



TC06625

Appeal number: TC/2015/02210

INCOME TAX – Penalties for failure to make self-assessment returns – Generic evidence - HMRC’s failure to prove compliance with requirements of Schedule 55 Para 4(1)(c) – Daily penalties for two years quashed - Whether a reasonable excuse for the other penalties? – No – Whether special circumstances? – No - Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR FRANCES D GALLAGHER

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS SONIA GABLE**

**Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice,
Chichester Street, Belfast BT1 3JF on Tuesday 17 July 2018**

Miss Labhaoise Glancy, Solicitor, appeared for the Appellant

Ms Mary Hendrick, an Officer of HMRC, appeared for the Respondents

DECISION

1. These are our full reasons for our decision, which was given at the conclusion of the hearing, that we would allow the appeal in part, and would cancel the daily penalties for 2011/12 (£900) and 2012/13 (£900) (amounting to £1,800). We have dismissed the rest of the appeal and upheld all the other penalties. We gave short reasons for our decision at the time.

2. The parties asked us for written summary reasons. However, on reflection, we have decided to give full reasons. This is because the question of what must be proved in relation not only to penalties in general but also to daily penalties in particular has been considered and discussed by several different panels of the Tribunal in a number of decisions over the last few months and we consider it appropriate to add our views in this appeal to theirs in the event that any or all of these issues come at some point to be considered by the Upper Tribunal.

3. In our view, this present appeal is a further illustration of the emerging phenomenon (of which the decision of Judge Redston and Mr Simon in *Halfaoui v HMRC* [2018] UKFTT 13 (TC) is an excellent example) whereby the Tribunal, despite the presence and assistance of the parties, has had to act as a detective in order to work out whether the basic requirements for the lawful issue of certain penalties are met.

4. In this appeal, the Appellant appeals (by way of a Notice of Appeal dated 11 February 2015) against penalties that HMRC has imposed on him under Schedule 55 of the Finance Act 2009 ('Schedule 55') for a failure to submit annual self-assessment returns for three successive years (2010/11, 2011/12, and 2012/13) on time. Those penalties were upheld at departmental review on 21 January 2015.

5. The penalties that have been charged are as follows.

6. For the year **2010/11**:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55, imposed on 14 February 2012;

(2) a £300 "six month" penalty under paragraph 5 of Schedule 55, imposed on 7 August 2012;

(3) "Daily" penalties totalling £900, imposed on 7 August 2012;

(4) a £300 "twelve month" penalty, imposed on 19 February 2013.

7. For the year **2011/12**:

(1) a £100 late filing penalty;

(2) a £300 "six month" penalty;

(3) "Daily" penalties totalling £900

(4) a £300 "twelve month" penalty.

8. In relation to the twelve month penalties, it is important for us to record that HMRC does not argue that these are due because of any deliberate withholding of information by the Appellant. The penalties are issued under Paragraph 6(5) of Schedule 55. This is not a case of dishonesty, want of integrity, or any issues as to the Appellant's character.

9. For the year **2012/13**:

- (1) a £100 late filing penalty;
- (2) a £300 "six month" penalty;
- (3) "Daily" penalties totalling £900.

10. The Notice of Appeal refers to £3,100 being in dispute. This is arithmetically wrong. The actual penalties imposed and which are the subject matter of this appeal amount to £4,500.

11. The filing date for 2010/11 was 31 January 2012; for 2011/12 was 31 January 2013; and for 2012/13 was 31 January 2014.

12. The returns for all three years were filed on the Internet on 24 October 2014.

13. All those returns were therefore late. The returns for 2010/11 and 2011/12 were each more than 12 months late. The return for 2012/13 was more than 6 months late.

14. The legislation is set out in the Appendix, and was also contained in the Authorities Bundle prepared for the hearing.

15. On 3 December 2014, the Appellant had sought a review of the decision to impose the penalties, and had said:

"I enclose various letters from 26 May 2011 onwards from my doctor and hospitals, to back up my claim to be excused penalties because of ongoing health problems"

16. Consistently with this, the appellant's grounds for appealing are as follows:

"I record all business transactions and paper work is kept in various places throughout my house. Due to attendances at hospital and indeed when I was non hospitalised, I couldn't attend to my paperwork for my business due to intense discomfort coming from the debilitating pains in my head. I live with my wife and we have no family residing with us. You state that I was able to carry on with my farming business. Feeding cattle and other necessary tasks were carried out by my son (who is employed at other work) and to some extent by my wife. I was able to assist on the odd occasion. Despite willing (sic) to bring my tax returns up to date, I was unable to do so until quite recently when I felt much better and consequently was able to attend to bookkeeping work."

17. That is to say, the Appellant's appeal – consistently with his request for a review – was put on one basis, and one basis only – ill-health.

18. At the hearing, the Appellant put forward a completely new basis for his appeal, which was that he had been relying on his accountants to file his returns, and had
5 believed that everything was being done as it should have been.

Penalty Appeals

19. Because these are appeals against penalties, it is important to remember that an initial burden lies on HMRC to establish that events have occurred as a result of which
10 any particular penalty is, on the face of it, due. Facts, unless admitted, have to be proved. In order to prove something, evidence of a properly admissible character is required. Assertions in Statements of Case or at the hearing by Presenting Officers are not evidence. Unless sufficient evidence is provided to prove the relevant facts relating to
15 a particular penalty on the balance of probabilities, then that penalty must be cancelled without any question of 'reasonable excuse' (or special circumstances) becoming relevant: see the remarks of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC) at Para [69].

20. HMRC's Return Summary shows 'Full Returns' (i.e., full, blank, tax returns) being sent to Mr Gallagher on 6 April 2011 (for 2010/11); 6 April 2012 (for 2011/12);
20 and 6 April 2013 (for 2012/13).

21. In this appeal, Mr Gallagher, in his evidence to us, accepted that he had been sent Notices to File, in the form of those paper tax returns. Accordingly, the fact that Notices to File under section 8 of the *Taxes Management Act 1970* had been sent to him was not in dispute. Hence, we are satisfied that the Appellant was obliged to file self-
25 assessment returns for those years.

22. Given Mr Gallagher's admission, we do not need to address the evidential problem identified by Judge Jonathan Richards in *Islam t/a Zainub Takeaway v HMRC* [2017] UKFTT 0337 (TC) (a default paper case) as to whether HMRC's computer print-out, in and of itself, is sufficient to discharge the burden of proof. In *Anne Duncan v*
30 *HMRC* [2017] UKFTT 340 (TC) (another default paper case) Judge Richards found, albeit only on balance (i.e., that it was likelier than not) that HMRC's records were correct.

23. The £100 late filing penalties, £300 six month penalties, and £300 12 month penalties can be imposed on any person who is in the self-assessment regime, and who
35 has been given a Notice to File (whether that Notice to File be a separate document, or simply a blank paper return).

24. Hence, we are satisfied that the £100 late filing penalties, the six month penalties, and the 12 month penalties were all lawfully imposed, subject to any question of reasonable excuse or special circumstances.

40 The daily penalties

25. However, when it comes to the daily penalties the situation is different. We have to be satisfied, as a matter of law, that HMRC has served a notice of the kind referred to in Schedule 55 Paragraph 4(1)(c). Whilst this is not a point raised by the Appellant in support of his appeal, it is something that still must be proved, and HMRC still bears the burden: see *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC)

26. In relation to 2010/11, we are satisfied that HMRC gave appropriate notice for the purposes of Paragraph 4(1)(c) in relation to daily penalties.

27. At Page 54 of the bundle is a generic form SA372-30, dated '10/11' (which represents October 2011) and expressly relating, on the face of it, to the year 2010/11. In our view, its wording satisfies the requirements of Paragraph 4(1)(c), in relation to daily penalties. We are satisfied that the generic form was the version actually in circulation at the appropriate time (and was not, for example, produced or altered afterwards). We are satisfied, cross-referring to the Self Assessment system notes, that a copy of this form was sent to Mr Gallagher on 5 June 2012: see page 81 line 11.

28. At Page 55 of the bundle is a generic form SA372-60. In our view, its wording satisfies the requirements of Paragraph 4(1)(c), in relation to daily penalties. We are satisfied that the generic form was the version in circulation at the appropriate time (and was not, for example, produced or altered afterwards). We are satisfied, cross-referring to the Self Assessment system notes, that a copy of this form was sent to Mr Gallagher on 3 July 2012: see page 81 line 10.

29. By virtue of this exercise in 'jigsaw' reconstruction, and being in a position to cross-refer HMRC's internal records to the generic documents which were in use at the relevant time, we find, on balance, that those documents do reflect the information which was sent to Mr Gallagher at the time.

30. As such, appropriate notice of daily penalties was given for 2010/11. Those daily penalties were lawfully imposed, subject to any question of reasonable excuse or special circumstances.

31. However, there are no such template or generic materials before us in relation to the other two years in relation to which daily penalties were charged, namely 2011/12 and 2012/13. Whilst the self-assessment record does record the sending of certain identified documents to Mr Gallagher, we do not know what those documents actually said. We cannot use notices from 2010/11 to guess at the content of notices in 2011/12 or 2012/13. This is an evidential deficiency which cannot be cured by section 114 of the *Taxes Management Act 1970*.

32. Hence, we are not satisfied that appropriate notice of daily penalties was given for those two years, and the daily penalties for 2011/12 and 2012/13 must be cancelled.

The Witness Statement of Ms Mitchell

33. This position is unaltered by the contents of the witness statement put forward by HMRC in its Supplementary Bundle from one Georgina Mitchell, an Officer of HMRC.

The date of that witness statement has been cropped in the course of photocopying. The Statement is headed ‘Confirmation of the process for issuing late payment and late filing penalty notices’.

34. No formal application was made to admit that statement into evidence.

5 35. Ms Mitchell was not present at the hearing to be cross-examined.

36. In any event, and bearing in mind the factors discussed by the Tribunal (Judge Redston and Mr Simon) in *Halfaoui v HMRC* [2018] UKFTT 13 (TC) at Paras [33]-[45], the witness statement is not obviously relevant, and, even if it were, is of little to no probative value.

10 37. Evidence as to the system (even if that evidence is accurate) is meaningless in the absence of evidence as to the outputs of that system – the point which we have already dealt with above.

38. Moreover:

15 (1) The witness statement does not deal with the circumstances of Mr Gallagher, or his appeal, at all;

(2) There is a marked absence of dates on which certain things are said to have been done by Ms Mitchell;

(3) There is no evidence as to what HMRC’s procedures were at the times relevant for this appeal;

20 (4) There is no evidence that Ms Mitchell had first-hand experience of the detailed operational procedures used to send out letters between 2012 and 2014.

Reasonable Excuse

25 39. There is no definition of "reasonable excuse" in the statute, but its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd OBE QC stated (in the analogous context of VAT penalties):

30 “ 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
35 time, a reasonable thing to do?”

40. We apply that test here.

41. We do not consider that the Appellant meets it.

42. We do not accept that he had a reasonable excuse for any of the late filings.

43. We have set out the Appellant's written grounds of appeal above.

Ill-health

5 44. We deal with the issue of ill-health first. We have carefully considered all the documents which the Appellant has put before us. Whilst Mr Gallagher doubtless experienced a succession of problems with his health, the evidence falls far short of showing that his health was so bad that he was genuinely incapable of attending to his tax affairs from (say) January 2012 (being the latest date for filing 2010/11) to January 2014 (being the latest date for filing for 2012/13) – that is to say, for two whole years.

10 45. The earliest document is from 26 May 2011 and records attendance as an out-patient at the eye clinic of Altnagevin Area Hospital. Mr Gallagher was referred for clinical review in 2 months. He was diagnosed with ocular rosacea, but no routine review was arranged in August 2011 and the recommendations were for a low level of self-care. He had a fall in late 2011, and was referred to a clinic in March 2012 with
15 some pain and restricted movement in his left shoulder. He was not an in-patient. He was discharged in May 2012 with a referral for physiotherapy. In August 2012, he was diagnosed with headache, and giant cell arteritis, and was admitted to Antrim Hospital, but he was discharged after three days. By September 2012, he is recorded as working as a farmer again: see page 21 of the bundle. In November 2012, he attended the
20 outpatient clinic, and was listed for review in a year. In December 2012, he injured his wrist when his arm was bent around a gate by a bull. He had an operation and was discharged shortly thereafter.

25 46. We find that whilst the Appellant did genuinely suffer some problems with his health, for some of the period, these were not so serious or debilitating or continuous to the extent that he was genuinely incapable of attending to his tax affairs, or of asking someone else to do so on his behalf.

Reliance on accountants

30 47. The Appellant also told us that he had been relying on his accountants to complete and file his tax returns, and had been hand-delivering paperwork and letters received from HMRC to the accountants' offices, and had not been aware that his returns had not been filed.

35 48. This was an entirely new argument. It had not been mentioned, or even hinted at, in the Request for a Review or the Grounds of Appeal. Mr Gallagher told us that he had signed both of those documents, but had not written them, and had not read them before signing. He told us that those documents had been written for him by his accountants.

49. We accepted his evidence that, when he had received documents from HMRC, he had taken them to his accountants – usually by hand - and had expected them to deal with them.

50. Schedule 55 Paragraph 23(2)(b) says that where a taxpayer relied on any other person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

51. He did have accountants, and those accountants failed to file returns. There is no hard and fast rule for us to apply in deciding whether the Appellant took reasonable care to avoid his accountant's failures.

52. We have decided that Mr Gallagher did not take reasonable care, in the sense that he did not exercise the degree of care to be expected of the ordinary reasonable taxpayer who had engaged accountants to do his returns for him.

53. A number of factors lead us to this conclusion.

54. All we have to go on is what the Appellant told us at the hearing. There is nothing before us in terms of documents or other information or materials to corroborate or back up what Mr Gallagher said at the hearing. This is somewhat surprising because – on the face of it – if Mr Gallagher (as he told us) had been paying his accountants £700 a year for each of these three years to do his tax returns, and those accountants had not in fact done what they contracted to do, which resulted in the imposition of substantial penalties. In those circumstances, one would have expected to see some evidence, at some point, of a complaint by Mr Gallagher to his accountants (or even, if not a complaint, a strong expression of dissatisfaction) that they had let him down in a way which had exposed him to significant financial penalties. No such evidence was put before us. Indeed, Mr Gallagher's accountants for this period – R Patterson & Co – were the same accountants who eventually filed his returns (24 October 2014), and shortly thereafter (29 October 2014) wrote the letter seeking an appeal.

55. Mr Gallagher did tell us that he challenged his accountant about this 'when the bundle came in', and that his accountant's response was that he had been waiting on information from Mr Gallagher before filing the returns. Mr Gallagher said that his accountant had been 'waiting on a bank statement', but it is hard to reconcile this with the late filing of three years' worth of returns. Mr Gallagher said that his accountant sometimes wrote letters looking for information to do the return, and that Mr Gallagher would get that information, but no such letters were put before us.

56. The self-assessment print-out records the sending of warning letters. Mr Gallagher accepted that he was getting post from HMRC. Even if he did not open the letters to see what was in them, he nonetheless was able to identify that they were from HMRC, and took them to his accountants. In our view, a reasonable taxpayer in this position would either have opened the letters, or, at the very least, would have asked his accountants – at some point - what the letters were about. We also take into account that this was not a situation which was passing or transient – it was going on for two whole years, during which period a succession of eleven penalties were issued.

57. It is a point of lesser importance, although not entirely irrelevant, that Mr Gallagher had been in the self-assessment regime since 1996, and penalties (albeit £zero) had been issued for each of the two years immediately previous to those in

dispute in this appeal. So Mr Gallagher was an individual who must be taken to have known what the self-assessment regime required of him; and must be taken to have known that penalties would be imposed if he did not ensure that he filed in time.

58. The other difficulty is that, even if this amounted to a reasonable excuse for late filing, we do not know when that reasonable excuse came to an end, and so do not know, and cannot assess, whether Mr Gallagher's eventual filings on 24 October 2014 were without 'unreasonable delay' after the excuse ceased: see Schedule 55 Paragraph 23(2)(c).

Special circumstances

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59. HMRC did not explicitly consider special circumstances. But we do not consider that this renders its decision in relation to the penalties flawed in a public law sense.

60. Even had HMRC considered that information and materials in the context of special circumstances, we consider that it would inevitably have come to the same conclusion, and would have upheld the penalties.

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61. We acknowledge that HMRC was working on the basis of the information and materials placed before it, which dealt entirely with Mr Gallagher's health. Ultimately, it was down to Mr Gallagher to choose what evidence and information to provide. He was professionally represented. It was not HMRC's responsibility to seek to 'fish' for further evidence or further grounds of appeal and HMRC cannot be criticised for not considering, as special circumstances, information and material which was not put before it.

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Conclusion

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62. For the above reasons:

(1) We confirm the penalties for 2010/11 (amounting to £1,600)

(2) We cancel the daily penalties of £900 for the year 2011/12, but confirm the other penalties imposed for that year (amounting to £700)

(3) We cancel the daily penalties of £900 for the year 2012/13, but confirm the other penalties imposed for that year (amounting to £400).

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63. The total amount due by way of penalties therefore falls from £4,500 to £2,700.

Application for permission to appeal

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64. 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

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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.

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**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 6 AUGUST 2018

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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.

5 2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

10 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to P specifying the date from which the penalty is payable.

15 (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

(a) may be earlier than the date on which the notice is given, but

20 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

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25 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

30 (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—

35 (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

(2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

- 5 (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—

- 10 (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—

- 15 (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—

- 20 (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—

- 25 (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

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(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

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(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

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(a) staying a penalty, and

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

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

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

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

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(a) affirm HMRC's decision, or

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

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

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

(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.

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

1.