxpayer could not challenge the absence of the requisite s8 "purpose" in an appeal against penalties, concluding at [101] and [102]:

> 101. Given the absence of any statutory right to appeal the service of a section 8(1) TMA notice, we cannot see a proper basis for interpreting Schedule 55 as excluding from challenge the question whether a section 8(1) notice was validly served on the taxpayer. If, as HMRC accepts, it must prove that a notice was in fact served and time for compliance has

> expired, it follows that the taxpayer should be entitled to challenge the validity of the notice that gives rise to a penalty, including on the basis that it was not served for the prescribed statutory purpose. If not, the time for judicial review having by then expired, the taxpayer is effectively unable to appeal the penalty on the ground that no compliance with the purported notice was due. One would expect to see an unqualified right of appeal against the imposition of a penalty, absent some good reason in the statutory scheme for curtailing it.
>
> 102. Moreover, the consequence of HMRC's argument is that a taxpayer would have to start judicial review proceedings promptly after service of a notice to file, if minded to challenge the notice on any basis. That seems to us to be an improbable intention to impute to Parliament, given that the sums in issue will often (as here) be relatively small, the notice concerned only the individual taxpayer, and judicial review proceedings are relatively expensive as compared with an appeal to HMRC or the FTT. There is the additional problem that, in most cases, the time for issuing judicial review proceedings will have expired at or before the time at which the default in filing a tax return occurs.

23. An application of the Upper Tribunal's reasoning in *Goldsmith* would necessarily result in HMRC's Ground 1 being dismissed because a determination of whether notice under s8 was "given….by an officer of the Board" is an aspect of determining the "matter in question", namely whether the taxpayers have failed to submit timely returns in response to (valid) notices under s8. However, Ms Nathan QC urges us not to follow the reasoning in *Goldsmith* for two reasons. First, she argues that the Upper Tribunal's reasoning is plainly wrong, so that we are not obliged, as a tribunal of equal seniority, to follow it. Second, she argues that s8B of TMA (which was not referred to in *Goldsmith*) demonstrates that, reading the statutory code as a whole, Parliament could not have intended the FTT to have jurisdiction to determine the validity of a s8 notice in an appeal against a Schedule 55 penalty.

24. Ms Nathan QC deployed before us most of the arguments that she put before the Upper Tribunal in *Goldsmith* arguing, in essence, that by enquiring into the validity of the s8 notices, the FTT was trespassing into public law matters on which it had no jurisdiction. We are not, however, satisfied that the Upper Tribunal's decision in *Goldsmith* was wrong. Indeed, we find this to be an even clearer case than *Goldsmith*. In this appeal, the taxpayers are arguing that there is a fundamental problem with the s8 notice itself (namely that it was not given by an officer of HMRC). There is no question of any public law element in that question; it simply involves the question whether the notice was "given… by an officer of the Board" in the requisite statutory sense. We consider it to be clear that the FTT has power (for the reasons given in *Goldsmith*) to consider that alleged defect as part of its determination whether the taxpayers should be penalised for failing to comply with the requirements of that notice.

25. Section 8B of TMA, on which HMRC rely, gives HMRC power to withdraw a notice under s8 in the following terms, so far as material:

8B Withdrawal by HMRC of notice under section 8 or 8A

> (1) This section applies to a person who is given a notice under section 8 or 8A.
>
> (2) Before the end of the withdrawal period, HMRC may withdraw the notice (whether at the request of the person or otherwise).
>
> (3) …
>
> (4) If HMRC decide to withdraw the notice under section 8 or 8A they must do so by giving the person a notice under this section.
>
> …
>
> (8) See paragraph 17A of Schedule 55 to FA 2009 as to the cancellation of liability to a penalty under any paragraph of that Schedule by including provision in a notice under this section.

26. If HMRC exercise their power under s8B of TMA to withdraw a s8 notice, paragraph 17A of Schedule 55 provides that they may, but are not obliged to, cancel any penalty that has arisen under Schedule 55 as a consequence of a failure to comply with the notice prior to its withdrawal.

27. Section 8B of TMA, and paragraph 17A of Schedule 55, apply to individuals in relation to the 2012-13 and subsequent years of assessment. They would, therefore, have been relevant to that part of the proceedings in *Goldsmith* that related to the 2012-13 tax year, even though they would not have been in force in the 2011-12 tax year (which was also at issue in *Goldsmith*). Ms Nathan QC did not criticise the Upper Tribunal in *Goldsmith* for failing to refer to s8B or paragraph 17A, acknowledging that no arguments were before it as to their significance. However, she submitted that the provisions demonstrated that, when Parliament turned its mind to remedies available to a taxpayer dissatisfied with a notice under s8 of TMA, it decided that those remedies were limited to a right to ask HMRC to withdraw the notice (in exercise of its powers under s8B) and to ask HMRC to cancel any penalties that had arisen in the interim (in exercise of its powers under paragraph 17A of Schedule 55). That, in turn, she argued made the situation analogous to that considered in *Beadle v HMRC* [2019] UKUT 101 in the context of accelerated payment notices. Accordingly, Parliament's decision not to give a statutory right of appeal against a s8 notice, but instead to provide taxpayers with the more limited right to request HMRC to withdraw that notice, demonstrated by necessary implication that the FTT lacked jurisdiction to consider the validity of the notice in an appeal against penalties. Thus, she submitted, the Upper Tribunal in *Goldsmith* was wrong to conclude that Parliament must have intended the validity of s8 notices to be within the scope of issues to be determined in a penalty appeal.

28. Ms Nathan QC emphasised that HMRC are not arguing that, prior to the enactment of s8B, taxpayers were entitled to argue, in an appeal against a Schedule 55 penalty, that the underlying s8 notice was invalid, but that this right was lost with the enactment of s8B in relation to the 2012-13 and subsequent tax years. Rather, she submitted that s8B indicated Parliament's intentions at all relevant times. However, even with that explanation, we reject HMRC's submissions as to the significance of s8B. That provision was enacted simply to provide HMRC with a statutory mechanism for cancelling the effect of a s8 notice (and any penalties that have arisen in the interim) if, on reflection, they consider that a taxpayer should not have been asked to submit a tax

return. Section 8B is not analogous to the right to make representations in connection with partner payment notices contained in s222 of Finance Act 2014 that was considered in *Beadle*. First, s8B does not provide taxpayers with a specific right to "challenge" a decision to issue a s8 notice, or even a right to make representations on whether a s8 notice should be issued. Rather, s8B simply states that HMRC can decide to withdraw a s8 notice of their own motion or following a taxpayer's request. Second, the Upper Tribunal's conclusion in *Beadle* was influenced by an understanding of Parliament's purpose in enacting the Finance Act 2014 regime on "partner payment notices" (namely to deny taxpayers the timing advantages that could otherwise arise from the implementation of tax avoidance schemes) which excluded, "by necessary implication", such taxpayers' rights to challenge the validity of APNs in penalty proceedings. No similar necessary implication arises from Parliament's decision to give HMRC the power to withdraw s8 notices once issued.

29. Finally, HMRC draw attention to the specific wording of s8 of TMA and argue that the "purpose of establishing the amounts in which a person is chargeable to income tax" referred to in s8 could, as a matter of construction, refer not to HMRC's purpose in issuing a notice to file, but rather to the purpose to be served by the return that a taxpayer is required to make. We are not aware of that argument having been made in *Goldsmith*. However, it is not in our judgment relevant to the question of the scope of the FTT's jurisdiction to determine the validity of a s8 notice. Therefore, we do not consider this argument demonstrates that the Upper Tribunal in *Goldsmith* was wrong to conclude that it had jurisdiction to consider this issue.

30. We will not, therefore, depart from the conclusions or reasoning in *Goldsmith* either on the basis that it is "plainly wrong" or on the basis of the different arguments presented to us based on s8B of TMA. HMRC's first ground of appeal is accordingly dismissed.

HMRC's Grounds 2 and 3

31. We will deal with HMRC's Grounds 2 and 3 together as they both involve challenges to the FTT's conclusion that, for a notice to be given "by an officer of the Board", a named officer either has to sign the notice or it has to be made clear in some other way that a particular named officer was "giving" that notice.

32. In our judgment, properly construed, s8 does not impose a requirement that an officer of the Board is identified in the notice as the giver of the notice. Rather, it imposes a substantive requirement that the giving of a notice must have been under the authority of an officer of HMRC. Therefore, if a police constable, for example, purported to require a taxpayer to submit a tax return that would not be a lawful request under s8 (unless the police constable happened also to be an officer of HMRC). Instead, the requirement is that whoever requires the notice to be given, whether identified or not, has the status of an HMRC officer.

33. The FTT considered that s8(1)(a) of TMA requires a return to be delivered to "the officer", being the same officer who gives the s8 notice and relied on this conclusion as supporting its decision that the s8 notice had to be given by an identified "flesh and

blood" officer. However, the statutory scheme as a whole does not justify this approach. By virtue of s2 of the Commissioners for Revenue & Customs Act 2005 ("CRCA"), the "officers" of HMRC are those staff that the Commissioners of Revenue & Customs have appointed for the purposes of exercising the Commissioners' functions. Section 2(4) of CRCA provides that anything commenced by one officer can be continued by another. Moreover, s113(1A) of TMA provides that:

> (1A) Any notice or direction requiring any return to be made under the Taxes Acts to an inspector or other officer of the Board[1] may be issued or given in the name of that officer or, as the case may be in the name of the Board, by any officer of the Board, and so as to require the return to be made to the first-mentioned officer.

34. Against that background, s8 cannot be construed as requiring an identified officer to give a notice requiring a return to be given to that very officer.

35. The taxpayers invite us to draw a distinction between provisions such as s8 of TMA which permit "an officer of the Board" to give a notice and provisions such as paragraph 4(1) of Schedule 55 which permit daily penalties to be charged when "HMRC decide" that they should be. The difference in language indicates a clear distinction, the taxpayers argue, between a decision made by "HMRC" as an institution and decisions made by an individual named officer. We reject that argument, at least in the context of s8 of TMA, for essentially the same reasons we have already given. Section 5 of CRCA makes the Commissioners responsible for, among other matters, the collection of tax. Section 2 of CRCA permits the Commissioners to appoint officers of Revenue & Customs and those officers can exercise the functions of the Commissioners by virtue of s13 of CRCA. Section 4 of CRCA provides that "the Commissioners and the officers of Revenue & Customs may together be referred to as Her Majesty's Revenue & Customs". We therefore do not see the "clear distinction" for which the taxpayers argue. On the contrary, "the Commissioners" (or "HMRC") and the officers of Revenue & Customs are simply different manifestations of the persons required and authorised to exercise the statutory function of collecting tax.

36. It follows that we consider HMRC's Grounds 2 and 3 are made out. We will determine how the FTT's decisions should be dealt with in the light of these errors of law after considering HMRC's other grounds of appeal.

HMRC's Ground 4

37. Before determining HMRC's Ground 4, it is relevant to consider the extent to which either taxpayer had, prior to the FTT's determinations, suggested that any notice under s8 of TMA might be invalid on the basis that it was not given by an officer of the Board.

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[1] Defined by s118 of TMA as the "Commissioners of Inland Revenue" which, by s50 of CRCA is defined to include the "Commissioners of Revenue & Customs"

38. We were not shown any evidence of Mr Shaw raising the point prior to the FTT's determination and we therefore took it to be common ground that he did not.

39. Mr Rogers did not raise the issue in his Notice of Appeal to the FTT of 23 October 2017. HMRC served their Statement of Case on or around 30 November 2017. It appears likely that Mr Rogers had seen this by 12 December 2017 because on that date he wrote to the FTT to say that he was "now in receipt of the Tribunal's papers" and to complain that what he regarded as an important piece of evidence (a conversation with HMRC in early 2015) was "missing" (by which, we infer, he meant that the conversation was not dealt with in HMRC's Statement of Case or accompanying documentation). On 1 February 2018, Mr Rogers sent an email to the FTT which, as well as making other points in support of his appeal, contained the following section:

> Please find attached my final comments for the tribunal …
>
> Finally, I notice that Judge Richard Thomas, in a recent case last October, has recently stated that penalties should only be valid if issued by Humans, and not computer generated.
>
> HMRC decided not to appeal his decision.

40. The FTT forwarded Mr Rogers's email to HMRC on 28 February 2018.

41. We do not accept HMRC's characterisation of Mr Rogers' email as an attempt to amend his Grounds of Appeal without permission. Rule 26(3) of the FTT Rules permits a taxpayer, in a default paper case, to serve a reply to HMRC's Statement of Case within 30 days of the date on which HMRC send it to the taxpayer. Rule 26(3) permits that the reply may both respond to HMRC's Statement of Case and provide any further information relevant to the case. Since, as we have observed, it appears as though Mr Rogers received HMRC's Statement of Case on or around 30 November 2017, it is more accurate to characterise his email of 12 December 2017 as a reply and his email of 28 February 2018 as a (late) amendment to that reply.

42. It is, however, the case that Mr Rogers did not have the FTT's permission to amend his reply. Nevertheless, having received a copy of his email of 28 February 2018, there is no suggestion that HMRC applied to the FTT to submit that the email should be disregarded because it was late. In the circumstances, we have concluded that, by conduct, all parties acknowledged that the contents of that email were before the FTT. There was a degree of informality in that approach that would not have been appropriate in a more complicated case. However, the FTT's overriding objective in Rule 2 of the FTT Rules enjoins the avoiding of "unnecessary formality" and, in the context of a default paper case involving modest penalties, we would regard that approach as appropriate.

43. The parties were agreed that the decision of Judge Richard Thomas to which Mr Rogers was referring was *Khan Properties v HMRC* [2017] UKFTT 830. That appeal was concerned with penalties imposed on a company under Schedule 18 of Finance Act 1998. The applicable statutory provision was s100 of TMA which provided that "an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty…" Judge Thomas concluded that the penalties at

issue in that appeal were issued by a computer, and not by a "human being" and so did not comply with s100. However, he said at [54]:

> 54. I should also make it clear that in any case what I say is limited to the position as it applies to the penalty in paragraph 17 Schedule 18 FA 1998. In particular it should not be read as applying to any of the penalties in Schedules 55 and 56 FA 2009.

44. We therefore do not consider that Mr Rogers's email of 28 February 2018 was raising the argument that he had received no valid notice under s8 of TMA. At most his email was raising an argument that the penalty assessment he had received was invalid. We acknowledge that Mr Rogers was not professionally represented. However, any litigant, whether professionally represented or not, should expect to make their case clearly. That will not necessarily involve the use of technical or legal language but whatever language is used, it should be sufficient to identify the precise point that is made so that the other party can respond to it as necessary and the FTT can determine it. There is a material difference between an argument that a penalty assessment is invalid and an argument that the original notice triggering the requirement to deliver a return was invalid.

45. It follows, therefore, that in determining that any notice under s8 of TMA was not valid, the FTT was deciding the appeals on a basis for which neither taxpayer had argued and against which HMRC had been given no opportunity to respond (or to provide evidence).

46. The taxpayers argue the FTT's conduct was not procedurally unfair as HMRC (as an institution) were aware of decisions of the FTT such as *Khan Properties* calling into question the validity of HMRC notices and assessments that were "issued by computer". They go as far as arguing that, being aware of such decisions, HMRC had a positive duty, in appeals by litigants in person, to draw them to the attention of the FTT and that, having failed to do so, they could scarcely complain when the FTT identified the point itself. No authority was given for such a broad proposition. Indeed in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, the Supreme Court noted that, while a court might make allowances for litigants in person in case management decisions or during hearings, such litigants are not subject to a lower standard of compliance with rules. The Supreme Court's decision is inconsistent with HMRC having a positive duty to assist litigants in person to make their own case against HMRC decisions.

47. Nor do we accept the taxpayers' submission that, since HMRC were aware of FTT decisions in which it was held that documents issued by HMRC "by computer" were invalid, they must have known that the validity of the s8 issues was a live issue in the appeals of Mr Rogers and Mr Shaw. If correct, that would mean that HMRC have a duty to assume that any point that could conceivably be taken by a litigant in person is actually taken. That proposition is just as broad, and no more supported by authority, than the one we set out at [46] above and we reject it for similar reasons.

48. We therefore conclude that it was procedurally unfair for the FTT to determine that the s8 notices were invalid without first giving HMRC the opportunity to respond, or

to provide evidence addressing the FTT's concerns. Conscious that the FTT determines large numbers of "default paper" penalty appeals, we give the following guidance to the FTT on how to address any future concerns that it has on the validity of s8 notices.

49. Paragraph [101] of *Goldsmith* records HMRC's acceptance (which in our view is correct) that, in order to impose a penalty for late filing of a tax return under Schedule 55, HMRC must prove that a notice under s8 was in fact served. Before us, HMRC seemed less ready to accept this point, but we consider it follows from the following passage of the judgment of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC):

> 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

50. It follows that, if HMRC fail to provide <u>any evidence at all</u> to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice.

51. Where HMRC have given <u>some</u> evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems <u>record</u> a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was <u>actually</u> sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice[2], the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was <u>actually</u> sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so.

[2] Mr Edwards did not dispute receiving a s8 notice before the FTT, but he did in proceedings before the Upper Tribunal.

52. Where HMRC have adduced some evidence that a s8 notice was served, they do not need to anticipate every conceivable challenge that a taxpayer might make to the validity of such a notice and produce evidence to rebut all such potential arguments in advance. Such a requirement would be unworkable and disproportionate. Rather, where HMRC have given some evidence that a s8 notice was served, and there is no suggestion from the taxpayer that such notices are invalid, HMRC are entitled to proceed on the basis that no challenge is being made to the validity of those notices. If the FTT identifies its own concerns on the validity of a s8 notice, the proper course is for the FTT to write to the parties, before releasing its decision, to explain the nature of those concerns and to invite the parties to make submissions on the point and, if they wish, to apply for permission to adduce further evidence as necessary.

Remaking the FTT's decisions in the light of the Respondents' Notices

53. It follows from our analysis of HMRC's appeal that the FTT's decisions contain errors of law. In those circumstances, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that:

> (1) We may, but need not, set aside the decisions of the FTT; and
>
> (2) If we do set aside the decisions, we must either:
>
> > (a) remit the cases to the FTT with directions for reconsideration or
> >
> > (b) re-make the decisions.

54. Since the errors of law are material to the decisions, we will set them aside. We will then remake those decisions in the light of the points made in the Respondents' Notices and, in doing so, will consider the taxpayers' applications to amend.

Whether, applying the right test, s8 notices were given by an officer of the Board

55. In directions made on 3 September 2019, the Tribunal gave HMRC permission to adduce witness evidence to assist the Tribunal to remake the FTT's decisions if it was minded to do so. HMRC duly submitted witness statements of four HMRC officers dealing with the "end to end process" by which s8 notices were issued. The taxpayers did not challenge any of that evidence.

56. The witness statement of Officer Michelle McClure in particular demonstrated that a team consisting of HMRC officers (the "Operational Excellence Business Delivery SA team") formulates, and keeps updated, criteria for deciding which taxpayers are to be required to submit tax returns. Having formulated those criteria, HMRC's computers perform an automated scan of their database to identify taxpayers who meet the criteria. A small team of HMRC officers then manually checks a small sample of 200 cases (essentially to check that those cases meet the criteria as a high level check of the automated scan). The witness statements of Officer Elisa Simmonds and Officer Martin Hodge explain that HMRC themselves send notices to file in digital form and that HMRC have outsourced the function of sending out notices in hard copy form to a third party provider called "Communisis".

57. We agree with the taxpayers that HMRC's evidence does not establish that a specific, identified HMRC officer took the decision to send s8 notices to them. However, as we have explained in our discussion of HMRC's Grounds 3 and 4, the statute does not require a specific officer to be identified. The taxpayers also argued that HMRC's evidence did not even demonstrate that HMRC officers generally had authorised the giving of s8 notices (since the actual selection exercise was performed by computer and hard copy notices were physically despatched by Communisis). We reject those submissions. HMRC officers decided on applicable criteria and taxpayers meeting those criteria received s8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified. Nor does it matter that Communisis physically sent out hard copy s8 notices. The legislation does not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a s8 notice leaving the implementation of that decision to administrative staff and contractors.

58. We remake the FTT's decisions so as to conclude that s8 notices were given to both Mr Rogers and Mr Shaw by officers of the Board.

Whether HMRC gave any s8 notices at all

59. As we have observed, the FTT made no finding as to whether notices under s8 of TMA were given, confining itself to a conclusion that any notice given was not valid. The taxpayers have applied to amend their Respondents' Notices so as to include an argument that HMRC did not give either of them any notice under s8 of TMA (valid or otherwise).

60. Given that we have decided to remake the FTT's decisions, it is necessary for us to determine whether HMRC gave the taxpayers notices under s8 since, as we have observed at [49] above, that is a matter on which HMRC bear the burden of proof. Therefore, the question for us is not whether we should give the taxpayers permission to make an argument that no s8 notice was given but rather whether, in remaking the FTT's decisions, we are satisfied that the evidence before the FTT was sufficient to establish that s8 notices were given.

61. The position in Mr Shaw's appeal is straightforward. HMRC asserted in their Statement of Case that Mr Shaw was given an (electronic) notice to file on 6 April 2016. They produced as evidence at "Folio 1" of the bundle before the FTT an extract from their computer records recording the issue of that notice. On its own, that evidence was relatively weak. However, Mr Shaw did not, in his Notice of Appeal to the FTT, dispute having received a s8 notice. We were not shown any reply to HMRC's Statement of Case challenging HMRC's assertion that a notice was given (or indeed any correspondence from Mr Shaw to this effect). Mr Shaw endeavoured to submit a tax return which also tends to suggest that he realised he had been required to do so. The combined weight of HMRC's evidence is sufficient to discharge their burden of proving a s8 notice was given.

62. In Mr Rogers's appeal, HMRC said in their Statement of Case that a s8 notice requiring a tax return for 2015-16 was sent by post to Mr Rogers at his home address on or around 6 April 2016. They also exhibited at "Folio 1" a copy of their computer records.

63. It was somewhat less clear whether Mr Rogers was disputing having received a s8 notice in the FTT proceedings. His Notice of Appeal to the FTT made no such assertion. We were shown HMRC's notes of telephone calls with Mr Rogers in which he complained about not having been sent a paper return. However, that is not inconsistent with a s8 notice being given since, having received a s8 notice, a taxpayer is entitled to choose whether to file online or to send a paper return.

64. We were shown a note of a telephone call that took place on 18 May 2017 that read as follows:

> TP TEL IN RE LFP ADVISED TO FILE AND APPEAL TP ADVISED NOT AWARE HE HAD TO FILE ADVISED SA ENDED END OF 2015

65. This is difficult to interpret but it appears as though, having received a late filing penalty (the "LFP" referred to in the note), Mr Rogers telephoned HMRC to say that he did not know he had to file a return as he thought he had been taken out of the self-assessment regime at the end of 2015. That could certainly be read as an assertion (to HMRC) that he had not been given a s8 notice. However, on 15 May 2017, Mr Rogers called HMRC with the note of conversation recording him as saying that he had "never recd rtn he has had a gateway code in the past however he was not prepared to submit online" (suggesting that his complaint was that HMRC failed to send him a return, rather than failing to send a notice). That impression is reinforced in Mr Rogers's email to the FTT of 12 December 2017 which included the following passage:

> The most important piece of evidence for my case is missing. The phone call I made in early 2015 to tell H M Revenue and Customs that I had retired is not logged. Also my request to "please send me Paper Returns" to avoid my having to use the computer, which I am not proficient with…

66. Arguments put by litigants in person will inevitably not be crafted with the precision of lawyers. However, even taking that into account, we do not consider that Mr Rogers was putting in issue the question whether he had ever received a s8 notice. Therefore, the quality of HMRC's evidence on this issue should be assessed on the basis that their assertion and evidence that a s8 notice was given was not being challenged. In our judgment, given that context, the evidence from their computer was sufficient to discharge their burden of proof on this issue.

67. Accordingly, we are satisfied on a balance of probabilities that both Mr Rogers and Mr Shaw were given notices under s8 of TMA on or around 6 April 2016 (the date appearing in HMRC's evidence).

Reasonable excuse

68. Both taxpayers raised the question of "reasonable excuse" before the FTT, although having decided that the s8 notices were invalid, the FTT made no findings on this issue. Both taxpayers have, in their Respondents' Notices, argued that they had a reasonable excuse with the result that the FTT was correct to set aside their penalties (albeit for reasons different from those the FTT gave). The taxpayers therefore need no further permission in order to make arguments on reasonable excuse. Indeed, we observe that paragraph 23 of Schedule 55 specifically permits taxpayers to seek to satisfy either the FTT or the Upper Tribunal of the existence of a reasonable excuse.

69. In evaluating the taxpayers' submissions on reasonable excuse, we will follow the approach that the Upper Tribunal set out in *Perrin* as follows:

> 81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

70. It was common ground that the fourth step identified above means that, if a reasonable excuse ceases, but the taxpayer fails to submit the tax return within a reasonable time after the excuse ceases, the taxpayer loses the benefit of the reasonable excuse defence in relation to all Schedule 55 penalties imposed in connection with that return.

71. Applying that approach first to Mr Shaw's appeal, we conclude that the relevant proven facts for the purposes of steps one and two are as follows:

> (1) Prior to the 2015-16 tax year, Mr Shaw had filed his tax returns online every year since 2005-06. However, 2015-16 was the first year in which he

received digital communications from HMRC, as opposed to letters in the post (see uncontradicted statements made in HMRC's Statement of Case).

(2) As we have found at [67], on or around 6 April 2016, HMRC gave Mr Shaw a notice to file a return for the 2015-16 tax year via his online account.

(3) His online return for 2015-16 was due no later than 31 January 2017. Since he was about to go on an extended holiday to Australia, he decided to submit his tax return well in advance of the deadline, in December 2016. He filled in all the information in the return, but failed to complete the final submission stage and so filed no return by the deadline. Completing the final submission stage would require Mr Shaw to confirm that the information provided was correct and, as a final security check, to re-enter his username and password. Once the submission stage was complete, a message would appear on screen saying that the return was successfully completed (see unchallenged statements as to the process for online submission made in HMRC's Statement of Case). Mr Shaw acknowledged in correspondence with HMRC that "It could have been an oversight by me that I did not check properly that my submission had been sent. I had issues with my PC at the time of submission and used my daughter's PC to send it…"

(4) Mr Shaw's tax return when finally submitted (see below) indicated a liability to Class 2 NICs for 2015-16 of £145.60. On 2 January 2017, he made an online payment of £3.69 to HMRC. On 4 January 2017, he made an online payment of £146. He received emails from "WorldPay" confirming that those payments had been made successfully.

(5) HMRC's system automatically generated emails to Mr Shaw warning that the return had not been submitted. In addition, after the due date for submission of the return had passed, HMRC sent emails to Mr Shaw telling him to check his online account on 16 February 2017 (as a £100 penalty had been added to his account), on 8 June 2017 (as a notice of daily penalties had been added to that account), on 6 July 2017 (as a daily penalty reminder had been added) and on 15 August 2017 (as £900 daily penalties and a £300 6-month penalty had been added). All of these emails went into Mr Shaw's "spam" email folder. Mr Shaw did not open those emails and they were automatically deleted 30 days after receipt (see his unchallenged statements to this effect in his Notice of Appeal to the FTT).

(6) On 30 October 2017, HMRC's debt management team sent Mr Shaw a letter to his home address informing him of the outstanding penalties. Mr Shaw received this in "early November" and filed his return for 2015-16 online on 6 or 7 November 2017. As noted, above, HMRC's automatic calculation of tax and NIC due on the basis of the information in the return was just £145.60 of Class 2 NIC.

72. Mr Shaw argues that his "reasonable excuse" is that having made a genuine and reasonable attempt to file his return in advance of the deadline, he was unaware that the attempt had failed and, since emails from HMRC went into his "spam" folder, could not reasonably have been expected to become aware of that failure until early

November 2017 when he received the letter from HMRC's debt management team. He submitted his return in short order after receiving that letter.

73. Applying step three in *Perrin*, we are not satisfied that the proven facts set out at [71] establish a reasonable excuse. By 2015-16, Mr Shaw had been filing online for 10 years and should have realised that he had not completed the online filing process. As an experienced online filer of tax returns, the absence of any confirmation from HMRC that the return had been submitted should have caused him to check whether it had indeed been submitted. Having made a voluntary choice to receive notices from HMRC digitally, he should have ensured that he was in a position to receive notices that HMRC sent him, by checking his "spam" settings.

74. It was submitted to us that, having received emails from WorldPay confirming payments of sums online in early 2017, it was reasonable for Mr Shaw to believe his return had been submitted. We do not accept that submission. While we acknowledge that the amount of £146 that Mr Shaw paid HMRC online is similar to his final Class 2 NIC liability of £145.60, we were not shown any statement by Mr Shaw to the effect that he paid HMRC £146 thinking it to be the liability established by a (successfully submitted) tax return.

75. Turning to Mr Rogers, the relevant proven facts are as follows:

> (1) Mr Rogers retired in 2015. Some time in 2015, he called HMRC, informed them of his retirement and asked that future tax returns be sent to him in paper form as he did not want to file online. (Unchallenged statement in Mr Rogers's Notice of Appeal).
>
> (2) On or around 6 April 2016, he was given a notice under s8 (see our finding at [67] above).
>
> (3) On 12 May 2016, Mr Rogers received a letter from HMRC regarding his tax credit position for 2015-16. That letter told Mr Rogers that, in his claim for tax credits, he had not mentioned additional sources of income which HMRC knew he and his wife to have. For example, he had not mentioned his state pension of £6,748 per year or his wife's state pension of £5,875 per year. The letter informed Mr Rogers that, if he didn't reply to their letter by 11 June 2016, they would calculate his entitlement to tax credits by reference to the information that they had on file (and not the lower figures which Mr Rogers had provided to them).
>
> (4) Mr Rogers filed no return by the applicable deadline of 31 January 2017. HMRC asserted in their Statement of Case that they sent Mr Rogers a £100 penalty notice on or around 7 February 2017 and exhibited evidence from their computer system recording that penalty as issued. Mr Rogers has not denied receiving that penalty notice and we conclude he did receive it and should have realised from that document that HMRC regarded a tax return as outstanding.
>
> (5) In May 2017, Mr Rogers received a letter from HMRC's debt management team which, we infer, related to the £100 penalty. Between

May 2017 and July 2017, Mr Rogers made a number of telephone calls to HMRC. As we have concluded at [65] above, those calls were focused on Mr Rogers' complaint that HMRC had not sent him a paper tax return and his attempts to get HMRC to send him (by post) a return he could fill in. Some confusion was caused by the fact that, in this period, Mr Rogers was clearly doing some work on his return for 2016-17 and he submitted that return (in paper form) in August 2017.

(6) On 11 August 2017, Mr Rogers was issued with further penalties under paragraphs 4 and 5 of Schedule 55.

(7) On 23 October 2017, Mr Rogers filed his return for 2015-16 online.

76. The reasonable excuse advanced by Mr Rogers is that, having received the letter relating to his tax credit position, on 12 May 2016, it was reasonable for him to assume that no tax return was needed. In oral submissions at the hearing, it was suggested more generally that Mr Rogers was confused by HMRC's correspondence. (We note that in his email of 12 December 2017, Mr Rogers said that he had "early dementia" which meant that he could not concentrate for long on paperwork that HMRC sent him. No medical evidence of dementia was given and Counsel did not suggest that dementia was the foundation of Mr Rogers's reasonable excuse.)

77. We do not consider that Mr Rogers is entitled to the defence of "reasonable excuse". HMRC's letter of 12 May 2016 dealt only with his tax credit position. It did not mention his income tax liability at all and still less did it suggest (even implicitly) that there was no need for Mr Rogers to file a tax return for 2015-16. No reasonable excuse has been shown for Mr Rogers's failure to file a return on time.

78. In any event, by February 2017 (when Mr Rogers received the first £100 penalty) or, at the very latest by May 2017 when, having received a letter from HMRC's debt management team Mr Rogers made telephone contact with HMRC, it would have been clear to a reasonable person that the tax return for 2015-16 was outstanding. Even if, contrary to our conclusion, there had initially been a reasonable excuse, it ceased at that point. Yet Mr Rogers did not submit his return until 23 October 2017. We regard that delay as unreasonable with the result that, as outlined at [70] the defence of "reasonable excuse" is not available.

79. Our conclusion, therefore, is that neither Mr Rogers nor Mr Shaw is entitled to the defence of "reasonable excuse".

HMRC's purpose in issuing s8 notices

80. In their skeleton arguments, both taxpayers apply for permission to amend their Respondents' Notices so as to argue that HMRC did not issue s8 notices for the requisite statutory purpose of "establishing the amounts in which a person is chargeable to income tax and capital gains tax…".

81. Mr Rogers makes that argument on the basis that, having sent the letter relating to his tax credit position on 12 May 2016, HMRC demonstrated that they were aware of the full extent of his income and, moreover, that he had no incremental liability to tax

over and above the amount of any tax deducted at source. Therefore, any s8 notice issued could not be for the purpose of either determining or fixing a tax liability so, even taking into account the wider sense of "establishing" used in *Goldsmith*, the notice was not issued for the appropriate purpose.

82. We reject that argument. HMRC's letter of 12 May 2016 did not indicate that they were aware of the full extent of Mr Rogers' income or tax liability. The letter said only that they were aware of other sources of income that Mr Rogers had not mentioned to them in connection with his claim for tax credits. That letter did not mention the extent of Mr Rogers' income tax liability at all.

83. The taxpayers' skeleton argument raised this point in the context of Mr Shaw as well. However, he has advanced no explanation of why HMRC's s8 notice was not issued for the requisite purpose. Ms Murray accepted that this made Mr Shaw's argument "more difficult". We would go further: without such an explanation, his argument necessarily fails.

84. Therefore, the taxpayers' arguments in this regard have no force. In any event, since they were not raised before the FTT, and since no good reason was advanced why these arguments were not advanced in the Respondents' Notice settled by counsel on 30 July 2018, it is too late for those points to be made now and we would, therefore, have refused permission in any event for the taxpayers to amend their Respondents' Notice.

Disposition

85. HMRC's appeal is allowed on Grounds 2, 3 and 4 and dismissed on Ground 1. We remake the FTT's decision so that both Mr Rogers and Mr Shaw are liable to the penalties in the amounts imposed by HMRC.

MR JUSTICE ZACAROLI

JUDGE JONATHAN RICHARDS

RELEASE DATE: 30 December 2019