



TC 08313

CUSTOMS AND EXCISE CIVIL EVASION PENALTY – Finance Act 1994 section 8 and the Finance Act 2003 section 25(1) – Was the Appellant dishonest – yes - Were the penalties and deductions correctly calculated – Yes –Reasonable Excuse or Special Circumstances - No - APPEAL DISMISSED

BETWEEN

TC/2018/06520

MR KARL FRENCH

Appellant

-and-

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

Respondents

**TRIBUNAL: MR G. NOEL BARRETT-
PRESIDING MEMBER
MR DEREK ROBERTSON –
MEMBER**

The hearing took place on 5th August 2021. The hearing (at the Appellant’s request) was listed to be heard in person at Alexandra House, The Parsonage, Manchester. However upon the Appellant informing the Tribunal that he could not attend the hearing, did not want the hearing to be postponed and requesting that the matter be dealt with in his absence, the hearing on Mr Barrett’s direction, took place as a Video hearing, V (video) and the Tribunal video platform was used.

No members of the public attended Alexandra House in person nor requested to join the Video hearing

Mr Karl French, the Appellant not in attendance

Mr Rupert Davis of Counsel for HM Revenue and Customs’ Solicitor’s Office, for the Respondents.

PRELIMINARY MATTER

1. The appellant emailed the Tribunal on 28th July stating:

“Hi Guys,

Unfortunately I’m self-isolating with COVID
at present and will be unable to attend court on 5th August.

Kind regards
Karl”

2. The respondent’s email was treated by the Tribunal as an application to postpone the hearing.
3. On the direction of Judge Cannon the Tribunal wrote to Mr French on 29th July by email as follows:

“Dear Sirs,

We refer to the Appellant's email dated 28 July 2021 and HMRC's response of the same date which have been placed before Tribunal Judge Cannan. The Judge hereby directs as follows:

By return email and no later than 5pm on Friday 30 July 2021,
Mr French should:

1. Set out full details of the circumstances in which he is required to self-isolate and over what period and forward to the Tribunal appropriate evidence.
2. Confirm whether he is requesting a postponement of the hearing.
3. Provide a detailed response to HMRC's email dated 28 July 2021.”

4. The appellant replied by email to the Tribunal on 30th July stating:

“Hi,

I’m currently isolating until the 6th August however my wife has now tested positive today and I believe we have to start the 10 days again going off the government website.

I’m not looking for a postponement and ask the matter be dealt with in my absence.

Phoning in wouldn’t work as the kids are off nursery (6months & 3) as you can appreciate the house is like a mad house at present.

My argument is I was told the matter was over by the boarder control officer. I was told to sign a form at 330am in the morning to acknowledge confiscation. I was not told things would go further nor was I offered legal counsel.

I also believed Tenerife to be on par with the Spanish Main.

Kind regards

Karl French”

5. The Tribunal decided in the circumstances in accordance with section 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that the appellant had been properly notified of the hearing and that it was in the interests of justice to proceed with the hearing in the appellant's absence.

DECISION

The Appeal

1. The appellant is appealing against a Customs Civil Evasion Penalty under The Finance Act 1994 section 8 in the sum of £852 and an Excise Civil Evasion Penalty under and the Finance Act 2003 section 25(1) in the sum of £3,124. The total sum under appeal being £3,976.

The Facts

2. On 15 September 2017 the Appellant was intercepted in the green “nothing to declare” channel at Manchester Airport returning from Tenerife.

3. Tenerife is a “third country” from which there is a personal allowance of 200 cigarettes for returning travellers.

4. The appellant stated that he had been to Tenerife for one day only.

5. Upon being searched, his baggage was found to hold 27,400 cigarettes.

6. The cigarettes and tobacco were not declared and were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended). The goods were seized under s.139 of The Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture under s.49 of CEMA.

7. The legality of seizure was not challenged in the Magistrates’ court and the seizure has been deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

8. On 5 June 2018 the respondent wrote to the appellant informing him that he was being investigated for the purposes of a possible imposition of a Civil Evasion penalty under s.8(1) of the Finance Act 1994 for the attempted evasion of excise duty and under s.25(1) of the Finance Act 2003 for the attempted evasion of customs duties. The letter invited co-operation.

9. On 19 June 2018 a reminder letter was sent, absent a reply from the Appellant.

10. By letter dated 28 June 2018 the appellant replied stating that:

(1) He was the only person involved

(2) He noticed that the price of cigarettes was considerably cheaper than the UK

(3) He did not know this would happen

- (4) The cigarettes were put in his suitcase and carried as hold luggage
- (5) He had previously travelled abroad on 3 occasions in the year prior to the seizure.
- (6) He was in Tenerife to see his parents.

11. On 23 July 2018 the penalty was levied and assessed at £3,976, comprising a customs civil evasion penalty of £852 and an excise civil evasion penalty of £3,124 (taking into account deductions of 35% for disclosure and 25% for cooperation).

12. By letter dated 8 August 2018 the appellant requested a review. He stated that the customs officer told him that the seizure would be the end of the matter. He queries the RRP used in the duty calculation. He considered that further punishment (after seizure) would financially ruin his family.

13. On 24 September 2018 the respondent replied stating that the decision was upheld.

14. By notice of appeal dated 18 October 2018 the Appellant appealed the penalty on the following grounds:

- (1) I know my actions were wrong.....when the cigarettes were seized the border force officer told me the matter was over
- (2) I did sign the BOR162 Form but was told that this was to acknowledge that the cigarettes had been seized, the officer didn't mention any further action
- (3) It was 3.30am in the morning...I was tired and was not given the opportunity to read the document....or to seek legal advice
- (4) I was not given the opportunity to pay the tax/duty
- (5) I feel that the confiscation.....as a severe penalty in itself but to punish me further for a lack of judgement is harsh
- (6) I was not aware that Tenerife is considered a third country. In my mind Tenerife is under Spanish Sovereignty
- (7) I have travelled quite a bit.....however I was still not aware of the restrictions for Tenerife
- (8) I have made a mistakebut I have paid a high price in the confiscation of the cigarettes
- (9) I learnt a harsh lessonthat will not be repeated
- (10) I was told that the matter was over and thought that I could get on with my life
- (11) This kind of penalty.....has caused me distress and anxiety

15. We accept these facts, as set out above, in paragraphs 2 to 14 inclusive.

The Law

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

Dishonesty

17. The penalties under these provisions require that the Appellant has been dishonest.

18. The appropriate test for dishonesty is the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37.

19. In *Barlow Clowes*, Lord Hoffman at paragraph 10 described the test as follows:

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

20. In *Royal Brunei Airlines*, Lord Nicholls described the test as follows:

“Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances.....If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.”

21. The objective test was confirmed by the Supreme Court in *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67, Per Lord Hughes at paragraph 74:

“These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the factfinder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest. This test applies in both civil and criminal law.”

Per Lord Hughes (when discussing the judgements in *Royal Brunei* and *Barlow Clowes*) in *Ivey* at paragraph 63:

“Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution.”

The Respondents Submissions On Dishonesty

22. Entering the green channel with non-duty paid excise goods above the allowance is objectively dishonest by the standards of an ordinary, reasonable person.

23. Mr Davies on behalf of the respondents submitted that the subjective element of the test will be met because :

(1) It is well known that Tenerife is a non-EU country for customs and excise purposes.

(2) The Appellant appears to be a regular traveller to Tenerife and his parents live there.

(3) The Appellant had recently travelled to both EU and non-EU countries.

(4) The airport has signage which described the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. The more often a person travels and passes such signage, the assertion that such signs have never been noticed becomes less credible.

(5) This amount of cigarettes and tobacco would take up a considerable amount of luggage space, suggesting a degree of pre-planning. The cigarettes were carried in checked luggage. It is noted that the Appellant stayed for only one day in Tenerife and the Respondent questions why he would have carried empty baggage suitable to carry 27,400 cigarettes and purchased checked in luggage allowance if the cigarette purchase was a spur of the moment decision based upon a chance notice of the lower price of cigarettes.

(6) It is noted that travelling abroad for a period of only one day and purchasing large quantities of excise goods is often an indication that the purchase of the goods was in fact the purpose of the trip.

(7) Accordingly, on the balance of probabilities, the Appellant knew his allowances for importing tobacco and cigarettes, or at least knew that the amount he was importing was likely to be over the limit, even if he was not aware of the exact allowance.

(8) Although the Appellant states that he was unaware that Tenerife is a 3rd country, he does not state what he thought the limits actually were. It is noted that there is no limit when importing cigarettes from the EU provided that the goods are for own use. It is generally accepted that cigarettes and tobacco go stale after 1 year. The Appellant imported 27,400, which if smoked by himself, equate to an unrealistic 75/day over

one year. If the Claimant bought the cigarettes to sell in the UK, then that is dishonest even if he thought the applicable law was that for EU originated cigarettes.

(9) The appellant was importing 137 times his personal allowance. Even if genuinely unaware of his allowances, the large quantity of cigarettes would have prompted a reasonable and honest person to make enquiries rather than assuming there was no tax to pay.

The Tribunals Findings Upon Dishonesty

24. Despite that which Mr French told HMRC, detailed in his Notice of Appeal and has said in his emails. Having considered the case law, heard the submissions made by Mr Davis on behalf of the respondent and as a result of the facts we have found in paragraphs 2 to 14 inclusive, we find that the appellant was dishonest.

25. Given that Mr French says that he travelled abroad regularly to both EU and non-EU countries; the customs signage that would undoubtedly have been present at the various airports he passed through; that his parents actually lived on Tenerife; the huge amount of cigarettes he attempted to import illegally; the physical space they would have taken up; the good fortune that he had with him an empty suitcase large enough in which to carry the cigarettes; the cost of the cigarettes, for what Mr French says was a spur of the moment decision; and finally that fact that Mr French was only present on Tenerife for less than 24 hours, all point to the finding, even if Mr French did not know that he was acting dishonestly, in contravention of the law, that any ordinary decent traveller would have known so.

26. Whether Mr French actually knew or believed that he was acting dishonestly, in our view his stated knowledge or belief, was not reasonably held. Further any ordinary decent traveller with Mr French's attributes, in the circumstances in which Mr French describes, would have realised in our view, that their actions were dishonest.

27. The appellant says that he was mistaken as to the law and thus as to the allowances for cigarettes. We do however not accept, given the huge quantity of cigarettes imported, even if Tenerife had been part of the EU, that the appellant has in any event, established that the cigarettes were for his own use, given the number of cigarettes (75 per day) that he would have had to have smoked, in order to use them up within a year, before they became stale.

The Penalties

28. Having heard from Customs Officer Lee Crozier and having reviewed his statement together with the documents in the hearing bundle referred to therein and reviewed the legislation, we are satisfied that the total duty evaded in the sum of £9,941 was correctly calculated by him using the lowest known price for Lambert and Butler cigarettes at the time of seizure; that the penalties have been properly levied against the appellant; and that Officer Crozier properly took into account the appellant's co-operation when applying reductions to the penalties

Reasonable Excuse

29. The legislation under both The Finance Act 1994 section 8 and the Finance Act 2003 section 25(1) makes it clear that neither an insufficiency of funds nor that the person liable to the penalty acted in good faith, are matters which can be taken into account by the Tribunal.

30. The burden of proving either a reasonable excuse or some other special circumstances, (in order to mitigate the penalties) rests with the appellant, the standard of proof being the normal civil standard ie on the balance of probabilities.

31. Given our earlier findings, we do not accept that the appellant has established any reasonable excuse for his actions.

32. The fact that the appellant mistakenly believed that no further action would be taken after he had signed the BOR162 Form, does not amount to a reasonable excuse.

Proportionality

33. Finally the appellant raises the question that the penalties themselves are too harsh, which we take to mean disproportionate.

34. This Tribunal's powers on this type of appeal are limited and we do not believe that we have any jurisdiction to consider whether or not the underlying legislation, which sets out the mechanisms for calculating penalties is disproportionate.

35. In any event we believe that the penalties created under The Finance Act 1994 section 8 and the Finance Act 2003 section 25(1) are wholly within the margin of appreciation which is conferred on Parliament for devising a suitable penalty regime. The penalties are proportionate to the amount of duty which has been evaded. There is nothing in our view disproportionate about the penalties that have been imposed in this case.

Special Circumstances

36. We find that HMRC properly considered all they ought to have considered and did not consider anything they ought not to have considered when reaching their original decision and on their review.

37. We do not find that there is anything out of the ordinary or exceptional or abnormal in regard to this appeal, such as to amount to any special circumstances which would warrant a reduction of the penalties.

Decision.

38. Unfortunately, as the appellant chose not to attend the hearing, we had to rely for the appellants evidence, entirely on that which the appellant told HMRC, that which he set out in his Notice of Appeal and upon his emails.

39. We had no opportunity to hear from the appellant, nor to ask any questions of him.

40. Further, Mr Davies on behalf of the respondents had no opportunity to cross-examine the appellant, in order to test the veracity of the evidence provided by the appellant in written form.

41. We have weighed all the evidence carefully.

42. We find for the reasons already provided that:

(1) The appellant was dishonest

(2) The duties have been correctly calculated and the penalties applied thereto as discounted are entirely appropriate, if not generous.

(3) The appellant does not have a reasonable excuse for the penalty.

(4) There are no special circumstances which should have been taken into account in order to reduce the penalties

43. We therefore dismiss the appeal and confirm the penalties in the total sum of £3,976

Application for permission to appeal

44. 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.

G. Noel Barrett

**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 01 NOVEMBER 2021**

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APPENDIX – RELEVANT STATUTORY PROVISIONS

The Law

16. The Customs and Excise Management Act 1979 (“CEMA”) provides:

"49(1)Where-

a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-

(ii) unloaded from any aircraft in the United Kingdom.

f) ... those goods shall, subject to subsection (2) below, be liable to forfeiture.”

139(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer...

17. Paragraph 3 Schedule 3 CEMA provides:

“Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ...”

18. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

"If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited."

19. S.8 Finance Act 1994 states:

Penalty for evasion of excise duty.

(1) Subject to the following provisions of this section, in any case where—

(a) any person engages in any conduct for the purpose of evading any duty of excise, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability), that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded.

(2) References in this section to a person’s evading a duty of excise shall include references to his obtaining or securing, without his being entitled to it—

(a) any repayment, rebate or drawback of duty;

(b) any relief or exemption from or any allowance against duty; or

(c) any deferral or other postponement of his liability to pay any duty or of the discharge by payment of any such liability, and shall also include references to his evading the cancellation of any entitlement to, or the withdrawal of, any such repayment, rebate, drawback, relief, exemption or allowance.

(3) In relation to any such evasion of duty as is mentioned in subsection (2) above, the reference in subsection (1) above to the amount of duty evaded or sought to be evaded shall be construed as a reference to the amount of the repayment, rebate, drawback, relief, exemption or allowance or, as the case may be, the amount of the payment which, or the liability to make which, is deferred or otherwise postponed.

(4) Where a person is liable to a penalty under this section—

(a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) an appeal tribunal, on an appeal relating to a penalty reduced by the Commissioners under this subsection, may cancel the whole or any part of the reduction made by the Commissioners.

(5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—

(a) the insufficiency of the funds available to any person for

paying any duty of excise or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty.

(6) Statements made or documents produced by or on behalf of a person shall not be inadmissible in—

(a) any criminal proceedings against that person in respect of any offence in connection with or in relation to any duty of excise, or

(b) any proceedings against that person for the recovery of any sum due from him in connection with or in relation to any duty of excise, by reason only that any of the matters specified in subsection (7) below has been drawn to his attention and that he was, or may have been, induced by that matter having been brought to his attention to make the statements or produce the documents.

(7) The matters mentioned in subsection (6) above are—

(a) that the Commissioners have power, in relation to any duty of excise, to assess an amount due by way of a civil penalty, instead of instituting criminal proceedings;

(b) that it is the Commissioners' practice, without being able to give an undertaking as to whether they will make such an assessment in any case, to be influenced in determining whether to make such an assessment by the fact (where it is the case) that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for an investigation;

(c) that the Commissioners or, on appeal, an appeal tribunal have power to reduce a penalty under this section, as provided in subsection (4) above; and

(d) that, in determining the extent of such a reduction in the case of any person, the Commissioners or tribunal will have regard to the extent of the co-operation which he has given to the Commissioners in their investigation.

(8) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence, that conduct shall not also give rise to liability to a penalty under this section.

20. S.25(1) Finance Act 2003 states:

Penalty for evasion

(1) In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability), that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

21. S.29 Finance Act 2003 states:

Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section 25 or 26—

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

- (a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,
- (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,
- (c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

22. S.31 Finance Act 2003 states:

Time limits for demands for penalties

(1) A demand notice may not be given—

(a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or

(b) in the case of a penalty under section 26, more than 3 years after the conduct giving rise to the liability to the penalty ceased.

(2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

(3) A demand notice—

(a) may be given in respect of a penalty to which a person was liable under section 25 or 26 immediately before his death, but

(b) in the case of a penalty to which the deceased was so liable under section 25, may not be given more than 3 years after his death.

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.

