[2019] UKFTT 402 (TC)

INCOME TAX - penalty for failure to make returns - Schedule 55 of the Finance Act 2009 - whether special circumstances - whether proportionate – late appeal - appeal dismissed - penalties reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07217

Appeal number: TC/2019/00128

BETWEEN

MATTHEW WALKER **Appellant**

-and-

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

TRIBUNAL: JUDGE DR KAMEEL KHAN

The Tribunal determined the appeal on 1 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 July 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2019.

DECISION

Background

The Appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit annual self-assessment returns on time for the periods 2013-2014, 2014-2015 and 2015-2016 tax years. The Appellant has made a late appeal application.

1. The penalties for late filing of a return can be summarised as follows:

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 15.

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.

i. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 20 of Schedule 55 FA 2009.

ii. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

iii. The appeal, which is late, is against the £100 late filing penalty £900 daily penalty, £300 six and twelve month penalties 2013-2014, 2014-2015 and 2015-2016 tax years.

2. **The appeal is against the following**

A late appeal application is made.

A penalty imposed under Paragraph 3 of Schedule 55 for the late filing of the Individual Tax Return for the year ending 5 April 2014.

Daily penalties imposed under Paragraph 4 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2014.

A penalty imposed under Paragraph 5 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2014.

A penalty imposed under Paragraph 6(5) of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2014.

A penalty imposed under Paragraph 3 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2015.

Daily penalties imposed under Paragraph 4 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2015.

A penalty imposed under Paragraph 5 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2015.

A penalty imposed under Paragraph 6(5) of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2015.

A penalty imposed under Paragraph 3 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2016.

Daily penalties imposed under Paragraph 4 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2016.

A penalty imposed under Paragraph 5 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Individual Tax Return for the year ending 5 April 2016.

3. **Filing Date and Penalty Date**

Under 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 as the date after the filing date.

Reasonable Excuse

Paragraph 23 of Schedule 55 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 to a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

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

   i. An insufficiency of funds, unless attributable to events outside the Appellant's control, and

   ii. Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

5. 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*).

6. HMRC's view is that 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.

Relevant Statutory Provisions

Section 8 of the Taxes Management Act 1970 ('TMA') places a statutory obligation on a taxpayer to make and deliver a return to HMRC by the stipulated due date if a notice has been served on the taxpayer.

Section 8(1D) provides for the due dates of filing, whereby a paper return is due by 31 October and an electronic return is due by 31 January in the following tax year. Failure to file a return on time results in a penalty. Where a party has repeat failures to file returns there are additional time penalties.

The right to appeal against penalty determinations is provided under 100B of the Taxes Management Act ('TMA'), and the Tribunal is given jurisdiction to decide whether a 'penalty has been incurred', to set aside the determination, to confirm, to increase or to reduce the penalty to the correct amount.

Findings of Fact

1. The notice to file for the year ending 5 April 2014 (**2013-2014**) was issued to the Appellant on 25 April 2014. The SA 316 includes information relating to the deadlines for submitting a return and also the late filing penalty charge for not submitting the return on time. The notice also confirms that more penalties will be due if the return is three, six or twelve months late.

2. The filing date was 31 October 2014 for a non-electronic return or 31 January 2015 for an electronic return. The Appellant's non-electronic return for the year 2014-2015 was not received. Late filing, 3, 6 and 12 month penalties were applied. These were correctly applied in accordance with the law.

3. The notice to file for the year ending 5 April 2015 (**2014-2015**) was issued to the Appellant on 6 April 2015. The SA 316 includes information relating to the deadlines for submitting a return and also the late filing penalty charge for not submitting the return on time. The notice also confirms that more penalties will be due if the return is three, six or twelve months late.

4. The filing date was 31 October 2015 for a non-electronic return or 31 January 2016 for an electronic return. The Appellant's non-electronic return for the year 2014-2015 was received on 13 September 2018. Late filing, 3, 6 and 12 month penalties were applied. These were correctly applied in accordance with the law.

5. The notice to file for the year ending 5 April 2016 (**2015-2016**) was issued to the Appellant on 6 April 2016. The SA 316 included information relating to deadlines, penalties and more penalties if the return was 3, 6 or 12 months late.

6. The filing date was 31 October 2016 for a non-electronic return or 31 January 2017 for an electronic return. The Appellant filed a non-electronic return for 2015-2016 on 13 September 2018. This meant that late filing, 3, 6 and 12 month penalties applied. These were correctly applied in accordance with the law.

7. The Appellant owed no tax for 2013-2014, 2014-2015 and £588 for 2015-2016. The penalties for the relevant period total £4,800. The Appellant had penalties for other years which were not the subject of this appeal.

8. The self-assessment statements of accounts sent to the Appellant were to the correct address and showed penalties accruing. There were also penalty reminders issued to the Appellant at the same address.

9. The appeal was filed on 25 July 2018 after the deadline had passed for appealing against penalties for 2013-2014, 2014-2015, 2015-2016 and the fine of £4,800.

The Appeal

9. The Appellant stated in his appeal notice -

"In 2014, I received a late fine for self-assessment as I was self-employed. I rang the Tax Office using the general number from the letter I received explaining that I had completed my tax return online. The guy I spoke with asked me whether I had received a confirmation

email. I informed him that I hadn't and no longer had my unique ID number in order to log in. He asked me to go through it on the telephone which I did he then said to leave that with him and he would sort this out. The next time I knew anything was wrong was in 2018 when my tax code changes and money started to be taken from my wages …. I rang HMRC who said I owed £5,500."

10. HMRC sent the Appellant a decision letter on 20 November 2018 rejecting his appeal because the deadline had passed for appealing against the penalties for the relevant years.

11. The Appellant wrote in on 17 December 2017 to the Tribunal to say this was unfair since he was not aware of the position of late returns until 2018. He has made the point that since no tax was due the penalty is disproportionate and unfair.

12. The Appellant has said he completed the self-assessment tax return and he was "not aware anything was wrong until April 2018".

13. He felt HMRC would "sort out" his online issues.

HMRC Submissions

14. From correspondence with HMRC, the Appellant was aware that several years of tax returns were outstanding. The Appellant put in claims for expenses relating to the laundering of his work uniforms. These claims were made in 2013, 2014, 2015, and 2016. He was advised that tax returns for 2014-2015 and 2015-2016 needed completion and filing. These were filed on 13 September 2018 which is 612 days after HMRC's letter of 10 January 2017. The returns for 2013-2014 remain outstanding.

15. The Appellant created an online account and while he states that he filed his returns there is no evidence to support this position.

16. The Appellant did not act as a reasonable person and there are no reasonable grounds for his non-compliance with his statutory obligations.

17. In his telephone conversation with HMRC on 10 March 2016 there is no record to show that he was having a problem with his unique tax reference number. He was advised to complete his outstanding tax returns and the Appellant indicated he was OK with that position.

18. The warnings on the £100 notice issued to the Appellant are sufficient to show that he knew there could be more penalties levied for late returns.

Discussion

Let us start by looking at the late appeal. The tribunal will allow this appeal out of time. It is true that the appeal is significantly late. However, there are significant penalties involving many thousands of pounds against a taxpayer who had no tax liability for two of the three years of the appeal. It appears to the tribunal that the Appellant may be prejudiced by not having all the facts of the case considered and a fair and just decision given. We must carry out a balancing act and to refuse an extension in this case, even where there is a significant delay in appealing, may lead to an unfair result.

Let us look at what constitutes a reasonable excuse.

The meaning of "reasonable excuse" for the purposes of Sch.55 was considered in the case of Christine *Perrin v HMRC Commissioners* [2018] UKUT 0156.

The Upper Tribunal set out what they considered to be a useful approach to determining the relevant issues:

1. First, establish what facts the taxpayer asserts give rise to a reasonable excuse (it may include the belief, acts or omissions of the taxpayer or any other person).

2. Second, decide which of those facts are proven.

3. Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. Ask the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

4. Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time.

In doing so, the Tribunal should decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

In looking at the 2013-2014 returns, the notice to file was issued on 25 April 2014 and properly served on the taxpayer who had registered himself for self-assessment online in April 2014.

His self-employment started on 13 February 2014, which falls in the tax year 2013-2014. He should have made himself aware at that time of his responsibilities for his tax affairs. This includes submitting tax returns on time and paying any liability by the due date.

He did not have a tax liability for this year but was still required to file a return and had reminders to file from HMRC. There is public information available to taxpayers to help to understand the filing obligations.

A responsible individual would ordinarily adhere to their legal obligations under the Taxes Acts but this was not done by the Appellant. Indeed, a return has not been filed for 2013-2014 at the time of this decision.

For the year 2014-2015, the same pattern emerges. The notice to file was issued to the Appellant on 6 April 2015 but the return was filed on the 13 September 2018. For the year 2015-2016, the notice to file was issued on 6 April 2016 but the return was filed on 13 September 2018. There is no question that the Appellant was remiss in his filings of the self-assessment returns and the penalties were charged in accordance with the law.

In his defence, the Appellant asserts that he did not have his unique tax reference number. However, this was not the evidence presented at the time of his phone call with HMRC on 10 March 2016.

At that time he agreed that he **could** file his return online or in paper form and made no mention of not having his tax reference number during the phone call to the HMRC helpline.

During the period he submitted claims for 2014, 2015 and 2016 to the Tax Repayment Agency for expenses for laundering his work uniform. He was told on the 10 January 2017 that he needed to complete his self-assessment returns. He made no further contact with HMRC until 13 September 2018, some 612 days after HMRC's letter dated 10 January 2017.

The correspondence from HMRC in 2017 should have alerted him to the fact that his returns were outstanding and penalties were outstanding but no attempt was made to make contact with HMRC in the period January 2017 to September 2018.

He did make contact with the repayment agency concerning his repayment claims.

The Appellant stated that he thought that he had filed his returns. The law does not provide a defence for an honest belief or indeed a mistaken belief but only for a reasonable excuse.

The Appellant was sent correspondence by HMRC explaining his filing obligations and penalties. The fact that the self-assessment returns were not filed means he was not a reasonable and prudent taxpayer exercising foresight and due diligence and having proper regard for his responsibility under the Taxes Acts. He has now filed his returns for tax years 2015 and 2016 but not for 2014.

The HMRC have shown that, on a balance of probabilities, a penalty should be charged. The Appellant has not been able to show there is a reasonable excuse for not paying the penalties.

The Appellant has not demonstrated that a reasonable excuse existed or that his actions were those of a reasonable man.

Further, in applying the *Perrin* test set out above, the Appellant falls at the second hurdle. We do not find as proven any fact that may, at least in theory, be capable of constituting a reasonable excuse.

There is therefore no reasonable excuse.

Special Circumstances

The finding that the Appellant did not have a reasonable excuse for the late filing of the self-assessment return, is not, however, the final determination of the Tribunal.

We need to consider whether there are any special circumstances that justify reducing the amount of any of the penalties.

Paragraph 16 of Sch. 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. The power given to the tribunal differs if the appeal is an appeal as to the amount or if the tribunal thinks that the decision itself is flawed, when considered in the light of principles applicable to judicial review.

Those principles include, in making a decision, the decision-maker must have regard to matters that are material or relevant to the decision being made.

HMRC have confirmed that they did consider whether there were any special circumstances and concluded that there are none. However, there is nothing to indicate that HMRC actually considered the issue of special circumstances.

The tribunal feels that it must be a material consideration whether the penalties are proportionate and whether the full penalty should become due on a nil tax return which is filed late. There is no tax to collect unlike returns which are late where there is an outstanding liability.

The conventional wisdom is that the fact only that no tax is due is not in itself sufficient to give rise to a special circumstance and a reduction in the penalty. There must be something in the facts “which is uncommon or exceptional, or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law” to have a special circumstance.

Let us look at this more carefully.

The definition of a "special circumstance" is not provided in law. In *Crabtree v Hinchcliffe (1971) 3 All E R 967* there is dicta, as stated above, that special circumstances means something "exceptional, abnormal or unusual" or "something out of the ordinary run of events". The statutory provisions in that case were different to those being considered here.

In *White v HMRC [2012] UKFTT 364 (TC*), the HMRC officer did not give a special reduction in a penalty, but failed to provide any explanation. The tribunal noted that there was no evidence to indicate that the HMRC officer had considered a special reduction before the penalty determination was made. The tribunal considered that the HMRC officer's failure to give reasons for concluding that there were no special circumstances (and hence that no special reduction should be made) meant that his decision was flawed.

In *Bluu Solutions Ltd v Revenue & Customs [2015] UKFTT 95 (TC*), the tribunal expressed the view that a decision by HMRC on whether or not there are special circumstances can be made at any time up to the conclusion of the tribunal hearing. However, it agreed with the tribunal in **White** that a decision of HMRC in relation to special circumstances requires reasons, as otherwise the tribunal cannot know whether the decision was flawed.

In *Arnfield v Revenue & Customs [2015] UKFTT 53 (TC)* the tribunal went on to consider whether there were 'special circumstances' (within FA 2009, Sch. 55, para 16). The tribunal could only substitute its decision for that made by HMRC if it decided that HMRC's application of the special circumstances provision was "flawed when considered in the light of the principles applicable in proceedings for judicial review" (FA 2009, Sch. 55, para 22).

There was no evidence of HMRC having considered whether there were special circumstances. HMRC's failure to consider the question whether to exercise their discretion to take account of special circumstances was therefore a flawed decision. The tribunal was therefore entitled to vary the penalty if special circumstances existed.

The term "special circumstances" is not a term of art; it is an ordinary term which can be given an ordinary meaning as required by statutory interpretation. It is wide enough to include the concept of proportionality, which is founded on the principle of fairness.

In looking to see if the penalty is proportionate, the tribunal must look at the gravity of the infringement and the penalties applied must be necessary for the object pursued, which is to have taxpayers file their returns on time. The penalty applied to achieve this objective cannot be disproportionate or, if you like "over the top".

The absence of an explanation of what was considered by HMRC as part of the consideration of special circumstances and the fact that there is no evidence to indicate that the HMRC officer had considered a special reduction before the penalty determination was made means that the determination is flawed. The tribunal can only conclude that the failure to consider the question whether to exercise their discretion to take account of special circumstances must mean that the judgement of the HMRC officer was not applied to the facts of the case.

We simply have a statement stating the decision of HMRC" was not flawed and there are no special circumstances to reduce the penalty". This is not satisfactory.

It is hard to see how a penalty of £4800 for not filing a return is fair to a person who has no tax liability in two of the three tax years and only a nominal liability for the third year.

At the very least the HMRC office should look at the gravity of the infringement and the penalties applied in determining if proportionate. A simple explanation to show what was considered by the officer as part of considering the special circumstances would have shown that the officer applied his mind to the facts and circumstances.

The tribunal therefore holds that there was an omission by HMRC to exercise its discretion under the special reduction provisions.

Decision

There is no reasonable excuse for the late submission of the returns for the relevant years.

There is, however, a reduction of all penalties by 50 %. The penalties for 2013-2014, 2014-2015 and 2015-2016 are therefore halved.

It seems to the Tribunal that the imposition of penalties of £4,800 on the Appellant would be disproportionate. There is nothing to indicate what the HMRC officer considered in examining the special circumstances. A consideration of special circumstances should include a consideration of the proportionality or otherwise of the amount of the penalty.

A penalty at this level is unlikely to meet the objectives of the legislation, which is to get taxpayers to comply with the Taxes Act and more likely to be seen as unfair and disproportionate considering all the facts. It would send the wrong message to taxpayers.

Appeal

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 KAMEEL KHAN
TRIBUNAL JUDGE

RELEASE DATE: 21 JUNE 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

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

2. 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).

3. 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.

4. 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.

5. 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.

6. 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.

7. 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 ribunal'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.