



[2019] UKFTT 457 (TC)

TC07262

INCOME TAX – penalties for late filing of PAYE returns - Schedule 55 Finance Act 2009 – whether to give permission for late appeal to HMRC against five of the penalties – no – whether special circumstances or reasonable excuse for failure in respect of which remaining penalty was imposed – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/01634

BETWEEN

COUNTRY FOODS (SWANAGE) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 5 July 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 7 March 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 March 2019.

DECISION

INTRODUCTION

1. Country Foods (Swanage) Limited (“CFS”) is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit PAYE Real Time Information returns on time.

2. The penalties that have been charged under paragraph 6C of Schedule 55 can be summarised as follows:

(1) A £200 penalty for the period 6 January 2017 to 5 February 2017 imposed on 5 May 2017;

(2) a £200 penalty for the period 6 February 2017 to 5 March 2017 imposed on 5 May 2017;

(3) a £200 penalty for the period 6 March 2017 to 5 April 2017 imposed on 5 May 2017;

(4) a £200 penalty for the period 6 November 2017 to 5 December 2017 imposed on 9 February 2018;

(5) a £200 penalty for the period 6 December 2017 to 5 January 2018 imposed on 9 February 2018; and

(6) a £100 penalty for the period 6 July 2018 to 5 August 2018 imposed on 16 November 2018.

3. CFS’s grounds for appealing against the penalties can be summarised as follows:

(1) they did file returns as and when employees were paid and have filing receipts; and

(2) they argue that, owing to the presence of “special circumstances”, the amount of the penalties should have been reduced - the taxpayer is a tiny health food shop and the five employees will be required to cut their hours as the taxpayer will be severely financially hampered by the need to pay these fines; and

(3) CFS would need a payment plan as they couldn’t afford to pay all the penalties at the same time.

PRELIMINARY ISSUE – LATE APPEALS

4. CFS appealed to HMRC on 12 February 2019. This appeal under s31A Taxes Management Act 1970 (“TMA 1970”) was made late and in their Statement of Case HMRC state that they refuse consent to the late appeal under s49(2)(a) TMA 1970. However, I draw a distinction in this regard between the penalties specified in [2(1)] to [2(5)] above and that at [2(6)], as explained below.

5. HMRC note that:

(1) the first three penalties were imposed on 5 May 2017, the last date to appeal was therefore 4 June 2017 and so the appeal is 20 months late, and

(2) the next two penalties were imposed on 9 February 2018, with a last date to appeal of 11 March 2018 and so the appeal is 11 months late.

6. HMRC’s objection based on lateness of 11 months or 20 months applies only to the first five penalties. Whilst HMRC have not expressly stated that they agree to the late appeal against the sixth penalty (which was made two months’ late), I consider that HMRC have given consent to late notice for (and only for) the penalty of £100 imposed on 16 November 2018. The appeal

against that penalty of £100 is therefore before me and I consider it in the discussion below. Any further reference to late appeals does not refer to the appeal in respect of that penalty.

7. In the context of the late appeals made against the first five penalties, HMRC note that:
- (1) all penalty notices were issued to the address held on record at the time, which is the current address of CFS and the address shown on the Notice of appeal to the Tribunal; and
 - (2) full payment submissions (“FPS”), which contain the required information, were received after payments were made to the employees rather than on or before such payments.
8. HMRC refer to the decision of the Upper Tribunal in *Data Select Limited v HMRC* [2012] UKUK 187 (TCC), in which Morgan J stated:

“34... As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.”

9. I need to decide whether to give permission for the appeals against the penalties specified in [2(1)] to [2(5)] above to be made to HMRC outside the statutory deadline. I address this at the start of the Discussion, having made various findings of fact. At that point I then go on to consider the substantive appeal (at least in respect of the sixth penalty). I organise matters in this manner for convenience only, and this approach should not be taken as indicating that I have given any weight, when deciding whether to give permission in respect of any or all of the first five appeals, to the fact that the sixth appeal is before me in any event.

FINDINGS OF FACT

10. I have made the following findings of fact on the basis of the papers before me.
11. HMRC have provided me with a copy of their records headed “Payments to individuals reported late” setting out the date on which employees were paid and the date on which the corresponding FPS was received. The due date for filing the FPS in each case is on or before the date on which the payment was made to employees. The detail of this is set out below, and I accept this information. I note in this regard that one of CFS’s grounds of appeal is that the FPS were filed on time. HMRC do not dispute that the FPS were filed, and I find that they were so filed on the dates specified below. However, I do not accept CFS’s submission that they were “on time” as CFS have not provided any argument or evidence to challenge the submission dates recorded by HMRC.
12. For the periods in respect of which penalties were issued, the dates of payment and submission were as follows:

PAYE period	Date of payment to employees	Date of FPS	Number of employees
6 January 2017 to 5 February 2017	6 January 2017	10 January 2017	11
	20 January 2017	24 January 2017	11
	27 January 2017	31 January 2017	11
6 February 2017 to 5 March 2017	10 February 2017	14 February 2017	11
	24 February 2017	28 February 2017	11

	3 March 2017	9 March 2017	11
6 March 2017 to 5 April 2017	10 March 2017	14 March 2017	11
	17 March 2017	22 March 2017	11
	24 March 2017	28 March 2017	11
6 November 2017 to 5 December 2017	10 November 2017	14 November 2017	9
	17 November 2017	23 November 2017	9
	24 November 2017	30 November 2017	9
	1 December 2017	6 December 2017	9
6 December 2017 to 5 January 2018	15 December 2017	20 December 017	9
	22 December 2017	4 January 2018	9
	29 December 2017	4 January 2018	9
	5 January 2018	11 January 2018	9
6 July 2018 to 5 August 2018	13 July 2018	19 July 2018	7
	20 July 2018	25 July 2018	7

13. HMRC assessed the penalties on:

- (1) 5 May 2017 in respect of the periods 6 January 2017 to 5 February 2017, 6 February 2017 to 5 March 2017 and 6 March 2017 to 5 March 2017 – with the penalty assessment being £600,
- (2) 9 February 2018 in respect of the periods 6 November 2017 to 5 December 2017 and 6 December 2017 to 5 January 2018 – with the penalty assessment being £400, and
- (3) 16 November 2018 in respect of the period 6 July 2018 to 5 August 2018 – with the penalty assessment being £100.

14. The papers included a copy of the penalty assessment which was issued to CFS on 5 May 2017, addressed to CFS at 15 Station Road, Swanage BH19 1AB. HMRC did not have a copy of the other two penalty assessments and produced a copy of their computer records headed “View filing penalty notices” which stated that they had been issued. CFS has not denied receiving any of these three assessments. I find that they were issued on the dates specified at [13] above.

15. HMRC’s taxpayer notes show that on 16 November 2017 HMRC received a letter from CFS appealing against penalties imposed for the periods ending 5 May 2017, 5 June 2017 and 5 July 2017. HMRC discharged those penalties and issued an “education letter” to CFS.

16. HMRC’s taxpayer notes show that HMRC made a general education call to CFS’s agent on 25 July 2018 to highlight the importance of filing on time. The notes indicate that the agent failed security.

17. HMRC’s taxpayer notes state that CFS started filing on time on 3 August 2018 but had received a total of 22 penalties issued from 21 August 2015 to November 2018.

18. The Generic Notification Service (“GNS”) issues electronic customer service warning messages to employers to help them report PAYE payroll information and pay their PAYE liability in full and on time. The messages are sent when an employer or agent sends a FPS late or HMRC hasn’t received the expected number of FPS. HMRC have produced an extract

of their records showing that from 21 November 2013 to 3 January 2019 66 Generic Notification Messages (“GNM”) were sent by the GNS to CNS notifying them of late filings or non-filings. HMRC also state that these GNM can be accessed through PAYE online or commercial payroll software. I find that these GNM were sent/made available by HMRC. However, no evidence was available to indicate whether CFS, or its agent on its behalf, had taken the necessary steps to ensure that it received these messages. On balance, I find that CFS did not receive these messages.

19. On 12 February 2019 CFS’s agent, Suttle and Co, appealed against the penalties to HMRC. These appeals were made through the online PAYE system, and the only information specified is “This has been filed on time and I have submission receipt on file.” No reason is given for the lateness of the appeal.

20. On 15 February 2019 HMRC sent two letters rejecting these appeals as follows:

(1) referring to the penalties at [2(1)] to [2(5)] above, these were rejected as being made late; and

(2) referring to the penalty of £100 at [2(6)], this was rejected on the basis that CFS did not have a reasonable excuse for failing to report PAYE information on time. The FPS was sent after CFS paid its employees, but PAYE information must be reported on or before a payment is made to an employee.

21. On 7 March 2019 Suttle and Co notified CFS’s appeal to the Tribunal.

22. In their Statement of Case HMRC do consider the question of special circumstances. They refer to the statements that CFS did file as and when employees were paid, they have filing receipts and that the penalties would cause financial hardship. HMRC conclude these do not merit a reduction of the penalty.

DISCUSSION

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

Late appeals to HMRC

24. The appeals against the first five penalties were either 20 months late or 11 months late. HMRC refer in their Statement of Case to the decision of the Upper Tribunal in *Data Select*.

25. *Data Select* and *Martland v HMRC* [2018] UKUT 178 (TCC) were dealing with a different situation to that in the present appeal, namely an application by the taxpayer in each case to make a late appeal to the Tribunal (rather than HMRC). In *Martland*, the Upper Tribunal described the statutory provisions for these different appeal rights as being very similar. Accordingly, I have concluded that I should apply the principles explained in those decisions when deciding whether it is appropriate for me to give permission in the present appeal.

26. In *Martland* the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. It said:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can

be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal.”

27. The appeals were 11 months late and 20 months late. Having regard to the decision of the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 254 (TCC) in which the Upper Tribunal stated that, in the context of an appeal right which must be exercised within 30 days of a particular decision, “a delay of more than three months cannot be described as anything but serious and significant” I have no doubt that the delay is both serious and significant.

28. No specific explanation is given by CFS for the delay. They have argued, in the context of the substantive appeal, that the FPS were filed on time and they have the submission receipts on file. To the extent this can be read as suggesting that therefore they were not aware of the penalties or the need to take any action, this is not credible. CFS has not denied receiving the penalty notices, and they should have made CFS aware that there was a problem that needed to be addressed.

29. The final stage in the process outlined by *Martland* is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the detriment to the taxpayer which would be caused by my not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission. I also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

30. In conducting that process, I am required:

(1) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected; and

(2) without descending into a detailed examination of CFS's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of my decision.

31. HMRC have emphasised the need for appeals to be made in time so as to give finality to them. That must be right. In considering the position of CFS, who would also suffer detriment if they are denied the ability to appeal late, the evidence available to me suggests the merits of their appeals are not strong – they have repeatedly failed to file on time, have persisted in this

notwithstanding having received explanations of their obligations, and no reason has been given for these repeated delays.

32. I therefore conclude that, in the interests of fairness and justice, I should not permit CFS to appeal late to HMRC against the penalties of £200 each which were imposed for the periods to 5 February 2017, 5 March 2017, 5 April 2017, 5 December 2017 and 5 January 2018.

Penalty of £100 issued on 16 November 2018

33. I have concluded that the payments were made to seven employees on 13 and 20 July 2018, and the relevant FPS were submitted on 19 and 25 July 2018 respectively. These defaults occurred in the period 6 July to 5 August 2018. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalty imposed is due and has been calculated correctly.

34. CFS’s grounds of appeal can be summarised as follows:

- (1) They did file returns as and when employees were paid and have filing receipts; and
- (2) They argue that, owing to the presence of “special circumstances”, the amount of the penalties should have been reduced - the taxpayer is a tiny health food shop and the five employees will be required to cut their hours as the taxpayer will be severely financially hampered by the need to pay these fines.
- (3) CFS would need a payment plan as they couldn’t afford to pay all the penalties at the same time.

35. HMRC’s Statement of Case includes the following:

- (1) as part of HMRC’s RTI awareness campaign a letter was issued to all employers during October 2012 encouraging them to get ready for the new way of reporting PAYE information from April 2013. The letters included a helpsheet and links to further information – I note that no evidence was provided to support this statement;
- (2) 23 penalties have been issued to CFS between 21 August 2015 and 16 November 2018, and it is therefore unreasonable for both CFS and their agent to assume they were submitting their RTI returns correctly – this differs from the taxpayer notes which state that 22 penalties were issued;
- (3) HMRC have accepted earlier appeals from CFS but this does not set a precedent and they cannot rely on having their penalties routinely cancelled;
- (4) an education letter was issued to CFS on 16 November 2017 telling them how to file correctly and a general education call was made to their agent on 25 July 2018; and
- (5) employers can register to get email reminders so they’ll know when HMRC sends them any notices or alerts by logging on to PAYE online – this will enable employers to access the GNM which are sent.

Reasonable excuse

36. CFS have not expressly claimed that they have a reasonable excuse for the defaults. I have however considered whether such an excuse might be found to have existed.

37. CFS’s first ground of appeal is that FPS were filed “on time”. I have concluded that whilst FPS were submitted in respect of the payments made to employees, they were submitted after the date on which payments were made to employees, and this is late. They were due on or before the date of any payment. The filing receipts were not provided by CFS (although HMRC note they had been provided with other appeals by CFS) but I accept HMRC’s

submission that the existence of the receipt only shows that HMRC received the FPS – it does not mean that it was on time.

38. This repeated mistake by CFS suggests a lack of awareness of the timing requirements or, possibly, a disregard for the detail of the requirements. I have considered whether this could constitute a reasonable excuse for the failure within paragraph 23 of Schedule 55. However, I do not consider this is an objectively reasonable conclusion for CFS to reach. There have been multiple defaults (which are the subject of the six penalties in [2] above), and there is no sign that CFS has sought to change its behaviour after the penalty assessment of May 2017 was issued. Whilst I do not make any finding as to HMRC’s submissions regarding RTI awareness campaigns or helpsheets generally available to taxpayers, it is clear that CFS is aware of the need to file FPS, and to do so in respect of each payment made to employees.

39. To the extent that the second ground of appeal (financial hardship for a tiny shop) is based on ability to pay, paragraph 23(2)(a) provides that insufficiency of funds is not a reasonable excuse for the failure, unless attributable to events outside the taxpayer’s control.

40. I have therefore concluded that CFS has no reasonable excuse for the defaults in filing returns.

Special circumstances

41. Paragraph 16(2)(a) of Schedule 55 provides that ability to pay cannot be a special circumstance.

42. HMRC have considered whether there are special circumstances. I do not consider that their decision not to reduce the penalty was flawed, and accordingly I do not have the power to substitute my own decision for that of HMRC.

Payment plan

43. The Tribunal does not have jurisdiction to deal with payment plans or time to pay arrangements. These would need to be agreed with HMRC. I note that HMRC’s Statement of Case states that if CFS have difficulty making payment they should contact the Business Payment Support Service, the details of which can be found on the GOV.UK website.

CONCLUSION

44. Permission to make a late appeal to HMRC against the penalties for the periods to 5 February 2017, 5 March 2017, 5 April 2017, 5 December 2017 and 5 January 2018 is refused. The five penalties of £200 each are therefore confirmed.

45. The appeal against the penalty of £100 issued on 16 November 2018 is refused. That penalty is therefore confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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: 12 JULY 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

1. The obligation to provide Real Time Information is imposed by the Income Tax (Pay As You Earn) Regulations 2003/2682, Regulation 67B of which provides:

67B.— Real time returns of information about relevant payments

(1) Subject to paragraph (1A) , on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation unless the employer is not required by regulation 66 (deductions working sheets) to maintain a deductions working sheet for any employees.

(1A) But a Real Time Information employer⁵—

(a) which for the tax year 2014-15 meets Conditions A and B, or

(b) which for the tax year 2015-16 meets Conditions A and C,

may instead for that tax year deliver to HMRC the information specified in Schedule A1 (real time returns)⁶ in respect of all relevant payments made to an employee in a tax month on or before making the last relevant payment in that month.

(1B) Condition A is that, at 5th April 2014, the Real Time Information employer is one to whom HMRC has issued an employer's PAYE reference⁷.

(1C) Condition B is that, at 6th April 2014, the Real Time Information employer employs no more than 9 employees.

(1D) Condition C is that, at 6th April 2015, the Real Time Information employer employs no more than 9 employees.

(2) The information must be included in a return.

(3) Subject to paragraph (4), if relevant payments are made to more than one employee at the same time, the return under paragraph (2) must include the information required by Schedule A1 in respect of each employee to whom a relevant payment is made at that time.

(4) If relevant payments are made to more than one employee at the same time but the employer operates more than one payroll, the employer must make a return in respect of each payroll.

(5) The return is to be made using an approved method of electronic communications.

47. Regulation 67I then prescribes the amount of the penalty:

67I. Penalty: failure to comply with regulation 67B or 67D

(1) For the purposes of paragraph 6C of Schedule 55 to the Finance Act 2009 (amount of penalty: real time information for PAYE), a Real Time Information employer which fails to deliver a return falling within item 4 in the Table in paragraph 1 of that Schedule in accordance with—

(a) regulation 67B (real time returns of information about relevant payments);

(b) regulation 67BA (employees in respect of whom employer is not required to maintain a deductions working sheet);

(c) regulation 67BB (employees paid in specific circumstances);

(d) regulation 67C (modification of the requirements of regulation 67B: notional payments); or

(e) regulation 67D (exceptions to regulation 67B)
as the case may be, is liable to a penalty of the amount set out in paragraph (2).

(2) Where a Real Time Information employer fails to deliver such a return and the number of persons employed in the period to which the return relates is—

- (a) no more than 9, the penalty is £100;
- (b) at least 10 but no more than 49, the penalty is £200;
- (c) at least 50 but no more than 249, the penalty is £300; and
- (d) at least 250, the penalty is £400.

48. The penalties at issue in this appeal are then imposed by Schedule 55. Paragraph 1 of Schedule 55 applies where a taxpayer fails to deliver a specified return on or before the filing date, and item 4 in the table is a return under regulation 67B.

49. Paragraph 6B, 6C and 6D deal with liability to a penalty:

6B

Paragraphs 6C and 6D apply in the case of a return falling within item 4 or 4A in the Table.

6C

(1) If P fails during a tax month to make a return on or before the filing date, P is liable to a penalty under this paragraph in respect of that month.

(2) But this is subject to sub-paragraphs (3) and (4).

(3) P is not liable to a penalty under this paragraph in respect of a tax month as a result of any failure to make a return on or before the filing date which occurs during the initial period.

(4) P is not liable to a penalty under this paragraph in respect of a tax month falling in a tax year if the month is the first tax month in that tax year during which P fails to make a return on or before the filing date (disregarding for this purpose any failure which occurs during the initial period).

(5) In sub-paragraphs (3) and (4) “the initial period” means the period which—

(a) begins with the day in the first tax year on which P is first required to make a return, and

(b) is of such duration as is specified in regulations made by the Commissioners, and for this purpose “the first tax year” means the first tax year in which P is required to make returns.

(6) P may be liable under this paragraph to no more than one penalty in respect of each tax month.

(7) The penalty under this paragraph is to be calculated in accordance with regulations made by the Commissioners.

(8) Regulations under sub-paragraph (7) may provide for a penalty under this paragraph in respect of a tax month to be calculated by reference to either or both of the following matters—

- (a) the number of persons employed by P, or treated as employed by P for the purposes of PAYE regulations;
 - (b) the number of previous penalties incurred by P under this paragraph in the same tax year.
- (9) The Commissioners may by regulations disapply sub-paragraph (3) or (4) in such circumstances as are specified in the regulations.
- (10) If P has elected under PAYE regulations to be treated as different employers in relation to different groups of employees, this paragraph applies to P as if—
- (a) in respect of each group P were a different person, and
 - (b) each group constituted all of P's employees.
- (11) Regulations made by the Commissioners under this paragraph may—
- (a) make different provision for different cases, and
 - (b) include incidental, consequential and supplementary provision.

6D

- (1) P may be liable to one or more penalties under this paragraph in respect of extended failures.
- (2) In this paragraph an “extended failure” means a failure to make a return on or before the filing date which continues after the end of the period of 3 months beginning with the day after the filing date.
- (3) P is liable to a penalty or penalties under this paragraph if (and only if)—
- (a) HMRC decide at any time that such a penalty or penalties should be payable in accordance with sub-paragraph (4) or (6), and
 - (b) HMRC give notice to P specifying the date from which the penalty, or each penalty, is payable.
- (4) HMRC may decide under sub-paragraph (3)(a) that a separate penalty should be payable in respect of each unpenalised extended failure in the tax year to date.
- (5) In that case the amount of the penalty in respect of each failure is 5% of any liability to make payments which would have been shown in the return in question.
- (6) HMRC may decide under sub-paragraph (3)(a) that a single penalty should be payable in respect of all the unpenalised extended failures in the tax year to date.
- (7) In that case the amount of the penalty in respect of those failures is 5% of the sum of the liabilities to make payments which would have been shown in each of the returns in question.
- (8) For the purposes of this paragraph, an extended failure is unpenalised if a penalty has not already been imposed in respect of it under this paragraph (whether in accordance with subparagraph (4) or (6)).
- (9) The date specified in the notice under sub-paragraph (3)(b) in relation to a penalty—
- (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 (2) in relation to the relevant extended failure.

(10) In sub-paragraph (9)(b) “the relevant extended failure” means—

(a) the extended failure in respect of which the penalty is payable, or

(b) if the penalty is payable in respect of more than one extended failure (in accordance with sub-paragraph (6)), the extended failure with the latest filing date.

50. 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.

51. 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.

52. 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.