



[2019] UKFTT 578 (TC)

TC07372

*INCOME TAX - late appeal to HMRC - late filing penalties - whether reasonable excuse – no
- appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02630

BETWEEN

SANDRA PRITT

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER TRIGGER
SUSAN STOTT**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 08
August 2019**

Sandra Pritt in person, for the Appellant

Sophie Brown, Tribunal Case Worker at HM Revenue and Customs for the Respondents

DECISION

1. Mrs Sandra Pritt, (the “appellant), appealed against penalties that respondents, (HMRC), have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55 “) for failure to submit an annual self-assessment return on time for tax years 2010-11, 2011-12, 2012-13, 2014-15.

2. The penalties that have been charged can be summarised as follows:

2010-11

- (1) A £100.00 late filing penalty imposed under paragraph 3 of Schedule 55 on 14 February 2012 ;
- (2) Late filing “daily” penalties totalling £900.00 imposed under paragraph 4 of Schedule 55 on 07 August 2012.
- (3) A £300.00 “six month” late filing penalty imposed under paragraph 5 of Schedule 55 on 07 August 2012; and
- (4) A £300.00 “twelve month” late filing penalty imposed under paragraph 6 of Schedule 55 on 19 February 2013.

2011-12

- (1) A £100.00 late filing penalty imposed under paragraph 3 of Schedule 55 on 12 February 2013;
- (2) Late filing “daily” penalties totalling £900.00 imposed under paragraph 4 of Schedule 55 on 14 August 2013;
- (3) A £300.00 “six month” late filing penalty imposed under paragraph 5 of Schedule 55 on 14 August 2013; and
- (4) A £300.00 “twelve month” late filing penalty imposed under paragraph 6 of schedule 55 on 25 February 2014.

2012-13

- (1) A £100.00 late filing penalty imposed under paragraph 3 of Schedule 55 on 18 February 2014.

2014-15

- (1) A £100.00 late filing penalty imposed under paragraph 3 of Schedule 55 on 17 February 2016;
- (2) Late filing “daily” penalties totalling £900.00 imposed under paragraph 4 of Schedule 55 on 12 August 2016;
- (3) A £300.00 “six month” late filing penalty imposed under paragraph 5 of Schedule 55 on 12 August 2016; and
- (4) A £300.00 “twelve month” late filing penalty imposed under paragraph 6 of Schedule 55 on 21 February 2017.

3. In relation to the 12 month penalties set out above HMRC are not asserting that there was any deliberate withholding of information.

Late appeal to HMRC

4. HMRC asserted that the appellant’s appeal to HMRC under section 31 of the Taxes Management Act 1970, (the “TMA”), was made outside the statutory deadline. Accordingly, HMRC refused to give consent under section 49(2) (a) of the TMA. However, in their statement of case HMRC deals with the substantive appeal only and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC. The Tribunal therefore consider that HMRC have now given consent under section 49(2) (a). Accordingly the Tribunal admitted the appeal forthwith.

5. It was not in dispute that the appellant failed to file her self-assessment returns by the due date.

Grounds of appeal

6. That HMRC has failed on the balance of probabilities to demonstrate that a “notice to file” was issued to the appellant for each year, the subject of this appeal. However the appellant accepted that the address held for her by HMRC was correct and had been correct at the relevant time;

7. That HMRC has failed to demonstrate that the penalty notices were issued to the appellant and that HMRC had failed to provide to the appellant the information required by the legislation;

The appellant asserts that both of these matters are in issue. HMRC was obliged to provide some evidence to show that the “notice to file was issued in each of the tax years the subject of this appeal together with the penalty notices. However, HMRC had provided only a template of the “notice to file” and a template of the penalty notices. There was a witness statement but no actual witness. This asserted that HMRC had procedures that were robust regarding printing and issuing of documents. The appellant maintained that these documents, produced by HMRC, were insufficient to discharge the evidential burden on HMRC that documents had been sent.

8. That there are a number of factors which when combined made it impossible for the appellant to deal with her tax affairs promptly. The appellant relied on the case of *Scott Building Contracts Ltd TC/2017/00694* in this respect; the appellant asserts that the combined factors detailed below demonstrate that she had a reasonable excuse for the late filing of her self-assessment tax returns for the tax years 2010-11, 2011-12, 2012-13 and 2014-15.

9. That the appellant encountered failure by her accountant and dishonest dealings;

In 2009 the appellant had dispensed with the services of her accountant. He had assured her on various occasions that her tax affairs were in order, which turned out to be incorrect. Subsequently the police were involved and charges were laid. The appellant maintains that this state of affairs explains why so many of her tax return were submitted late in the periods prior to the tax years the subject of this appeal.

10. That the appellant at the relevant time was running a failing business;

The appellant was the owner of a small cafe in the Manchester area from 2002 trading five days each week. She ceased to trade in 2015. She had a part-time assistant who helped out when the appellant could not be present. In the main her customers came from three local factories. In 2012 she experienced an acute reduction in trade. This was occasioned by the closure of one of the factories and the relocation of the other two. In addition double yellow lines were painted on the road which limited passing trade.

11. That the appellant had caring responsibilities for her mother-in-law;

The appellant’s mother-in-law developed Alzheimers in 2012. Initially she refused to have any outside carers. This meant that the appellant had to travel several times a week to assist her mother-in-law with personal care. In 2013 the appellant’s mother –in –law went into a residential home. This reduced the appellant’s caring responsibilities but, nevertheless, the appellant was still required to attend at the residential home when her mother-in-law became difficult.

12. That the appellant had a number of debilitating health conditions; These consisted of Folate Deficiency (B12) Anaemia diagnosed in 2001; a difficult menopause between 2006 and 2016; from 2012 Polycythaemia Vera a type of blood cancer which causes the blood to thicken and in “2011” the appellant broke her leg.
13. That the appellant’s age was a factor.

Findings of fact

14. That a notice to file a self-assessment tax return for the tax years 2010-11, 2011-12, 2012-13 and 2014-15 was issued to the appellant on 06 April 2011, 06 April 2012, 06 April 2013 and 06 April 2015 respectively.
15. That penalty notices were issued to the appellant by HMRC for her failure to file a return for each of the tax years the subject of this appeal and that the appellant was provided with the information required by the legislation.
16. That the appellant was required to deliver for each of the tax years ended 05 April 2011, 05 April 2012, 05 April 2013 and 05 April 2015 an electronic return by 31 January 2011, 31 January 2012, 31 January 2013 and 31 January 2015 respectively.
17. That the appellant filed the 2010-11 tax return on 18 February 2014 749 days late.
18. That the appellant filed the 2011-2012 tax return on 18 February 2014 383 days late.
19. That the appellant filed the 2012-13 tax return on 18 February 2014 18 days late.
20. That the appellant filed the 2014-15 tax return on 27 June 2017 513 days late.
20. That each notice to file detailed above warned the appellant that a penalty would be imposed if a return was filed late. In the first instance the penalty would be £100.00 and that further penalties would accrue if the return was three, six or 12 months late.
21. That 13 penalty notices were sent to the appellant by HMRC on the following dates:-
 - 14/02/2012 for the year 2010-11 late filing penalty in the sum of £100.00
 - 07/08/2012 for the year 2010-11 daily penalties in the sum of £900.00
 - 07/08/2012 for the year 2010-11 6 month late filing penalty in the sum of £300.00
 - 19/02/2013 for the year 2010-11 12 month late filing penalty in the sum of £300.00
 - 12/02/2013 for the year 2011-12 late filing penalty in the sum of £100.00
 - 14/08/2013 for the year 2011-12 daily penalties in the sum of £900.00
 - 14/08/2013 for the year 2011-12 6 month late filing penalty in the sum of £300.00
 - 25/02/2014 for the year 2011-12 12 month late filing penalty in the sum of £300.00
 - 18/02/2014 for the year 2012-13 late filing penalty in the sum of £100.00
 - 17/02/2016 for the year 2014-15 late filing penalty in the sum of £100.00
 - 12/08/2016 for the year 2014-15 daily penalties in the sum of £900.00
 - 12/08/2016 for the year 2014-15 6 month late filing penalty in the sum of £300.00
 - 21/08/2017 for the year 2014-15 12 month late filing penalty in the sum of £300.00

22. That the appellant was sent a number of reminder letters also that penalties were accruing.
23. That each of the penalty notices all of which are detailed above were served on the appellant and received by her.
24. That HMRC had correctly calculated the penalties for tax years 2010-2011, 2011-12, 2012-13 and 2014-15 in accordance with the legislation;
25. That the appellant has failed to show a reasonable excuse existed for the failure to file on time. (Paragraph 23 of Schedule 55);
26. That there are no special circumstances to justify a Special Reduction, (Paragraph 22(3) of Schedule 55).
27. That the Tribunal had no jurisdiction to reduce a penalty because it was perceived as unfair.

Discussion

28. HMRC had provided a witness statement from Georgina Mitchell an employee of HMRC familiar with the computer procedures relating to the printing and issue of late filing penalty notices at HMRC. The statement sets out in detail the computer program, and the time scales applicable with multiple controls in place. The physical elements of printing, enveloping and despatching of each notice is certified to set Quality Management Systems. This procedure would have been used to send to the appellant the notices to file and the penalty notices of which there were 13. The Tribunal relied on the decision of the Upper Tribunal in the Administrative Appeals Chamber *CH /3801/2008 [2009] UKUT 27 (ACC)* in which Judge Edward Jacobs said so far as is relevant:

“... I consider that the evidence of the submission writer, the computer printout and the notification letters is, taken together and without further explanation of the printout, sufficient to show on a balance of probabilities that the local authority made the decisions it claims to have made in respect of entitlement and liability”...

29. Furthermore, the appellant accepted that she had received “copious” amounts of mail from HMRC during the relevant period but she did not understand the contents. The Tribunal decided that it was highly improbable that the appellant would not have been sent the notices to file and the penalty notices in the light of the number of documents sent to her during the relevant period and, in addition the procedure used by HMRC to despatch notices to taxpayers such as the appellant, with built in safeguards. If the appellant was unsure about the contents of the correspondence she could have obtained advice from HMRC. Alternatively she could have used HMRC’s web site to clarify matters.
30. None of the documents served on the appellant were returned to HMRC as undelivered under the service provided to HMRC by the Royal Mail. Accordingly the Tribunal deemed on the balance of probabilities that service had been effected on the appellant of the notices to file and the penalty notices. (Interpretation Act 1978).
31. The penalties levied were fixed by law and applied to all taxpayers. There was no discretion in either HMRC or the Tribunal to alter those penalties save in express circumstances which are set out in paragraphs 22 and 23 of Schedule 55. Accordingly, the penalties were not disproportionate and those penalties had been correctly calculated and imposed by HMRC for the late filing of the returns.
32. In reaching this decision the Tribunal considered the case of *Barry Edwards v HMRC [2019] UKUT 0131 (TCC)* in which it was held that the mere fact that a taxpayer had little tax liability for the relevant tax year does not justify the reduction in the penalty on either the grounds of proportionality generally or because of the presence of “special circumstances”.
33. In addition a reduction for special circumstances must be used sparingly in circumstances where there is something exceptional or beyond the taxpayer’s control. That HMRC considered whether there were special circumstances which would warrant a special reduction but found that there were none. The Tribunal found that the decision of the HMRC was not flawed when considered in the light of the principles applicable in proceedings by way of judicial review. It followed therefore that the Tribunal could not substitute its own decision for that of HMRC to reduce the penalties.
34. The relevant statutory provisions are included as an Appendix to this decision.
35. The Tribunal had to decide if there was a reasonable excuse demonstrated by the appellant.
36. In order to reach a conclusion the Tribunal considered the decision of the Upper Tribunal in *Perrin v HMRC [2018] UKUT 156 (TCC)* which Held that a Tribunal is required to deal with the following issues when considering whether there is a reasonable excuse:

- a) Firstly, establish what facts the taxpayer asserts give rise to a reasonable excuse. The appellant relies on the contents of his notice of appeal to demonstrate a reasonable excuse.
- b) Secondly, decide which of those facts are proven. The appellant had dispensed with the services of her accountant in 2009 because of his failure to file the appellant's tax returns prior to that date and his alleged criminal conduct. Any failure to file on time after 2009 could not be the fault of that accountant as he was not engaged by the appellant after that year. In all other respects the facts are proved.
- c) Thirdly, decide whether, viewed objectively, those proven facts do indeed amount to a reasonable excuse. In order to complete the appellant's return for the tax year 2011 to 2014 she borrowed money from a relative to employ an accountant. The accountant completed the 2013-14 and filed it on time. The appellant accepts that she failed to provide the new accountant with information necessary to enable that accountant to complete the tax return for the tax years 2010-11, 2011-12 and 2012-13 on time. However the return for 2013-14 was completed and filed by the due date. The 2014-15 return was not filed on time because the appellant had retired and did not realise that a final return was required. The Tribunal decided that the appellant had not acted as a prudent taxpayer. The self-assessment regime places the responsibility on a taxpayer to comply with her legal responsibility to file her tax return on time. Furthermore the appellant had failed to make any or any adequate enquiries as to her responsibility to file a final return on retirement. No reasonable excuse had been demonstrated.

37. The appellant had various medical problems but the Tribunal did not consider that they demonstrated a reasonable excuse. The appellant suffered with Folate Deficiency (B12) Anaemia and had done so since 2001. This was medicated by injections at six weekly intervals at her GP's surgery followed by a blood test. She had contracted blood cancer which was slow growing. This condition was treated in tandem with her anaemia.

38. The appellant had suffered with a difficult menopause for 10 years from 2006 which was monitored by her GP with specialist input.

Whilst the appellant maintained that she suffered with stress there was no mention of any mental problems in her medical notes which were before the Tribunal. The appellant was not on any medication for depression or anxiety, neither had she been referred for counselling or specialist care.

39. In addition the appellant claimed to have broken her leg in 2011 and to have been in plaster from hip to knee for eight weeks. However the medical notes recorded that her leg was broken in 2009 and that there had been occasion only in July 2013 when she had experienced swelling around the ankle due to the hot weather.

40. The total of the medical attention which the appellant received from 2011 to 2015 was not in the opinion of the Tribunal so significant as to prevent the appellant from completing her tax returns and filing them on time.

41. The appellant pleaded also that she had caring responsibilities for her mother-in-law aged 90 who refused to move to a residential home. The appellant told the Tribunal that she shared the caring responsibilities with her husband, whereby he cleaned the house and she changed the bed. Care was provided from 2010 to 2012 when the appellant's mother-in-law moved into a residential home. During the relevant period the appellant bought groceries for the mother-in-law when she did her own shopping and visited her at home two or three times a

week after work. The Tribunal did not consider that these caring responsibilities were sufficient to demonstrate a reasonable excuse. Many taxpayers are required to undertake caring responsibilities and are able also to comply with their tax obligation. The assistance given by the appellant was valuable but minimal. Her mother-in law was resident in her own home. There was no evidence that the appellant was regularly called to attend at the home of her mother-in-law at unsocial hours or on a daily basis or on frequent occasions during the week or at weekends or during the night. There was no evidence that her mother in law had been admitted to hospital or that she wandered or that she was unsafe at home.

42. The appellant's business had started to fail in 2012. This is a fact that many small business experience. The changing nature of the locality on which a business depends is a factor in running a business and one for which any business should be aware and be ready to adapt to survive. This is a commercial reality and not a reasonable excuse for failing to file a tax return on time.

43. The appellant asserted that the combined effect of all the matters pleaded above constituted a reasonable and relied on *Scott Building Contracts Limited [2017] UKFTT 630 (TC)*. The Tribunal distinguished this case on the facts from the appellants pleaded case and declined to follow the decision. In the Scott case the combined reasons which were held to be a reasonable excuse were:-

- (1) The appellant had just moved home, having just had a baby. The baby was not sleeping day or night and she also had an older child to take care of.
 - (2) She and her partner had suffered a burglary, and her car and her partner's van (together with all his tools) were stolen. In consequence, her partner could not work for months thereafter and he became depressed.
 - (3) The business had recently started on a large new contract.
 - (4) They had problems with their accountant, who was difficult to contact and who did not respond promptly to them (they have since engaged a new accountant).
- All the events recited above happened between May 2014 and January 2015. The appellant's pleaded circumstance happened over a period from 2010 to 2015. None of the events prevented her from continuing to run her business. She had no large contract and was not depressed. Her medical conditions had in the main been long standing and were managed with little detriment to her business. Finally she had not relied on her accountant during the relevant period because she had no accountant until one was engaged to complete and file her 2013-14 return.

44. Fourthly, having to decide when any reasonable excuse ceased. As no reasonable excuse had been demonstrated by the appellant the Tribunal did not consider this point.

45. The Tribunal had regard to the following cases pleaded by HMRC:

Donaldson v HMRC [2016] EWCA Civ 761 which held that as the appellant knew the start date for the period of the daily penalty and the notice of assessment told him that the end date of the period was 90 days late, the omission of the period from the notice was one of form and substance and the appellant was not misled or confused by the omission. The omission did not affect the validity of the notice.

The Clean Car Co ltd (1991) was cited but the Tribunal relied on the case of *Perrin* referred to above which established the test to determine whether a reasonable excuse has been shown on both a subjective and an objective test.

The Commissioners for Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC) which held that there was no ability to discharge a penalty on the grounds of unfairness.

Profile Security Services v C&E Commissioners [1996] BVC which held that an accountant's dishonesty in concealing penalties could amount to reasonable excuse.

Lorimer [2016] TC 05083 which held that ill health could be a reasonable excuse

Dhariwal [2015]TC 04254 which held that reliance on an accountant where the accountant intentionally had misled the appellant could be a reasonable excuse.

H Thompsett (1988)3 BVC 787 which held that a reasonable could exist for part of the periods of default.

The Tribunal noted the case of:

Stephen Rich v The Commissioners for Her Majesty's Revenue and Customs TC/ 2010/09157 which held that reliance on an accountant could amount to a reasonable excuse.

46. For the reasons given in the body of this judgment the appeal was unsuccessful.

47. Accordingly, the penalties totalling £4,900.00 are due and payable by the appellant and remain outstanding for the tax years 2010-11, 2011-12, 2012-13, and 2014-15.

Right to apply for permission to appeal.

48. 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.

**JENNIFER TRIGGER
TRIBUNAL JUDGE**

RELEASE DATE: 13 SEPTEMBER 2019

APPENDIX

Relevant provisions of Schedule 55 of the Finance Act 2009

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.

5 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)—

- 10 (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.

15 (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)—

- 20 (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:

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25 (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—

- 30 (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:

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35 (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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (6) Paragraph 6A explains the 3 categories of information.
5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:
- 23—
- 35 (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
- 40 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

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(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:

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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—

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(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—

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(a) staying a penalty, and

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

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the 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:

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(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—

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(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—

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

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(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.