



[2022] UKFTT 37 (TC)

**TC 08389**

*INCOME TAX - Penalties - Application to strike out appeal on basis of want of jurisdiction -  
Application to strike out appeal on basis of no reasonable prospects - Applications dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal numbers: TC/2017/08323  
TC/2018/07829  
TC/2019/01139  
TC/2019/04314**

**BETWEEN**

**ROBERT CRAWFORD**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**

**Sitting on 13 September 2021, with (due to Covid-19 restrictions) a hearing on the Tribunal's Cloud Video Platform, which, having been notified on the Tribunal's website, is treated as a hearing in public**

**Mr Andrew Thornhill QC for the Appellant**

**Mr Philip Simpson QC, instructed by the Office of the Advocate General, for the Respondents**

## DECISION

1. This is my decision following a case management hearing convened principally to deal with HMRC's application to strike out these appeals.
2. I dealt with an earlier case management hearing, face-to-face, in Edinburgh, on 18 November 2019. On that occasion, I gave directions which contemplated various applications, including an application to strike-out. A face-to-face hearing which was due to have taken place in March 2020 could not take place due to Covid-19 restrictions then in force. Various circumstances since that date prevented this hearing going ahead sooner. After liaison with the parties, it went ahead remotely using a video link. I am entirely satisfied that this was a fair and just way of dealing with the hearing, and that each party was afforded as full an opportunity to present their arguments as if we had been in the same room in Edinburgh.
3. There are approximately 160 separate matters in dispute, across the four numbered appeals (noting that one of which, TC/2018/07829, may now have been withdrawn). Some matters are referred to in more than one appeal. The matters are, generally, penalties (together with various surcharges and interest) on late payments of income tax over a series of years from 1999/2000 to 2016/17. There is no dispute that many tax liabilities were not met timeously. But a significant feature, and the cornerstone of the dispute as it now stands, is that the quantum of the various amounts said to have been unpaid timeously and paid late arises because of the manner in which HMRC allocated Mr Crawford's payments.
4. There are two core formal documents: HMRC's Composite Statement of Case dated 31 January 2020 (and its annexed landscape format table) and the Appellant's List (undated).
5. There is also a draft agreed summary of case management issues dated 31 August 2021, which identifies three issues as follows:

"Issue 1

Whether giving effect to a loss claim (otherwise agreed) pursuant to section 42 TMA 1970 and Schedule 1B is part of the claim such that Mr Crawford can insist on effect being given in the manner requested. [...]

Issue 2

Mr Crawford claims that he has consistently requested payments made by him to HMRC to be allocated primarily against tax (and not interest or penalties) and the most recent tax liabilities as opposed to the earliest [...]

Issue 3

In respect of the penalties covered by TC/2019/01139, were the penalties properly notified to Mr Crawford."

6. However, the way in which the submissions developed at the hearing moved beyond the issues as precisely framed, and I propose to deal with them in a slightly different way.

### JURISDICTION

7. HMRC's fundamental and over-arching point is that I lack jurisdiction, and in consequence (by virtue of Rule 8(2)(a)) must therefore strike out, any appeal against any penalty, for any year, where that penalty arises in consequence of late payment of any sum occasioned by the allocation of payments.
8. It is common ground, and I accept, that the question of jurisdiction is 'binary' and 'hard-edged': that is to say, I either have jurisdiction, or I do not. There is no middle ground, nor any

scope for me to find that I might have jurisdiction: see *Raftopoulou v HMRC* [2015] UKUT 579 (TCC) at Para [25] (Judges Berner and Raghavan).

9. Unlike (for example) the High Court, this Tribunal has no inherent jurisdiction. The jurisdiction of this Tribunal is entirely statutory. Therefore, the source of any jurisdiction to decide an appeal must be found in legislation. If there is no such source, then there is no jurisdiction.

10. Mr Thornhill QC invites me to consider Schedules 56 of the Finance Act 2009.

11. Schedule 56 Paragraph 13, in full, says:

"PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P."

12. Here, Mr Thornhill QC does not seek to rely on Paragraph 13(1). He expressly disavows it. He accepts that penalties do, in principle, arise. He also accepts that this Tribunal has no jurisdiction 'to decide the allocation of payments per se'. (see Paragraph 7 of the Appellant's List).

13. He seeks to rely on Paragraph 13(2) and argues that this gives a short answer to the issue of jurisdiction, because, if the Appellant's payments were not allocated as he had asked for, then the amount of the tax-gearred penalties was greater than would have been the case had the taxpayer's directed allocation been given effect to. Put even more shortly, he says that the penalties are thereby in too large an amount, the challenge is to the amount, and "the amount of a penalty" is an appealable matter.

14. Mr Simpson QC accepts that 'the amount of a penalty' is an appealable matter, but argues that Paragraph 13(2) is not engaged here. His argument is that the words 'the amount of a penalty' do not suffice to give the Tribunal jurisdiction to adjust the underlying amount of tax, even where the penalty is tax-gearred, but go simply to such features as to whether HMRC has correctly identified the reductions for 'telling', 'helping' or 'giving', or whether there are 'special circumstances'. In short, that the Tribunal's jurisdiction, when it comes to 'the amount of the penalty' is circumscribed by the matters set out elsewhere in Schedule 56.

15. He argues (and it would probably be common ground) that the amount of the penalty is a function of the allocation of payments, but argues that the allocation of payments by HMRC is not an appealable matter, which means that any penalties arising therefrom, or in consequence thereof, cannot be an appealable matter either, even under Paragraph 13(2).

16. By way of analogy, he invites me to consider a penalty imposed in relation to a discovery assessment. He says that if the assessment itself is not appealed, then the Tribunal cannot look to the assessment, but can only adjust the penalty under the Schedule 24 grounds such as reasonable excuse.

17. In my view, this is a dispute about 'the amount of the penalties' within the proper meaning and effect of the statutory provisions set out above, meaning that the Tribunal does have jurisdiction to consider these penalties. Contrary to Paragraph 55 of HMRC's composite statement of case, I do not consider that it would be 'outwith the jurisdiction of the Tribunal to make [the allocation of payments] via the circuitous route of quantum of penalties'.

18. These are my reasons.

19. Reason 1: The fact that there is a dispute about allocation does not mean that this dispute cannot be a justiciable dispute about amount.. The route is not 'circuitous': it is dead straight. There is direct and immediately proximate cause and effect: the allocation is the cause, and the amount of the penalties is the effect. But consideration of the effect does not preclude consideration of the cause; and indeed is artificial without consideration of the underlying cause.

20. Reason 2: This is a common-sense reading of the legislation. The legislation providing for appeals against penalties is expressed in simple language. There is no expressed reservation or carve-out. The obvious Parliamentary purpose inherent in the plain reading of Schedule 56 Paragraph 13 is that penalties should be capable of being appealed to this Tribunal, and that the scope of appeal is wide. As such, I would be very hesitant to impose any reading on the Paragraph which would in effect impose any limitation not otherwise clearly expressed in it.

21. Reason 3: From my knowledge and experience of penalty appeals, to read this Paragraph restrictively, or over-formally, would cause many appeals to flounder because appellants often do not specify which limb of Sch 56 Paragraph 13 they are applying under (and nor are they invited to do so). Indeed, appellants often do not refer to this Paragraph at all, but sometimes say "I should not have to pay any penalty", without specifying whether the true argument is (i) no penalty should have been imposed in the first place, or (ii) the penalty, even if correctly imposed, should be zero.

22. Reason 4: It is at least arguable that the penalties constitute a criminal charge for the purposes of Article 6 of the ECHR: see the decision of the Grand Chamber in *Jussila v Finland* [2007] 45 EHRR 39, and the discussion of this by the Tribunal (Judge Guy Brannan) in *Omagh Minerals v HMRC* [2018] UKFTT 697 (TC) at Paras [43]-[53]. Although this aspect was not canvassed before me, I cannot disregard this line of reasoning which, in my view, provides further support for the argument that I should tread carefully when considering the juridical scope of the appeal right which Parliament has decreed, and should seek to give effect to it if that can be done without doing violence to the language, or producing an absurdity (which Parliament cannot be taken to have intended).

23. Reason 5: Fairness and Justice. When it comes to penalties, and their 'severance' (for want of a better word) from liability to the underlying tax, I am not sure that the situation is quite as Mr Simpson QC argues. In my view, Personal Liability Notices are a relevant parallel. There, the Tribunal has been reluctant to debar the taxpayer from challenging the underlying liability, even though the taxpayer with the primary interest in doing so (ie. the company) has gone into liquidation and has not appealed. In *Jason Andrew v HMRC* [2016] UKFTT 295 (TC) the Tribunal (Judge Peter Kempster and Mrs Beverley Tanner) accepted the Appellant's argument that it would be unjust if he was not permitted to challenge the validity of the company's penalty, because it would result in the Company Penalty being "rubber stamped" despite points the taxpayer wished to raise. At Paragraph [35], the FTT remarked

"We have considered carefully whether the wording on appeal rights in Schedule 24 entitles the officer to challenge the company penalty – at least insofar as aspects relevant to the personal liability notice which he or she is appealing. Our concern is that where a company penalty has crystallised without any challenge by the company, that may be not because the company has actively considered the matter and decided not to appeal to the Tribunal but simply because events such as liquidation or dissolution overtake the company, or because the issue of personal liability notice(s) totalling the entire company penalty render the company with no remaining interest in contesting the company penalty (because para 19(2) prevents double recovery of penalties). Any officer of the company who faces an apportionment of that penalty (by way of a personal liability notice) would,

on HMRC's analysis, be faced with an unchallengeable company penalty. We think that (at least in cases more complicated than the current appeal) that could give rise to problems for the Tribunal in achieving a fair and just result on the officer's appeal against the personal liability notice."

24. Reason 6: I find further support for my conclusion as to justiciability in the Tribunal's decisions in *Bilaman Management Services LLP* [2014] UKFTT 270 (TC) (Judge Swami Raghavan and Mrs Shameem Akhtar) and *C & DDH Ltd* [2014] UKFTT 688 (TC) (Presiding Member Mr Peter Sheppard and Dr Heidi Poon). Although both are first instance decisions, and neither binds me, both are full reserved decisions. Both were decisions following substantive hearings (albeit both hearings were asymmetric, in the sense that the Appellant neither appeared nor was represented). Both involved challenges to the size of the penalties inter alia on the basis of mis-allocation of payments: see Paragraph [27] of *Bilaman*; and Paragraphs [37-38] of *C & DDH*. In neither appeal does HMRC seem to have argued, unlike here, that the appeals, insofar as they raised issues of (mis)allocation were non-justiciable. Although both appeals were dismissed (for other reasons), it seems to me that both hearings proceeded on the footing that allocation was justiciable, and was capable, at least in principle, of amounting to a reasonable excuse.

25. The issue of allocation also arose in the earlier decision of *Kelcey and Hall Solicitors* [2012] UKFTT 662 (TC), where the Tribunal (having heard from both parties) allowed the appeal in part, on the footing that a failure by HMRC to allocate payments in the taxpayer's best interests in accordance with its internal guidance amounted, exceptionally, to special circumstances. There was no argument in that case that the penalties were non-justiciable because they arose as a result of mis-allocation.

26. For the sake of completeness, I should also mention my own previous decision in *Appiah v HMRC* [2019] UKFTT 331 (TC) which was not in the bundle. *Appiah* was a default paper case, hence decided without the benefit of full argument, where I allowed the taxpayer's appeal on the footing that a misallocation amounted to a reasonable excuse for late payment. To the best of my recollection (supplied only by re-reading the published decision) HMRC engaged there with the substance of the argument, and did not invite me to strike out the appeal on the basis of justiciability.

#### **WHETHER AN APPEAL ON THE BASIS OF ALLOCATION SHOULD BE STRUCK OUT ANYWAY?**

27. At Paragraph 57 of its composite Statement of Case, HMRC accepts, correctly, that the allocation of payments can have knock-on effects for the amount of penalties and surcharges.

28. But, on the footing that I decided in Mr Crawford's favour in terms of justiciability, HMRC's secondary position is that I should nonetheless strike out his appeal on the footing that it enjoys no reasonable prospects of success: Rule 8(3)(c).

29. The relevant legal principles in approaching a discretionary strike-out are well-known. I am bound by the Upper Tribunal's guidance in *HMRC v Fairford Group plc and other* [2015] where, at Para [41], Simon J and Judge Colin Bishopp said:

"In our judgment an application to strike out in the FTT under Rule 8(3)(c) should be considered in a similar way to application under CPR 3.4 ... The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing ... A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable... The Tribunal must avoid conducting a 'mini-trial'."

30. In *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) the Upper Tribunal (Henry Carr J and Judge Sinfield) remarked (at Para [33]):

"Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098 ...

"i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not

enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

31. In short, HMRC bears the burden of establishing that the taxpayer's case in this regard enjoys prospects which are no more than false, fanciful or imaginary.

32. Here, there is evidence that Mr Crawford was alive to the issue of allocation, and its impact, and asked HMRC to make certain allocations.

33. On 3 September 2010, he wrote in relation to a sum of £100,000 asking that it should be allocated to the latest income tax and NI, "and not, repeat not, to the earlier outstanding liabilities. Also the amount should not be allocated to any penalties/surcharges which are the subject of any outstanding appeals." He also gave directions for a £6,000 payment made in August 2010 that it should be "allocated to later tax liabilities rather than earlier ones, again excluding any penalties/surcharges under appeal."

34. There is also correspondence in March 2012, the latest being 23 March 2012 relating to payments of which the last was 12 March 2012.

35. It is argued that a request to allocate can be made no later than the payment: see *'The Mecca'*; *Cory Brothers and Company Ltd v The Owners of the Turkish Steamship 'Mecca'* [1897] AC 286, esp at 293 *per* Lord Macnaghten. When a debtor is making a payment to his creditor, he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time he makes the payment, the right of appropriation devolves on the creditor.

36. In principle, that may be right. It is an easy rule to apply in a clear-cut situation. But this situation, to my eyes, and in the context of an interlocutory hearing, is not so clear-cut:

(1) In my view, the letter of 23 March 2012 cannot be read in isolation from the earlier letters, including one on 12 March 2012, discussing reallocation of some £562,000 already paid;

(2) It can fairly be said that HMRC was not, in March 2012, resisting the requests for allocation/re-allocation on the "no right to demand allocation after payment" basis which it now does;

(3) Nor can the letter of 23 March 2012 be read in isolation from what actually seems to have happened afterwards, which (as recorded in HMRC's letter of 12 June 2012 and the accompanying so-styled 'updated Statement of Liabilities') was that HMRC did allocate, in June 2012, all payments made since 12 August 2010 'toward outstanding Tax'.

37. HMRC's own internal Self-Assessment notes at page 36 of bundle 2 give some corroborative detail for the letters, and its own internal actions, such as faxing a note to another section on 28 March 2012 'requesting numerous reallocations'. If HMRC is now right, then HMRC did not have to do any of those things, and indeed could not have been made to do them. That introduces doubt as to the validity of its position now.

38. In September 2018, and according to what seems to be a computer print-out of Mr Crawford's self-assessment payment at page 369 of bundle 1, concerning the sum of £1535.80, Mr Crawford has written, by hand, "Please make absolutely certain the £1535.80 is credited to my 2017/18 Income Tax Liability only. Please return this cheque uncashed if you cannot do that." There is a response to this from Officer Shields on 1 November 2018 which suggests that this request was not received, 'and HMRC standard practice has therefore been followed, whereby the payment has been allocated to the oldest non Debt Payment Programme debt'.

39. In relation to this latter request, there is an issue of disputed fact as to whether the request was in fact made (or, if made, received). That cannot be resolved on the papers, because there are legitimate questions to ask about the document referred to.

40. I accept HMRC's argument that it is a specific request as to a specific payment, but, if the request was properly made (an issue to be determined), then the £1535.80 should have been allocated as requested, and penalties etc flowing from the allocation of £1535.80 to oldest debt rather than to 2017/18 would fall for consideration by the Tribunal.

41. It seems to me that the true nature and effect of the communications in 2012 is germane to this appeal (not least because Mr Crawford complains that the reallocation of all payments since 12 August 2010 was latterly changed unilaterally by HMRC, giving rise to some of the penalties in dispute).

42. Applying the guidance in *Fairford* and *EasyJet*, this is not something which can fairly and justly be dealt with summarily. I am satisfied that Mr Crawford's prospects of succeeding on this aspect of his appeal are better than false fanciful or imaginary, and therefore I decline to exercise my jurisdiction to strike out his appeals in this regard.

#### **LOSS CLAIM**

43. There is a perhaps narrower issue in relation to 2015/16 only where there is a claim to spread loss back to 2014/15. Mr Thornhill QC says that this is something that Mr Crawford wanted: he asked for it, and HMRC agreed; but, despite that agreement, HMRC eventually allocated the loss elsewhere on the basis that there was a 'freestanding credit'. Hence, the 2014/15 tax was (it is argued, contrary to the taxpayer's instruction) unreduced and attracted a penalty for late payment which penalty would have been smaller had the 2014/15 tax been reduced by the 2015/16 loss.

44. Mr Crawford QC says that his remedy is his right to appeal against the quantum of the penalty. For the already reasons set out above, I agree.

45. It is necessary for me to say a little more about this particular issue. It relates to section 64 of ITA 2007 (Claims for trade loss relief against general income) and its interplay with Schedule 1B TMA 1970.

46. In *R (on the application of Derry) v Revenue and Customs Commissioners* [2019] STC 926 the taxpayer bought shares in 2009/10 which he sold at a loss in 2010/11. In his return for 2009/10 he claimed share loss relief against his income for 2009/10. There were two issues: (i) the effect in law of a claim to set the relief against the income for the previous year; and (ii) the inclusion of such a claim (even if erroneous) within the taxpayer's return for the previous year.

47. The Supreme Court held that the taxpayer could make a claim to the relief in 2009/10, because the provisions in the Income Tax Act, in the absence of any indication to the contrary, took precedence and were not displaced by the provisions of Schedule 1B of the Taxes Management Act. In Para [36] Lord Carnwath analysed this in terms of the presence or absence of 'signposts' in the legislation.

48. Although there is no signpost in ITA 2007 section 64, section 64 is part of a Chapter, the whole of which is subject to Paragraph 2 of Schedule 1B TMA 1970 (claims for loss relief involving two or more years) by virtue of ITA 2007 section 60(2).

49. Schedule 1B TMA 1970 Para 2 applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ('the later year') to be given in an earlier year of assessment ('the earlier year'): Para 2(1). Para 2(3) provides that the claim shall relate to the later year. Para 2(6) provides that effect shall be given



to the claim in relation to the later year, whether by way of repayment or set-off, or by an increase in the aggregate amount given by TMA 1970 section 59B(1)(b), 'or otherwise'.

50. Section 60(2) provides such a "signpost" to TMA Schedule 1B, and Schedule 1B thereby laid down (with specificity) how the claim was to be made, and (with somewhat less specificity, the 'or otherwise') how the claim was to be given effect to: see *Knibbs and others v HMRC* [2019] STC 2262 where the Court of Appeal (David Richards, Henderson and Moylan LJJ) held that, where a taxpayer had made a carry-back claim for trade loss relief, the scheme for the calculation of income tax in ITA 2007 Chapter 3 Part 2 had not excluded from its ambit the operation of TMA Schedule 1B Para 2(6).

51. In *Knibbs*, at Para [59], the Court of Appeal considered the discussion by Lord Hodge in *Da Silva* [2017] STC 2483 at Paras [26]-[30], and remarked "*This reasoning therefore provides clear authority, at the highest level, that where a claim to carry back trading losses is made, the taxpayer must make a claim in his tax return in respect of Year 2, and state the extent to which the relief claimed has already been given.*"

52. In *Da Silva*, Lord Hodge also considered (at Para [31]) the words 'or otherwise' in TMA Sch 1B Para 2(6) and remarked that those "open the door to an adjustment of the amount chargeable to income tax".

53. Mr Thornhill QC says that Paragraph 2(6), and the 'or otherwise' end the matter. If the claim was made in Year 2, then it can be given effect to in any of the ways set out in Para 2(6). He argues that this is at the taxpayer's election.

54. The taxpayer's 2016 return is in the bundle, and declares a net business loss of £38,966 (Box 65), which is reproduced in Box 79 as the 'loss to be carried back to previous year(s) and set off against income (or capital gains).' The tax calculation summary (SA100) makes an adjustment (Box 15) 'Decrease in tax due because of adjustments to an earlier year' of £16,370.34. Box 17 is a white space, which is populated "Box 15 Trading Loss carried back of £38,977 results in a 16,370.34" (sic). The figures all point to a loss in Year 2 being carried back to Year 1, the immediately preceding year.

55. Mr Thornhill QC says that Mr Crawford indicated set-off for 2014/15 and set-off is what should have happened.

56. Mr Simpson QC disagrees with this analysis. His principal point is that it is for HMRC, and not for the taxpayer, to determine which of the means in Paragraph 2(6) should be adopted; and that, if HMRC decides to give effect to the claim in a particular way, there is no provision conferring a right of appeal in this Tribunal against that decision. He says that the only challenge is by way of judicial review, or to raise the issue as a defence to enforcement action, or (in relation to payments on account) to apply for a reduction in those payments under section 59A TMA 1970.

57. Secondly, he says that the repayment or set-off do not change the amount of the tax liability, but simply change the amount which has to change hands in order to satisfy the tax liability. This is the gist of his analysis that Paragraph 2(6) does not, and indeed cannot, lawfully or properly operate to bear on the amounts of tax.

58. I must address these arguments within the necessarily limited confines of an interlocutory application.

59. As to Mr Simpson QC's first argument, TMA Sch 1B Paragraph 2(6) sets down a series of three specified ways in which the claim can be given effect to, and one unspecified way.

60. Here, a claim has not been given effect to in the way sought. That is the cause. Were there no penalty, then Mr Simpson QC might well be right as to the absence of any right of

challenge in this Tribunal. But the matter does not end there because there is a penalty, and the tax-geared penalty for 2014/15 has ended up different to what it would otherwise have been had the loss been set-off against 2014/15.

61. The discussion and reasoning above apply: the effect is the amount of the penalty, the amount of the penalty is an appealable matter, and the amount of the penalty is in dispute. That is not circuitous: it is the direct consequence of HMRC issuing the penalty.

62. Mr Simpson QC's second point is a nice one, but I am not sufficiently sure that his analysis, as a matter of pure law, is right. It is again seeking to segregate - in my view, impermissibly - the effect from the cause. There is an element of artificiality about it. Moreover, I am not satisfied that this approach is what Lord Hodge really meant in *Da Silva*. In *Knibbs*, the Court of Appeal, at Para [61], itself identified some uncertainty as to what argument Lord Hodge was really addressing in *De Silva*. It seems to me that Mr Simpson's position is a gloss on what is said in *De Silva*, and open to legitimate argument.

63. At the hearing, on the face of it, it seemed to me that the way in which the 2015/16 return had been framed accorded with Schedule 1B, and therefore there was no substantive obstacle to the claim for loss relief in 2015/16 being given effect to in the way that Mr Crawford had asked: namely, allocation to the immediately preceding year, 2014/15.

64. I canvassed with Mr Simpson QC, if that was right, whether it was open to me, notwithstanding HMRC's application, to nonetheless break the log-jam by resolving the 2015/16 loss claim issue summarily in favour of the taxpayer under Rules 8(3)(c) and 8(7) (i.e., barring HMRC from taking further part in the proceedings as to that issue). He said I should not, and submitted that the same would be outside the scope of the hearing.

65. In principle, I disagree. Rule 8 powers do not require an application. They can be exercised by the Tribunal of its own initiative. This is subject to the safeguard of Rule 8(4) which provides that I cannot strike out the whole or a part of a case on the footing that I do not consider it to have a reasonable prospect of succeeding unless I have first given the party affected (the Rule says 'appellant', but this has to be sensibly read as the party in jeopardy, whether the Appellant or HMRC) an opportunity to make representations. A case management hearing, intended to manage a case, is an excellent opportunity to give such an opportunity, and the same was given.

66. As to the substance, I am properly cautioned by Mr Simpson QC not to make such a decision without being fully versed in the relevant facts. Albeit not without hesitation, I agree with him. In the circumstances, it is better to err on the side of caution. But, having said that, I invite the parties to consider my views below as to the potential merits and costs-savings of exploring whether particular issues are capable of agreement. This could well be one.

#### NOTIFICATION

67. This part of the Appeals deals with a set of penalties for 2013/14, 2014/15, 2015/16 and 2016/17 coming to about £25,000. These are identified in the schedule supplied to HMRC under cover of a letter dated 7 November 2018 and at page 471 of the bundle as being for 2013/14 (£12,360), 2014/15 (£8,845), 2015/16 (£1,603) and 2016/17 (£3,908). They are a mixture of fixed late filing penalties, and tax-geared late filing and payment payments.

68. Here, there is no dispute as to jurisdiction. HMRC instead argue that these notified appeals should be struck out *in limine* (and regardless of any issue as to whether they are late) on the footing that Mr Crawford enjoys no reasonable prospect of this part of his case succeeding: Rule 8(3)(c).

69. There is a legal dispute as to the preconditions for validity of penalties. Mr Crawford contends that it is essential to the validity of penalties that they be notified: ie, unless notified,

a penalty is not valid. HMRC contends that the penalties are valid notwithstanding notification, and that notification goes only to collection. The parties' positions intersect to a limited degree in that they agree that, absent notification, there cannot be any collection.

70. But all this, so far as ventilated in an interlocutory hearing where a striking out is contemplated, misses the point that Mr Crawford says that he was not notified, because at least some of these penalties reached him at his house.

71. A taxpayer's contention that penalties did not in fact reach them is often one which cannot be resolved summarily. Given that penalties are said to have been dispatched to his usual residential address in the course of the ordinary post, then a rebuttable presumption of service arises (pursuant to section 7 of the *Interpretation Act 1978*), and the burden of rebuttal moves to Mr Crawford. For present purposes, I do not think that I need to go beyond that to examine whether a failure to notify affects validity per se (as Mr Crawford argues) or does not affect validity per se but just collection (as HMRC argues). Absent notification, that may end up being a distinction without a difference.

72. This is dealt with in Mr Crawford's 'List' ('the Appellant did not realise that he was being made subject to these penalties until receipt of the comprehensive Statement of Account covering 1999 to 2016 on or about 23 October 2017'). There is some contemporary evidence supportive of Mr Crawford's position: for example, his letter to HMRC dated 10 November 2017 complaining that HMRC had sent him a spreadsheet with 33 line entries totalling some £25,826, but that he had no details of the penalty calculations, and was not aware that they had been formally issued to him.

73. He says the same in his letter of 7 November 2018: "undertaking a review of the 31 October 2018 SA Statement of Account ... I notice that there are a large number of penalties listed which have not formerly" (sic?) "been intimated to me in the norma manner, but merely listed on my SA Statement of Accounts."

74. HMRC have produced a generic witness statement from an Officer of HMRC, dated 18 March 2019, dealing with the general processes for the production of printing and issuing late payment and late filing penalty notices.

75. I remind myself of the guidance in *Fairford* and *EasyAir*: see above. Mr Crawford has placed in issue his receipt of these penalties. There is enough before me to satisfy me that his argument enjoys prospects which are better than false, fanciful or imaginary. In my view, in the circumstances of this appeal, it is not fair and just for that to be dealt with summarily, and without Mr Crawford a fair chance to rebut the presumption. Accordingly then, I decline to exercise my discretion to strike out his appeal in this regard.

#### **SOME OTHER OBSERVATIONS**

76. During the hearing, I was told that a Sheriff sitting in Edinburgh in relation to civil proceedings brought by HMRC against Mr Crawford voiced despair as to whether that court could ever get to the bottom of this dispute between these parties, especially in terms of the figures.

77. I urged the parties to consider whether any of the issues in dispute (even if not all of them) could be resolved by way of discussion. I take this opportunity to repeat that invitation.

78. As this application has proved procedural skirmishing is time-consuming, expensive, and may ultimately end up proving unproductive. Litigation is replete with the unexpected. It is a matter of regret that Covid-19 restrictions and other factors outside the control of the parties meant that this hearing, which was to have taken place face to face in March 2020, has only now - 18 months later - been able to take place remotely. Now there will be further delay before the next steps in this dispute.

79. Although I have power to stay the proceedings, I do not have the power to stay the proceedings specifically for the purposes of alternative dispute resolution. In that regard, I have no power to do more than encourage or to warn. What follows contains elements of both.

80. This dispute is very fragmentary, and by virtue of that characteristic, has perhaps ended up looking far more complicated than it may actually end up being. Counsel both told me that nothing could be agreed in terms of figures until certain key issues have been resolved, with that resolution to come, at some unspecified point in the future, from the Tribunal.

81. I have referred above to a 'log-jam': this rolling series of appeals is now jammed up behind one or two decisions, perhaps even very modest ones, which are within the ability of the respective parties to seek to resolve, pragmatically and not dogmatically.

82. I may have misunderstood (and I bear in mind that there may be matters of privilege involved) but I do find it difficult to readily accept that represented parties are incapable of even seeking to establish, on the footing of certain assumptions (for present purposes, it does not matter whether these will end up proving correct or incorrect) what, arithmetically, the tax-gearred penalty position would be (penalties for late filings are different).

83. It strikes me that it is only when the parties have engaged in that sort of exercise - even if adversarial, that can still be done collaboratively - that they might be able to establish whether (in colloquial terms) the game is worth the candle. In the context of this dispute, performing such an exercise would allow each to know whether extensive interlocutory procedural skirmishing is genuinely the best way of seeking to resolve Mr Crawford's tax affairs. What is sure is that, one way or the other, those affairs must at some point be resolved, whether by the parties, or by the Tribunal.

#### **DECISION**

84. HMRC's application is dismissed.

#### **NEXT STEPS**

85. In my view, it is neither proportionate nor does it obviously further the overriding objective to convene another case management hearing. The context and history of these appeals, including the latest hearing, shows that the legal firepower directed at it will, if left unchecked, only ever expand. This dispute has come to take on a life of its own because the whole has assumed prominence over the parts. Some of the appeals relate to individual penalties of extremely modest sums.

86. The next step is apparently going to be an application for permission to bring late appeals, which HMRC have indicated it will resist and which, it is apparently common ground, will involve the giving of oral evidence by Mr Crawford.

87. I want to be able to move this dispute on to the point where all the outstanding issues can be resolved.

88. I am minded to direct that the next step should be a 'rolled-up' hearing where the application(s) to bring late appeals (insofar as that/those application(s) remain in dispute by HMRC) shall be heard and determined at the same time as the substantive appeals (which can be heard, in the usual way, *de bene esse*). In that way, all the evidence and submissions can be heard by the same Tribunal, in one go, on one occasion. It does not seem to me as if this manner of resolution will impose any materially greater strain on the parties' resources (or, for that matter, the Tribunal's) than dealing with an application to make late appeals as a freestanding substantive application. The contrary is likely: the application for permission to make late appeals will, if freestanding, end up traversing much of the same ground either already covered,

or to be covered if permission is given. There will be much otherwise avoidable duplication of time and effort.

89. I direct the parties, within 28 days of the release of this Decision, to liaise and seek to agree directions for the further management of these appeals. I am reserving further consideration of such directions (but not of any further hearings) to me.

90. I am not giving the parties an entirely free rein on directions. These are standard track appeals, and there will have to be a witness statement, supported by a Statement of Truth, from the Appellant, which deals in sufficient detail with the matters which are the subject matter of his appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

91. 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.

**Dr Christopher McNall  
TRIBUNAL JUDGE**

**Release date: 07 OCTOBER 2021**