[2019] UKFTT 454 (TC)

TC07259

INCOME TAX – penalties for late filing of returns - Schedule 55 Finance Act 2009 – whether determination by officer of HMRC required – no – whether special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01588

BETWEEN

DOUGLAS NEIL CAMPBELL **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 5 July 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 7 March 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 May 2019.

DECISION

INTRODUCTION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 Finance Act 2009 ("Schedule 55") for the failure to submit annual self-assessment returns for the tax years 2014-2015 and 2015-2016 on time.

2. The penalties that have been charged can be summarised as follows for the tax year 2014-2015:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 February 2016;

(2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 12 August 2016;

(3) a £300 "twelve month" penalty under paragraph 6 of Schedule 55 imposed on 21 February 2017 - there is no allegation by HMRC that the withholding of information was deliberate in this regard; and

(4) "daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 12 August 2016.

3. The penalties that have been charged for the tax year 2016-2016 can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 7 February 2017;

(2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 11 August 2017; and

(3) "daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 11 August 2017.

4. Mr Campbell's grounds for appealing against the penalties can be summarised as follows:

(1) the reason given for the late filing is stated to be that he had experienced (unspecified) practical difficulties with the completion of the returns (partly because of his residence in Australia) but accepts this does not amount to a "reasonable excuse";

(2) he argues that HMRC have failed to assess the penalty properly as the penalty notices were issued by a computer and not by an officer of HMRC, so there has been no valid determination (citing *Khan Properties v HMRC* [2017] UKFTT 0830 (TC));

(3) he argues that HMRC use their powers in an arbitrary manner which ought not be allowed, referring in this respect to his representative having experience of HMRC cancelling penalties in various circumstances, including where no or some tax was payable, where the appeal was submitted late and where no appeal had been submitted and no tax return filed; and

(4) he argues that, owing to the presence of "special circumstances", the amount of the penalty should have been reduced, as no tax was owing for either year so HMRC have suffered no loss, and for 2015-2016 he was owed a refund of £283 being the income tax paid by his agent under the non-resident landlords scheme in respect of his rental income for that year .

5. Mr Campbell's appeal to HMRC under s31A Taxes Management Act 1970 ("TMA 1970") was made outside the statutory deadline. HMRC initially refused consent under

s49(2)(a) TMA 1970 in their letter of 6 February 2019. However, HMRC have now prepared a full Statement of Case which deals with the substantive appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a).

FINDINGS OF FACT

6. I have made the following findings of fact based on the papers before me. There was no disagreement between the parties as to the due date for filing the returns, the date on which they were submitted, or that penalty notices have been sent (although, as noted above, Mr Campbell does challenge the validity of the penalty determinations which is addressed in the Discussion).

7. The papers did not include a copy of the notice to file for either tax year. HMRC did provide a print-out of their Return Summary for each tax year, which states that the notice to file for 2014-2015 was issued on 6 April 2015 and the notice to file for 2015-2016 was issued on 6 April 2016. No additional evidence was provided in support of this, but I note that Mr Campbell has not denied receiving these notices. I have concluded that these notices to file were issued by HMRC on or around the dates specified in the Return Summaries.

8. The tax return for 2014-2015 was due to be filed (if in paper copy) by 31 October 2015 or (if submitted online) by 31 January 2016. HMRC's Return Summary indicates that it was filed online on 21 September 2017. This is not disputed and I find this was the date of submission.

9. The tax return for 2015-2016 was due to be filed (if in paper copy) by 31 October 2016 or (if submitted online) by 31 January 2017. HMRC's Return Summary indicates that it was also filed online on 21 September 2017. This is not disputed by Mr Campbell, and I find this was the date of submission.

10. Mr Campbell did not provide a copy of any of the penalty notices with his Notice of appeal to the Tribunal. HMRC have explained that they do not retain copies of penalty notices which are generated and sent to taxpayers. They have provided various pro forma notices as follows:

(1) Self Assessment: Late tax return Notice of penalty assessment – penalty of £100 in accordance with paragraph 3 of Schedule 55; and

(2) Self Assessment: Notice of penalty assessment – assessment of daily penalties of £10 a day for 90 days and the "six month" late penalty of £300 (under paragraphs 4 and 5 of Schedule 55).

11. HMRC have provided, for each tax year in issue, a computer-generated print-out headed "View/Cancel Penalties", stating the date and amount of the various penalties that were issued. These are:

(1) for the tax year 2014-2015, a late filing penalty of £100 on 17 February 2016, a daily penalty of £900 on 12 August 2016, a six month late filing penalty of £300 on 12 August 2016 and a twelve month late filing penalty of £300 on 21 February 2017; and

(2) for the tax year 2015-2016, a late filing penalty of £100 on 7 February 2017, a daily penalty of £900 on 11 August 2017 and a six month late penalty of £300 on 11 August 2017.

12. Whilst the evidence supporting the assessment and notification of these penalties is somewhat equivocal, being based on HMRC's computer records, I note that Mr Campbell has not denied receiving them or provided any reason why he might not have received them, and

accordingly I find that penalty notices in respect of the penalties listed in [11] above were sent to Mr Campbell on or around the date specified in HMRC's records and referred to in [11].

13. I am also satisfied, based on the pro forma notices provided to me, that HMRC have met the requirement in paragraph 4(1)(c) of Schedule 55 that they give notice to Mr Campbell specifying the date from which daily penalties are payable.

14. HMRC's Statement of Case sets out that they have considered whether to reduce the penalties under paragraph 16(1) of Schedule 55 by reason of special circumstances. That submission states that HMRC have considered the following:

(1) no tax was owed for either year so HMRC have suffered no loss and the penalties are said to be disproportionate;

(2) penalties were issued by computer not by an officer of HMRC so there has been no valid determination of the penalties;

(3) returns were submitted late due to practical difficulties, noting that Mr Campbell does not contend this amounts to a reasonable excuse; and

(4) HMRC use their powers in relation to late filing penalties in an arbitrary manner which is unfair to Mr Campbell (and other taxpayers) and ought not be allowed.

15. HMRC concluded that these are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

DISCUSSION

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

17. I have concluded that the tax return for the tax year 2014-2015 was submitted on 21 September 2017. It should have been submitted by 31 January 2016. The tax return for the tax year 2015-2016 was submitted on 21 September 2017. It should have been submitted by 31 January 2017. Subject to considerations of the validity of the penalties, arguments as to HMRC's "arbitrary" conduct and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

18. Mr Campbell's grounds for appeal to refer to having experienced "certain practical difficulties" over completing the returns, with the only additional information being that this was partly because of his residence in Australia since February 2014, but accepts that this does not amount to a "reasonable excuse" for the purposes of Schedule 55. None of the information before me suggests that there might have been a reasonable excuse based on a different ground. Accordingly, I have not considered that basis for reducing penalties further.

Validity of the penalties

19. Mr Campbell referred in his appeal to HMRC to the decision of Judge Thomas in *Khan Properties* and the conclusion reached therein that s100(1) TMA 1970 required that a determination be made by a "flesh and blood" officer of the Board. That decision has been considered by Judge Hellier in *Gilbert v HMRC* [2018] UKFTT 0437 in the context of penalties imposed under Schedule 55 at [48] to [60]:

> "48. In *Khan* Judge Thomas was considering penalties arising under Sch 18 Finance Act 1998. He held that such penalties were to be levied by a determination under section 100 Taxes Management Act 1970 ("TMA") and said:
>
> > 23. In my view the requirement in s 100(1) TMA is for a flesh and blood human being who is an officer of HMRC to make the assessment, that is

to decide to impose the penalty and give instructions which may be executed by a computer (s 113(1D) TMA).

49. I note however that Judge Thomas was concerned to be precise in his conclusions. He said:

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

50. Thus his conclusions in relation to Sch 18 penalties cannot automatically be taken as applicable to the Sch 55 penalties in Mr Gilbert's appeal.

51. In this context I note that Sch 18 FA 1998 contains no provisions relating to the assessment of penalties, and that as a result the provisions of section 100 TMA were relevant to their assessment (or determination). Section 100(1), on which part of Judge Thomas' argument rested, provided:

> "(1) … an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."

52. Further provisions of section 100, 100A and 100B provided for the service of a determination on the taxpayer, the date when the penalty was payable, and the mechanism for appeal. None of these were the subject of provisions in Sch 18 FA 1998.

53. By contrast para 18 Sch 55 FA 2009 contains specific provisions for the assessing, notification and payment of, and appeal against, a penalty.

54. In particular para 18(1)(a) provides that when a person is liable to a penalty under the schedule

> "HMRC must…assess the penalty".

55. In contrast to the words of section 100 TMA, that does not appear to me to require that an identifiable officer of HMRC must make an assessment.

56. A second limb of judge Thomas' argument in *Khan* rested on the proposition that the making of an assessment required a decision to assess made by an officer. He found that in that case there was no evidence of any decision making by an officer, and that HMRC's manuals suggested that the penalty was produced without human intervention by the computer ([38]). He recited the FTT decision in *Morgan & anor v HMRC* UKFTT 317 (TC) in which the tribunal – in relation to a separate requirement of para 4(1)(b) Sch 55 which expressly requires that HMRC must "decide that …a penalty should be payable - said that it was

> "not satisfied that an action by HMRC's computer is a decision by HMRC"

57. So far as concerns that specific requirement in para 4 Sch 55 that HMRC must decide that a penalty is payable the Court of Appeal held that this condition was satisfied because HMRC had taken a policy decision that such penalties should be assessed. The Master of the Rolls said :

> [18].In my judgment, a generic policy decision of the kind taken by HMRC in June 2010 is a decision which satisfies the requirement of para 4(1)(b). I do not, therefore, need to deal with Mr Vallat's alternative submission that para 4(1)(b) is satisfied by HMRC's computer, programmed in accordance with that policy decision, automatically issuing a penalty

> notice. I must confess to having considerable doubts as to whether it is correct.
>
> 58. The penalties assessed on Mr Gilbert were under paras 3 and 5 of Sch 55 which do not contain the requirement in para 4 that HMRC must "decide" that a penalty should be payable, so the precise context of those decisions not directly relevant to Mr Gilbert's appeal. Nevertheless there remains an argument that for HMRC to "assess", as is required by para 18(1)(a), some person has to take a decision so to do.
>
> 59. I do not consider however that this is correct. There is a difference between the making of an "assessment" to tax which requires the exercise of some judgement and the assessing of a penalty the amount of which, in the case of penalties under para 3 and 5 Sch 55, is fixed by the statute. I do not consider that the requirement in para 18(1)(a) Sch 55 that HMRC assess the penalty requires the making of a decision so to do: the language of that provision is mandatory and confers no discretion or room for any decision. It does not therefore require the action of a specific named officer.
>
> 60. For these reasons I reject the argument that the assessing of a penalty under paras 3 or 5 Sch 55 must be done by a named officer and cannot be done by a computer (if it was). I find that the penalties were lawfully assessed."

20. I agree with the reasoning of Judge Hellier in *Gilbert*. In the present appeal, penalties have been imposed under paragraphs 3, 4, 5 and 6 of Schedule 55:

(1) for the reasons given by Judge Hellier, paragraph 18 of Schedule 55, which requires that HMRC assess the penalty (and therefore applies to all of the penalties), does not require the making of a decision to do so;

(2) paragraphs 3, 5 and 6 do not require any decision to be made at all, and each state that a person "is liable" to the relevant penalty if the relevant conditions are satisfied; and

(3) paragraph 4 provides that a person is liable to a penalty if (at paragraph 4(1)(b)) "HMRC decide that such a penalty should be payable". This was addressed by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 where, as cited above, the Master of the Rolls stated that a generic policy decision of the kind taken by HMRC in June 2010 is a decision which satisfies the requirement of para 4(1)(b) - no individual decision was required for the imposition of each penalty.

21. I have therefore concluded that the penalties were validly imposed in accordance with the requirements of Schedule 55.

Conduct of HMRC in exercising statutory powers

22. Mr Campbell has also argued that HMRC's approach to cancelling penalties which have been imposed is "arbitrary" based on the experiences of his representative. This ground raises the question of the extent to which this Tribunal is entitled to take into account matters of public law in exercising its jurisdiction. There is a considerable body of authority on this matter, notably *Wandsworth LBC v Winder* [1985] AC 461, *Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864, *Oxfam v HMRC* [2009] EWHC 3078, *Hok Limited v HMRC* [2012] UKUT 363 (TCC), *HMRC v Noor* [2013] UKUT 71 (TCC) and *The Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713.

23. These decisions were considered by the Upper Tribunal in *R & J Birkett v HMRC* [2017] UKUT 0089 (TCC), and the Upper Tribunal, having reviewed the authorities, concluded as follows:

(1) this Tribunal has no general judicial review jurisdiction;

(2) it may in certain cases have to decide questions of public law either in the course of exercising the jurisdiction that it does have or to determine whether it has jurisdiction in the first place;

(3) in each case, therefore, in assessing whether a particular public law point is one that the Tribunal can consider, it is necessary to consider the specific jurisdiction that the Tribunal is exercising and then to determine whether the particular public law point that is sought to be raised is one that falls to the Tribunal either in exercising that jurisdiction or in determining whether it has jurisdiction; and

(4) since the Tribunal is a creature of statute, this is ultimately a matter of statutory construction.

24. I cannot see any basis in Schedule 55 for concluding that, in considering whether a penalty has been properly imposed or whether HMRC should have exercised its discretion (in accordance with that Schedule) to reduce the amount of a penalty, I should generally take into account the approach taken by HMRC to cancelling penalties which have been imposed on other taxpayers.

25. Paragraph 20 provides that a person may appeal against a decision of HMRC that a penalty "is payable by them" or "as to the amount of the penalty payable by them". The subject-matter of the appeal before the Tribunal is therefore confined to the penalty imposed on the relevant taxpayer. Paragraph 22 then provides that the Tribunal may affirm or cancel HMRC's decision that a penalty is payable, and may affirm or substitute another decision that HMRC had power to make as to the amount of the penalty. Notably, given that the grounds of appeal made particular reference to the cancellation of penalties by HMRC, paragraph 23 provides that liability to a penalty does not arise if the person satisfies HMRC or, on appeal, this Tribunal or the Upper Tribunal, that there was a reasonable excuse for the failure. This makes it clear that where a person disagrees with HMRC's decision on reasonable excuse, they can appeal to the Tribunal and seek to persuade the Tribunal that they had a reasonable excuse. Paragraph 16 provides that if HMRC think it right because of special circumstances they may reduce a penalty. This empowers HMRC to take account of a variety of possible factors which it might find to be sufficiently special – but a decision by HMRC as to how to exercise this discretion for one taxpayer cannot, in an appeal to this Tribunal, provide a basis for re-making a decision in relation to a different taxpayer.

26. I cannot therefore take account of HMRC's approach to cancelling penalties imposed on other taxpayers when considering the penalties which have been imposed on Mr Campbell.

Special circumstances

27. HMRC did consider whether to reduce the penalties on the grounds that there were special circumstances but refused to do so. I can only substitute my own decision for that of HMRC if I conclude that HMRC's decision was flawed when considered in the light of the principles applicable in proceedings for judicial review.

28. The factors considered by HMRC are set out at [14] above. I would not necessarily regard unspecified practical difficulties in filing returns as relevant to consideration of special circumstances, nor the argument made that there has been no valid determination – the latter, if correct, should result in the penalties being cancelled as improperly imposed, not as valid but able to be reduced. I have already dealt with the argument that HMRC's position on cancelling penalties is arbitrary.

29. I have, however, considered further Mr Campbell's argument in relation to the unfairness of penalties where no is tax owed (and thus there is no loss to HMRC).

30. Mr Campbell has argued that the penalties charged are unfair because he had no tax liability for the relevant tax years, and indeed was owed a refund in one of the years. This Tribunal does, in certain circumstances, have the power to reduce a penalty because of the presence of "special circumstances". In *Edwards v HMRC* [2019] UKUT 0131 (TCC), the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty. It follows that I have concluded that the mere fact that Mr Campbell had no tax liability for the relevant tax years and was owed a refund for one of them does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of "special circumstances".

31. I do not consider that HMRC's decision on special circumstances was flawed, and accordingly I cannot change it.

CONCLUSION

32. The late filing penalties for the tax years 2014-2015 and 2015-2016 are confirmed and Mr Campbell's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 11 JULY 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 18 of Schedule 55 deals with the assessment of a penalty:

18—

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the liability to tax which would have been shown in a return.

(5) Sub-paragraph (6) applies if—

(a) an assessment in respect of a penalty is based on a liability to tax that would have been shown in a return, and

(b) that liability is found by HMRC to be excessive.

(6) HMRC may by notice to P amend the assessment so that it is based upon the correct amount.

(7) An amendment under sub-paragraph (6)—

(a) does not affect when the penalty must be paid;

(b) may be made after the last day on which the assessment in question could have been made under paragraph 19.

8. 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.