



[2019] UKFTT 0355 (TC)

**TC07183**

*INCOME TAX – penalty for late payment - Schedule 56 of Finance Act 2009 – whether reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00203**

**BETWEEN**

**DANIELA STOYANOVA**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JEANETTE ZAMAN**

The Tribunal determined the appeal on 24 May 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 9 January 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 March 2019.

## DECISION

### INTRODUCTION

1. This is an appeal by Ms Stoyanova against late payment penalties imposed by HMRC under paragraph 3(2) of Schedule 56 Finance Act 2009 (“Schedule 56”) and paragraph 3(3) of Schedule 56 for the failure to pay tax on time for the tax year 2016-2017.
2. HMRC originally imposed penalties of £192 under each of paragraphs 3(2) and 3(3). Those penalties were reduced to £8 under each of those sub-paragraphs following amendments made to Ms Stoyanova’s tax return in January 2019.
3. Ms Stoyanova’s Notice of Appeal to the Tribunal states that the appeal is about “Penalty for late filing of self-assessment tax return”, but HMRC state that the return was not filed late and no penalties for late filing have been imposed. HMRC have treated this as an appeal against the penalties which have been imposed for late payment, and I have done the same.
4. Ms Stoyanova’s grounds for appeal are that, although she usually submits her returns on time before 31 October, she did not know that it had not been delivered on time this year.
5. An appeal against a penalty must first be made to HMRC. If HMRC rejects that appeal, then a taxpayer may appeal that decision to this Tribunal. The legislation prescribes the time limits applicable to these appeals.
6. On 10 September 2018 Ms Stoyanova’s agent, Infoaccounting100 Ltd (“Infoaccounting100”), wrote to HMRC to appeal against the penalties. That appeal was in time in respect of the penalty imposed under paragraph 3(3) of Schedule 56 but late as regards the penalty under paragraph 3(2). That appeal was returned by HMRC on 8 October 2018 as not capable of being considered by them until the tax had been paid. There was no suggestion in that letter that HMRC were rejecting it as a late appeal. Further, I have concluded that another appeal was subsequently made to HMRC, which was considered by HMRC and rejected by HMRC (on the substance of the matter and not on the grounds it was late). This is based on the letter from Infoaccounting100 on 20 November 2018 requesting a review of HMRC’s decision, which refers a letter from HMRC of 11 November 2018. In their Statement of Case HMRC say they cannot locate this letter (of 11 November 2018), and nor do I have the letter which preceded it from Infoaccounting100.
7. It is apparent from the above that Ms Stoyanova’s appeal to HMRC under s31A Taxes Management Act 1970 (“TMA 1970”) was made outside the statutory deadline in respect of the penalty under paragraph 3(2) of Schedule 56. HMRC have prepared a full Statement of Case which deals with the substantive appeal against both penalties (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a) TMA 1970.

### BURDEN OF PROOF

8. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely balance of probabilities. This principle was recently restated by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) where it said at [69]:

“Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of “reasonable excuse” becoming relevant.”

9. Before considering the evidence before me, I had regard to the recent decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

“49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.

50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:

“In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.”

51. The FTT also made the following observations at [14] to [16] with which we would agree:

“14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant’s address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.

15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that “would have” or “should have” happened carries no evidential weight whatsoever. An advocate’s assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.

16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us.”

52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be “anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file...”. The FTT declined to infer that the production of a “Return Summary” sheet showing “Return Issue date” with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.

53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:

“... a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn.”

54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an “absence of cogent and/or reliable evidence of system”, finding that the documentary evidence produced was “no more than equivocal”.”

#### **FINDINGS OF FACT**

10. On the basis of the papers before me I have made the following findings of fact.

11. HMRC submit that they sent Ms Stoyanova notice to file a tax return for the year 2016-2017 on or after 6 April 2017. The evidence produced by HMRC in support of this is a computer-generated “Return Summary”, as HMRC do not retain copies of the notices which are automatically generated and sent to taxpayers. Ms Stoyanova has not denied receiving this, and it appears from HMRC’s Statement of amounts owed this is not her first year in the self-assessment regime. Whilst HMRC’s evidence in support is somewhat equivocal, the absence of any suggestion to the contrary leads me to find, on the balance of probabilities, that the notice to file for the tax year in question was sent to Ms Stoyanova.

12. Ms Stoyanova’s tax return for 2016-2017 was due on 31 October 2017 (if a paper return is filed) or 31 January 2018 (if a return is filed online). HMRC’s Return Summary states that an online return was filed on 31 January 2018, and their Statement of Case adds that it was filed by Infoaccounting100 on Ms Stoyanova’s behalf. Ms Stoyanova’s grounds of appeal suggest that Ms Stoyanova had tried to file a paper return before the earlier filing date of 31 October 2017, and argue that she should not be responsible if such a paper return is not delivered. HMRC submit that they have not received a paper return (either by the filing date or later). I find that Ms Stoyanova (or her agent) did submit a tax return for the year 2016-2017 online on 31 January 2018. It is therefore irrelevant whether there had been an earlier attempt to submit a paper return.

13. Upon submission of the tax return, a Tax Calculation was generated automatically on the basis of the information supplied on Ms Stoyanova’s return. HMRC have included a copy of that Tax Calculation, which I accept, and it shows a balancing charge for 2016-2017 of £3,855.40. That amount was due by 31 January 2018.

14. HMRC state that this amount was not paid by 31 January 2018 and remained unpaid at the penalty date of 3 March 2018 so the first late payment penalty of £192 (ie 5% of the tax owed) was charged. As to whether this amount was unpaid, HMRC have produced a Statement generated on 18 February 2019, showing transactions from 24 March 2017 to 31 January 2019. The only credits thereon are adjustments to the tax liability based on amendments made to the tax return and entries showing the suspension of collection of penalties. Ms Stoyanova has not stated that she had paid the tax in question. I find that the tax liability of £3,855.40 (as it was at that time) was unpaid at the penalty date.

15. To demonstrate that notice of assessment of the penalty was given, HMRC have produced a screenshot of information as at 17 December 2018 showing that a 30 days late payment penalty was imposed, with a due date of 19 April 2018. They have also produced a pro forma Self Assessment Notice of penalty assessment. As with the evidence produced by HMRC of notice to file having been sent, this is somewhat equivocal. Ms Stoyanova has not denied receiving the penalty notices. However, it is notable that Ms Stoyanova has repeatedly referred to the appeal being against a late filing penalty rather than late payment penalties – and the letters which I have seen from her agent also use this same language. This distinction was drawn to Ms Stoyanova’s attention by HMRC in their review conclusion letter of 20 December 2018. I have considered whether apparent confusion casts doubt on HMRC’s assertion that late payment penalties were imposed. I note in this regard that the pro forma included by HMRC is used for both late filing and late payment penalties, and there is a prominent sub-

heading “Late filing and payment penalties for the year ended 5 April YYYY”. I also note that Ms Stoyanova received a late filing penalty for the tax year 2015-2016. I have concluded that the reference to late filing penalties in this appeal is a result of confusion and, although I would have expected Ms Stoyanova’s agent to have recognised and corrected this at an earlier stage, I do not take this to support a claim that HMRC have incorrectly imposed a late filing penalty and have not imposed late payment penalties. I therefore find that HMRC did send the required notice of penalty assessment to Ms Stoyanova.

16. HMRC state that five months after the penalty date of 3 March 2018 the balancing charge remained unpaid. I find that this was the case, on the basis of the information referred to in [14] above.

17. HMRC state that a further notice of penalty assessment was issued on or around 28 August 2018. This is also shown on the screenshot from 17 December 2018, and Ms Stoyanova has not denied receiving such notice. For the reasons given in [15] above, I find that this notice of penalty assessment was given by HMRC to Ms Stoyanova.

18. Ms Stoyanova does not give any reason for late payment of the tax liability.

19. HMRC’s submission records show that Ms Stoyanova’s agent made an amendment to her tax return on 14 January 2019 which reduces the tax liability to £165.40, and therefore the penalties were reduced by HMRC to £8 each.

20. HMRC’s review conclusion letter of 20 December 2018 states that HMRC have considered all of the information which HMRC hold but do not think there are any special circumstances which allow them to reduce the penalties. In reaching this decision the reviewer states that she considered the following statement made by or on behalf of Ms Stoyanova:

“I am writing you regarding the letter you send to me on 11 November 2018 and would like to ask for an independent review. I would like to tell you that I am not agree to pay this penalty, because I send no paper on time (before 31/10) my 2016-2017 Tax Return and if Royal Mail did not delivered on time I believe this is not my fault. Due to this reason I kindly ask you to reconsider your decision”.

21. I find that HMRC did consider special circumstances and did consider the reason given by Ms Stoyanova and quoted in [20] above.

## **DISCUSSION**

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

23. I have concluded that the tax liability for the 2016-2017 tax year was not paid by the due date and remained unpaid five months after the penalty date. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

### **Reasonable excuse**

24. Paragraph 16 of Schedule 56 provides that liability to a penalty does not arise in relation to a failure to make a payment if the taxpayer satisfies HMRC or the Tribunal that there is a reasonable excuse for the failure. For this purpose, neither an insufficiency of funds (unless attributable to events outside the taxpayer’s control) or reliance on a third party (unless the taxpayer took reasonable care to avoid the failure) are capable of being a reasonable excuse (paragraph 16(2)).

25. Ms Stoyanova has consistently put forward the position that the basis for her appeal is that it was not her fault that the tax return was not received on time, but rather that of Royal Mail. The tax return was, however, received on time – it was submitted online on 31 January 2018 and no penalties for late filing have been imposed. The penalties under appeal are for

late payment of the tax, and Ms Stoyanova has not produced any argument or supporting evidence to explain this late payment.

26. I therefore conclude that there is no reasonable excuse for the failure.

### **Special circumstances**

27. Paragraph 9(1) of Schedule 56 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 9(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

28. In other contexts "special" has been held to mean "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). However, the Upper Tribunal in *Edwards* recently said at [72] that:

"In our view, as the FTT said in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) at [99], there is no reason for the FTT to seek to restrict the wording of paragraph 16 of Schedule 55 FA 2019 by adding a judicial gloss to the phrase."

29. The Upper Tribunal then agreed with this statement of the Tribunal in *Advanced Scaffolding*:

"102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

30. HMRC have considered whether there are special circumstances and I have concluded that this decision is not flawed. Accordingly, I cannot alter that decision.

### **CONCLUSION**

31. I affirm the late payment penalties imposed by HMRC under paragraphs 3(2) and 3(3) of Schedule 56.

### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

32. 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.

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 04 JUNE 2019**

**APPENDIX**  
**RELEVANT STATUTORY PROVISIONS**

**TAXES MANAGEMENT ACT 1970**

**59B Payment of income tax and capital gains tax: assessments other than simple assessments**

- (1) Subject to subsection (2) below, the difference between—
- (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
  - (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A or 59AA of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
- shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section 246D(1) of the principal Act, section 626 of ITEPA 2003 or section 399(2) or 530(1) of ITTOIA 2005.
- (2) The following, namely—
- (a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and
  - (b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year, ...
- shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.
- (2A) The reference in subsection (1)(b) to payments on account under section 59AA does not include any amounts already repaid under section 59AA(5).
- (3) In a case where the person—
- (a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but
  - (b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,
- the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.
- (4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.
- (4ZA) In a case in which the notice required by section 7 was given following the receipt of a notice under section 8B, subsections (3) and (4) apply as if—
- (a) the reference to the notice required by section 7 were a reference to the original notice required by that section, and
  - (b) the references to notice under section 8 or 8A were references to the original notice under that section.
- (4ZB) In subsection (4ZA) the references to original notices are to notices given before the notice under section 8B.
- (4A) Where in the case of a repayment the return on the basis of which the person's self-assessment was made under section 9 of this Act is enquired into by an officer of the Board—
- (a) nothing in subsection (3) or (4) above shall require the repayment to be made before the day

on which, by virtue of section 28A(1) of this Act, the officer's enquiries are treated as completed; but

(b) the officer may at any time before that day make the repayment, on a provisional basis, to such extent as he thinks fit.

(5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—

(a) section 9ZA, 9ZB, 9C or 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or

(b) section 12ABA(3)(a), 12ABB(6)(a), 28B(4)(a), 30B(2)(a), 33A(4)(a) or 50(9)(a) of this Act (amendment of partner's return to give effect to amendment or correction of partnership return), is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act.

(5A) Where a determination under section 28C of this Act which has effect as a person's self-assessment is superseded by his self-assessment under section 9 of this Act, any amount of tax which is payable or repayable by virtue of the supersession shall be payable or (as the case may be) repayable on or before the day given by subsection (3) or (4) above.

(6) Any amount of income tax or capital gains tax which is payable by virtue of an assessment made otherwise than under section 9, 28H or 28I of this Act shall, unless otherwise provided, be payable on the day following the end of the period of 30 days beginning with the day on which the notice of assessment is given.

(7) In this section any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income. But such a reference does not include income tax repaid on a claim for repayment of income tax which—

(a) is treated as having been paid by virtue of section 520(4) of ITA 2007 (gift aid relief: income tax treated as paid by trustees of charitable trust), or

(b) has been deducted at source from income to which section 532, 533, 536 or 537 of that Act (certain sources of income exempt from income tax) applies.

(8) PAYE regulations may provide that, for the purpose of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations.

## **FINANCE ACT 2009 SCHEDULE 56**

### **1**

(1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

(3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

(4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the day after the date specified in or for the purposes of column 4 of the Table in relation to that amount.



(5) Sub-paragraph (4) is subject to paragraph 2A.

	Tax to which payment relates	Amount of tax payable	Date after which penalty is incurred
<b>PRINCIPAL AMOUNTS</b>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid

### 3

(1) This paragraph applies in the case of—

- (a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,
- (aa) a payment of tax falling within item 6ZB in the Table,
- (b) a payment of tax falling within item 2 or 4 which relates to a period of 6 months or more, and
- (c) a payment of tax falling within item 2 which is payable under regulations under section 688A of ITEPA 2003 (recovery from other persons of amounts due from managed service companies).

(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.

### 9

(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.

### 11

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

- (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of an amount of tax which was due or payable.

(4A) If an assessment in respect of a penalty is based on an amount of tax due or payable that is found by HMRC to be excessive, HMRC may by notice to P amend the assessment so that it is based upon the correct amount.

(4B) An amendment made under sub-paragraph (4A)—

(a) does not affect when the penalty must be paid;

(b) may be made after the last day on which the assessment in question could have been made under paragraph 12.

### **13**

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

### **14**

(1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

### **15**

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(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 9—

(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 9 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.

### **16**

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.

(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.