



TC05564

Appeal number: intentionally blank

INCOME TAX – penalties and surcharges – whether mental illness a reasonable excuse for long-term non-compliance – yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

The appellant

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public in London

The appellant in person

Ms S McMullen, HMRC officer, for the Respondents

DECISION

The history of the appellant's dispute with HMRC

5 1. By January 2007, HMRC were concerned that the appellant was in receipt of
income which was subject to tax, yet had neither completed a tax return nor notified
HMRC of her liability to tax. On 17 January 2007, HMRC sent the appellant notice
to complete five tax returns for the tax years 01/02 – 05/06 inclusive, and required
10 them to be submitted on 24 April 2007. I find, for reasons given below at §76 that
thereafter, she was sent annual notification of her liability to complete tax returns for
the subsequent years.

2. The appellant did not submit tax returns by the due date, which led to HMRC
both assessing late filing penalties and making determinations for those years based
on an estimate of her tax liability.

15 3. HMRC attempted to enforce payment of the determinations. This led the
appellant to file tax returns for 02/03, 03/04, 04/05 on 15 October 2008. The effect of
that was to displace the determinations for those years.

4. HMRC opened enquiries into these returns, as they were entitled to do. The
appellant did not provide the information HMRC requested, so HMRC closed the
20 enquiries on 21 December 2010 making assessments which displaced the figures in
the appellant's returns. The assessments were for approximately £800 per year, and
the three of them totalled £2,463.30

5. Earlier, on 21 July 2010, HMRC issued determinations for tax years 2005/6,
2006/7, 2007/8 and 2008/9 totalling £29,000. The appellant said that she submitted
25 the returns for these years, so that the determinations for those later years were also
displaced. HMRC did not accept that they had received any tax returns from her other
than the three for 02/03-04/05 inclusive (and those submitted in 2016 referred to in
§12 below).

6. HMRC also issued various penalties, set out in the attached schedule, and
30 assessed interest.

7. HMRC attempted to enforce the entire debt against the appellant in the County
Court. Those proceedings were stayed to enable the appellant to lodge an application
for permission to appeal out of time in this Tribunal, which she did in early 2014.

The first hearing in this Tribunal

35 8. There was a hearing before Judge Nolan in late 2014 the outcome of which was
an unless order giving the appellant 3 months to state whether she intended to pursue
her application to be able to appeal against the three assessments out of time. Nothing
was said about her appeal against penalties and surcharges.

The second hearing in this Tribunal

9. She did not comply with Judge Nowlan's order and that led to her application to appeal the three assessments being struck out. The hearing before me resulted in their reinstatement, but subject to a further unless order. At the same time, I struck out her appeal against the determinations, interest and court fees on the grounds that the Tribunal had no jurisdiction to consider them.

10. Subsequent to that hearing, and after many extensions, but with the appellant still not producing any evidence that the assessments overcharged her to tax, the application for permission to appeal them out of time was eventually struck out for non-compliance.

11. Her appeal against the penalties and surcharges remained live and that led to the third hearing (being the second before me.)

The 2016 returns

12. Both Judge Nowlan and I had explained to her in the hearings before us and in our written decisions that it was not possible to appeal against HMRC determinations: these had to be superseded by self assessments. Moreover, it was too late for the appellant to submit self-assessments to displace the determinations, but she could apply to HMRC for special relief and the sooner she did so the better. It is not a matter over which this Tribunal has jurisdiction: nevertheless, from what was said in appellant's third hearing, I understand, but without making any finding of fact as the issue is not relevant to this appeal, that the appellant submitted to HMRC in 2016 the tax returns covering the years in question, and that HMRC have rejected her claim for special relief because the new tax returns were not supported by evidence that they were correct.

This hearing

13. The only issues for this Tribunal to resolve in this hearing were, as explained to the parties before the hearing:

- (a) The appellant's application for her appeals against the penalties and surcharges (listed in the schedule at the end of this decision) to be admitted out of time;
- (b) If admitted out of time, the determination of her appeal against the penalties and surcharges.

The appellant

14. I will refer to the appellant throughout this document simply as 'the appellant' without referring to her by her name. I explain why below.

15. I had the benefit of various medical reports from psychiatrists submitted by the appellant during the course of her appeal, and from hearing the appellant in the two hearings in front of me. I find, and HMRC does not suggest otherwise, that the

appellant has been diagnosed with, and has, a severe and enduring mental illness, namely paranoid schizophrenia.

Anonymity

16. Understandably, the appellant does not want her diagnosis to be public
5 knowledge. Yet full decisions of this Tribunal are usually published to give other
taxpayers an understanding of how the Tribunal applies the law. I could not make this
decision without referring to her diagnosis because it is relevant to what I have to
decide. While it is in the interests of justice being seen to be done that decisions are
not ordinarily anonymised, in this case I considered that the appellant's illness was an
10 exceptional circumstance. This was because mental illness should not be a bar to
challenging HMRC decisions, so it is right to grant anonymization of this decision, so
other litigants with mental illness are not discouraged from appealing.

The appellant as a witness

17. The appellant appeared able to follow the proceedings and indeed was able to
15 participate in them and effectively cross-examine HMRC's witness. I would not
necessarily have realised that she had a mental illness were it not for the medical
reports and for her repeated claim, for which I could see no basis, that there was a
conspiracy to prevent her sorting out her financial affairs.

18. The medical reports were largely consistent with each other. They said she had
20 fixed and delusional beliefs and would not remember information that was
inconsistent with her fixed beliefs. She believed that there was a conspiracy against
her and that many people and organisations were involved, and was unable to take on
board any information given to her contrary to her delusional beliefs.

19. The truth of her diagnosis was apparent in the hearing. One example was her
25 fixed belief that at some stage HMRC had entirely deleted all her records: yet it was
obvious that HMRC still had her records and produced copies of some of them to the
Tribunal. Another example was when I asked her whether she thought it was her
condition which made it difficult for her to get help from tax advisers: her answer
was that her illness might contribute, but the real reason was that there was some sort
30 of conspiracy to prevent her sorting out her affairs.

20. The appellant was confident but inconsistent in her evidence on dates, giving
me two different years in which she was diagnosed. As mentioned below, certain
evidence was not credible. Combined with the undisputed diagnosis of paranoid and
delusional beliefs, it meant I was wary of accepting what she said and could not
35 consider her a reliable witness.

The appellant's capability to manage her affairs

21. Ms McMullen did not dispute the appellant's diagnosis. What HMRC did not
accept was that it left the appellant incapable of managing her affairs, submitting tax

returns on time, and/or instructing a representative to act on her behalf to do these things.

22. It was clear to me in both hearings that the appellant was disorganised, arriving very late, having driven into central London without having sorted out her car parking ticket, and with a large pile of papers, many of which were not relevant, and omitting some which she said she had, which may have been relevant.

23. She was also involved in numerous other court hearings, and had produced some documents about this in her various applications for postponement. In the hearing she indicated she was disputing a claim for about £20,000 in car parking charges. The impression I gained was of chaotic financial affairs.

24. She produced a large pile of police reports covering the last six years and informed me that there were more at home covering earlier years. This was consistent with her evidence, which I accept, she was diagnosed with her mental illness after the police had persuaded her to seek psychiatric help due to the high number of complaints she had made to them. Many of the reports related to complaints made by the appellant that persons had stolen her identity and many were complaints made by her against her tenants. The quantity and nature of these reports seemed consistent with her diagnosis of paranoid schizophrenia: they indicated that even if she owned properties, as it appears she did, she did not really appear to be capable of managing them as a business. Tenants are unlikely to stay tenants if reported to the police by their landlord.

25. It was not in dispute that she had filed three tax returns in 2008 for the years 02/03-04/05 (§3). HMRC say this proves she could have submitted the later years too. (The appellant claims that she did but I do not accept that evidence as explained below.) Later, she defended county court proceedings brought against her by HMRC, she obtained missing bank statements from her bank, filed an appeal with this Tribunal, has managed that appeal and met deadlines on some occasions (even if only to ask for an extension of time), has appeared at three tribunal hearings and has now in 2016 filed further tax returns, albeit very late.

26. My view is that none of these factors shows that the appellant is capable of rationally dealing with her affairs. So far as the tax returns were concerned, they were nearly blank and HMRC did not accept that they were correct. While superficially she may appear capable, other evidence (such as that in §24) shows she is not. My conclusion is that while on one level she lets property, and understood the need to file tax returns and deal with legal proceedings, on another level her mental illness robbed her of her capacity to deal with these matters rationally.

Ability to instruct advisers

27. I have case managed this file since the appellant's second appearance in this Tribunal. Over the eighteen months since then, I have been aware of the appellant's many attempts to obtain representation: she has had a succession of advisers, or

would-be advisers all of whom have decided not to continue to represent her, largely it seems to me, because they could not get acceptable instructions from her.

28. HMRC did not accept this and indicated that it was because the appellant did not pay the advisers but that is not consistent with the evidence. For example, there was a charity providing tax advice to those without funds whose letter to the appellant indicated that they would not meet with her unless she was accompanied by a member of her family; and there was an accountant who resigned after he found it impossible to get acceptable instructions, and so it continued.

29. I find that her illness was such that she could not give instructions acceptable to professional persons. While many clearly wished to help her, there was an underlying irrationality in what she said making it very difficult for someone to act on her behalf. I was not, as I have said, able to accept much of what she said and an adviser would have a similar problem.

30. In my view her mental health meant both that she needed professional tax advice while at the same time it precluded her from obtaining it.

31. My conclusion was that I found that the appellant was not capable of properly managing her affairs, submitting correct tax returns on time, and/or instructing a representative to act on her behalf to do these things, and this was because of her severe and enduring mental illness.

20 **Other evidence - HMRC's witness**

32. The appellant had maintained consistently for some years that she had submitted her later tax returns for 05/06-08/09 to Mr Norde, an HMRC debt management officer working in a local HMRC office, not long after she submitted the three (for 02/03-04/05) which HMRC agree that they received. Mr Norde attended the hearing to give evidence. He was questioned at length by the appellant and in my view remained throughout consistent and credible in his evidence: where his recollection differed from that of the appellant's, I preferred Mr Norde's evidence. For instance, the appellant maintained that Mr Norde had helped her complete the returns everyone agreed she had submitted (those for 02/03-04/05). While he accepted he had met her, had written to her asking for outstanding returns, and would have accepted any completed returns from her, he did not accept he had helped her complete them because, as he said, he was not qualified to do so and it was not his job to do so. It would have been another officer who helped. The appellant remained adamant it was Mr Norde. But I prefer Mr Norde's evidence, and this was yet another reason why I considered it unwise to rely on what the appellant said, however confidently stated.

The facts

Onset of mental illness

33. One of the most pressing questions but on which I had very little evidence was the date from which the appellant's mental health deteriorated. The appellant's
5 evidence was unreliable: at one point she told me it was 2008 and another 2010.

34. Fortunately, the file contained a detailed report dated 6 April 2014 provided by the appellant with an application for postponement made in August 2014. It was missing from the Tribunal bundle, as so many documents were, due to HMRC's decision to pare down the bundle to only 'relevant' documents due to, I was told, the
10 very large number of documents in this case. While I can understand that the weight of large bundles make them difficult to carry and costly to post, HMRC should not take a unilateral decision to omit documents from a bundle. They should in all cases apply for permission from the Tribunal to do so, and they failed to do that here.

35. So while this document was not referred to in the hearing, HMRC were aware
15 of it, although they chose to omit it, with many other papers, from the bundle. I consider that I am entitled to rely on it.

36. The significance of this report is that it appears to be the only one ever provided to the Tribunal which gives the Tribunal an indication of when a psychiatrist thought that the appellant's illness commenced and that was 'about seven years' before April
20 2014. This view was given by a doctor who had treated her for the previous 2.5 years. I find therefore that it is more likely than not that her mental illness commenced at the start of 2007.

Absence from UK

37. Although the appellant's evidence was very vague on dates, it was clear she had
25 spent extended periods abroad, mostly in Dubai and Egypt, during the period at issue in this appeal. I think these could fairly be described as holidays as she told me that she had not worked while abroad, although she had considered emigrating and obtaining a job, and she returned back to the UK 'when the money ran out'.

The application for permission to make a late appeal

38. Section 31A of the Taxes Management Act 1970 ('TMA') permits taxpayers to
30 appeal but the appeal must be made within 30 days after the date the notice of the penalty or surcharge is given to the taxpayer. In this case the decisions which the appellant wishes to appeal are all dated on or before August 2011 and therefore all the appeals are too late. However, Section 49 of the Taxes Management Act 1970
35 ('TMA') permits in one of two situations a taxpayer to lodge a late appeal.

39. The first circumstance in which a taxpayer is permitted to lodge an appeal late is where HMRC are satisfied that there is a reasonable excuse for not giving the notice in time and that the appeal was lodged without unreasonable delay after the excuse

ceased (s 49(5) and (6) TMA). HMRC were not satisfied the appellant had a reasonable excuse so the appellant was unable to rely on these provisions.

40. The second circumstance in which an appellant can lodge an appeal late is where this Tribunal 'gives permission' (s 49(2)). There are no fetters given in the legislation on the exercise of this discretion by the Tribunal: it is well established that the Tribunal must take all relevant matters into account (*Data Select* [2012] UKUT 187 (TCC)) when exercising its discretion. While this means that the Tribunal might, in appropriate circumstances, grant leave to appeal out of time to a taxpayer without a reasonable excuse, it also means that the Tribunal will take all matters into account and so a taxpayer with a reasonable excuse will not necessarily be granted permission to appeal out of time.

What factors are relevant here?

41. The Tribunal should take account of all relevant factors when deciding such an application. The relevant factors include:

- (1) Rules are not enacted to be routinely disregarded. Leave to appeal out of time will only be granted exceptionally.
- (2) HMRC's entitlement to finality in a taxpayer's affairs.
- (3) Chance of success
- (4) The reason for the long delay.

20 *Importance of adherence to time-limits and the need for finality*

42. While this can be briefly stated, it is nevertheless very important that time-limits are observed and so leave to appeal out of time should therefore only be exceptionally granted. HMRC, and therefore the public in general, have the right to finality in tax affairs: where a taxpayer does not observe the time limits, that should ordinarily be the end of any dispute over liability.

43. HMRC's case was that the appellant had ignored many communications from HMRC, including her obligation to file returns, pay the estimated assessments and so on. She had only really responded once enforcement proceedings were commenced against her in the County Court. Those proceedings were then stayed to enable her to appeal to this Tribunal for leave to appeal the various assessments out of time.

44. I agree with HMRC that the importance of adherence to time-limits and the public interest in finality are against the appellant being granted leave to appeal out of time.

Chances of success

45. The appellant's appeal against the penalties appeared to be on two grounds:

- (a) she did not accept she had received the various notifications from HMRC to submit the tax returns and pay tax;
- (b) that she had a reasonable excuse.

46. The appellant would only have to succeed on one or other of these grounds to
5 succeed with her appeal against the penalties and surcharges. Putting aside whether
she received the notifications from HMRC, I considered that she had a good arguable
case on reasonable excuse because of her mental health condition and this factor was
in favour of permission being given.

Reason for the delay

10 47. In so far as the appellant put a case on this, she relied on her mental health as
the reason for her delay. HMRC did not accept her mental health caused the delay:
they considered, as I have said, that she had proved that she was capable of meeting
(some) tribunal deadlines and she had certainly responded to County Court
15 enforcement proceedings: she was capable, in their view, of submitting tax returns on
time.

48. I consider that there were two issues concerning her mental health:

- (a) Was it her mental health illness that caused her to make the late appeal against the various penalties and surcharges;
- (b) And if it was, was that a good reason for making a late appeal?

20 I will deal with each matter in turn.

49. Cause of the late appeal?: HMRC did not accept that the appellant's mental illness was the cause of her failure to deal with the imposition of the various surcharges and penalties, as they did not accept she was incapable of dealing with her affairs.

25 50. Even on the appellant's case, it seemed possible that at least some of her failures to respond to communications from HMRC arose from her long periods of absence from the UK, meaning that she may not have received some communications from HMRC promptly. It was also clear that she had moved house on at least one occasion.

30 51. However, I am satisfied for the reasons given above that her mental illness left her incapable of dealing with her affairs properly. To the extent that she failed to receive post or only became aware of it after the appeal period had expired, the ultimate cause of her absence and/or failure to provide an up to date address to HMRC was her mental illness. I consider her continuing failure to lodge appeals up
35 until the point that she did was at root caused by her mental ill-health.

52. While it is true that she was proved capable of lodging an appeal with HMRC and then the Tribunal despite her mental illness, I find that her mental illness was the cause of it being lodged so late.

53. Can mental illness be a good reason for making a late appeal? This question seems to raise the same issues as the question of whether a taxpayer has a 'reasonable excuse'. It is a question that is answered by looking at what the appellant actually did measured objectively against what a reasonable person in the same circumstances as the appellant, intending to comply with the law, would have done.

54. I consider this below and conclude that the appellant did have a reasonable excuse for her defaults from the start of 2007 onwards; I consider her mental illness clearly persisted at the date she lodged the appeal.

Conclusion

55. While I am conscious that time limits are intended to be obeyed and HMRC is entitled to finality if a taxpayer has not appealed within the given time limit, nevertheless the rules themselves recognise that it will be appropriate in some cases to extend time. While the extension sought in this case is for a number of years, and therefore requires some exceptional justification, I consider that there are exceptional circumstances in this case: the appellant is hampered by a severe and enduring mental illness which has since the start of 2007 prevented her, and still prevents her, dealing rationally with her affairs.

56. I grant her permission to bring her appeals against the various penalties and surcharges listed below out of time, and so I proceed to deal with her appeal.

The appeal against the various penalties and surcharges

57. As I have said the appellant's first ground of appeal was that she did not accept that any of the penalties and surcharges were correctly levied. No one had any copies of them: Ms McMullen could not tell me categorically under which legislation they were imposed other than that (as I accept) it was much more likely than not that they were imposed under the correct legislation on the date on which they were issued.

58. HMRC's case was that they possessed no copies of them as their computer systems did not keep copies of standard form letters, as they were issued to millions of taxpayers and it was not necessary. I don't agree with this policy as in this day and age records can be held electronically, but I do accept that HMRC in fact do not keep copies of computer generated penalty assessments. I also accept (as it is more likely than not) that their computer records (produced to the Tribunal) accurately record the dates on which the penalties and surcharges were imposed and the amounts of them.

59. The appellant's case was that she had no copies of the penalties and surcharges and had never had copies of them. I consider her case that she never received them below. It was also her case that she was not liable to the penalties and surcharges as she had filed her tax returns for all years for which she had been required to file.

60. It is for HMRC to prove:

- (1) The appellant was in default;

(2) The penalties and surcharges had been correctly raised and served on the appellant.

Firstly, I deal with the second of these questions, which is whether the penalties and surcharges were correctly served on the appellant.

5 *Did HMRC serve the penalty and surcharge notices etc on the appellant at the correct address?*

61. Daily penalties: I find these were imposed on the appellant en bloc on 15 November 2007 for years 01/02 to 05/06 and would have been imposed under s 93(3) TMA.

10 62. Late filing penalties: These would have been imposed under s 93 TMA. They were imposed in batches. The ‘first’ penalty, being the one imposed under s 93(1) TMA for the tax return merely being after the due date was imposed on 22 May 2007 in respect of years 02/03, 03/04 and 04/05; and the ‘second’ penalty, being the one imposed under s 93(4) when the tax return has still not been filed more than six
15 months after the due date was imposed on 7 October 2008 in respect of the same three years.

63. Year 05/06 was treated differently; the first penalty was imposed on 8 May 2007 and the second on 20 November 2007. Similarly, for the next four late tax returns, the first and second penalties were imposed at around the ‘normal’ times by
20 which I mean the times at which HMRC’s computer would automatically generate penalties to any taxpayer who had submitted their tax return late.

64. This made sense as when the appellant was given notice to complete tax returns, those for the earlier years 01/02-04/05 were well past the ‘normal’ dates for completion: the later years were not, which is why the penalties were imposed at the
25 ‘normal’ dates.

65. Late payment surcharges: Six surcharges were imposed, two each for the years 05/06, 06/07 and 07/08, all on 11 August 2010. The ‘first’ surcharge for each year was for payment not being made on the due date and the ‘second’ surcharge for each year was for payment being more than six months after the due date. I find they would
30 have been imposed under s 59C(2) and (3) TMA.

66. Service on the appellant: The appellant indicated in the hearing that she did not accept that she had received many of the communications from HMRC which HMRC said that they had sent to her. It certainly seemed likely to me, from what she said, that she may not have received communications from HMRC when she was in Dubai
35 and Egypt, and any which were sent to a property of hers of which she had moved out and let to tenants.

67. But the law may deem the appellant to receive letters even if they have not actually come into her hands. S 7 of the Interpretation Act 1978 provides:

S 7 References to service by post

5 Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

68. This must be read with s 115 TMA which provides as follows:

S115 Delivery and service of documents

10 (1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

15 (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if so given, sent, served or delivered to or on any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, may be so served addressed to that person –

(a) at his usual or last known place of residence, or his place of business or employment, or

20

69. The effect of this is that the notices to the appellant were validly served on her if HMRC can show that they were sent to her actual address *or* her last known place of residence.

25 70. HMRC's 'SA Notes' at around 2007 show that there were some frequent adjustments to HMRC's electronic record of her address, but this was some kind of computer error as the actual address (including post code) shown in HMRC's record did not change and the appellant accepts it was her address at the time.

30 71. For later periods, the appellant's evidence was vague about what was her actual address: in any event, I was not satisfied that HMRC had ever failed to update her SA account with any address she notified to them. I was satisfied that, as the SA notes disclosed that HMRC had a system to record taxpayer's last notified address, it was more likely than not that HMRC had sent correspondence to the appellant's last known place of residence. Taking into account the appellant's rather chaotic approach to her affairs, it seemed much more likely to me than not that if post had gone astray it was because the appellant had not notified her current address to HMRC.

72. So I consider all the notifications for the penalties and surcharges at issue in this appeal were correctly served on the appellant by post even though in practice she may well not have received them all. She is deemed to have received them.

40 73. I move on to consider the first requirement mentioned at §60 above and that is whether the HMRC have shown that the appellant was in default such that the penalties and surcharges were properly levied.

Penalties for late filing - did the appellant fail to file her tax returns when they were due?

74. The question whether the appellant failed to file her tax returns when due falls into two part parts:

- 5 (a) Did she receive notification from HMRC to file her returns?
 (b) If so, did she fail to file them?

75. Did the appellant receive notice to file? A taxpayer is only liable to file a tax return if HMRC notify that taxpayer that they are required to do so: s 8(1) TMA. HMRC produced to me a copy of their letter of 17 January 2007 in which they
10 demanded that the appellant provide tax returns for years 01/02 to 05/06. For the reasons given at §§66-72 above, I find it was validly served on the appellant.

76. So far as the later years were concerned, those tax years post-dated the letter of 17 January 2007. HMRC had no copies of the letters sent to the appellant demanding her to complete these tax returns. That is to be expected as HMRC, as I have said,
15 keep no copies of standard letters, and once HMRC had required tax returns for some years, they would be expected to automatically require them for future years. The letters are automated and sent to millions of taxpayers. I accept it is more likely than not that these letters were sent, and sent to the latest address HMRC held for the appellant and I find they were validly served.

20 77. Did the appellant fail to file her tax returns? It is HMRC's case that, until very recently, the appellant only filed tax returns for three years 02/03-04/05 and she filed those on 15 October 2008.

78. The appellant's case is that shortly after that date, she filed her other tax returns. In fact, the documents show that this was not the first time she claimed she had filed
25 returns which had been lost by HMRC.

79. Apart from those filed in 2016, I am unable to accept her claim that she filed any returns other than those three filed on 15 October 2008 for the three years 02/03-04/05. Her evidence, as I have already said, was generally unreliable. Her evidence on this specifically was not credible: she claimed to have handed in the returns for the
30 years 05/06-09/10 shortly after those for the years 02/03-04/05: this was impossible as the last two related to the years 08/09 and 09/10 which had not even ended at that point. Then she claimed to have posted the last two in 2010 and that she had proof of posting of this, but the proof of posting related to October 2008.

80. Moreover, I accept Mr Norde's evidence that, so far as he knew, she had not
35 filed any other returns and HMRC had processes in place to ensure returns were not lost. I find it was unlikely any returns would be lost and extremely unlikely that it would happen to the same taxpayer on more than one occasion. I do not accept that appellant's allegation that there was a conspiracy in HMRC to prevent her sorting out her tax affairs.

81. I find that until this year, the appellant had only filed three tax returns and those were for years 02/03-04/05 filed on 15 October 2008 and that was 18 months late.

82. Conclusion: I find both the daily penalties and late filing penalties, all raised under s 93 TMA were correctly imposed. The remaining question for penalties appeal was whether she had a reasonable excuse for failing to file them on time. I deal with that below at §92 onwards.

Surcharges for non-payment of the determinations: was the appellant in default?

83. HMRC may only raise determinations where tax returns have not been filed: s 28C TMA. I have concluded above that the relevant tax returns (2005/6, 2006/7, and 2007/08) were not filed until at the earliest 2016. While tax returns will supersede a determination, that is only if they are filed within the relevant time limit: s 28C(5). The current time limit is 3 years from the filing date; but the older time limits were more generous. But even under the older more generous time-limits of five years, 2016 was well out of time, the last of the filing dates being 31 January 2009.

84. I find the determinations were not superseded by self-assessment returns.

85. Additionally, liability depends on HMRC proving:

- (a) The determinations were validly raised
- (b) The tax was unpaid.

86. Dealing with the second point first, HMRC's case is that the tax is unpaid and the appellant has never disputed that (on the contrary she has disputed her liability to pay it). I find it was unpaid and remains unpaid.

87. But were the determinations validly raised? I find for reasons given above that they were correctly served on the appellant. But were they in time? The current rule is that they must be made within 3 years of the filing date (s 28C(5)(a)) but the older time-limit was five years. I find, relying on HMRC's records, which I consider more likely than not to be correct, that the determinations were raised on 21 July 2010.

88. The filing date for the 05/06 return was 24 April 2007, for 06/07 it was 31 January 2008, and for 07/08 it was 31 January 2009. The last two were clearly within the permitted three years (ie 31 January 2008 was less than three years before 21 July 2010). But 24 April 2007, the filing date for the 05/06 return, was more than three years before 21 July 2010 yet the time limit dropped to 3 years on 1 April 2010.

89. There were transitional provisions which delayed the coming into force of this legislation (Art 10 of SI 2009/403 delayed the commencement date to 1 April 2012) but only if the taxpayer had not been given notice to file within 12 months of the end of the year of assessment. The 05/06 year of assessment ended on 5 April 2006 and the appellant was given notice to file in January 2007. So these transitional rules did not apply: the time limit change had effect on 1 April 2010. So I find that the determination for 05/06 was out of time.

Conclusion

90. HMRC have therefore not satisfied me that the surcharges relating to the 05/06 determination were validly served, and the appeal against those surcharges must be allowed. I am satisfied that the other determinations were valid.

5 91. I am satisfied that the surcharges for 06/07 and 07/08 were correctly raised by HMRC and the appellant was in default. The remaining question is whether she had a reasonable excuse for her default.

Reasonable excuse

10 92. It seems to me that there is a reasonable excuse where a taxpayer acts as a reasonable person, mindful of their obligation to file tax returns and pay their tax liability, might act. Much the same has recently been said in the Upper Tribunal in the case of *ETB (2014) Ltd* [2016] UKUT 424 (TCC):

15 [14]The Guide refers HMRC officers to the Compliance Handbook which contains further guidance on reasonable excuse in the context of late payment of tax due to a shortage of funds. The Handbook states, at CH555800, that a person may have a reasonable excuse for failing to pay on time when the failure resulted from a shortage of funds which:

20 "... occurred despite the person exercising reasonable foresight and due diligence, having given proper regard to their tax due date obligations."

It seems to us that the statement in the Compliance Handbook at CH555800 is much better...

25 93. It is well established that physical illness can be a reasonable excuse, at least while unexpected. If the ill-health is or becomes long-term, the reasonable taxpayer, having due regard to his obligations, is expected to make arrangements for someone to act on his behalf in complying with his tax obligations during his incapacity.

30 94. Mental ill-health necessarily implies some irrationality in behaviour which sits oddly with the expression 'reasonable excuse' but nevertheless it is clear mental health, as well as physical incapacity, can be a reasonable excuse,: see the Upper Tribunal decision in *Ms A Z* [2011] UKUT B17(TCC):

[1]. Ms AZ appeals against the decision of the First Tier Tribunal (the Tribunal). That decision related to appeals against:

35 (i) fixed penalties for late filing (section 93 Taxes Management Act 1970) for the years 2002/03 and 2007/08 and

(ii) surcharges on unpaid tax (section 59C TMA) for the years 2002/03, 2003/04, 2005/6, 2006/07, 2007/08 and 2008/09.

40 [15] It is clear from the evidence that Ms AZ's mental health has been severely impaired as a result of the robbery and the assault. We accept the consultant psychiatrist's evidence that her mental state has caused

5 and will continue to cause “avoidance symptoms” and these cover areas such as her dealings with the Inland Revenue. We know from our own experience that mental health problems cause widespread compliance difficulties for both taxpayers and HMRC. ... Those factors demonstrate to our satisfaction that [the appellant’s] mental state at the time of each compliance default and each non-payment of tax was such as to provide her with a reasonable excuse for purposes of sections 59(8)(a) and 50C(9)(a).

10 95. It seems to me that, unlike with physical ill-health, the taxpayer with long-term mental health problems cannot necessarily be expected to make arrangements for someone else to act on their behalf during their incapacity: the mental health problems might make that difficult or even impossible. Indeed, in *Ms A Z* the Upper Tribunal accepted mental ill-health provided a reasonable excuse for a number of years. Much the same was said in *Freiberger* [2014] UKFTT (TC):

15 “Furthermore, we do not accept the submission, made in HMRC’s statement of case, that a person suffering from a lengthy period of ill-health ought to have sought help from HMRC or engaged professional help. Much will depend on the circumstances, but in the context of mental health, we are inclined to accept that the consequences of
20 suffering from severe depression may well prevent a person from acting in such a way as to sort out their tax affairs.”

25 96. Was the appellant’s mental health the cause of her failure to meet her tax obligations? I have found as a fact that her schizophrenia commenced in early 2007; I consider that it was the cause of her failure to file the tax returns by the due date of 24 April 2007 and was the cause of her subsequent failures to meet her tax obligations. I found she was incapable of doing it rationally herself or employing someone to do it on her behalf, and that has remained the position. It therefore follows that I find she had a reasonable excuse for entire period of default.

97. I allow the appeal against all the surcharges and penalties.

30 98. However, while I have found that the appellant’s mental health amounts to a continuing reasonable excuse for her failure to deal properly with her tax affairs, it has no relevance to her liability to file returns and pay tax. All persons, with or without illness, must pay their tax and will incur interest charges if it is paid late. Moreover, the appellant’s inability to properly address her filing obligations has
35 resulted in estimated liabilities being imposed on her, which are payable irrespective of her ill-health. They may, or may not, exceed what would have been her liability had she been able to file prompt and correct tax returns. This position is highly unsatisfactory for both HMRC and the appellant. I do not see an end to the problem as HMRC clearly have reasonable grounds for believing the appellant has untaxed
40 income, yet the appellant appears unable to keep proper records or file proper returns, or obtain help from persons who could do this on her behalf.

99. I note that if and when HMRC move to enforce payment of the outstanding tax by the appellant, although it is beyond the jurisdiction of this Tribunal, they should bear in mind that the determination in respect of year 05/06 was out of time.

100. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 20 DECEMBER 2016

Schedule of penalties and surcharges under appeal

- 5 The appellant appealed the matters which HMRC had attempted to enforce in the County Court. No other penalties or surcharges, which had been levied, were under appeal with this Tribunal. Those that were under appeal comprised as follows:

penalty	Tax year	Amount - £	Date of penalty
Daily penalties	01/02	420	15/11/7
1 st fixed late filing penalty	02/03	100	7/10/8
2 nd fixed late filing penalty	02/03	100	7/10/8
Daily penalties	02/03	420	15/11/7
1 st fixed late filing penalty	03/04	100	22/5/7
2 nd fixed late filing penalty	03/04	100	7/10/8
Daily penalties	03/04	420	15/11/7
1 st fixed late filing penalty	04/05	100	22/05/7
2 nd fixed late filing penalty	04/05	100	7/10/8
Daily penalties	04/05	420	15/11/7
1 st fixed late filing penalty	05/06	100	8/5/7
2 nd fixed late filing penalty	05/06	100	20/11/7
Daily penalties	05/06	420	15/11/7
1 st surcharge for late payment	05/06	300	11/08/10
2 nd surcharge for late payment	05/06	300	11/08/10
1 st fixed late filing penalty	06/07	100	19/2/8
2 nd fixed late filing penalty	06/07	100	5/8/8
1 st surcharge for late payment	06/07	350	11/08/10
2 nd surcharge for late payment	06/07	350	11/08/10
1 st fixed late filing penalty	07/08	100	16/6/9
2 nd fixed late filing penalty	07/08	100	4/8/9
1 st surcharge for late payment	07/08	400	11/08/10
2 nd surcharge for late payment	07/08	400	11/08/10
1 st fixed late filing penalty	08/09	100	16/2/10
2 nd fixed late filing penalty	08/09	100	3/8/10
1 st fixed late filing penalty	09/10	100	15/2/11
2 nd fixed late filing penalty	09/10	100	2/8/11