



Neutral Citation: [2022] UKFTT 00022 (TC)

Case Number: TC08681

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2022/02727

*Schedule 55 Finance Act 2009 - fixed penalty for late filing of Soft Drinks Industry Levy tax return - whether taxpayer had a reasonable excuse for his default - whether there were special circumstances - appeal dismissed.*

**Judgment date: 09 December 2022**

**Decided by:**

**TRIBUNAL JUDGE NEWSTEAD TAYLOR**

**Between**

**SHIVSAGAR ENTERPRISES LTD**

**Appellant**

**and**

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

**Respondents**

The Tribunal determined the appeal on 9 December 2022 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 19 April 2022 (with enclosures), HMRC's Statement of Case acknowledged by the Tribunal on 19 August 2022, and the Document Bundle comprising 218 pages.

## DECISION

### INTRODUCTION

1. The Appellant (Shivsagar Enterprises Ltd) appeals against HMRC’s decision to issue a £400 late filing penalty (“LFP”) charged under Paragraph 13, Schedule 55 to the Finance Act 2009 (“Sch 55 FA 09”) in respect of the late filing of a Self-Assessment Tax Return for the Soft Drinks Industry Levy (“the SDIL Return”) for the period from 1 October 2021 to 31 December 2021.

<b>Period</b>	<b>Date of Penalty</b>	<b>Legislation</b>	<b>Description</b>	<b>Amount</b>
1.10.2021 – 31.12.2021	16.03.2022	Para 13, Sch. 55 FA 09	Late Filing Penalty	£400

### Findings of Fact

2. SDIL is a tax payable on the packaging or importation of soft drinks into the United Kingdom. The Appellant, who is liable to pay the levy, is required to file quarterly returns electronically and make any payment of SDIL due within 30 days of the end of each quarter.

3. Regulations 19 and 21 of the Soft Drinks Industry Regulations 2018, provide that the quarterly filing periods are fixed dates, being 30 June, 20 September, 31 December and 31 March. Accordingly, the deadlines for filing are 30 July, 30 October, 30 January, and 30 April, being 30 days of the end of each quarter.

4. 30 July 2022 was the filing date for the Appellant’s quarterly return for the period ending 30 June 2020. On 5 November 2020, the Appellant filed the return, being 98 days late (“the First Default”). On 16 February 2021, the Respondents issued a £100 late filing penalty and started a penalty period for SDIL from 1 July 2020 to 30 June 2021, pursuant to Paragraph 13B (2-3), Sch. 55 FA 09.

5. 30 October 2020 was the filing date for the Appellant’s quarterly return for the period ending 30 September 2020. On 16 November 2020, the Appellant filed the return, being 17 days late (“the Second Default”). On 18 February 2021, the Respondents issued a £200 late filing penalty and extended the penalty period for SDIL to 31 October 2021, pursuant to Paragraph 13C (2), Sch. 55 FA 09.

6. 30 January 2021 was the filing date for the Appellant’s quarterly return for the period ending 31 December 2020. On 13 February 2021, the Appellant filed the return, being 14 days late (“the Third Default”). On 12 March 2021, the Respondents issued a £300 late filing penalty and extended the penalty period for SDIL to 31 January 2022, pursuant to Paragraph 13C (2), Sch. 55 FA 09.

7. 30 April 2021 was the filing date for the Appellant’s quarterly return for the period ending 31 March 2021. On 28 May 2021, the Appellant filed the return, being 28 days late (“the Fourth Default”). On 7 June 2021, the Respondents issued a £400 late filing penalty and extended the penalty period for SDIL to 1 May 2022, pursuant to Paragraph 13C (2), Sch. 55 FA 09.

8. 30 January 2022 was the filing date for the Appellant’s quarterly return for the period from 1 October 2021 to 31 December 2021.

9. On 3 February 2022, the Respondents received the SDIL Return, being 4 days late (“the Fifth Default”).

10. On 24 March 2022, the Respondents issued a ‘Notice of a late filing penalty for SDIL and extension of penalty period’ (“the Notice”) to 106 Denecroft Crescent, UB10 9HZ, being the Appellant’s address as confirmed on the Notice of Appeal. The Notice extended the penalty period to 30 January 2023.

11. Prior to 19 April 2022, the Respondents received the Appellant’s appeal against the LFP in accordance with Paragraph 20, Sch.55 FA 09.

12. On 19 April 2022 and before the Respondents replied to the Appellant’s appeal, the Appellant appealed to the Tribunal.

13. On 3 May 2022, the Respondents acknowledged the Appellant’s appeal received prior to 19 April 2022 stating *“Thank you for your recent letter asking for a review of your [SDIL] Late Filing Penalty in respect of the quarter ending 31/12/2021. Your request has been passed to our Technical team who will contact you in due course.”*

14. On 13 May 2022, the Respondents replied to the Appellant’s appeal (received prior to 19 April 2022) confirming that a *“...waiver is not applicable and that you will need to request a Review of our decision or appeal by contacting the Appeal Tribunal direct.”* I note that there is an inherent contradiction between the letter dated 3 May 2022 which acknowledge receipt of the Appellant’s request for a review and this letter informing the Appellant that it needed to request a review.

15. On 15 July 2022, the Respondents were notified by the Tribunal of the Appellant’s appeal.

### **The Law**

16. The relevant statutory provisions and authorities are not in dispute and, so far as necessary, are included as an Appendix to this decision.

17. HMRC bear the burden of proof. This means that they must show, on the balance of probabilities, that the LFP is due. If they do so, the burden then shifts to the Appellant to show there is a reasonable excuse for late filing.

### **The Appellant’s Contentions**

18. The Appellant’s contentions are set out the document attached to the Notice of Appel. In summary, the Appellant contends that the Fifth Default was caused by the Respondents’ website not working properly. The Appellant states that it has video proof of the website malfunctioning. On 25 November 2022, I directed the Appellant to provide such video evidence to the Respondents and the Tribunal within 7 days. Also, I informed the Appellant that *“...if such evidence is not provided within 7 days, then the appeal will be determined without reference to it.”* No such video evidence has been provided and, accordingly, I have determined this appeal without reference to it.

## HMRC's Contentions

19. HMRC contend that:

- (1) The penalty was correctly issued.
- (2) The Appellant does not have a reasonable excuse for the late filing of the SDIL Return.
- (3) The Respondents' decision in relation to special reduction of the penalties was not flawed.

## Discussion

20. I have carefully considered the papers.

21. As to the validity of the LFP, I am satisfied that the Appellant is liable to a penalty of £400 for failing to file the SDIL Return by the filing date. In reaching this decision, I refer to and rely on the following:

- (1) On 16 February 2021, a penalty period began to run as a result of the First Default, Paragraph 13B, Sch. 55 FA 09.
- (2) As a result of the Second, Third and Fourth Defaults, the penalty period was extended on 3 separate occasions such that it was eventually due to expire on 1 May 2022.
- (3) Pursuant to Regulation 21 (1) SDIL Regulations, the Appellant's SDIL Return for the period ending 31 December 2021 was due by 30 January 2022.
- (4) The Respondents received the SDIL Return on 3 February 2022.
- (5) The SDIL Return was 4 days late.
- (6) This was the Appellants Fifth Default and occurred within the penalty period.
- (7) In accordance with Paragraph 13C (6), Schedule 55 FA 09 the Appellant is liable to a penalty of £400.

22. As to reasonable excuse:

- (1) Pursuant to paragraph 23, Schedule 55 FA 09, liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if the Appellant satisfies me that there is a reasonable excuse for the failure.
- (2) The Appellant bears the burden of proof. This means that the Appellant must show, on the balance of probabilities, that there is a reasonable excuse for the failure to make a return.
- (3) Save that Paragraph 23 (2) (a-c), Schedule 55 FA 09 sets out three situations that are incapable of constituting a reasonable excuse, there is no statutory definition of what constitutes a reasonable excuse. Whether or not a person had a reasonable excuse is an objective test and "*is a matter to be considered in the light of all the*

circumstances of the particular case" *Rowland v HMRC* (2006) STC (SCD) 536 at paragraph 18.

(4) In *The Clean Car Company v C&E Commissioners* [1991] VATTR 234, Medd QC set out the test to be applied when considering whether there is a reasonable excuse as follows:

*"The test of whether or not there is a reasonable excuse is an objective one. In my judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible taxpayer 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?"*

(5) Further, in *Perrin v HMRC* [2018] UKUT 156 at paragraph 81, the Upper Tribunal provided guidance as to the correct approach to a reasonable excuse defence 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."*

(6) In summary, whether there is a reasonable excuse or not depends on the particular circumstances in which the failure occurred and the abilities of the person who failed. The standard by which this fails to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question: *David Collis v HMRC* [2011] UKFTT 588 (TC). What is a reasonable excuse for one person may not be a reasonable excuse for another. Finally,

in respect of beliefs, I remind myself that the Upper Tribunal in *Perrin* concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held.

(7) Pursuant to *Perrin*:

(a) First, it is the Appellant's case that he has a reasonable excuse for the failure to submit the SDIL Return by the filing date because the Respondents' website was not working properly.

(b) Second, I accept that on 26 January 2022 the Appellant signed into the Respondents website on 3 occasions in very short succession. I accept that this might indicate that the Appellant was experiencing some difficulties using the Respondents' website, but it does not prove the cause of those difficulties i.e., a fault with the Respondent's website or with the Appellant's own internet connection. The Appellant did not use the help link on the website or contact the Respondents by telephone or email for assistance. I also note that the Respondents' colleagues refer to the website experiencing the "*usual and normal level of errors*" at the relevant time. However, the Respondents' website was not offline between 29 October 2021 and 3 February 2022 and there is no suggestion that these "*usual and normal level of errors*" prevented users from filing returns. Accordingly, I am not satisfied that the Appellant has proved, on the balance of probabilities, that the difficulties experienced with the Respondents' website were as a result of the Respondents' website or that they prevented the Appellant from filing the SDIL Return.

(c) Third, I must decide whether, viewed objectively, those proven facts amount to an objectively reasonable excuse and the time that reasonable excuse ceased. In so doing, I should ask myself "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?" As detailed above, I am not satisfied that the Appellant has proven that the Respondents' website was not working properly at the material time. However, even if the Respondents website was not working properly at the relevant time, I am not satisfied that, viewed objectively, those facts amount to an objectively reasonable excuse for the following reasons:

(i) The Respondents' records show that on 26 January 2022 the Appellant logged in to the website on three occasions. If, which I do not accept, the Respondents' website was not working properly on 26 January 2022 then the Appellant should have tried again before the filing date, being 30 January 2022, to file the SDIL Return. The Appellant did not do so despite its awareness, in light of the earlier defaults, of the consequences of failing to file the SDIL Return by the deadline. In fact, the Appellant did not try again until 3 February 2022, being 4 days late, when the SDIL Return was successfully filed. In short, if (which I do not accept) the Respondents' website was not working properly on 26 January 2022, then the Appellant may have an objectively reasonable excuse for not filing the SDIL that day, but as there is no evidence that the Respondents' website was not working properly thereafter that does not excuse the Appellant's failure to file the SDIL in the period between 27-30 January 2022.

(d) Fourth, if, which I do not accept, the Appellant had a reasonable excuse for the failure to file the Return then I consider that that reasonable excuse ceased at the latest on 31 January 2022, there being no evidence that the Respondents'

website was malfunctioning or experiencing any “*usual and normal level of errors*” after that date. In the circumstances, the Appellant did not remedy the failure without unreasonable delay because it took another 3 days to remedy the failure. There was no good reason for this delay especially considering the Appellant’s knowledge of the consequences of failing to file the SDIL on time

(e) In all the circumstances, I am not satisfied that the Appellant acted as a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the Appellant at the time.

23. As to special reduction:

(1) Pursuant to Paragraph 16, Schedule 55 FA 09, the Respondents have a discretion to reduce any penalty charged under Schedule 55 FA 09 if they think it right so to do because of special circumstances.

(2) Pursuant to paragraph 20 (2), Schedule 55 FA 09, the Appellant can appeal against the amount of a penalty. Pursuant to paragraph 22 (2-3), Schedule 55 FA 09, the Tribunal can affirm the Respondent’s decision or substitute its own decision. However, the Tribunal can only substitute its decision if the Respondent’s decision is flawed, which is a high test. To be flawed, the Respondent must have considered irrelevant matters, failed to consider relevant matters, or made a decision no reasonable decision maker could have made, Paragraph 22 (4), Sch 55 FA 09.

(3) Save that paragraph 16 (2) (a-b), Sch 55 FA 09 states that neither ability to pay nor the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another amounts to special circumstances, there is no precise definition of special circumstances.

(4) In *Barry Edwards v HMRC* [2019] UKUT 131 (TCC), the Upper Tribunal stated as follows:

*“68. There are many appeals in the FTT where the question as to whether there are special circumstances justifying a reduction in the amount of a penalty has been considered. Accordingly, from time to time the FTT has made general observations about what might constitute special circumstances. In many of those decisions, reference is made to Crabtree v Hinchcliffe (Inspector of Taxes) [1972] AC 707 where Viscount Dilhorne (in a rather different context to that with which we are concerned) suggested at page 739E that:*

*“For circumstances to be special [they] must be exceptional, abnormal or unusual...”*

69. In *Warren v HMRC* [2012] UKFTT 57, the FTT put a gloss on the meaning of “special”. It said at [54] that:

*“The adjective “special” requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or*

*possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.”*

70. *In Welland v HMRC [2017] UKFTT 0870 the FTT likewise did not confine the meaning to circumstances which did not affect many taxpayers. After referring to the passage in Warren cited above, the FTT said at [125]:*

*“What was said in Warren seems right, if very general. ... In summary, it seems to me that the alleged special circumstances must be an unusual 40 event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.”*

71. *By contrast, in Collis v HMRC [2011] UKFTT 588 the FTT said at [40] that:*

*“to be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves.”*

72. *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. In support of that approach the FTT referred to the observation made by Lord Reid in Crabtree v Hinchcliffe at page 731D-E when considering the scope of “special circumstances” as follows:*

*“the respondent argues that this provision has a very limited application... I can see nothing in the phraseology or in the apparent object of this provision to justify so narrow a reading of it”.*

73. *The FTT then said this at [101] and [102]:*

*“101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.*

*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.”*

74. *We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration.”*



- (5) In summary, special circumstances should not be given a restrictive interpretation. It covers any circumstances which are relevant to the issue under consideration whether relevant to the individual taxpayer and where the decision to charge a penalty at the statutory level is contrary to Parliament's intention in enacting the penalty regime namely, to encourage timely compliance with filing obligations. Notably, in *Barry Edwards v HMRC* [2019] UKUT 131 (TCC), at paragraph 86 the Upper Tribunal confirmed that the Schedule 55 regime is proportionate, and penalties are correctly due even in circumstances where there is no additional tax liability. Further, I have no power to discharge or adjust a validly issued penalty on the basis that I consider it unfair, *Hok Ltd v HMRC* [2012] UKUT 363 (TCC).
- (6) The Respondents have considered the Appellant's grounds of appeal and concluded that there are no special circumstances which would merit a reduction of the LFP. I have considered the Respondents' correspondence, specifically the letter issuing the LFP, dated 24 March 2022, and the two subsequent letters dated 3 and 13 May 2022. None of these letters expressly raise or consider special circumstances. In fact, I note that whilst the 3 May 2022 letter acknowledged the Appellant's request for a review the later letter, dated 13 May 2022, informed the Appellant that a review request would need to be made. In the circumstances, I am not satisfied that the Respondents properly considered special circumstances in advance of the Statement of Case. Accordingly, I consider that the Respondents' decision is flawed and that I have the power to substitute my own decision. However, I am not satisfied that the grounds relied upon by the Appellant amount to special circumstances for the same reasons that I am not satisfied they amount to a reasonable excuse. I also note that the LFP is in accordance with Parliament's intention to encourage timely compliance with filing obligations. Therefore, I decline to interfere with the Respondents' decision

24. The appeal against the LFP of £400 is dismissed. The LFP is upheld in its entirety.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

25. 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.

**NEWSTEAD TAYLOR  
TRIBUNAL JUDGE**

**Release date: 09<sup>th</sup> DECEMBER 2022**

**APPENDIX**  
**LEGISLATION**

1. Regulations 19 - 21 of the Soft Drinks Industry Levy Regulations 2018 provides that:

***“Regulation 19***

*19(1) A liable person must make payments of soft drinks industry levy in respect of each accounting period.*

*19(2) The accounting periods are the three month periods ending with 31st March, 30th June, 30th September and 31st December.*

***Regulation 20***

*20(1) A liable person must pay the total amount of soft drinks industry levy payable in respect of an accounting period within the period of 30 days beginning with the last day of the accounting period.*

*20(2) The total amount is the amount required to be stated in the return in respect of the period.*

*20(3) Payment must be made by the method prescribed.*

***Regulation 21***

*21(1) For each accounting period, a liable person must make a return to the Commissioners and do so within the period of 30 days beginning with the last day of the accounting period.*

*21(2) A return must be dated and made in the form and manner prescribed by the Commissioners, including electronically, subject to such exceptions as they may prescribe.*

*21(3) A return must include the matters prescribed by the Commissioners.”*

2. Paragraph 1, Schedule 55 FA 09 sets out the penalty for failure to make returns as follows:

*“(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...*

*(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 13 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).

The table is at paragraph 1(5):-

(5) In the provisions of this Schedule which follow the Table-

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document.

<i>1</i>	<i>Income Tax or Capital Gains Tax</i>	<i>a. Return under section 8 (1) of TMA 1970</i> <i>b. Accounts, statement or document require under section 8 91) (b) of TMA 1970.</i>
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3. Paragraphs 3 Schedule 55 FA09 provides that if P fails to submit his return on or before the filing date, he “... is liable to a penalty under this paragraph of £100” for each tax year.

4. Paragraphs 13B – 13E, Schedule 55 FA 2009 provides as follows:

**“13B**

1. (1) P is liable to a penalty under this paragraph of £100.
2. (2) In addition, a penalty period begins to run on the penalty date for the return.
3. (3) The penalty period ends with the day 12 months after the filing date for the return, unless it is

*extended under paragraph 13C(2)(c) or 13H(2)(c).*

**13C**

(1) This paragraph applies if

(a) a penalty period has begun under paragraph 13B or 13G because P has failed to make a return (return A), and

(b) before the end of the period, P fails to make another return (return B) falling within the same item in the Table as return A.

*(2) In such a case -*

*(a) paragraph 13B(1) and (2) do not apply to the failure to make return B, but*

*(b) P is liable to a penalty under this paragraph for that failure, and*

*(c) the penalty period that has begun is extended so that it ends with the day 12 months after the filing date for return B.*

*(3) The amount of the penalty under this paragraph is determined by reference to the number of returns that P has failed to make during the penalty period.*

*(4) If the failure to make return B is P's first failure to make a return during the penalty period, P is liable, at the time of the failure, to a penalty of £200.*

*(5) If the failure to make return B is P's second failure to make a return during the penalty period, P is liable, at the time of the failure, to a penalty of £300.*

*(6) If the failure to make return B is P's third or a subsequent failure to make a return during the penalty period, P is liable, at the time of the failure, to a penalty of £400.*

*(7) For the purposes of this paragraph*

*(a) in accordance with sub-paragraph (1)(b), the references in sub-paragraphs (3) to (6) to a return are references to a return falling within the same item in the Table as returns A and B, and*

*(b) a failure to make a return counts for the purposes of those sub-paragraphs if (but only if) the return relates to a period of less than 6 months.*

*(8) A penalty period may be extended more than once under sub-paragraph (2)(c).*

### **13D**

*(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.*

### **13E**

*(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) 100% of any liability to tax which would have been shown in the return in question, and*

*(b) £300 .*

*(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of*

*(a) 70% of any liability to tax which would have been shown in the return in question, and*

*(b) £300.*

*(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.”*

5. Paragraph 16, Schedule 55 FA 2009 provides as follows in respect of special reduction:

*“(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.”*

6. Paragraph 20 of Schedule 55 FA09, provide P with a right of appeal to HMRC against (i) a decision that a penalty is payable and (ii) the amount of that penalty.

7. Paragraph 22, Schedule 55 FA09 provides as follows:

*“(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.*

*(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).*

8. Paragraph 23, Schedule 55 FA 2009 provides as follows in respect of reasonable excuse:

*“(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.”*