



[2019] UKFTT 545 (TC)

TC07339

INCOME TAX - individual tax return – application to appeal self-assessment – no basis to do so - penalties for late filing - late appeal - application for permission to appeal out of time - application refused - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/01066

BETWEEN

MATTHEW DILLON

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE TRACEY BOWLER
JANE SHILLAKER**

Sitting in public at Taylor House, Rosebery Avenue, London on 31 July 2019

Mr Derek Thomas, chartered accountant, for the Appellant

Mr Reji John, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Mr Dillon against penalties totalling £1300 imposed by the Respondents ('HMRC') under Paragraphs 3, 4 and 5 of Schedule 55 Finance Act 2009 ("Schedule 55") for the late filing by the Appellant of his self-assessment tax return for the tax year ending 5 April 2011 and against the amount charged to tax for the same year.
2. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012;
 - (2) "daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012; and
 - (3) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012.
3. Mr Dillon did not appeal to HMRC for more than five years after the due date on which the appeal should have been made. After receiving a response to his appeal from HMRC, Mr Dillon was also more than a year late in then making his appeal to the Tribunal. Mr Dillon made an application to appeal out of time. HMRC opposed the application.
4. For the reasons given below we refuse that application and dismiss the appeal.

BACKGROUND

5. On 22 March 2017 Mr Dillon's agent wrote to HMRC to appeal the penalties which had been imposed in relation to the late submission of the 2010-11 tax return, referring to Mr Dillon having family issues and being stressed. Form APP04 (the late penalty appeal form) was sent to Mr Dillon and his agent.
6. On 22 November 2017 Mr Dillon's agent, Mr Thomas, wrote to HMRC asking to appeal against "the balance due for 2010/11" and maintained that, although the appeal was late, it was valid as there had been a fundamental error in the preparation of Mr Dillon's accounts.
7. On 20 December 2017 HMRC wrote to the Appellant (and sent a copy of the letter to his agent) explaining that the deadline had passed for appealing the penalties and saying that if Mr Dillon did not agree that his appeal was too late, he could write to HM Courts & Tribunals Service by 19 January 2018 to appeal.
8. Mr Dillon's agent did not receive the copy letter and contacted HMRC, who responded in a letter dated 16 March 2018 and again provided details for how to appeal to the Tribunal.
9. On 19 February 2019 the Appellant lodged an out-of-time appeal with the Tribunal. The grounds of appeal stated that the late appeal was due to Mr Dillon sending a form T239 (appointing a representative) and not receiving a reply.
10. HMRC has maintained that the late appeal should not be permitted.

FINDINGS OF FACT

11. The evidence consisted of the bundle prepared by HMRC and letters provided by Mr Thomas with the appeal form and in an email to the Tribunals' service. Mr Dillon did not

attend the hearing, but Mr Thomas made submissions on his behalf. Taking into account all of the evidence we made the following factual findings.

12. Mr Dillon works as a qualified electrician and has done so throughout the years since and including 2010. Sometimes he has provided his services as an electrician through a limited company and sometimes he has been employed directly.

13. At some point since 2010 he and his wife separated and divorced.

14. Mr Dillon has been registered for self-assessment since 1996.

15. Details of an agent acting for Mr Dillon were provided to HMRC on 12 January 2009 but were removed on 20 January 2012.

16. Mr Dillon was in contact with HMRC by telephone about various matters in 2009 and 2010.

17. On 6 April 2012 HMRC issued a notice to file a tax return for the tax year 2010-11. The tax return was due to be submitted in paper form by 31 October 2011 and in electronic form by 31 January 2012.

18. On 14 February 2012 HMRC issued a penalty assessment of £100 pursuant to paragraph 3 of Schedule 55 for the late filing of the 2010-11 return.

19. On 7 August 2012 HMRC issued a penalty assessment of £900 pursuant to paragraph 4 of Schedule 55 for the late filing of the 2010-11 return.

20. On 7 August 2012 HMRC issued a penalty assessment of £300 pursuant to paragraph 5 of Schedule 55 for the late filing of the 2010-11 return.

21. On 18 August 2012 Mr Dillon called HMRC about his tax return for 2010-11. A paper return was issued to him and he was advised that he would need to include his salary received from his company on his personal tax return.

22. On 26 September 2012 Mr Dillon submitted his tax return.

23. On 19 November 2012 Mr Dillon called HMRC and was told that the penalties could not be waived.

24. Mr Dillon had further contact with HMRC in 2012 and 2013. He wrote to HMRC on 23 April 2013 seeking to amend his 2010-11 self-assessment return. HMRC replied with details for him to complete. No further action was taken by Mr Dillon about this at that time. Apart from notifying a change in address, Mr Dillon had no further contact with HMRC until 31 October 2016 when new agent details were given to HMRC.

25. On 1 March 2017 his agent telephoned HMRC to ask for the address to which to send an appeal.

26. On 22 March 2017 Mr Dillon's agent contacted HMRC about appealing the penalties imposed in relation to the late submission of the tax return for 2010-11. Mr Dillon and his agent were sent the form for making an appeal but did not return it.

27. On 22 November 2018 Mr Dillon's agent wrote again to HMRC to appeal the penalties and to ask for the self-assessed tax for 2010-11 to be cancelled.

GROUNDS OF APPEAL

28. The grounds of appeal were stated in the notice of appeal to be that the tax return for 2010-11 was erroneously completed because Mr Dillon incorrectly stated his company's revenue as his self-employed income.

29. Having read the correspondence between Mr Thomas and HMRC and having considered Mr Thomas' submissions we consider that Mr Dillon relies on the following points in his appeal:

- (4) The tax return for 2010-11 was incorrectly completed and should be cancelled;
- (5) Mr Dillon was limited in managing his tax affairs by family problems caused by the breakdown of his marriage and consequent stress.

APPEAL OF THE SELF-ASSESSMENT FOR THE TAX YEAR 2010-11

30. Mr Dillon has sought to appeal the self-assessed tax for the year 2010-11, asking for the balance due to be cancelled. HMRC submit that this Tribunal has no jurisdiction to consider the self-assessed tax for 2010-11 if the late appeal is admitted.

31. The powers of the Tribunal are provided by statute. The Tribunal only has the powers given to it by Parliament in legislation.

32. Mr Dillon claims that he made a mistake in the calculation of his tax in his self-assessment for 2010-11. However, his representative has not been able to identify any provision which enables us to consider his self-assessment for 2010-11.

33. The relevant legislation is set out in an appendix to this decision. In summary, the legislation applies as follows.

34. Section 9ZA of the Taxes Management Act 1970 ("TMA") provides that a person can correct an error in a self-assessed tax return within 12 months from the due date of the return; i.e. in this case by 31 January 2013. Mr Dillon wrote to HMRC to seek to amend his tax return on 22 April 2013 which was after the 31 January 2013 deadline.

35. Provisions contained in paragraph 3 of Schedule 1AB to the TMA enable recovery of overpayment of tax to be made up to four years from the end of the tax year in which the error was made; i.e. until 5 April 2016. Mr Dillon did not make an overpayment claim within this period.

36. Mr Thomas asked to correct the tax return for 2010-11 in a telephone call to HMRC on 31 May 2017. He has subsequently written to HMRC asking for the tax payment for 2010-11 to be cancelled.

37. We have no power to extend the time limits provided in Section 9ZA TMA or paragraph 3 of Schedule 1AB to the TMA.

38. Appeal rights in relation to income tax returns are governed by Section 31 TMA. It is specifically stated in that section that an appeal can be brought against any assessment to tax which is not a self-assessment.

39. Accordingly, Mr Dillon has not shown any basis for his claim to have the tax self-assessed for the tax year 2010-11 to be cancelled.

APPEAL OF THE PENALTIES

The Law

40. Moving on from the claim for the tax amount for 2010-11 to be cancelled, the next matter before us is the appeal in relation to the penalties imposed by HMRC. The first issue is whether to admit the late appeal.

41. The relevant legislation is set out in an appendix to this decision. In summary, the legislation applies as follows.

42. Paragraph 21 of Schedule 55 provides that an appeal against a penalty assessed under any paragraph of that Schedule is to be treated in the same way as an appeal against an assessment to the tax concerned. In the case of a failure to make a return under section 12AA of the Taxes Management Act 1970 (“TMA”), the result is that, among other provisions, sections 31, 31A and 49 of that Act are applied.

43. The effect of applying sections 31 and 31A of TMA 1970 is that a notice of an appeal must be given to HMRC within 30 days after the specified date. In the case of penalties the specified date is the date of issue of the penalty notices.

44. The effect of applying section 49 of TMA 1970 is that, in a case where HMRC do not agree to notice of an appeal being made to them after the expiry of the 30 day time limit, the tribunal has a discretion to give permission to admit the appeal late (section 49(2)(b) of TMA 1970).

45. The recent Upper Tribunal case of *William Martland v HMRC* [2018] UKUT 0178 (TCC) has considered what the approach of this tribunal should be to the exercise of that statutory discretion.

46. The Upper Tribunal said that in exercising judicial discretions generally, particular importance is to be given to the need for ‘litigation to be conducted efficiently and at proportionate cost’, and ‘to enforce compliance with rules, practice directions and orders’, although this should not detract from the general injunction to ‘consider all the circumstances of the case’.

47. The Upper Tribunal provided the following guidance for the consideration of late appeals by the first tier tribunal (“FTT”):

“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 the 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 of “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 the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. [...] The FTT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice – there is

obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal [...]

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay[...] Nor should the fact that the applicant is self-represented [...] HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

48. In Mr Dillon's case the grounds of appeal are not fully articulated, but the Tribunal was satisfied from the papers and the submissions made by Mr Thomas that Mr Dillon relies upon having a reasonable excuse for not submitting his returns as a result of family problems and stress. That depends upon the application of paragraph 23 of Schedule 55 to FA09 (reasonable excuse) and the guidance provided in case law and, in particular, the case of *Christine Perrin v HMRC Commissioners* [2018] UKUT 0156, to the facts of this case.

49. In *Perrin* the Upper Tribunal held as follows:

“81. When considering a ‘reasonable excuse’ defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(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. In doing so, it should take 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. It might assist the FTT, in this context, to ask itself 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 (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again 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.”

50. HMRC can also reduce a penalty because of “special circumstances” under paragraph 16 of Schedule 55. We can only interfere with HMRC's decision if we think that the decision in respect of the application of the special circumstances provisions is “flawed” when considered in the light of principles applicable to judicial review.

51. The burden of proof is on HMRC to show that the necessary conditions were met for the issue of penalties. The burden of proof is then on Mr Dillon to show that he had a reasonable excuse for the late filing of his tax return. In each case the standard is the usual civil standard of balance of probabilities.

Discussion

52. It is clear that the delay in notifying the appeals in respect of all the penalty assessments was both serious and significant. Even if the delay is calculated only until the initial contact made by Mr Dillon's agent in March 2017, the delay ranged from 5 years in the case of the £100 penalty imposed on 14 February 2012 to 4 ½ years in the case of the £300 penalty imposed on 7 August 2012.

53. The amount at stake totals £1,300 and Mr Dillon's tax return for the tax year 2010-11 shows taxable profit from his self-employment of £20,468. The penalties are therefore a notable, but not very large proportion of his income for the year. We have not been provided with evidence to show that his income has significantly altered since 2012 and we were told by Mr Thomas that Mr Dillon had started a new job just a few days before the hearing.

54. Mr Dillon has not disputed that the notice to file his tax return for 2010-11 and the penalty notices were received by him. The evidence provided by HMRC is sufficient to discharge the burden on HMRC to show that the documents were correctly issued.

55. The evidence about why the appeal was made late and why the returns were filed late has been particularly vague in this case. Given that Mr Thomas appeared at the hearing as the representative of Mr Dillon, we would have expected him to have obtained instructions on relevant matters, such as the dates of Mr Dillon's marriage problems and how those problems affected him. Mr Thomas could only provide the vaguest estimate of when the marriage breakdown occurred and little evidence of how Mr Dillon was affected, beyond saying that Mr Dillon spent some time staying with a friend and a period out of work. He was unable to specify when this occurred with any degree of certainty, or for how long it lasted. Mr Thomas confirmed that Mr Dillon has no health problems as far as he is aware.

56. Mr Dillon telephoned HMRC about his 2010-11 tax return in August 2012. He did not give any reason for his failure to submit the return before, or attempt to appeal the penalties which had been issued. Given that Mr Dillon is a qualified electrician we find no basis to doubt his ability to read and understand the penalty notices sent to him. He has been registered for self-assessment since 1996 and can therefore be expected to have been aware of his filing obligations.

57. Mr Dillon remained in contact with HMRC in 2012 and 2013, but he did not appeal the penalties. We find that little reason has been provided for this inaction.

58. Mr Dillon informed HMRC of a new address in June 2014. Details of a new agent were provided in October 2016, but even at that point no action was taken to appeal the penalties for a further 6 months.

59. For all these reasons we are therefore satisfied that Mr Dillon has a very weak case if it is admitted as a late appeal.

60. If we reject the application for permission to make a late appeal, Mr Dillon loses his right to argue the substantive issues. However, HMRC can rightly expect that they would not have to deal with these five years after the time when Mr Dillon should have raised them. We conclude that given the strength of HMRC's case and the obvious weakness of Mr Dillon's case, there is little prejudice caused to Mr Dillon in refusing him permission to appeal late. We are therefore not satisfied that the balance weighs in favour of allowing the late appeal.

DECISION

61. For all these reasons we have therefore decided that Mr Dillon's appeal is dismissed and the penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

62. 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.

**TRACEY BOWLER
TRIBUNAL JUDGE**

RELEASE DATE: 20 AUGUST 2019

Appendix

Section 9ZA TMA 1970 Amendment of personal or trustee return by taxpayer

- (1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.
- (2) An amendment may not be made more than twelve months after the filing date.
- [(3) In this section “the filing date”, in respect of a return for a year of assessment (Year 1), means—
 - (a) 31st January of Year 2, or
 - (b) if the notice under section 8 or 8A is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice.

Schedule 1AB TMA 1970 Recovery of overpaid tax etc

Paragraph 1 Claim for relief for overpaid tax etc

- (1) This paragraph applies where—
 - (a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due, or
 - (b) a person has been assessed as liable to pay an amount by way of income tax or capital gains tax, or there has been a determination or direction to that effect, but the person believes that the tax is not due...

Paragraph 3 Making a claim

- (1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.
- (2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is—
 - (a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a return or returns under section 8, 8A or 12AA of this Act, the tax year to which the return (or, if more than one, the first return) relates, and
 - (b) otherwise, the tax year in respect of which the payment was made.

Section 31 TMA 1970 Appeals: right of appeal

- (1) An appeal may be brought against—
 - (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
 - (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
 - (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
 - (d) any assessment to tax which is not a self-assessment.

Section 31A Appeals: notice of appeal

- (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) In relation to an appeal under section 31(1)(a) or (c) of this Act—
 - (a) the specified date is the date on which the notice of amendment was issued, and
 - (b) the relevant officer of the Board is the officer by whom the notice of amendment was given.
- (3) In relation to an appeal under section 31(1)(b) of this Act—
 - (a) the specified date is the date on which the closure notice was issued, and
 - (b) the relevant officer of the Board is the officer by whom the closure notice was given.
- (4) In relation to an appeal under section 31(1)(d) of this Act [(other than an appeal against a simple assessment)]³—
 - (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.

Section 49 Late notice of appeal

- (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 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) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
- (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).

SCHEDULE 55 FINANCE ACT 2009 - PENALTY FOR FAILURE TO MAKE RETURNS ETC

Paragraph 1

- (1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date. 11
- (2) Paragraphs 2 to 13 set out -
 - (a) the circumstances in which a penalty is payable, and
 - (b) subject to paragraphs 14 to 17, the amount of the penalty.
- (3) If P’s failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).
- (4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“penalty date”, in relation to a return or other document falling within any of items 1 to 3 and 5 to 13A in the Table, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

Paragraph 3

P is liable to a penalty under this paragraph of £100.

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

Paragraph 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.

Paragraph 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) ...

Paragraph 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.

Paragraph 20 Appeal

- (1) P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

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.