



**TC06848**

**Appeal number: TC/2018/02812**

***INCOME TAX – penalty for failure to make returns – notices not received – wrong initial and partially incorrect postcode – whether reasonable excuse - no***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JOHN FARRAR**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO  
Mr JOHN WILSON**

**Sitting in public in Leeds on 21 August 2018**

**The appellant appeared in person  
Miss Truelove, presenting officer for HMRC**

## DECISION

### Introduction

- 5 1. The appellant (Mr Farrar) is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit annual self-assessment return for the tax years 2011/12 and 2012/13 on time.
2. The penalties that have been charged can be summarised as follows:
- 10 (1) Two £100 late filing penalties under paragraph 3 of Schedule 55 imposed on 12 February 2013 and 18 February 2014
- (2) Two £300 “six month” penalties under paragraph 5 of Schedule 55 imposed on 14 August 2013 and 18 August 2014
- (3) a £300 “twelve month” penalty under paragraph 6 of Schedule 55 imposed on 25 February 2014
- 15 (4) Two “daily” penalties each totalling £900 under paragraph 4 of Schedule 55 imposed on 14 August 2013 and 18 August 2014.
3. Mr Farrar’s 2011/12 tax return was filed electronically and so was due on 31 January 2013. It is not disputed that the return was filed on 11 December 2017.
4. Mr Farrar’s 2012/13 tax return was filed electronically and so was due on 31  
20 January 2014. It is not disputed that the return was filed on 28 January 2015.

### Whether the appeal was made late

5. Mr Farrar’s appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline, for the same reasons as given as his reasonable excuse below. At the hearing, HMRC argued that the appeal was made late and that the Tribunal should not  
25 allow an application to bring a late appeal.
6. However, it was not disputed that Mr Farrar had appealed to the Tribunal within 30 days of receiving a letter from HMRC in response to his appeal to them. That letter from HMRC was a substantive review of their decision to charge penalties and did not make any objection to the late appeal by Mr Farrer to HMRC. HMRC had evidently  
30 prepared for the substantive hearing as they had provided the Tribunal with a hearing submission addressing the substantive matters. Accordingly, we find that:
- (1) HMRC did not object to the late appeal when it was made to them; and
- (2) HMRC gave a substantive response to that appeal; and
- (3) The appeal to this Tribunal was made in time; and
- 35 (4) HMRC had prepared for the substantive hearing;

7. We noted HMRC's submissions as to the process that should be followed when considering whether to admit a late appeal. Although the appeal was clearly made late to HMRC we decided that, taking all of the circumstances into account and particularly the fact that HMRC did not object to the lateness of the appeal when providing a substantive response to that appeal, Mr Farrer's appeal should be allowed to proceed.

### **Appellant's case**

8. Mr Farrar's case can be summarised as follows:

(1) at some time in the middle of the 2012/13 tax year HMRC had changed his name and address on their systems from John C Farrar to Tohn C Farrar and had changed the second part of his postcode from 9EW to 9EV;

(2) as a result of these changes, he had not received any correspondence from HMRC until the middle of 2012 until 2017 other than a letter dated 3 June 2014, addressed to Mr T C Farrar with the incorrect postcode;

(3) he considered that the debt had arisen to someone who does not exist and that HMRC should not expect him to pay something that was not issued to him;

(4) he was aware that it is a criminal offence to open mail that is not addressed to you. His father had opened the letter of 3 June 2014 by mistake;

(5) he had not had any issues with self-assessment tax and had not had any issues since HMRC updated their systems to reflect the correct details;

(6) he considered that HMRC should not be able to suddenly expect him to pay a debt addressed to someone else simply because they had correctly updated his details on the system;

(7) he has had to contact HMRC to update his address numerous times since 2017 as the address keeps changing and his postman keeps reminding him of the discrepancies;

(8) he is not fully aware of his self-assessment obligations, contrary to HMRC's assertions. He works on his father's farm and his expertise is rearing animals and driving tractors and so he has to employ an accountant to sort out his tax issues;

(9) he was shocked to learn in April 2017 that he had accumulated a debt with HMRC of over £3,000 as this was the first time he knew anything about the debt. Although HMRC promised to send him details of how the debt had arisen, he had heard nothing further until a field force officer visited the farm in 2018 and spent some time explaining how the debt had arisen. The field force officer had advised him to make sure that his accountant completed the returns and that he could appeal the debt;

(10) The debt is over half of his annual income.

9. Mr Farrar also explained that:

- (1) he sends all his paperwork to his accountant, who also deals with the farm accounts and tax, and has very little to do with the paperwork otherwise;
- 5 (2) he did not know when or how his tax returns for 2012/13 and 2013/14 were filed as his accountant deals with the returns and does it online, so there is no need for Mr Farrar to sign anything and so he would not expect to receive anything from the accountant. Mr Farrar explained that he responds to the accountant when he hears from him but is not waiting for or looking for anything from the accountant at any time. He is too busy dealing with matters on the farm and knew that the tax has always just been done when the farm accounts are done.
- 10 (3) any correspondence from HMRC is opened and put into a folder. He does nothing more with it because the accountant gets a copy and will come to the farm to deal with it;
- (4) he has had no assistance from the accountant over the penalties but Mr Farrar does not like bothering people, and knows the accountant is very busy;
- 15 (5) he does not know whether his accountant received any notices or reminders about the penalties. When asked, the accountant had “not said a word”;
- (6) he regularly gets letters addressed to someone who has never lived at his address, and he sends those back when they arrive;
- 20 (7) he accepted that, with hindsight, maybe he should have called HMRC about the 3 June 2014 letter, but he didn’t understand the implications and his father didn’t make anything of it. They had just put the letter to one side;
- (8) there had been no contact from HMRC debt collectors prior to the visit of the field force officer in 2018;
- 25 (9) he has had other problems with his post and his postman had explained that post is sorted automatically on the basis of the postcode and any letters with discrepancies have to be dealt with manually. His present postman has been delivering his post for about three years.

**HMRC’s case**

10. HMRC submitted, in summary:
- 30 *Inaccuracies generally*
- (1) The change in Mr Farrar’s first initial, and the incorrect last letter in his postcode did not invalidate the notices to file or penalty notices as s114 of the Taxes Management Act (TMA) 1970 allows certain errors to be ignored if the document is “in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.” It was submitted that the use of “T” in place of “J” in Mr Farrar’s first name and “V” in place of “W” in the postcode did not mean that the documents were not in conformity with the Taxes Acts and, as it was not
- 35
- 40 disputed that the taxpayer reference number on the documents was correct, that

Mr Farrar was “designated therein according to common intent and understanding”.

*Incorrect postcode, whether reasonable excuse generally*

5 (2) HMRC explained that there is no “9EV” postcode, so that post could not have been automatically sorted by the Royal Mail to be incorrectly delivered to that postcode. No correspondence has been returned to HMRC as undelivered by the postal service.

10 (3) The second part of Mr Farrar’s postcode has been recorded as “9EV” on HMRC’s systems since at least 2007, as shown by HMRC records. It was not corrected on HMRC’s systems until 2018 during preparation for this hearing. Mr Farrar had not reported any problems receiving correspondence before 2012 and had stated that he started to receive correspondence again when his name was changed back, even though the postcode was still incorrect on HMRC’s systems at that time.

15 (4) The letter of 3 June 2014 was delivered to Mr Farrar although it was addressed with the 9EV postcode.

20 (5) HMRC noted Mr Farrar’s evidence that his postman reminds him of discrepancies in the address and so submitted that the postman would have realised that the correspondence was meant for Mr Farrar even with the incorrect postcode.

(6) HMRC submitted that, accordingly, the error in Mr Farrar’s postcode at the relevant times did not mean that he did not receive the relevant notices and other correspondence and so did not provide him with a reasonable excuse for the failure to file the returns on time.

25 *Incorrect first initial, whether reasonable excuse generally*

(7) Mr Farrar’s first name had been changed on HMRC systems on 25 June 2012. This was as a result of information on a claim made by Mr Farrar’s partner for tax credits. It appeared that the data capture had misread “J” as “T”. HMRC records had been automatically updated accordingly.

30 (8) HMRC submitted that the incorrect initial would not prevent the relevant documents from being delivered in the ordinary course of the post. The relevant documents had not been returned undelivered and so, following s7 Interpretation Act 1978, the correspondence must be regarded as having been received. The letter of 3 June 2014 had, for example, clearly been received by Mr Farrar.

35 (9) Further, HMRC submitted that Mr Farrar’s contention that he was precluded from opening the correspondence because it was not addressed to him did not provide him with a reasonable excuse as the 3 June 2014 letter had clearly been opened and so he would have known that it contained his tax details, including the tax reference number..

40 (10) The test of reasonable excuse is whether the taxpayer has acted in the way that a prudent person in the same circumstances, intending to comply with their obligations as to tax, would act. HMRC submitted that such a person on receiving a letter which was correctly addressed apart from an incorrect first initial and an

incorrect last letter of the postcode, with the correct surname and a distinctive address, would realise that there had been a mix-up and would have contacted HMRC to check the position.

5 (11) HMRC submitted that the incorrect first initial in correspondence could not, therefore, amount to a reasonable excuse. Even if it did amount to a reasonable excuse, a reasonable excuse must continue throughout the period of default and, as the letter of 3 June 2014 had been opened, such a reasonable excuse would have ended at that time as the contents of the letter make it clear that penalties were accruing to Mr Farrar.

10 *Whether the penalties were correctly issued*

(12) In addition to the general submissions above, HMRC made specific submissions as to the issue of Notices to File and penalty notices for the relevant periods.

15 (13) HMRC records showed that the Notice to File for 2011/12 was issued to Mr Farrar on 6 April 2012, before the change to his name on the records was made. Although the postcode was incorrect, this had been the case for a number of years at that point. The Notice to File was not returned to HMRC as undelivered by the postal service.

20 (14) HMRC therefore submitted that the Notice to File for 2011/12 must be regarded as having been received by Mr Farrar in the ordinary course of the post, following s7 Interpretation Act 1978.

25 (15) HMRC submitted that the Notice to File for 2012/13, which was shown on HMRC records to have been sent on 6 April 2013, was also received by Mr Farrar in the ordinary course of the post, although the first initial was wrong on their systems, and therefore the document, at the time, because:

(a) it was not returned undelivered to HMRC;

(b) A full return was issued to Mr Farrar for 2013/14, containing the same errors, on 6 April 2014 and that return was filed on time and HMRC submitted that the return had therefore been received by Mr Farrar.

30 (16) HMRC noted that Mr Farrar filed his 2012/13 tax return on 28 January 2014. This was the same date that he filed his 2013/14 tax return. Mr Farrar's details were not corrected on HMRC's systems until 24 January 2015. HMRC submitted that Mr Farrar's filing of his 2012/13 tax return must have been in response to the return or the reminders to file issued by HMRC during 2013, each of which contains the name and postcode error. HMRC submitted that Mr Farrar  
35 must have therefore received this correspondence.

40 (17) The Notice to File and other correspondence to Mr Farrar was copied to his accountant, as a form 64-8 was on file at all relevant times authorising the accountant as Mr Farrar's agent. The accountant has not advised HMRC at any time that the name or postcode were incorrect. Nothing sent to the agent has been returned to HMRC as undelivered.

(18) HMRC therefore submitted that, as it was not disputed that the returns had been filed late, the penalties had been correctly issued and that Mr Farrar had not established a reasonable excuse for the late filing.

*Reasonable excuse generally*

5 (19) HMRC also submitted that Mr Farrar had been in self-assessment for a number of years and therefore was familiar with his obligations under that system. HMRC submitted that a prudent taxpayer, conscious of their obligations in relation to tax, would have known that they needed to complete a tax return for the relevant years and would have taken steps to ensure compliance even if they  
10 had not received a notice to file or a tax return. At the very least, HMRC submitted that Mr Farrar should have enquired of his accountant or HMRC whether a return was needed.

11. HMRC submitted that they had considered whether Mr Farrar’s inability to pay and the errors in his initial and address amounted to special circumstances which would  
15 warrant a reduction in the penalty and concluded that they did not.

12. HMRC also submitted that, pursuant to the Upper Tribunal decision in *Hok* [2012] UKUT 363 (TCC), the First Tier Tribunal has no jurisdiction to discharge penalties simply because they are considered to be unfair.

**Discussion**

20 13. Relevant law in relation to penalties is attached as an appendix to this decision.

*Inaccuracies generally*

14. Section 114 TMA 1970 provides (as relevant):

(1) “An assessment or determination, warrant or other proceedings which purports to be made in pursuance of any provision of the Taxes Acts shall not be  
25 quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.”

30 15. The errors on Mr Farrar’s record at HMRC, and hence on correspondence, were (a) the substitution of “T” for “J” in his first name, so that this was recorded as “Tohn” rather than “John” and the substitution of “V” for “W” in the last letter of his postcode.

16. We consider that, if the Notices to File and penalty notices amount to “other proceedings”, these errors are not sufficient to mean that those documents are not “in  
35 substance and effect in conformity with or according to the intent and meaning” of the relevant legislation.

17. We also consider that the person charged or affected thereby is designated therein according to common intent and understanding as we consider that “common intent or understanding” would interpret “Tohn” as being “John” with a typographical error and

Mr Farrar’s name is otherwise correctly set out, and the reference numbers in the correspondence clearly relate to Mr Farrar. We consider that the minor error in the postcode would not affect the validity of the document, particularly as Mr Farrar’s address is distinctive, being a named place rather than a numbered house in a street.

5 *Whether Mr Farrar has a reasonable excuse*

1. The test of whether something is a “reasonable excuse” for the late filing of a tax return is not set out in statute but, in our view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

10 “a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

15 2. Mr Farrar argues that he has a reasonable excuse for his failure to file the relevant returns on time because he did not receive correspondence from HMRC other than a piece of correspondence which he considered was not addressed to him, and so did not know that he was in default.

20 3. We considered that Mr Farrar was a credible witness and that, for reasons unknown, he did not see the majority of the documentation that HMRC said was sent to him during this period. We have some sympathy for Mr Farrar because that failure clearly meant that he did not realise that his tax affairs were not up to date for a longer period of time than would have been the case if he had so received the relevant documentation.

25 4. However, we do not consider that Mr Farrar has established that the correspondence (including the Notices to File) was not in fact delivered to his address. It is clear that correspondence with the incorrect postcode was seen by Mr Farrar for a long period before 2012 (and so was clearly delivered) and continued to be seen and therefore delivered after 2017 although the postcode was not corrected on HMRC’s systems until 2018; from Mr Farrar’s evidence, his postman, who has been in the role since at least 2015, is clearly able to recognise the intended recipient of the  
30 correspondence and deliver it accordingly despite the incorrect postcode.

35 5. From Mr Farrar’s evidence, we have concluded that Mr Farrar pays little attention to his tax affairs, trusting that everything will be dealt with by his accountant, and that his father also deals with post on his behalf (for example, Mr Farrar’s evidence was that it was his father who had opened the letter dated 3 June 2014). Mr Farrar’s evidence was that correspondence from HMRC is simply put into a file and left to be dealt with by the accountant. None of the documentation was returned undelivered to HMRC.

40 6. We conclude, therefore, that it is more likely than not that the Notices to File and correspondence have been delivered to Mr Farrar’s address and that he has not seen them because someone else had simply put them to one side for the accountant without Mr Farrar realising that the correspondence had arrived. We conclude, therefore, that



the Notices to File were properly issued and received, even though Mr Farrar did not see them.

7. Nevertheless, we cannot agree that this provides him with a reasonable excuse because, using the *Clean Car* test, we consider that a prudent tax payer in Mr Farrar's  
5 circumstances would have been aware that tax returns were required and would have realised that his tax returns had not been completed.

8. For example, Mr Farrar's evidence was that his tax affairs were dealt with by the accountant at the same time as the farm accounts<sup>1</sup>, but there was no indication that Mr  
10 Farrar made any attempt to establish why, when the accountant arrived to deal with the farm accounts for the relevant years, he was not also provided with any tax return to check. We note Mr Farrar's evidence that he was busy with his farm work and that it did not occur to him that anything was delayed, but we consider that a prudent taxpayer would have asked the accountant about the status of the tax return and otherwise ensured that their tax affairs were dealt with on time. A taxpayer within self-assessment  
15 in Mr Farrar's circumstances is required to comply with their tax obligations, even if not prompted by HMRC (for example, by notifying liability where they have not received a return, under s7 TMA 1970).

9. We do not consider that Mr Farrar's reliance on his accountant amounts to a reasonable excuse either. A taxpayer is responsible for ensuring that their tax affairs are  
20 dealt with in a timely manner and cannot have a reasonable excuse where they abdicate all responsibility for completion and filing of returns to an adviser and do not make any enquiries as to whether the returns have actually been filed. There is clearly some question as to why Mr Farrar's accountant, who was registered as Mr Farrar's agent with HMRC and so should have had notification of the failure to file and the penalties, did not tell him that penalties were accruing (and apparently filed the 2012/13 without  
25 Mr Farrar's knowledge, according to Mr Farrar's evidence) but that does not remove the responsibility on Mr Farrar to ensure that he complies with his obligations under self-assessment.

10. Further, Mr Farrar agrees that one piece of correspondence did reach him: the  
30 penalty notice letter dated 3 June 2014. This letter is addressed to "Mr T C Farrar", rather than "Mr J C Farrar", and the address is correct apart from the last letter of the post code. The letter was opened and the contents clearly include a tax reference number which Mr Farrar did not dispute was his tax reference number.

11. For a penalty for a failure to file a return to be quashed as a result of a reasonable  
35 excuse, the relevant return must be filed without delay following the cessation of the reasonable excuse. Mr Farrar's returns were filed several months after this letter was received, on 28 January 2015 (for 2012/13) and 11 December 2017 (for 2011/12).

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<sup>1</sup> It should be noted that this is simply to indicate timing: Mr Farrar worked on the farm and his evidence was that the accountant visited the farm to deal with the various financial matters for which he was engaged at the same time, one of which was Mr Farrar's tax return. Mr Farrar's tax return related to his own income and not that of the farm.

12. We consider that a reasonable taxpayer in Mr Farrar's position would, having received this letter, made enquiries of either their adviser or HMRC and so would have realised that the relevant tax returns had not yet been filed. The minor inaccuracies in the first initial of the name and the last letter of the postcode would not, we consider,  
5 prevents prudent taxpayer from realising that it was likely to be connected with their tax affairs. We note Mr Farrar's evidence that post for an unknown person was regularly delivered to his address but his evidence was that such post was addressed to a person with a completely different surname: the surname on the letter of 3 June 2014 was "Farrar" and, indeed, Mr Farrar accepted that he should have made enquires when he  
10 received the letter.

13. We consider, therefore, that even if Mr Farrar had had a reasonable excuse, it would have ended when this letter was received.

14. We noted Mr Farrar's submission that the debt is half of his annual income, and that he cannot afford to pay it. It is, however, clear in law that simple inability to pay  
15 does not amount to a reasonable excuse and, in this case, we consider that the reason for the inability to pay (Mr Farrar's low income) does not amount to a reasonable excuse. We also note that we cannot discharge the penalty on the grounds of unfairness because we agree that we are bound by the Upper Tribunal decision in *Hok*, as submitted by HMRC.

15. Finally we must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a  
20 special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards we see no reason to overturn HMRC's decision.  
25

### **Decision**

16. The appeal is dismissed and the penalty upheld in full.

17. 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  
30 accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.  
35

**ANNE FAIRPO  
TRIBUNAL JUDGE**

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**RELEASE DATE: 06 DECEMBER 2018**

## APPENDIX – RELEVANT STATUTORY PROVISIONS

18. 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 19. 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).

20. 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—

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

30 (b) £300.

21. 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.

22. 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

5 (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.

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

10 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

15 (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

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

24. 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:

25 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—

30 (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—

35 (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.

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