



*INCOME TAX – Schedule 55 and 56 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return and a subsequent failure to pay tax on time – whether HMRC has proven failure – whether taxpayer had a reasonable excuse for her default – Permission to appeal out of time refused - appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TC07210**

**Appeal number: TC/2019/00636**

**BETWEEN**

**MEGAN WITTY**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ABIGAIL HUDSON**

The Tribunal determined the appeal on 4 June 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 25 January 2019 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 26 March 2019.

## DECISION

### INTRODUCTION

1. This is an appeal by Mrs Megan Witty ('the Appellant') against penalties totalling £2,238 imposed by the Respondents ('HMRC') under Paragraphs 3, 4, 5 and 6(5) of Schedule 55 Finance Act 2009, for her failures to file self-assessment ('SA') tax returns for the tax years ending 5 April 2011 and 2012 on time.
2. She further appeals against penalties totalling £2,139 imposed by the Respondents ('HMRC') under Paragraph 3 of Schedule 56 Finance Act (FA) 2009, for failures to submit payment on time for those tax years.

### BACKGROUND

3. The Appellant's return for 2010-11, was due by 31 October 2011 or if filed electronically no later than 31 January 2012.
4. The Appellant's return for 2011-12, was due by 31 October 2012 or if filed electronically no later than 31 January 2013.
5. The penalties for late filing of a return can be summarised as follows:
  - (i) A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.
  - (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
  - (iii) If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 or 5% of the liability to tax, whichever is the greater, is imposed under Paragraph 5 of Schedule 55 FA 2009.
  - (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 or 5% of the liability to tax, whichever is the greater, is imposed under Paragraph 6 of Schedule 55 FA 2009.
6. It is alleged that the Appellant's return for 2010-11 was not filed on time and penalties of £100, £900, £569 and £569 were imposed, under (i), (ii), (iii) and (iv) above. HMRC do not contend that there was any deliberate withholding of information.
7. It is alleged that the Appellant's return for 2011-12 was not filed on time and a penalty of £100 was imposed, under (i) above.
8. The Appellant's tax payment for the year ending 5 April 2011, was due by no later than 31 January 2012, under Section 59B Taxes Management Act ('TMA') 1970.
9. The Appellant's tax payment for the year ending 5 April 2012, was due by no later than 31 January 2013, under Section 59B Taxes Management Act ('TMA') 1970.
10. Paragraph 3 of Schedule 56 FA 2009 sets out the provisions in relation to the late payment penalty system. Under paragraph 3(2) the first penalty is calculated at 5% of all tax remaining unpaid after the expiry of 30 days from the due date. Where tax remains unpaid, after the end of the period of five months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed (paragraph 3(3)). Where tax remains unpaid, after the end of the period of 11 months beginning with the penalty date, a further penalty of 5% of the tax unpaid at that date is imposed (paragraph 3(4)).

11. It is alleged that the Appellant's tax for 2010-11 was not paid on time and penalties of £569, £569 and £569 were imposed, under paragraphs 3(2), 3(3) and 3(4) above.

12. It is alleged that the Appellant's tax for 2011-12 was not paid on time and penalties of £144, £144 and £144 were imposed, under paragraphs 3(2), 3(3) and 3(4) above.

#### *Filing date and Penalty date*

13. Under s 8(1D) TMA 1970 a non-electronic return must normally be filed by 31 October in the relevant financial year or an electronic return by 31 January in the year following. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

14. The 'penalty date' following late payment of tax is defined at Paragraph 1(4) Schedule 56 FA 2009 and is the date on which a penalty is first payable for failing to pay the amount, the day after 30 days from the date payment became due.

#### *Reasonable excuse*

15. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased. A taxable person who is otherwise liable to a late payment penalty, may similarly escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the penalty (Paragraph 16 of Sch 56 of FA 2009).

16. The law specifies two situations that are not reasonable excuse:

- (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and
- (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

17. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

18. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

#### *The background facts*

19. The Appellant had been within the SA regime since 1992.

20. The Appellant's 2010-11 return was issued on 6 April 2011 and so was due to be returned in paper form by 31 October 2011 or online by 31 January 2012. The Appellant's 2011-12 return was issued on 6 April 2012 and so was due to be returned in paper form by 31 October 2012 or online by 31 January 2013. The Notices to file a return was sent by HMRC to the Appellant at her home address in the UK.

21. The Appellant says that she did file her paper tax returns on time.

22. The paper SA returns for both years were received by HMRC on 29 November 2012. They were therefore over 12 months or just under one month late respectively.
23. HMRC imposed a fixed penalty of £100 together with daily penalties [90 days at £10 for each day] totalling £900. The return still having not been received six months after the filing date HMRC then imposed a fixed penalty of £300. Having received a copy of the SA return in November 2012 that six-month penalty was reassessed and the penalty was recalculated at 5% of the liability to tax thus increasing the penalty by a further £269, making the penalty in total £569. The return still having not been received 12 months after the filing date, there followed a further fixed penalty of £569.
24. The Appellant's tax liability for the year 2010-11 was £11,392.57 which was due by 31 January 2012.
25. As the tax was outstanding 30 days later, a penalty of £569 was imposed. A similar penalty was imposed at 5 months after the penalty date and another at 11 months after the penalty date, when the tax liability remained outstanding.
26. As of the date of the statement of case £6,108.25 of the tax liability remains unpaid, some payments having been made through 2014 and 2015, and credits applied following overpayment from the tax liabilities due in 2016 and 2018.
27. The Appellant's tax liability for the year 2011-12 was £2,890.98 which was due by 31 January 2013.
28. As the tax was outstanding 30 days later, a penalty of £144 was imposed. A similar penalty was imposed at 5 months after the penalty date and another at 11 months after the penalty date, when the tax liability remained outstanding.
29. As of the date of the statement of case the tax liability for that year remains unpaid.
30. The Appellant appealed to the Tribunal on 25 January 2019.

#### **PERMISSION TO APPEAL OUT OF TIME**

31. The appellant's appeal was notified to the Tribunal late. For the following reasons, I have decided not to give permission for the appeal to be notified late:
32. The relevant penalty notices were dated between 14 December 2012 and 27 March 2014. Therefore the time limit for appealing expired on a date between the 15 March 2012 and 27 March 2014. No appeal was received until 2 November 2018, and so the Appellant was between four and a half and six and a half years late in appealing.
33. Mrs Witty has not provided any explanation for why she did not appeal earlier. The penalty notices were sent by post to the address that she has provided. It is not suggested that she did not receive that documentation, and indeed there is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries. In those circumstances, I find that she did receive that communication.
34. The consequences to either party of an extension of time limits must be considered in light of my assessments of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the SA tax regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits, however, she provides no explanation for her delay in appealing and no explanation as to way that prejudice should be mitigated.
35. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

- a) The length of the delay;
- b) Whether there is a good explanation for that delay;
- c) The consequences of permission to appeal;
- d) The consequences of refusal of permission.

36. In the circumstance I do not consider that Mrs Witty has a good explanation for her delay which is of some significant length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

### **The Appellant's case**

37. The Appellant's grounds of appeal are that all of the returns were in fact filed on time.

### **HMRC's Case**

38. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund. Penalties are no longer linked to liability.

39. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

40. Similarly, a late payment penalty is raised solely because tax is paid late, in accordance with Schedule 56 FA 2009. Where tax is paid after the relevant deadline a penalty is charged. The later the tax is received, the more penalties are charged.

41. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his SA tax return or late payment of his tax liabilities.

### *Reasonable Excuse*

42. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a late filing penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure. Paragraph 16 of Schedule 56 has the same effect in relation late payment penalties.

43. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?" [Page 142 3rd line et seq.].

44. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

45. If there is a reasonable excuse it must exist throughout the failure period.

46. The Appellant has not provided a reasonable excuse for her failure to file her tax return for the years 2011-11 and 2011-12 on time. The Appellant has similarly not provided a reasonable excuse for her failure to pay her tax liabilities on time. Accordingly the penalties have been correctly charged in accordance with the legislation.

47. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

### *Special Reduction*

48. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a late filing penalty if they think it is right because of special circumstances. Paragraph 9(1) of Schedule 56 has similar effect in relation to late payment penalties. "Special circumstances" is undefined save that, under paragraph 16(2) and 9(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

49. In other contexts "special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

50. Where a person appeals against the amount of a late filing penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. Paragraph 15(1) and (2) of Schedule 56 have similar effect in relation to late payment penalties. The Tribunal may rely on paragraphs 16 or 9 of the Schedules (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

51. HMRC have considered the Appellant's grounds of appeal but assert that her circumstances do not amount to special circumstances which would merit a reduction of the penalties.

52. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 or paragraph 9 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

### **FINDINGS OF FACT**

53. The notice to file the SA returns were issued to Mrs. Witty at her home address on 6 April 2011 and 2012. Similarly a penalty notice for late filing of the return for the year 2010-11 was issued to her home address on or around 14 February 2012. There followed further penalty notices in relation to that failure on or around 7 August 2012 and 8 January 2013. A penalty notice was issued on or around 11 December 2012 in relation to the late filing of the return for the tax year 2011-12, again to her home address.

54. Penalty assessment notices were issued to that home address on or around 8 January 2013 and 19 February 2013 in relation to the tax due in 2011. Penalty assessment notices were issued to that home address on or around 19 March 2013, 14 August 2013 and 25 February 2014 in relation to that failure. Mrs Witty does not suggest that she did not receive that documentation, and indeed there is no suggestion on the evidence before me that there were any difficulties

with the postal service at around the time of those deliveries. In those circumstances, I find that she did receive that communication.

## DISCUSSION

55. Relevant statutory provisions are included as an Appendix to this decision.

56. I have concluded that the tax returns for the 2010-11 and 2011-12 tax years were not submitted until 29 November 2012. They should have been submitted by 31 October 2011 and 2012 respectively. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

57. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable. I am satisfied that the penalty notices dated between 14 February 2012 and 25 February 2014 were sent to the postal address linked to the Appellant’s SA account (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761).

58. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.

59. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. In the circumstances of this case, it is for Mrs Witty to satisfy me that she did post her returns in time, and I’m afraid that I am not satisfied of the same. The original letter from MTL McHardy Trenfield appears to imply an acceptance that the returns had not been filed on time because “they were voluntary”. Alternatively, had I found that she did honestly believe that she had filed her returns, in light of the fact that she received numerous penalty notices over the next months but made no attempt to file the returns again until November 2012, any reasonable excuse could not be said to have existed throughout the failure period.

60. I have seen a letter from MTL McHardy Trenfield Accountants which refers to an enclosed schedule showing a repayment of £1,375.16 due. It is wholly unclear to me what the schedule is intended to show or where the figures upon it originate. Certainly it does not appear to reflect the tax calculations provided by HMRC. Mrs. Witty has offered no explanation as to why the tax liabilities were not paid on time, and no evidence that they were. The letter goes on to suggest that no penalties are due for late filing because “the return were voluntary as she needed to obtain a mortgage”. It is not clear what is meant by this. SA returns are not voluntary, and once registered in the SA regime one is issued a return and required to file it on time. It is immaterial what her reasons for registering within the regime were.

61. The Appellant had no excuse in respect of the late delivery of a paper return to HMRC by 31 October 2011 or 2012 respectively. Nor does she have a reasonable excuse for failing to pay her tax liabilities on time.

62. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

63. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mrs Witty.

64. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Mrs Witty relied upon was her contention that she had filed her returns by the return date. I have explained above why I do not accept that she had such an honest belief. Similarly, I conclude that her explanation does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

### **CONCLUSION**

65. I therefore confirm the penalties as follows. For the tax year 2010-11 a fixed penalty of £100, the daily penalties of £900, further fixed percentage penalties of £569 and £569. Thereafter penalties for failing to pay the tax by the due date of £569, £569 and £569. In total, penalties of £3,845.

66. For the tax year 2011-12 a fixed penalty of £100. Thereafter penalties for failing to pay the tax by the due date of £144, £144 and £144. In total, penalties of £532.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

67. 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.

**ABIGAIL HUDSON  
TRIBUNAL JUDGE**

**Release date: 18 June 2019**



**APPENDIX**  
**RELEVANT STATUTORY PROVISIONS**

**Finance Act 2009**

68. The penalties at issue in this appeal are imposed by Schedule 55 and 56. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late, and paragraph 56 which imposes penalties if tax is paid late.

**Schedule 55**

69. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

- (1) P is liable to a penalty under this paragraph if (and only if) —
  - (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
  - (b) HMRC decide that such a penalty should be payable, and
  - (c) HMRC give notice to P specifying the date from which the penalty is payable.
- (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
- (3) The date specified in the notice under sub-paragraph (1)(c)—
  - (a) may be earlier than the date on which the notice is given, but
  - (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

70. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

- (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
- (2) The penalty under this paragraph is the greater of —
  - (a) 5% of any liability to tax which would have been shown in the return in question, and
  - (b) £300.

71. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

6—

- (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.
- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of —

- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 100%,
- (b) for the withholding of category 2 information, 150%, and
- (c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of —

- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

- (a) for the withholding of category 1 information, 70%,
- (b) for the withholding of category 2 information, 105%, and
- (c) for the withholding of category 3 information, 140%.

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

- (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(6) Paragraph 6A explains the 3 categories of information.

72. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

(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.

73. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

16—

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- (2) In sub-paragraph (1) “special circumstances” does not include—
  - (a) ability to pay, or
  - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
  - (a) staying a penalty, and
  - (b) agreeing a compromise in relation to proceedings for a penalty.

74. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

22—

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —
  - (a) affirm HMRC’s decision, or
  - (b) substitute for HMRC’s decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—
  - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
  - (b) to a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

### **Schedule 56**

75. Paragraph 1(4) of Schedule 56 states that the “penalty date”, in relation to an amount of tax, means the day after the date falling 30 days after the date specified in section 254(5) of FA 2004 as the date by which the amount must be paid.

76. Paragraph 3 sets out the amount of penalty payable –

3(1)...

(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

77. Paragraph 9 of Schedule 56 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

9—

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

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

(a) ability to pay, or

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

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

(a) staying a penalty, and

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

78. Paragraph 13 of Schedule 56 gives a taxpayer a right of appeal to the Tribunal and paragraph 15 of Schedule 56 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

15—

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may —

(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 9 —

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),  
or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

79. Paragraph 16 of Schedule 56 contains a defence of "reasonable excuse" as follows:

16—

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make payment

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.]

(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.

### **Taxes Management Act 1970**

80. Section 8 - Personal return- provides as follows:

(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, on or before the day mentioned in subsection (1A) below, 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.

(1A) The day referred to in subsection (1) above is-

- (a) the 31st January next following the year of assessment, or
- (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

- (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
- (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

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

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

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

- (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or
- (b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

- (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.