[2017] UKFTT 749 (TC)

TC06160

Appeal number: TC/2017/03248

INCOME TAX – penalties for failure to make returns – the appellant reasonably understood that the return had been submitted online – whether or not reasonable excuse – yes – whether or not special circumstances – yes – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ROBERT MORRIS **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS SHAMEEN AKHTAR

Sitting in public at Liverpool Civil and Family Court, 3rd Floor, 35 Vernon Street, Liverpool, L2 2BX on 20 July 2017.

The Appellant appeared in person.

Mr A O'Grady, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. Mr Morris 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 for the year 2013/14 and the year 2014/15.

2. The penalties that have been charged in respect of the year 2013/14 can be summarised as follows:

(1) A £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 18 February 2015.

(2) "Daily" penalties under paragraph 4 of Schedule 55 imposed on 14 August 2015 in the sum of £900.

(3) A £300 six month late filing penalty under paragraph 5 of Schedule 55 imposed on 14 August 2015.

(4) A £300 twelve month late filing penalty under paragraph 6 of Schedule 55 imposed on 23 February 2016.

3. The penalties that have been charged in respect of the year 2014/15 can be summarised as follows:

(1) A £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 February 2016.

(2) "Daily" penalties under paragraph 4 of Schedule 55 imposed on 12 August 2016 in the sum of £900.

(3) A £300 six month late filing penalty under paragraph 5 of Schedule 55 imposed on 12 August 2016.

4. Mr Morris' grounds for appealing against the penalties are in summary that he filed both returns online in good time and that (on his case) he reasonably thought that this had been successful. He does not label these grounds either as reasonable excuse or as special circumstances. However, given that HMRC have treated them as both, we also do so.

5. There was no dispute that the amounts of the penalties were properly calculated and no dispute that the pre-requisites for being entitled to charge penalties had been fulfilled (subject to the questions of reasonable excuse and special circumstances). For the avoidance of doubt, it appeared from the grounds of appeal that Mr Morris might be seeking to argue that the penalties were disproportionate. In fact, Mr Morris did not pursue this argument in the hearing. For completeness, we note that even if this argument had been pursued, we would have dismissed it. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's powers to reduce penalties because of the presence of "special circumstances". Therefore, for the reasons set out in *HMRC v Bosher* [2013] UKUT 01479 (TCC), we

would not have considered that we have a separate power to consider the proportionality or otherwise of the penalties.

6. Mr Morris' appeal to HMRC under s31A of the Taxes Management Act 1970 (the "TMA 1970") was out of time. However, HMRC have helpfully consented to the appeal being made late pursuant to section 49(2)(a) of the TMA 1970. The appeal to this Tribunal has been made in time.

Findings of fact

7. We heard oral evidence from Mr Morris. We make the point at this stage that we found Mr Morris to be a credible, honest and straightforward witness. HMRC did not present any witness evidence. We also considered a bundle of documents prepared by HMRC but relied upon by both parties.

8. We make the following findings of fact. In doing so, we bear in mind that the burden of proof in establishing that the penalties were correctly charged is upon HMRC (although in fact this is academic given that this is not in dispute) and the burden of proof in establishing a reasonable excuse or special circumstances is upon Mr Morris. The standard of proof in both respects is the balance of probabilities.

9. In the course of the tax years 2012/13, 2013/14 and 2014/15, Mr Morris carried on business as a part time private guitar teacher. His earnings were very modest as he was at the early stages of pursuing a career in music and was being financially supported by his girlfriend.

10. Mr Morris completed his 2012/13 tax return online on or very soon after 1 January 2013. He said that he did this in early January to allow him a month to resolve any problems if they arose. On completing his online filing of the 2012/13 return, the website generated a receipt and a long reference number. In the event, there were no difficulties with the submission of his 2012/13 return and so it was successfully filed within time.

11. On or soon after 1 January 2015, Mr Morris set about filing his 2013/14 tax return online. The due date for an electronic return for 2013/14 was 31 January 2015 (and, for completeness, we note that the due date for a paper return was 31 October 2014 and so had already passed). When he came to what he treated as the final stage of inputing the return, he pressed the relevant keys for submitting the return. Mr Morris' evidence as to what happened next was that his experience differed to that of January 2013. Neither a receipt nor a reference number were generated. Instead, Mr Morris said that he received an onscreen message on a very basic web page saying either, "Thank you for your submission" or "Submission complete". There was no other instruction on the page. He took this as an unqualified confirmation of submission. He did not wait for any other page or reference and none came onto his screen. He did not print the page and did not receive an email or other confirmation. Mr Morris recognised that this stage was a different process to the previous year. However, he told us that he did not question this because he assumed that HMRC had changed or updated the system.

12. Mr Morris' evidence was that he filed his 2014/15 tax return online on or soon after 1 January 2016. The due date for an electronic return for 2014/15 was 31

January 2016 (and, again for completeness, we note that the due date for a paper return was 31 October 2015 and so had already passed). Mr Morris said that his experience was identical to the filing of the 2013/14 return on or about 1 January 2015. Again, he pressed the "submit" button when prompted, received a message on a web page saying "Thank you for your submission" or "Submission complete" and did not print this out or receive any other confirmation or reference.

13. We find on the balance of probabilities that Mr Morris' experience of filing the 2013/14 and 2014/15 returns was in accordance with his evidence as set out in paragraphs 11 and 12 above. We make this finding for the following reasons.

14. First, as set out above, we found Mr Morris to be a credible and honest witness.

15. Secondly, Mr Morris' evidence was that he was well versed in the use of computers. Indeed, he said that he had previously built his own computer and so had all the technical knowledge which that would require. He was not challenged on this. We therefore find on the balance of probabilities that he understood how to use the online filing system.

16. Thirdly, there was no error identified by HMRC in the steps which Mr Morris had taken in order to file the return other than the allegation that he should have waited for a reference number. We find that he did not wait for a reference number because he was notified in an unqualified confirmation message that the returns had been filed successfully. We deal below with whether or not this was reasonable under the heading "Discussion".

17. Fourthly, Mr O'Grady took us through the stages which would ordinarily occur at the end of the submission of the returns. He said that a receipt and reference number ought to be generated to signify the end of the process and that a web page would not ordinarily give the unqualified confirmation message suggested by Mr Morris without a receipt or reference number. Mr O'Grady was keen (and correct) to point out that he could not give evidence as to this and that he was simply setting out his understanding of the usual position. We accept that this is the usual position and this was not in dispute. However, Mr O'Grady was careful to say that he was not in a position to put forward any evidence to say that what Mr Morris said happened was incapable of happening. We have not seen any expert evidence on this matter or even any documents relating to this point. Indeed, we do not even have any witness evidence in this regard. Whilst we accept that what happened to Mr Morris is not the usual position, there is no evidence presented by HMRC to say that it could not happen. This is not to change the burden of proof; it remains Mr Morris' task to establish his reasonable excuse on the balance of probabilities. We simply say that whether or not what Mr Morris says happened is capable of happening is a relevant consideration in deciding whether or not, on the balance of probabilities, it did happen. Mr O'Grady did not put to Mr Morris that this was not capable of happening (correctly, given the absence of any evidence to this effect). The high point of HMRC's case on this issue was that Mr O'Grady said that an unqualified confirmation message such as that described by Mr Morris was highly unusual. Mr Morris said that, having now learnt what the usual position would be, he agreed.

18. Fifthly, at the conclusion of the hearing we invited HMRC to send to the Tribunal and Mr Morris screen shots of the website if they so wished in order to

consider whether or not anything on the page had been misconstrued by Mr Morris (although we did not require this and so did not make any directions in this regard or oblige HMRC to do so). This opportunity was not taken up. In any event, it was not put to Mr Morris in cross-examination that he had misunderstood or was mistaken as to any messages or instructions on the website.

19. It was common ground that HMRC had sent correspondence to Mr Morris but that he had not received it because he had not successfully changed his correspondence address. In particular, HMRC sent Mr Morris notices to file returns on 6 April 2014 and 6 April 2015, penalties and reminders in respect of the 2013/14 tax year on 18 February 2015, 2 June 2015, 30 June 2015, 14 August 2015 and 23 February 2016, and penalties and reminders in respect of the 2014/205 tax year on 17 February 2016, 23 February 2016, 31 May 2016, 5 July 2016 and 12 August 2016. HMRC asserted, and Mr Morris did not dispute, that the daily penalty reminders were the same as the sample standard format notice included within the bundle of documents before us.

20. HMRC sent the various notices and reminders to the addresses on their logs. They were not returned undelivered. These addresses were incorrect because Mr Morris had moved on various occasions before the letters were sent. Mr Morris did not inform HMRC about his house moves at the time, but instead did so at the time of filing his online returns. In the same way that (unbeknown to Mr Morris, as set out above), the online filing had been unsuccessful, the changes of address had also been unsuccessful.

21. We accept Mr Morris' evidence that the first time that he was aware that there had been a problem with filing his returns for 2013/14 was when he received a letter dated 5 January 2017 and received on 7 January 2017 from a company named Frederickson seeking payment of national insurance contributions. Although national insurance contributions do not form any part of this appeal, the significance is that this set Mr Morris on a chain of enquiry which revealed the penalties for the first time. Mr Morris said (when asked) that he did not check his online statement of account for penalties any earlier than 7 January 2017 because he had no reason to think that he had incurred any penalties. Mr Morris was asked how he knew to file returns if he had not received the notices to file. Mr Morris replied that he did not need to be prompted by a notice as this was something that he did at the start of every January. Having heard Mr Morris' evidence and finding it to be credible, we accept this. Mr Morris also said that if he had known earlier about the penalties, he would have resolved the problem straight away, he was organised enough to be able to do this immediately when he did find out, and he would have had no incentive not to do so as he did not expect to pay any tax. In response to a question as to whether he was surprised that nothing happened after he had (as far as he understood) filed the returns online, Mr Morris said that he was not surprised as he did not expect to pay anything and did not expect to receive any repayment or credit. Again, having heard Mr Morris' evidence we find it to be credible and, on the balance of probabilities, accept his explanations.

22. Mr Morris successfully filed his returns for 2013/14 and 2014/15 online on 7 January 2017.

Submissions

Mr Morris

23. The essence of Mr Morris' submissions was that he thought that he had filed the returns for 2013/14 and 2014/15 successfully, that he did not know there was a problem until 7 January 2017 and that he immediately and (successfully) filed both returns on the same day.

HMRC

24. Mr O'Grady submitted that Mr Morris did not have a reasonable excuse for either of the late tax returns. He said that Mr Morris was at fault for failing to register his change of address; had he done so, he would have received notices to file, penalty reminders and penalty notices. Mr Morris could also have checked his account online and would have seen that the penalties were due. He further submitted that Mr Morris should have known that his attempt to file the returns was unsuccessful as he was familiar with the system from 2012/13, and should have realised from his previous experience in 2012/13 that he had not been given a receipt or filing reference number.

25. Mr O'Grady set out his understanding of the system for online filing in paragraphs (e) (15) to (18) of his skeleton argument as follows:

> "(15) The filing process for self assessment returns is somewhat arduous but essentially straightforward in cases such as these, where the entries to be made are uncomplicated.
>
> (16) Once all pages are completed, an invitation is made to view the calculation and the final step is to click on the button which says, submit return.
>
> (17) The filer is then asked to wait for a short time until the confirmation message that the return has been successfully filed is received, at which time the filer is supplied with a reference number.
>
> (18) Where a return is filed online it is the filer's responsibility to ensure that the attempt has been successful."

26. Mr O'Grady said that it followed that Mr Morris had erred in his attempt to file the returns. He relied upon the First-Tier Tribunal decision of *Garnmoss Limited trading as Parham Builders v HMRC* [2012] UKFTT 315 (TC) (Judge Hellier and Mrs Hewett) ("*Garnmoss*"). He referred us to paragraphs [11] and [12] of the decision, which provide as follows:

> "[11] The Act provides that a person is to be regarded as being in default if he fails to pay the amount of VAT shown on the return as payable by him. The appellant therefore defaulted in respect of this period. The question for us is whether the appellant had a reasonable excuse.
>
> [12] What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable

> excuse. Thus this default cannot be ignored under the provisions of subsection (7)."

27. We asked Mr O'Grady whether he had any expert, technical or even witness evidence as to whether or not what Mr Morris said happened was capable of happening, notwithstanding the usual position as set out in his skeleton argument. He said that he had no such evidence. He said that all he could do was provide his own anecdotal information as to what would ordinarily happen when submitting a return online.

28. As regards special circumstances, Mr O'Grady submitted that there was nothing unusual about the facts of the case. This was premised upon HMRC's position that Mr Morris' evidence that he saw an unqualified confirmation message should be rejected.

Discussion

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

30. As set out above, we have concluded that the tax return for the year 2013/14 was submitted on 7 January 2017. As an electronic return, it should have been submitted by 31 January 2015.

31. Similarly, as set out above, we have concluded that the tax return for the year 2014/15 was also submitted on 7 January 2017. As an electronic return, it should have been submitted by 31 January 2016.

32. We have also concluded that the daily penalties were properly notified by virtue of the standard form penalty reminders. As set out above, HMRC have provided a copy of the penalty reminders sent in respect of both the 2013/14 and 2014/15 tax returns. It is in the standard form of the type considered in *Donaldson v HMRC* [2016] EWCA Civ 761 and approved as being compliant with the requirements of paragraph 4(1)(c) of Schedule 55. Subject to the considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

Reasonable excuse

33. In considering whether or not the appellant has a reasonable excuse, we bear in mind the following guidance of HHJ Medd QC in *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234:

> "It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. 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?"

34. We accept that Mr Morris had a reasonable excuse for the late filing of the 2013/14 and 2014/15 returns and that this reasonable excuse continued until 7 January 2017. This is for the following reasons.

35. First, as set out above, we have accepted Mr Morris' evidence that he saw an unqualified confirmation message on his computer screen. Although he could not be sure whether the wording was "Thank you for your submission" or "Submission complete", the tenor of both phrases is the same; namely, that the online filing was being confirmed as successful.

36. Secondly, we find that for both the 2013/14 and 2014/15 tax returns, treating this message as confirmation of successful filing was a reasonable thing to do for a responsible trader conscious of and intending to comply with his obligations regarding tax, having the experience and attributes of Mr Morris and placed in the situation in which Mr Morris was in. This was a message apparently being provided by HMRC's own website, which did not instruct or require Mr Morris to wait or do anything else and which reasonably conveyed to him the message that his returns had been filed successfully.

37. Thirdly, we have thought carefully about the significance of the fact that Mr Morris received a receipt and long reference number for 2012/13 but did not do so for 2013/14 or 2014/15. However, we have reached the view that this does not stand in the way of there being a reasonable excuse in Mr Morris' case. It may well have done so if the 2013/14 and 2014/15 message did not convey the meaning that the returns had been filed successfully. However, it was reasonable for Mr Morris to conclude from the messages he received (and we find that a reasonable taxpayer would have concluded) that the method of providing confirmation had changed. Indeed, we find that it was positively misleading for an unqualified confirmation message to be provided if in fact there was more to be done or provided by him or HMRC before that confirmation could safely be relied upon.

38. Fourthly, whilst it is correct that it was Mr Morris' obligation to inform HMRC about his changes of address, he thought that he had done so at the time of filing his returns but this suffered from the same problems. This was unknown to Mr Morris until he received the letter from Frederickson on 7 January 2017. For the same reasons, it was reasonable for Mr Morris not to check his account for penalties; he was unaware (and for the reasons set out above we find that it was reasonable for him to be unaware) of the possibility that he had incurred any penalties. His reasonable excuse therefore continued until 7 January 2017, which was the same day upon which he filed the returns.

39. Fifthly, on the face of it, this was a problem which was generated by HMRC rather than Mr Morris. Mr O'Grady did not put to Mr Morris that he was being untruthful or that he was mistaken about seeing an unqualified confirmation message (and we have, as set out above, accepted his evidence in this regard). Similarly, Mr O'Grady did not put to Mr Morris that he should have done something differently other than to wait for a reference number. We have already found that it was reasonable not to wait when given an unqualified confirmation message.

40. Sixthly, *Garnmoss* does not stand for the proposition that a genuine mistake can *never* be a reasonable excuse as opposed to the proposition that a mistake which has

not been reasonably made cannot be a reasonable excuse. This is for the reasons which the present Tribunal Judge (with Mr Philip Jolly) set out in *County Inns Ltd v HMRC* [2015] UKFTT 204 (TC) at [34] and [35] as follows:

> "[34] *Garnmoss Limited v HMRC* is not authority for the proposition that a mistake is never capable of constituting a reasonable excuse. In saying at [12] that, "the Act does not provide shelter for mistakes, only for reasonable excuses," the Tribunal was not ruling out the possibility that an act or omission can be a mistake *and* a reasonable excuse. Instead, the Tribunal was in our view making the straightforward point that a mistake is not enough on its own to excuse a default; the mistake has to have been reasonably made in order to constitute a reasonable excuse. This is, in our judgment, made clear by the following passages in *Garnmoss Limited v HMRC* at [29] and [30]:
>
> > '[29] Mr Parham submitted that it was reasonable for the company to expect that an instruction for a CHAPS payment would be executed on the date it was given and thus that the default should be expunged by section 59(7)(a). Mrs Davey said that a reasonably conscientious businessman would not have made this mistake or expected the money to be received on time.
> >
> > [30] We agree with Mrs Davey. It is reasonable to expect that if it is important that payment is received by a particular date the sender will check to ensure that its method of payment will achieve that objective.'
>
> [35] It follows that we do not agree that paragraph 6.3 of Public Notice 700/50 is a correct statement of the law. It is correct that a, "genuine mistake, honest and in good faith," is not sufficient in its own right to give rise to a reasonable excuse. However, the Public Notice gives the impression that such a mistake can *never* be a reasonable excuse. This is wrong. As set out above, a mistake that has been made reasonably is, in principle, capable of being a reasonable excuse."

41. For the reasons which we have already set out, if contrary to our previous findings Mr Morris was mistaken in not waiting longer, his mistake was a reasonable one because the website provided him with an unqualified confirmation message.

42. We do note HMRC's surprise that the website provided Mr Morris with an unqualified confirmation message. If HMRC had provided evidence that such a message was not capable of appearing, we might have taken a different view. However, as we have said, Mr O'Grady did not assert that such a message was not capable of occurring. Even treating Mr O'Grady's submissions as to the usual contents of the website as if it were evidence, he expressly accepted that this could only be evidence of the usual position rather than evidence that what Mr Morris said happened was incapable of happening. This decision does not of course bind any future determination of this factual issue in different cases, which will have to be considered upon the evidence adduced in those cases.

Special circumstances

43. In view of our decision on reasonable excuse, the question of special circumstances becomes academic. However, given that it was argued before us we will still set out our decision in this regard.

44. The relevant law as to the reduction of penalties for special circumstances (albeit in a VAT context) was well summarised as follows by the First-tier Tribunal (Judge Jonathan Cannan and Mrs Gay Webb) in *Solar Power PV Limited v HMRC* [2016] UKFTT 0400 (TC) at [68] and [69]:

> "[68] The Court of Appeal decision in *Clarks of Hove v Bakers' Union* [1978] 1 WLR 1207 at p1216 held that in the context of special circumstances, the word 'special' means "something out of the ordinary, something uncommon". In *Crabtree v Hinchcliffe* [1971] 3 All ER 967 Lord Reid stated at p976 that "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal.'" In the same case, Viscount Dilhorne said at p983 that "for circumstances to be special they must be exceptional, abnormal or unusual...".
>
> [69] The tribunal has generally accepted these meanings and we propose to do the same. We would add that the special circumstances must in our view also go some way to excusing or mitigating the conduct which has given rise to the Penalty, whilst at the same time recognising that there is no general power to mitigate. It appears to us that our jurisdiction involves considering HMRC's decision as to whether there are special circumstances. If there are special circumstances then HMRC has a discretion to reduce a penalty. It is only if we consider that HMRC's decision in relation to the application of paragraph 11 Schedule 24 is flawed that we can reduce the Penalty on the basis of special circumstances. The approach was summarised by the F-tT in *Collis v HMRC* [2011] UKFTT 588(TC):
>
> > '[36] ... Judicial review may be pursued in relation to decisions of public bodies on a number of grounds. Included amongst these are the grounds of illegality and fairness. In the context of a decision of HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL).
> >
> > [37] ... The tribunal should also consider whether HMRC have erred on a point of law (see *Customs & Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231; *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941). This will also include considering whether any internal HMRC policy on the application of the special circumstances rule is being applied too rigidly so as to amount to a fetter on HMRC's discretion.'"

45. In the present context, the Tribunal's power to substitute its decision for HMRC's to a different extent is limited to where HMRC's decision was flawed when

considered in the light of the principles applicable to judicial review (see paragraphs 22(3) and (4) of Schedule 55).

46. HMRC's position is that there were no special circumstances because the facts were not unusual. We find that this decision was flawed. This decision was premised upon a refusal to accept that Mr Morris was provided with an unqualified confirmation message. As we have found that such a message was provided to Mr Morris, HMRC's decision took into account the wrong facts.

47. For all the reasons set out in respect of reasonable excuse, we find that there are special circumstances to reduce the penalties to nil. In particular, the essence of HMRC's case is that an unqualified confirmation message would not usually or ordinarily be given without a receipt and reference number. Again, Mr O'Grady put to Mr Morris that this was "highly unusual". As such, the provision of unqualified confirmation messages in circumstances in which the returns had not been successfully filed is something out of the ordinary or uncommon. Further, whilst there is no power to mitigate, the circumstances must go some way to excusing the conduct. For the reasons already set out, Mr Morris' defaults do excuse his late filing and delay until 7 January 2017.

Conclusion

48. It follows that we allow the appeal in respect of the late filing of both the 2013/14 and 2014/15 tax returns.

49. We therefore cancel all penalties challenged in this appeal.

Application for permission to appeal

50. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 11 OCTOBER 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

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.

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)—
>
> (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).

3. 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.

4. 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.

5. 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.

6. 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.

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:

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

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

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.