TC07880

INCOME TAX – penalty for failure to make returns - Schedule 55 Finance Act 2009 – whether penalties notified – whether reasonable excuse or special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01235

BETWEEN

ILONA SZPAKOWSKA **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 5 October 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 24 March 2020 (with enclosures), HMRC's Statement of Case dated 24 July 2020 and an e-bundle of documents (as well as an e-bundle of authorities) which had been compiled by HMRC, the contents of which are described further in this decision notice.

DECISION

INTRODUCTION

1. Miss Szpakowska is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit an annual self-assessment return on time in respect of the tax year 2016-2017.

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 13 February 2018;

(2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018;

(3) a £300 "twelve month" penalty under paragraph 6 of Schedule 55 imposed on 19 February 2019; and

(4) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018.

3. Miss Szpakowska states that she is not appealing against the £100 late filing penalty, the first penalty that was imposed. She accepts that her return was submitted late. Miss Szpakowska's appeal is against the remaining penalties and her grounds for appealing against the penalties can be summarised as follows:

(1) She was aware of her responsibility to file her tax return which she has done successfully for a number of years. She accepts that she was partially at fault and failed to file her tax return on time. She had been very upset and feeling emotionally unstable for personal reasons, and had considered leaving the UK. Getting into her new job has since helped. She completely forgot about the tax return needing to be filed. She asks for acceptance as she has always worked hard and studied.

(2) She started to work as an employee of her current employer in December 2016 and did not file in respect of the period from April to December 2016 of self-employment as she thought that her new company would inform HMRC that she was employed and "since I was put on PAYE it will show in the system".

(3) HMRC's self-employment team should have been able to obtain information from PAYE records that she was no longer self-employed.

(4) She did not receive a reminder letter from HMRC. No messages were sent to her online account (either to remind her or to inform her of the penalties).

(5) She realised in June 2019 that her tax had become very high, and was advised (by her employer's accountant) to call HMRC and that is when she was told she had late filing penalties on her account. (This is based on the information set out in the grounds of appeal in the Notice of Appeal to the Tribunal. The request for review (on 3 December 2019) states that she found out there was a problem because her tax went up enormously in April 2018 and she filed the papers right away.)

(6) She did not receive the penalties or any correspondence from HMRC. The address held by HMRC at that time (52 Stanley Hill) is where she lived, and she has since checked with the owner of the house who has confirmed to her that no letters from HMRC addressed to her were received there. The letters might have been delivered to the wrong house, or not delivered at all. She changed her registered address with HMRC on 17 June 2019 and has since been receiving correspondence

from HMRC without any problems. HMRC did not send her electronic notification of the penalties (either text messages or to her HMRC online account).

(7) HMRC were taking money for the penalties from her account without her knowledge and she feels unsettled that this can happen. The way HMRC have been collecting the penalties means she is not able to tell how much money has been taken from her account for the penalties.

(8) The penalties are a very harsh punishment – she has been blacklisted for a credit card or loan. This will affect her ability to obtain a mortgage.

4. Miss Szpakowska is thus appealing on the basis that the penalties were not properly imposed, and also that she had a reasonable excuse for the failure to submit the return on time, or that owing to the presence of special circumstances the penalties should have been or should be reduced.

5. Miss Szpakowska's appeal to HMRC under s31A Taxes Management Act 1970 ("TMA 1970") was late, as the deadline is 30 days after the penalty notice was issued. The penalty notices against which she is appealing were issued between July 2018 and February 2019. Her appeal to HMRC was made on what I have found to be 30 September 2019 (as explained further below). HMRC rejected that appeal in their letter of 4 November 2019. When HMRC rejected her appeal they did so on the basis that they did not accept that there was a reasonable excuse for the late filing, and made no mention of the appeal having been made late. They thus impliedly accepted the late appeal, as they have power to do under s49(2) TMA 1970.

6. Miss Szpakowska's appeal to the Tribunal was then made in time.

BURDEN OF PROOF

7. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely the balance of probabilities.

8. Before considering the evidence before me, I had regard to the decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

> "49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.
>
> 50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
>
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:

> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."
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> 52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.
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> 53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:
> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."
>
> 54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

FINDINGS OF FACT

9. Miss Szpakowska has said that she was aware of her responsibility to file self-assessment returns as she had been self-employed and filed returns for a number of years. She does not specifically deny having received a notice to file for the tax year 2016-2017. She has, however, denied receiving the penalty notices and any reminders (either by post or to her online HMRC account). I take this reference to reminders as a challenge to the notice to file being received as well as to the penalty notices, given that such a notice to file (if sent) is generally sent immediately after the end of the tax year in question and can be viewed by taxpayers who are already within the self-assessment regime as a reminder of their obligations.

10. HMRC submit that a notice to file, penalty assessments and penalty reminder letters (as set out at [11] below) were sent to Miss Szpakowska by post to the address which they held on record for her. This is considered further below. HMRC agree that the required documents were not sent electronically to Miss Szpakowska - although she had an online account with HMRC and had checked the box to receive communications electronically she

had not verified the email address held by HMRC, and this was a required step before HMRC could or would send communications electronically (as their process was that when messages were added to the online account then the system would automatically send an email to the taxpayer to alert them that they had a new message and needed to log on to their account to view that message).

11. HMRC produced computer-generated records by way of evidence of the communications they say were sent (by post) to Miss Szpakowska. HMRC's processes are automated, such that documentation is generated automatically and sent out directly to taxpayers. HMRC do not hold a copy of the documents which they say were generated and posted to Miss Szpakowska. Their records show the following:

(1) The Return Summary states that a notice to file for the tax year 2016-2017 was sent on 6 April 2017, with a return due date of 31 January 2018 or paper return due date of 31 October 2017.

(2) The Taxpayer Address History shows that the address on HMRC's system (with effect from 12 March 2014 to 17 June 2019) was 52 Stanley Hill.

(3) View/Cancel Penalties states that the following were sent to Miss Szpakowska:

(a) Late filing penalty on 13 February 2018,

(b) Daily penalties on 31 July 2018,

(c) 6 months late filing penalty on 10 August 2018, and

(d) 12 months late filing penalty on 19 February 2019.

(4) The SA Notes state that the following were automatically issued:

(a) 30 day daily penalty reminder letter on 5 June 2018, and

(b) 60 day daily penalty reminder letter on 3 July 2018.

12. The bundle which HMRC prepared included specimens (ie non-taxpayer specific) of the notice to file and notice of penalty assessments.

13. Miss Szpakowska denies having received these, and denies that they were received at 52 Stanley Hill at all on the basis of having since checked with the owner of the house. She states (in her grounds of appeal) that she first became aware of the penalties having been issued in June 2019 when her tax increased.

14. Section 8 TMA 1970 provides that an obligation to file a return arises when notice is given to a person by HMRC. Paragraph 4(1)(c) requires that HMRC gives notice of the date from which daily penalties accrue.

15. At the outset I would note that:

(1) the evidence produced by HMRC is not strong (but nor can it be in circumstances where they rely on automated systems having operated properly), but the address they held in respect of the relevant dates is acknowledged to have been correct.

(2) the evidence based on the actions of Miss Szpakowska does support her not having been aware of her failure to file a return (or the resulting penalties) until June 2019.

16. Addressing this second point further, Miss Szpakowska called HMRC on 4 June 2019. There are two potential wrinkles in this being the time at which she became aware of the late filing:

(1) In their Statement of Case HMRC refer to her appeal to HMRC against the penalties as having been made on 30 March 2019. Miss Szpakowska appealed to HMRC using their prescribed form, which provides for the date to be entered numerically, in the format DD MM YYYY. HMRC in preparing their Statement of Case have read this as being 30 03 2019. I find that this is incorrect, and it reads 30 09 2019, ie 30 September 2019 and it therefore does not contradict Miss Szpakowska's assertion that she only became aware of the late filing in June 2019.

(a) At first glance the writing does appear to read 30 03 2019. However, the "3" in "03" is markedly different from that in "30". It looks very similar to the 9 in "2019", albeit not closely enough that it was obvious to me that this should read 09.

(b) The copy of the form in the bundle is not date-stamped to show when it was received by HMRC.

(c) HMRC rejected the appeal on 4 November 2019. That letter does not refer to the date the appeal was made. There is no evidence of there having been any further correspondence between the parties to explain any delay in responding.

(d) The appeal to HMRC attaches a screenshot of Miss Szpakowska's online account with HMRC. There is a tiny date stamp on that screenshot showing when it was printed, and although it is upside down and reads from right to left, I have concluded it says 01/10/2019. This would be consistent with the appeal having been made on 30 September 2019.

(2) Miss Szpakowska's request for a review (on 3 December 2019) stated that she only became aware of the penalties in April 2018 as her tax increased then. I find that this was an error in her form – whilst I do not have any information as to the tax payments being collected through PAYE or otherwise, there is no evidence of anything happening at that time (other than the issue of the penalties), whereas from June 2019 Miss Szpakowska did appear to start taking prompt actions to put matters in order – calling HMRC at the beginning of the month, filing her return later that month then appealing against the penalties as described further below.

17. I accept (and find as a fact) that Miss Szpakowska first became aware of the penalties in June 2019. This does not however determine whether or not notice to file was given by HMRC or that notice was given of the date from which the daily penalties would be charged.

18. Section 7 Interpretation Act 1978 provides that where an Act authorises or requires any document to be served by post then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Applying this provision, I am satisfied, based on the computer records produced by HMRC, that HMRC did properly address and post the notices and other communications to Miss Szpakowska. Whilst Miss Szpakowska denies having received these notices at the time (and they were not returned to HMRC as undeliverable) I infer from the information set out in the grounds of appeal that Miss Szpakowska was no longer living at 52 Stanley Hill at the time some or all of them were sent (based on her referring to having since checked with the owner of the house) and had not made adequate arrangements for forwarding of mail or notified HMRC promptly of the change of address.

19. I am therefore satisfied that a notice to file and the penalty assessments were issued, and that HMRC gave notice (as required by paragraph 4(1)(c)) of the date from which daily penalties would be charged.

20. Miss Szpakowska submitted her self-assessment return for the tax year 2016-2017 online on 17 June 2019. This was late as the last date for filing a return online was 31 January 2018.

21. Miss Szpakowska appealed to HMRC against the penalties on what I have found to be 30 September 2019.

22. HMRC rejected that appeal on 4 November 2019. The letter states that HMRC do not agree that Miss Szpakowska had a reasonable excuse for not filing her tax return on time.

23. Miss Szpakowska requested a review of HMRC's decision to charge penalties on 3 December 2019.

24. HMRC issued a review conclusion letter on 24 February 2020 which explained that the review officer had decided that the decision to charge the penalties was correct. HMRC considered whether there were special circumstances in the review conclusion letter, noting that they had considered:

(1) She was going through a very bad time and considered leaving the UK. She could not find work in Germany and so helped out her old employer. She is now employed and not self-employed.

(2) She would have filed her return right away if she had received a reminder letter.

(3) She cannot apply for a credit card and has to pay a lot of money which she does not have.

25. HMRC then considered whether there were special circumstances again when preparing their Statement of Case, as noted further below.

DISCUSSION

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

27. The burden of proof is on HMRC to establish, on the balance of probabilities, that the penalties were correctly imposed; it is then for Miss Szpakowska to demonstrate that a reasonable excuse exists for the defaults or that there were special circumstances.

28. I have concluded that the tax return for the 2016-2017 tax year was submitted on or around 16 June 2019. It should have been submitted by 31 October 2017 (in paper form) or 31 January 2018 (electronically). Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

Reasonable excuse

29. Paragraph 23 of Schedule 55 provides that a penalty does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC, or on appeal the Tribunal, that there is a reasonable excuse for the failure and the failure was remedied without unreasonable delay after the excuse had ended. Paragraph 23(2) states that neither an insufficiency of funds, unless attributable to events outside the taxpayer's control, nor reliance on another person to do anything, unless the taxpayer took reasonable care to avoid the failure, can be considered a reasonable excuse.

30. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?…
> It seems to me that Parliament in passing this legislation must have intended that 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 who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

31. That this is the correct test has been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [81] the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (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. In doing so, the Tribunal 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 Tribunal, 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 Tribunal 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.

32. Miss Szpakowska accepts that she was aware of her obligation to file a self-assessment return and is frank that she forgot to do so. She has not explained how the personal difficulties she was experiencing could have prevented her from filing a return, and it is significant that her explanation is that she was experiencing these problems in the first half of the tax year in question, and gaining employment in December 2016 was positive in this regard – this was several months before the return was due to be filed.

33. Whilst moving from self employment to employment did mean that Miss Szpakowska's employer deducted tax from her employment income through the PAYE system, this did not absolve her of the need to file a return for the tax year. It is not reasonable to assume that an employer would do this for her, nor could they do so given that there is no evidence that they

were provided with information as to her income from self-employment for the first half of the year. Similarly, the reference to HMRC's teams not communicating with each other does not answer this – even though HMRC were aware that she had become employed, it remained Miss Szpakowska's obligation to report her income from self-employment.

34. Miss Szpakowska's actions since June 2019 do indicate that, once aware that there was a problem, she has taken the required steps to deal with it – not just in terms of submitting the return and making an appeal, but also updating the address which HMRC holds on its system and subsequently verifying her email address. This does provide some evidence that, had she received a reminder in some form after the end of the tax year that she was likely to have taken action at that stage. However, once HMRC have issued a notice to file (immediately following the end of the tax year) I do not consider that it is objectively reasonable to require that they take further action to pursue and alert taxpayers individually to the need to file a return and the approaching deadline. The Tribunal is aware that HMRC undertakes generic publicity campaigns to remind taxpayers of the deadline being 31 January.

35. Miss Szpakowska states that she has been unsettled by HMRC being able to collect additional money from her without her knowledge, she is not aware of how much money has been taken and that her credit record has been tainted. I do not have any evidence of the payments which have been collected. However, these factors cannot amount to an objectively reasonable excuse for the delay in filing the self-assessment return.

36. I have therefore concluded that none of the explanations given by Miss Szpakowska amount to an objectively reasonable excuse for the default.

Special circumstances

37. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

38. In other contexts "special" has been held to mean "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). However, the Upper Tribunal in *Edwards* said at [72] that:

> "In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase."

39. The Upper Tribunal then agreed with this statement of the Tribunal in *Advanced Scaffolding*:

> "102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

40. HMRC have considered whether "special circumstances" exist, both in the review conclusion letter and in their Statement of Case. The factors considered by HMRC in the review conclusion letter do not reflect all of the arguments since put by Miss Szpakowska – largely because her arguments are set out most fully in the Notice of Appeal to the Tribunal. However, in their Statement of Case HMRC have considered all of the arguments put in reaching their decision that there are no special circumstances.

41. I do not consider that HMRC's decision is flawed. Accordingly, I cannot alter that decision.

CONCLUSION

42. For the reasons given above, the penalties imposed by HMRC are affirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 10 OCTOBER 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

1. Section 7 Interpretation Act 1978 contains provisions in relation to documents that are served by post:

> 7. References to service by post
>
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

2. Section 8 Taxes Management Act 1970 sets out the obligation on individuals to file a self-assessment return, and includes at s8(1):

> 8. Personal return
>
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

3. 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.

4. 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).

5. 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.

6. 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.

7. 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.

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:

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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 —

(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.