

**FIRST-TIER TRIBUNAL
TAX CHAMBER**



INCOME TAX- appeal against penalties for failure to make returns and payments on time - reasonable excuse - whether HMRC entitled to use a general payment to pay subsisting debts when no appropriation directed - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07216

**Appeal number: TC/2018/07795
TC/2018/07796**

BETWEEN

CHARLES DOKK-OLSEN

Appellant

- and -

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

Respondents

CLAIRE DOKK-OLSEN

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JENNIFER TRIGGER
SUSAN STOTT**

**Sitting in public at Mold Magistrates Court, the Law Courts, Civic Centre, Mold CH7
1AE on 15 May 2019.**

Daniel Hicks, chartered accountant Hicks Accountancy, for the Appellants

Carl Fallon, Officer of HMRC, for the Respondents

DECISION

By Directions, released by Her Majesty's Courts and Tribunals Service ("HMCTS") on 23 January 2019, the appeals by Charles Dokk-Olsen TC/2018/07795 and Claire Dokk-Olsen TC/2018/07796 shall proceed together and be heard together by the same Tribunal.

1 The appellants are appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for failure to submit annual self-assessments returns on time. Appellant Claire Dokk-Olsen also appeals against the penalties HMRC have imposed under Schedule 56 of the Finance Act 2009 ("Schedule 56") for failure to pay all the tax due on time.

2 On 09 June 2017 the appellants appealed to HMRC against its decision dated 23 May 2017 which related to tax years 2014-15 and 2015-16. Thereafter, on 17 September 2018, the appellants requested that HMRC conduct a review of the decision dated 23 May 2017. The review decision was dated 28 September 2018. The findings of the review were that the decision to charge the penalties was correct. At the same time the appellants were informed that action must be taken within 30 days of the date of the review letter if the appellants did not agree with the conclusion reached by HMRC. The appellants were advised that an appeal could be made to an independent tribunal but the appeal must be made within 30 days of the date of the review letter.

3 It was the appellants' case that the letter dated 28 September 2018 was not received by them until 24 October 2018.

4 Thereafter, the appellants' appeal, dated 30 November 2018, was sent to Her Majesty's Courts and Tribunals Service ("HMCTS") where receipt was acknowledged on 23 January 2019.

5 The appellants' appeal was notified to the Tribunal late. However, since HMRC have stated that they are not objecting to the late notification, the Tribunal gives permission under s 49G (3) or s 49H (3) of the Taxes Management Act 1970 for the appeal to be notified late.

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

Charles Dokk-Olsen

Tax year 2014-15

- (1) a £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 23/05/2017
- (2) a £300.00 "six month" late filing penalty under paragraph 5 of Schedule 55 imposed on 21/11/2017
- (3) "Daily penalties" for late filing totalling £900.00 under paragraph 4 of Schedule 55 imposed on 21/11/2017

Tax year 2015-16

- (1) a £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 23/05/2017
- (2) a £300.00 “six month” late filing penalty under paragraph 5 of Schedule 55 imposed on 21/11/2017
- (3) “Daily penalties” for late filing totalling £900.00 under paragraph 4 of Schedule 55 imposed on 21/11/2017

Total penalties due £2,600.00.

Claire Dokk-Olsen

Tax year 2014-15

- (1) A £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 23/05/2017
- (2) A £300.00 “six month” late filing penalty under paragraph 5 of Schedule 55 imposed on 21/11/2017
- (3) “Daily penalties” for late filing totalling £900.00 under paragraph 4 of Schedule 55 imposed on 21/11/2017

Tax year 2015-16

- (1) a £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 23/05/2017
- (2) a £300.00 “six month” late filing penalty under paragraph 5 of Schedule 55 imposed on 21/11/2017
- (3) “Daily penalties” for late filing totalling £900.00 under paragraph 4 of Schedule 55 imposed on 21/11/2017
- (4) a 30 days late payment penalty under Schedule 56 of £3.00, after due adjustment, imposed on 30 January 2018
- (5) a “six month” late payment penalty under Schedule 56 of £3.00, after due adjustment, imposed on 30 January 2018

Total penalties due £2,606.

4 The appellants’ letter of appeal, dated 19 November 2017, against the penalties states as follows:

“... Originally we/our accountant tried to register is (sic) for Self-Assessment back in October 2015. This was unsuccessful so our accountant made further attempts in November, December and again in January 2016. Our accountant was concerned that since neither of us had a UTR we would be unable to file an electronic return in time, therefore he contacted HMRC to explain the position. He was informed that the best thing to do would be for us to pay our tax with our national insurance number as a reference - which we did on 29 January, and for him to send in paper copies of the tax returns which he did. Assuming everything was fine we didn’t hear anything until the summer when we were issued with penalties from HMRC for not paying on time.

Both ourselves and our accountant spoke to HMRC on several occasions regarding the outstanding payment and eventually these payments were found by someone at HMRC as they had been ‘mis-allocated’ (wording used by an employee of HMRC) and kept in a ‘Holding Account’.

Please note that not once during any of these conversations did anyone from HMRC inform us that our returns had not been submitted. We were still assuming that the paper returns that were sent in through the post were sufficient.

It wasn't until the following year when the accountant went to file our tax returns that he noticed that the previous year's returns were still shown as outstanding. He contacted HMRC and explained the situation about sending the paper returns in and the advice he got was to file the outstanding returns electronically which he did straight away.

We cannot understand why we wouldn't have had any correspondence from HMRC during this period to chase us up for our outstanding returns. The problem was further exacerbated by another 'processing error' (Again, wording used by an employee of HMRC) at HMRC which meant our accountant was not getting the agents copy of any correspondence being sent to ourselves, instead we were getting two copies of each letter. This created a huge problem for us, as at that time we were spending the majority of our time down in London where we worked so nobody was at home to check the mail, and as we mentioned above our accountant wasn't receiving copy either.

To summarise we have found the last 3 years dealing with HMRC very problematic, and a constant worry as we received demands for tax payments that we had already made. We have encountered nothing but problems with HMRC, ranging from not issuing a Unique Tax Payers reference (sic), losing our tax payments and failing to notify us and our accountant of the outstanding returns.

We have tried to do everything in our power to ensure that we are compliant with HMRC -

- 1 Paper returns were filed as soon as we became aware that we would not be able to file them online (sic).
- 2 The money due was paid using our National Insurance number as references because HMRC had not provided UTR numbers, but somehow this was misallocated through no fault of our own.
- 3 HMRC at no point indicated that they had not received the paper returns.
- 4 Copies of the correspondence was not sent to our accountant.
- 5 Other subsequent returns have been filed on time and all payments made by the required date.

We and our accountant have wasted many hours writing to HMRC to explain the problems encountered and find it very disturbing that HMRC suggest we are at fault because paper returns were not sent recorded delivery..."

5. Accordingly the appellants maintain that that there is a reasonable excuse for the late filing of the returns in that the appellants have filed the paper returns for the tax years 2014-15 and 2015-16 in accord with the advice of HMRC. Furthermore, the appellants have paid the tax due for the same tax years again acting on the advice of HMRC. The appellants have done all that was possible to file the returns. The fact that HMRC had no record of receipt of either or both the returns was not a failure on the part of the appellants.

6. The appellants sent a payment of tax due for the tax year 2014-15 and a further payment of tax due for the tax year 2015-16 to HMRC. Both payments were by BACS transfer. The appellants used the bank details supplied by HMRC to effect each transfer. HMRC received the monies sent by BACS transfer and allocated those monies to a holding account. It is

accepted by the appellants that no instructions were given to HMRC at the time of making each transfer or at all. The payments were made generally without directing the appropriation.

7. The appellants further accept that HMRC held on record the correct address for the appellants.

8. The appellants signed and dated the paper returns for the tax years 2014-15 and 2015-16 but delegated to their accountant, Daniel Hicks of Hicks Accountancy (“the agent”) the responsibility of submitting those returns to HMRC.

9. The agent caused the returns to be sent through the ordinary course of the post. Neither of the returns was sent either by recorded delivery or registered post. No certificate of posting of either return was obtained by the agent. Neither the agent nor the appellants could identify the date on which each return was posted to HMRC. It was not the practice of the agent to check that HMRC had received paper returns and, in the experience of the agent, HMRC did not provide receipts for paper returns. In those circumstances the agent made no contact to ascertain whether the returns had been received by HMRC and the appellants relied on the agent to do all that was required to ensure that the returns had been filed.

10. Throughout the relevant period the appellants worked in London during the week and returned to Flintshire when not working in London. Charles Dokk-Olsen was in London Monday to Friday inclusive each week and Claire Dokk-Olsen worked in London on Tuesday and Wednesday each week. It was accepted that from 2017 correspondence was received from HMRC by the appellants and that the appellants sent to the agent duplicate copies of all such correspondence. It was not until the agent came to file the 2016-17 return that the appellants were aware that the tax returns for 2014-15 and 2015-16 had not been received by HMRC.

11. The agent by letter dated 09 June 2017 appealed against the penalties raised on the appellants in the sum of £200.00. The grounds of the appeal were that the appellants tried to register for self-assessment in 2015 but the paper applications were never processed. As a result the appellants were unable to submit their 2014-15 tax returns as they had not been given a UTR. However, the appellants paid the tax due for that year. “As they hadn’t heard back from HMRC about their UTR’s they sent in the paper forms again in March 2016; and again they didn’t hear back. Eventually we (the agent) ended up applying online for Mr & Mrs Dokk-Olsen in January 2017, unfortunately the UTR’s were not received before the 31 January 2017 filing deadline. However the client did pay their tax bills. When the UTR’s ‘were finally retained’ in March 2017, all the returns were filed straight away. To summarise we are appealing against the fines on the basis that the client tried on numerous occasions to apply for their UTR’s but for whatever reason this didn’t happen, and further on both clients paid the income tax due at the correct time.”

12. The appellants argue that owing to the presence of special circumstances the amount of the penalties should have been reduced. The special circumstances claimed are that the tax paid for tax years 2014-15 and 2015-16 should not have been allocated by HMRC to earlier debts namely the late filing penalties; the late filing daily penalties and the six month late filing penalties and the interest thereon, together with the late payment penalties imposed.

Findings of fact

13. That a notice to file was issued to the appellants. The appellants were required to deliver for the tax year ended 05 April 2015 a non-electronic or an electronic return by 16 May 2017. The appellants were required to deliver also for the tax year ended 05 April 2016 a non-electronic or an electronic return by 16 May 2017. This was evidenced in the form of a print-out from an HMRC internal system which recorded that the notice to file was issued on 09 February 2017. The notice to file was sent in the normal course of the postal system to the address held by HMRC on record as the address of the appellants at the relevant time. The notice to file was not returned to HMRC as undelivered by the Royal Mail. The appellants had confirmed that post was received at that address from HMRC. Furthermore, the appellants had demonstrated by a course of conduct that the notice to file had been received, in that the return for 2014-15 was filed on 08 December 2017 and the 2015-16 return was filed on 29 January 2018. These filing dates are agreed by the appellants. Furthermore, it is unlikely that the appellants would have tried to file the return if no notice to file was ever sent.

14. That the penalties for both the 2014-15 tax year and 2015-16 tax year have been correctly calculated by HMRC in accordance with the legislation.

15. That the appellants failed to demonstrate a reasonable excuse:

- (a) The paper return for the tax year 2014-15 was not received by HMRC, neither did HMRC receive the non-electronic tax return for the tax year 2015-16. The appellants failed to send either of the returns by either recorded delivery or registered post. No certificate of posting was produced by the appellants to confirm that either the non-electronic 2014-15 return or the non-electronic 2015-16 return was posted for delivery to HMRC.
- (b) The appellants failed to show a reasonable excuse for failure to file the return for 2014-15 or the return for 2015-16 by filing date of 16 May 2017. Furthermore, the appellants failed to demonstrate a reasonable excuse for the late filing of the 2014-15 return on 08 December 2017 and the late filing of the 2015-16 return on 20 January 2019.

16. That the appellant paid the tax due for the tax years 2014-2015 and for tax year 2015-16 as a general payment without directing appropriation to HMRC.

17. That HMRC considered whether there were special circumstances which would warrant a special reduction but found that there were none. The Tribunal found that the decision of the HMRC was not flawed when considered in the light of the principles applicable in proceedings by way of judicial review. It followed therefore that the Tribunal could not substitute its own decision for that of HMRC.

Discussion

18. The relevant statutory provisions are included as an Appendix to this decision.

19. The Tribunal has concluded that the tax return for the 2014-15 tax year was submitted on or around 08 December 2017 that being 175 days after the penalty date. Further that the tax return for the 2015-16 tax year was submitted on or around 29 January 2018 some 225 days after the penalty date. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been correctly calculated.

20. The Tribunal had to decide if the reasonable excuse put forward was capable of being a reasonable excuse. The appellants had delegated the responsibility to file both the non-electronic 2014-15 return and the non-electronic 2015-16 return to the agent. This action could have been pleaded as a reasonable excuse under paragraph 23 (2) (b) of Schedule 55 on the grounds that the appellants took reasonable care to avoid failure by their agent. However, the appellants did not claim a reasonable excuse on this ground. In any event if the appellants had pleaded a reasonable excuse under paragraph 23 (2) (b) the Tribunal would have dismissed the appeal because there was no evidence to show that the appellants had exercised reasonable care to avoid the failure to file, by the agent, the returns by the due date.

21. The Tribunal considered next the recent decision of the Upper Tribunal in *Perrin v HMRC [2018] UKUT 156 (TCC)* which Held that a Tribunal is required to deal with the following issues when considering whether there is a reasonable excuse:

- (a) Firstly, establish what facts the taxpayer asserts give rise to a reasonable excuse. The appellants assert: that acting on the advice of an employee of HMRC, non-electronic returns for the tax years 2014-15 and 2015-16 were submitted to HMRC out of necessity, because HMRC had failed to provide the appellants with their UTR's to enable them to file on line; that the returns were filed on time and that the tax for each of those years was sent by BACS to HMRC using the appellants' National Insurance numbers, again on the advice of HMRC; that the returns were recorded by HMRC as outstanding but the tax was received on time and placed in a holding account; that HMRC imposed a filing date of 16 May 2017; that the appellants received their UTR's in March 2017; that the 2014-15 tax return was received by HMRC on 08 December 2017; that the 2015-16 tax return was received by HMRC on 29 January 2018 and that the filing date was 16 May 2017.
- (b) Secondly, decide which of those facts are proven. The only facts proved are that HMRC received the tax due for the tax year 2014-15 and the tax due for the tax year 2015-16 via BACS payments from the appellant; that the monies were put in a holding account by HMRC; that HMRC received the return for the tax year 2014-15 on 08 December 2017; that HMRC received the return for the tax year 2015-16 on 29 January 2018; that the appellants received their UTR's in March 2017 and that the filing date was 16 May 2017.
- (c) Thirdly, decide whether, viewed objectively, those proven facts do indeed amount to a reasonable excuse. The appellants were intelligent and articulate as was evident from the letter of appeal and in evidence before the Tribunal. The appellants were employed in London and lived a considerable distance from London in Flintshire. The appellants were able to maintain a working life and home life balance which required an organised and disciplined regime. The appellants recognised that self-assessment returns must be filed once rental income was received. Appropriate steps were taken by the appellants to ensure an agent was engaged to regularise their tax affairs so as to comply with the appellants' tax obligations.

The appellants were able to keep abreast of the correspondence from HMRC and recognised the need to ensure that the agent was apprised of the correspondence and supplied the agent with copies thereof.

However, a prudent and responsible taxpayer would have recognised the duty to send urgent and important documents to HMRC under the protection of registered mail or some other form of protected delivery in the knowledge that failure to file on time would result in the imposition of penalties. There is a wealth of information in the public domain which the appellants could have accessed on the imposition of penalties, the amount of those penalties and the fact that the penalties increase the longer the delay in submitting a return. In particular the notice to file contained information on the penalty regime as detailed above.

Furthermore the appellants allowed matters to drift. The 2015-16 return was non-electronic. Again, no form of receipt to verify postage was obtained. There appeared to have been no proactive measures to obtain the UTR's from HMRC and yet the whole tenet of the action by the agent was to enable the appellants the ease of filing returns on line.

Finally, when the appellants were notified that the due date for both the 2014-15 tax return and the 2015-16 tax return was 16 May 2017 the appellants failed to file the 2014-15 tax return until 08 December 2018 or to file the 2015-16 tax return until 29 January 2018. The only explanation for this delay that was suggested at the hearing before the Tribunal was that "we were pre-occupied in tracing the monies sent to HMRC". The appellants have failed to act as a prudent and responsible taxpayers having regard to the appellants' responsibility to file the returns by the due date.

(d) Fourthly, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. As the Tribunal found that there was no reasonable excuse it did not consider this issue. However, if the Tribunal had considered this issue in all probability the appellants' would not have been successful. This is because of the lengthy delay between the filing date of 16 May 2017 and the dates that the returns for 2014-15 and 2015-16 were filed and the lack of evidence to explain that delay.

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

Buckland Omnibus Company Ltd v HMRC [2014] UKFTT 028 (TC) which held that the onus was on the appellant to ensure that the return was correctly filed on time. Furthermore HMRC had no legal responsibility to issue reminders nor to issue penalty notices using a set timetable.

Daw Building & Plumbing Services v HMRC [2014] UKFTT 739 (TC) which found that the appellant filed late and provided no proof of posting. Therefore the appellant failed to demonstrate a reasonable excuse.

O'Keefe v HMRC [2015] UKFTT 0159 (TC) where the appellant was unable to provide proof of posting and the Tribunal found that the appellant did not have a reasonable excuse.

23. It was agreed by the parties that the payments of tax due by the appellant had been made generally to HMRC without directing the appropriation. HMRC had taken the payments to be payments on account of the penalties levied and outstanding.

The Tribunal considered the following cases pleaded by HMRC in support of the principle that "where a debtor makes a payment generally, without directing the appropriation, it shall be taken to be a payment on account of the subsisting debt, and on no other account".

Hammersley at alt v Knowles, Esq (1798) 2 Espinasse 666 170 E.R. 490.

Abbey National plc v The Commissioners of Customs and Excise Neutral Citation Number: [2005] EWHC 1187 (Ch).

Chieftain Trailers Limited v The Commissioners for Her Majesty's Revenue and Customs [2012] UKFTT 132 (TC).

AJM Mansell Limited v The Commissioner for Her Majesty's Revenue & Customs [2012] UKFTT 602 (TC).

Swanfield Ltd & Ors v Revenue and Customs Commissioners [2017] BVC 507.

23. Accordingly, the Tribunal found that HMRC were entitled to use the payments made by the appellants for the tax due in the tax years 2014-15 and 2015-16 towards any debts and towards the penalties levied.

24. HMRC had considered whether there were special circumstances which would enable the penalties to be reduced in accordance with paragraph 16 of Schedule 55 but found there were none. The Tribunal may only substitute its own decision if it concludes that the decision by HMRC is flawed when viewed in the light of the principles applicable in proceedings by way of judicial review. Having carefully considered all that the appellants had to say, the Tribunal could not so conclude.

25. A taxpayer becomes liable to penalties of this kind for no other reason than his or her continuing failure to file a return; no proof of qualitative misconduct is required. The late filing penalty, the late filing "daily penalties" and the "six month" late filing penalty were simply a means of securing the production of timely returns.

26. For the reasons given in the body of this judgment the appeals were unsuccessful.

27. Accordingly, the penalties totalling £2,600.00 due and payable by the appellant Mr Charles Dokk-Olsen remain outstanding for the tax years 2014-15 and 2015-16. The penalties totalling £2,606 due and payable by appellant Mrs Claire Dokk-Olsen remain outstanding for the tax years 2014-15 and 2015-16.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**JENNIFER TRIGGER
TRIBUNAL JUDGE**

RELEASE DATE: 20 JUNE 2019

APPENDIX

Relevant provisions of Schedule 55 of the Finance Act 2009

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

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

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

- 10 (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
(b) HMRC decide that such a penalty should be payable, and
(c) HMRC give notice to P specifying the date from which the penalty is payable.

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

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

- 20 (a) may be earlier than the date on which the notice is given, but
(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

5—

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

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

- 30 (a) 5% of any liability to tax which would have been shown in the return in question, and
(b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

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).
- 5 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 10 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- 15 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 20 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- 25 (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—
- (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 30 (6) Paragraph 6A explains the 3 categories of information.
5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:
- 23—
- 35 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

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

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

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16—

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

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

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(a) ability to pay, or

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

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

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(a) staying a penalty, and

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

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

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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—

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(a) affirm HMRC’s decision, or

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

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

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

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

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