



Income tax – late appeal –whether late appeal allowed –no – late filing penalties – whether reasonable excuse or special circumstance – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

TC07279

**Appeal
number:
TC/2016/01114**

BETWEEN

BARRINGTON BROWN

Appellant

-and-

THE COMMISSIONERS FOR

HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE IAN HYDE

JOHN ADRAIN

Sitting in public at Birmingham on 28 June 2018

The Appellant did not appear and was not represented

Mr G Truelove, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. 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 and HMRC’s refusal to allow the appellant to appeal late against the penalties.

PRELIMINARY MATTER

2. The appellant did not attend the hearing either personally or through a representative and no indication had been given by the appellant in advance that he would not be attending. However, his representative, Miss Cotton of Bee-Line Accountants on being contacted was content for the matter to proceed in her and her client’s absence.

3. In deciding whether to proceed in the absence of a party, the Tribunal must have regard to the overriding objective of the Tribunal under Rule 2 of the Tribunal procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly, which under Rule 2(2) includes;

“.....

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

....

(e) avoiding delay, so far as compatible with proper consideration of the issues”

4. We have considered these principles and concluded that, the appellant having been given due notice of the hearing (including a warning in the usual format that should he not attend the hearing might proceed without him), and his representative indicating her consent for us to do so, the hearing should proceed. The appellant’s reasons for failing to file his tax return and appeal on time were set out in correspondence and his appeal and we determine that the appeal could properly be considered in his absence.

THE FACTS

5. Based on the papers provided to the Tribunal and the additional information provided by HMRC in the hearing we find the facts to be as set out below.

6. In respect of the year 2011-12;

(1) On 6 April 2012 HMRC issued a notice to the appellant to file a tax return.

(2) The date to file a paper return was 31 October 2012 or, if submitted electronically, 31 January 2013.

(3) On 12 February 2013 HMRC issued a £100 late filing penalty.

(4) On 14 August 2013 HMRC issued;

(a) a penalty of £900 being a daily penalty of £10 a day for 90 days

- (b) a “six month” late filing penalty of £300
 - (5) On 25 February 2014 HMRC issued a “twelve month” late filing penalty of £300
 - (6) On 7 December 2014 an electronic tax return for the year 2011-12 was received by HMRC.
- 7. In respect of the year 2012 -13;
 - (1) On 6 April 2013 HMRC issued a tax return for the year.
 - (2) The date to file a paper return the year 2012-13 was 31 October 2013 or, if submitted electronically, 31 January 2014.
 - (3) On 18 February 2014 HMRC issued a £100 late filing penalty notice.
 - (4) On 18 August 2014 HMRC issued;
 - (a) a penalty of £900 being a daily penalty of £10 a day for 90 days
 - (b) a “six month” filing penalty of £300
 - (5) On 6 December 2014 an electronic tax return for the tax year 2012-13 was received by HMRC.
- 8. We find that the appellant called HMRC on 15 January 2013 to ask about his account balance and in the call he was advised to call back once his return was filed.
- 9. We find that the penalty notifications were sent by HMRC to the appellant’s notified address and were received by the appellant.
- 10. The appellant appealed to HMRC against the penalties for both years on 9 December 2014.
- 11. Based on our findings above, subject to the arguments in this appeal, we find the penalties described above are properly due.
- 12. There are two issues in this appeal, first, whether the appellant should be granted leave to appeal late and, second, whether the appellant has a reasonable excuse or there are special circumstances such that the penalties are not payable.
- 13. The relevant statutory provisions are included as an Appendix to this decision.

APPELLANT’S ARGUMENTS

- 14. The appellant’s arguments as set out in his appeal and correspondence are as follows;
 - (1) the appellant was unaware of his obligations as self employed and, as he did not undertake any self employed work, did not realise he had to take any action
 - (2) the appellant’s mother, to whom he was very close, had died some five years before and he has suffered an extended period of bereavement
 - (3) The appellant has been off work on sick pay following an operation and has only just returned to work so would struggle to pay the penalties
 - (4) The appellant’s brother had the same problem and his appeal was allowed

(5) There was no tax to pay in the relevant years, indeed he has received a repayment.

15. The appellant has not identified whether the above arguments are made in respect of which aspect of this appeal so we will consider them in the context both of the late appeal and the substantive appeal.

HMRC'S ARGUMENTS

16. On the question of the appellant's appeal to them on 9 December 2014 being late, HMRC argued that the delay was significant;

(1) in respect of the 2011-12 tax year 635 days late for the initial £100 late filing penalty, 482 days late for the daily and six month penalties and 257 days late for the 12 month penalty for the same year.

(2) for the 2012-13 year the appellant was 264 days late for the initial £100 filing penalty and 83 days late for the daily and six month penalties.

17. There was no good reason for this delay. Whilst allowing the late appeal to be heard would allow the appellant to present his case, it would be reopening an appeal that HMRC were entitled to treat as closed.

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 legislation. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the taxpayer. The test is to consider what a reasonable person, who wanted to meet their tax obligations would have done in the same circumstances.

19. On the specific grounds raised by the appellant, HMRC argued as follows.

20. On the appellant's mother's death, this must have occurred in 2008 or 2009. HMRC are sympathetic but the first return relevant to this appeal did not need to be filed until 31 January 2013, and so whilst there may have been a reasonable excuse for a limited time, this could not be indefinite. In any event the appellant filed his 2010-11 return on time, after his mother's death.

21. On the appellant's depression and taking care of his brother, the appellant has not stated when these events occurred or provided any evidence as to how this affected him. Again, as the appellant filed his 2010-11 return on time and this cannot amount to a reasonable excuse.

22. As to the appellant having an operation, from the date of the correspondence HMRC assume it was in 2014. If it was after 31 January 2014 then it was after the relevant dates for filing and so irrelevant. If it was before 31 January 2014 then the appellant as a responsible taxpayer should have made arrangements or planned ahead to ensure his return was filed by the due date.

23. The appellant was told in a call with HMRC on 15 January 2013 that he could find out his account balance once his tax return was filed. It took the appellant 23 months from that call to file his return. This call demonstrates that the appellant was fully aware of his obligation to file a return but he never contacted HMRC stating he was having difficulties filing.

24. The appellant ultimately filed his returns with the help of his accountant. Once the appellant knew he was going to struggle to file his returns he should have sought assistance straight away but from correspondence it appears the accountants were not instructed until the penalties had been incurred.

25. The fact that no tax was payable is irrelevant to a liability to late filing penalties and insufficiency of funds is not a reasonable excuse, paragraph 23 Schedule 55.

26. HMRC cannot comment on the appellant's brother's tax position as all taxpayer's affairs are confidential. However, HMRC can say that the brother's case was for different years and quite different circumstances. In any event each taxpayer's case is treated individually and decided on its merits and HMRC do not compare appeals in order to make decisions.

27. On the question of a special reduction, HMRC acknowledged that they had previously not considered whether there were special circumstances but having now considered the position, do not consider the circumstances put forward by the appellant justify a special reduction.

DECISION: LATE APPEAL

28. Section 31A TMA requires a taxpayer to appeal a notice to HMRC within 30 days. The appeals are late and, as HMRC have not agreed to a late appeal under section 49(2)(a) TMA in respect of the appeal, this Tribunal must determine whether to give permission in accordance with section 49(2)(b) TMA.

29. On the question as to whether the appellant should be granted permission to appeal out of time, the Upper Tribunal in *Romaserve (Property Services) Ltd v HMRC* [2015] UKUT 254 held that:

“permission to appeal out of time should only be granted exceptionally, meaning that it should be the exception rather than the rule and not granted routinely”

30. Further the Upper Tribunal in *Romaserve* said;

“... the exercise of a discretion to allow a late appeal is a matter of material import, since it gives the tribunal a jurisdiction it would not otherwise have. Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

31. The approach to take in deciding issues as to non compliance with time limits in the Tribunal has been the subject of a number of recent cases, including the Upper Tribunal in *Data Select Limited v Revenue and Customs Commissioners* [2012] UKUT 187, *McCarthy & Stone (Developments) Limited v HMRC* [2015] STC 973, and the Court of Appeal in *BPP Holdings Ltd v HMRC* [2016] EWCA Civ 121 (with which the Supreme Court did not interfere, *BPP Holdings Ltd v HMRC* [2017] UKSC 55).

32. Ryder LJ made the following comments in BPP in the Court of Appeal;

“ [37] While I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness.

It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

[38] A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party....

[42] In my view the new CPR 3.9 and comments by the Court of Appeal in *Mitchell and Durrant v Chief Constable of Avon and Somerset Constabulary* [2013] EWCA Civ 1624.... clearly show that courts must be tougher and more robust than they have been hitherto when dealing with applications for relief from sanctions for failure to comply with any rule, direction or order. [Counsel for HMRC's] answer to this point was that the Jackson reforms and CPR 3.9 do not apply to tribunals. He pointed out that the overriding objective in CPR1 is in different terms to the overriding objective in r 2(3) of the UT rules. From April 2013, CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly and proportionate cost. CPR 1 also provides that dealing with the cases justly includes ensuring that it is dealt with expeditiously. [Counsel for the taxpayer] submitted that the courts and tribunals should not apply different standards to matters such as their attitude to the grant of an extension of time.

[43] I agree that the CPR does not apply to tribunals. I do not however, accept that the differences in the wording of the overriding objectives in the CPR and UT Rules mean that the UT should adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that subject to the CPR...

[44]... Morgan J applied CPR 3.9 by analogy...in just the manner I have suggested is appropriate....

[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the court should apply the new approach to CPR3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules”

33. More recently the Upper Tribunal in *William Martland v Commissioners for Revenue & Customs* [2018] UKUT 178 (TCC) reviewed these decisions in the context of an application to make a late appeal and provided fresh guidance;

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that

question, we consider the FTT can usefully follow the three stage process set out in *Denton*:

- (1) Establish the length of the delay. If it was very short (which would, in absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
- (2) The reason (or reasons) why the default occurred should be established.
- (3) The FTT can then move onto its evaluation all “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account that particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent that they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT’s deliberations artificially by reference to those factors. The FTT’s role is to exercise judicial discretion taking into account all relevant factors, not to follow the checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the appellant’s case; this goes to the question of prejudice – that is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than are very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal....

34. Whilst *Martland* was released on 1 June, only just before the hearing of this appeal and so was not considered, it contains direct guidance for the Tribunal on this matter and so we will adopt the tests as set out in *Martland*.

35. On the first of the factors in *Martland*, the length of delay, the delay ranged from 635 days late for the initial £100 late filing penalty in respect of the 2011-12 tax year to 83 days late for the daily and six month penalties for the 2102-13 year.

36. We agree with HMRC that, applying the three month test in *Romaserve*, with the exception of the daily and six month penalties for the 2012-13 year for which the appellant was 83 days, this delay is serious and significant.

37. On the second stage, whether there are reasons for the delay, the appellant raised a number of arguments which were not specifically directed to the delay issue but we have considered them for potential relevance.

38. We do not find that the fact that being unaware of his tax position is a good reason for being late in appealing. We find that the penalty notices sent to the appellant advised him that if he disagreed with the notices he needed to appeal. Accordingly we find he was aware of the need to appeal but he did not do so.

39. For the same reason we do not accept there being no tax payable in the underlying return as being relevant. The appellant was advised he had to appeal the penalties but did not.

40. We do not accept that the appellant's mother's death, the appellant's depression and taking care of his brother are good reasons for delay. It is for the appellant to demonstrate that he has a good reason and he has simply made the argument without any supporting evidence. The appellant's mother probably died in 2008 or 2009, a number of years before HMRC imposed the first penalty on 12 February 2013 and the Tribunal cannot accept without evidence that this was still a reason for delay at that time or the later dates for the subsequent appeals.

41. The appellant's brother's tax position is not relevant to the appeal being late. The appellant has not specifically made this point in the context of delay but rather appears to be raising it to argue that the penalties should be charged at all. Even if it were being raised in the context of the late appeal and there were evidence to support the point, it amounts to an argument that HMRC has not exercised its administrative powers properly. That is not a matter within the jurisdiction of this Tribunal.

42. For completeness we do not see the argument that the appellant would struggle to pay the penalties as relevant to whether there is a good reason for delay in appealing.

43. The third stage of the process is a balancing exercise to assess the merits of the reasons given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

44. The appellant would clearly be significantly prejudiced by a refusal to reinstate. This is a very serious matter for him as he would find it difficult to pay the penalties. HMRC argue that they should be entitled to treat a matter as closed if the taxpayer does not appeal in time. However they do not press the prejudice point, and this matter having been heard at the same time as the substantive appeal, we would note that HMRC appear not to have been any difficulties in presenting their case.

45. Prejudice to the appellant must be balanced against the merits of the reasons for delay and take into account the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. We have not found any good reasons for delay.

46. The appellant needs to demonstrate a good reason for appealing late and in this case he has not done so. Accordingly, applying the balancing exercise required by *Martland*, we refuse leave to appeal.

DECISION: SUBSTANTIVE APPEAL

47. Given our finding above, it is unnecessary for us to consider the substantive issue as to whether there was a reasonable excuse or special circumstances for the late filing of the returns but for completeness we will do so.

48. In respect of the tax year 2011-12 the appellant did not submit a return until 7 December 2014 and for the tax year 2012-13, he submitted it on 6 December 2014. Save for the points discussed below, the appellant does not dispute that the penalties are due.

49. Accordingly, subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due in respect of each year.

50. Paragraph 23 of Schedule 55 provides that there is a “reasonable excuse” for the failure to file a return if;

“(1) liability to a penalty under any paragraph of this Schedule does not arise in relation to the failure to make a return if the person satisfies HMRC or (on appeal) the First-tier 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)

(c) Where the person had a reasonable excuse for the failure but the excuse ceased he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

51. Paragraph 16 provides that a penalty may be reduced if there are “special circumstances”;

“(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....”

52. 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 in paragraph 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.”

53. Where a taxpayer argues that he has a reasonable excuse the standard to be applied is as set out in the decision of Judge Medd QC in *Clean Car Co Ltd* [1991] BVC 568;

“the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular Appellant as the tribunal considered relevant to the situation being considered”

54. We do not accept the appellant's argument that he was unaware of his tax obligations and that this is a reasonable excuse. The appellant had previously filed tax returns and as we have found HMRC mentioned to the appellant in the call on 15 January 2013 that a return needed to be filed. We do not therefore find that the appellant was ignorant of the obligation to file and even if he was responsible taxpayer would have been aware of those obligations and ensured he complied with them.

55. As with the position as regards reasons for being late in appealing, the appellant has not produced any evidence that his mother's death, his depression and taking care of his brother had such an impact on him over such a long period of time that they amount to a reasonable excuse. Again, the Tribunal is sympathetic but the appellant's mother appears to have died a number of years before the 31 January 2013 deadline to file the 2011-12 tax return and the Tribunal cannot accept without evidence that this was still a reason for delay in the period from 31 January 2013.

56. For the same reasons as set out above in respect of the late appeal issue the appellant's brother's tax position is not relevant to whether the appellant has a reasonable excuse.

57. The appellant argues that he would be unable to pay the penalty. Paragraph 23(2)(a) of Schedule 55 specifically provides that;

“(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control”

58. Inability to pay is therefore not a reasonable excuse.

59. We would therefore if necessary determine that there is no reasonable excuse for the late filing of the tax returns.

60. Finally we should consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. A special circumstance is generally taken to mean something exceptional, abnormal or unusual. By virtue of paragraph 16(2)(a) it cannot include ability to pay. The Tribunal's jurisdiction in this context is limited by paragraph 22 of Schedule 55 to circumstances where it considers HMRC's decision in respect of the application of paragraph 16 was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction.

61. Specifically on the point the appellant has argued that as there was no tax to pay, no penalty should be due, the point was considered by the Upper Tribunal in *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC). 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 we have concluded that the mere fact that the appellant had no tax liability for the relevant tax years does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of “special circumstances”.

62. Applying the judicial review standards we see no reason to overturn HMRC's decision and we affirm it.

CONCLUSION

63. We do not grant the appellant leave to file his appeals late. Further, we find that there is no reasonable excuse for the appellant filing his returns late nor are there any reasons to overturn HMRC's decision that there are no special circumstances. Accordingly we dismiss the appeal and affirm the penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

64. 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.

**IAN HYDE
TRIBUNAL JUDGE**

Release date: 25 July 2019

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. Section 31(1) Taxes Management Act 1970 (“TMA”) provides;

(1) An appeal may be brought against-

(a) ...

(b) ...

(c) ...

(d) any assessment to tax which is not a self-assessment”

2. Section 31A TMA provides;

“(1) Notice of an appeal under Section 31 of this Act must be given-

(a) in writing,

(b) within 30 days after the specified date,

(c) to the relevant officer of the Board

(2) ...

(3) ...

(4) In relation to an appeal under section 31(1)(d) of this Act-

(a) the specified date is the date on which the notice of assessment was issued, and

(b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

(5) The notice of appeal must specify the grounds of appeal”

3. Section 49 TMA provides;

“(1) This section applies in a case where-

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit

(2) Notice may be given after the relevant time limit if-

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given

(5) Condition B is that HMRC are satisfied that there was a reasonable excuse for not giving the notice before the relevant time limit

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased

(7) ...

(8) In this section “relevant time limit” in relation to notice of appeal, means the time before which the notice is to be given (but for this section)

4. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

5. 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).

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.