



Neutral Citation: [2023] UKFTT 00726 (TC)

Case Number: TC08915

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/12767

VAT – penalty for failure to notify liability to be registered for VAT – non deliberate – whether to permit a new ground of appeal – no – whether special circumstances – no – whether reasonable excuse – no – appeal dismissed

Heard on: 22 May 2023

Judgment date: 21 August 2023

Before

**TRIBUNAL JUDGE RACHEL GAUKE
JOHN WOODMAN**

Between

GB-GADGETS LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Zubair Hussain, director of the Appellant

For the Respondents: Olivia Donovan, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. GB-Gadgets Ltd (“GB-Gadgets”) appealed against a failure to notify penalty of £46,726.79 imposed under Schedule 41 to the Finance Act 2008 (“FA 2008”). The penalty related to unpaid VAT in the period from 1 September 2013 to 31 March 2018.
2. The Tribunal decided that HMRC’s decision relating to special circumstances was not flawed. The penalty is therefore confirmed and the appeal dismissed.
3. A summary of this decision was released to the parties on 21 June 2023. GB-Gadgets subsequently applied for this full decision.

THE FORM OF THE HEARING

4. The hearing was conducted by video link on the Tribunal’s Video Hearing Service. The documents to which we were referred were a bundle containing 180 pages, which included HMRC’s statement of case. Mr Hussain gave oral evidence at the hearing.
5. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

PRELIMINARY ISSUE

6. GB-Gadgets also appealed against an inaccuracy penalty of £8,588.94 imposed under Schedule 24 to the Finance Act 2007. The penalty related to the VAT that was due for the periods 06/18 to 01/20 inclusive.
7. At the hearing Ms Donovan, who appeared before us for HMRC, confirmed that the inaccuracy penalty had been suspended, and that as GB-Gadgets had ceased trading, HMRC would not seek to recover this penalty.
8. On the basis of Ms Donovan’s assurance that there are no circumstances in which HMRC would seek to recover the inaccuracy penalty, Mr Hussain withdrew GB-Gadgets’ appeal against this penalty.

FINDINGS OF FACT

9. We make the following findings of fact.
10. GB-Gadgets’ business was importing goods for resale online. It was incorporated on 27 December 2012. On 27 December 2017, a Dr Kashif Waseem transferred all of the ordinary shares in GB-Gadgets to Mr Hussain. On 1 January 2018, Mr Hussain was appointed as a director of GB-Gadgets. Dr Waseem resigned as a director on 10 January 2018. Mr Hussain then became GB-Gadgets’ sole director.
11. Mr Hussain told us that Dr Waseem had told him that GB-Gadgets opened its first bank account in September 2016. While we did not find this second-hand account to be the most reliable form of evidence, it was not challenged by HMRC and we had no evidence to the contrary, so we find it to have been established as a fact.
12. GB-Gadgets registered for VAT with effect from 1 April 2018.
13. On 9 January 2020, HMRC began a VAT compliance check on GB-Gadgets. HMRC requested certain information, which GB-Gadgets supplied. On 21 February 2020, HMRC

wrote to GB-Gadgets requesting further information. This was not supplied at that time, leading HMRC to issue an information notice on 9 November 2020 under FA 2008, Sch 36.

14. Meanwhile, on 22 September 2020, HMRC issued eBay with a joint and several liability notice under section 77B of the Value Added Tax Act 1994 (“VATA 1994”) which related to GB-Gadgets. Having received this notice, eBay blocked GB-Gadgets from trading on its platform. GB-Gadgets then ceased to trade entirely.

15. On 17 December 2021, HMRC issued a VAT assessment for £208,173 for the period from 1 September 2013 to 31 March 2018. The assessment was calculated on the basis of sales records supplied to HMRC, including from eBay. The fact that the assessment was calculated on the basis of sales records was disputed by Mr Hussain; we set out at paragraph [47] below the evidence on which we make this finding of fact.

16. On 21 December 2021, HMRC sent GB-Gadgets a “penalty explanation letter”, setting out the penalties they intended to charge. This included the failure to notify penalty that is the subject of this appeal. HMRC sent GB-Gadgets a formal assessment notice in relation to this penalty on 23 February 2022. This stated that the penalty under FA 2008, Sch 41 was assessed in respect of the period 01/09/2013 to 31/03/2018.

17. On 6 April 2022, GB-Gadgets requested a review of the penalties that had been imposed. HMRC sent their review conclusion letter on 9 June 2022, upholding the decision to issue the penalties.

18. GB-Gadgets appealed to this Tribunal on 6 July 2022.

WHETHER TO PERMIT A NEW GROUND OF APPEAL

19. GB-Gadgets’ grounds of appeal were solely that the penalty should be reduced due to special circumstances. The grounds of appeal did not dispute that GB-Gadgets had failed to notify its liability to be registered for VAT with effect from 1 September 2013, nor the amount of unpaid VAT which formed the basis on which the penalty was calculated.

20. At the hearing, however, Mr Hussain submitted that GB-Gadgets’ turnover had not exceeded the VAT registration threshold until April 2018. This was, in substance, an entirely new ground of appeal. Mr Hussain did not expressly request permission to amend his notice of appeal to add this new ground, but as he was not legally represented we decided that we should treat him as having made such a request.

21. A helpful recent summary of the principles which this Tribunal should apply when considering an application to amend grounds of appeal was provided by Judge Vos in *C4C Investments Ltd* [2022] UKFTT 367 (TC):

“[16] Mr Millington, on behalf of HMRC, referred to the decision of the High Court in *Essex County Council v UBB Waste (Essex) Limited* [2019] EWHC 819 (TCC). Peperall J helpfully reviewed at [8-11] the principles relating to applications to amend pleadings set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 and *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC) as well as adding his own comments. To the extent relevant to this application, the principles the Tribunal should apply can be summarised as follows:

- (1) Whether to allow an amendment is a matter for the discretion of the Tribunal which must be exercised in accordance with the overriding objective of dealing with cases fairly and justly. This involves striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the

amendment is permitted (*Quah* at [38(a)]). Dealing with appeals at a proportionate cost and avoiding delay where this is compatible with a proper consideration of the issues are part of the overriding objective in rule 2 of the Tribunal Rules.

(2) An application to amend is late if it could have been made earlier and the reasons for any delay are a relevant factor (*CIP Properties* at [19(a)] and *Essex CC* at [10]).

(3) An application to amend will normally be refused if the proposed amendment has no reasonable prospect of success (applying the test for summary judgment or striking out) (*Quah* at [36] and *Essex CC* at [11.1]).

(4) The consequences of allowing the amendment (for example in terms of further evidence and additional work for the parties) also needs to be taken into account. This will however be more relevant, the later the application is made during the course of the proceedings (*Essex CC* at [11.3]).”

22. We consider that this summarises the principles that we should apply when considering whether to permit a new ground of appeal in this case.

23. On the consequences of allowing the new ground of appeal, HMRC had prepared for the hearing on the basis that the only point in dispute was whether there were special circumstances. A new ground of appeal relating to whether GB-Gadgets was liable to be registered for VAT from September 2013 would significantly widen the scope of the dispute, necessitating an adjournment so that HMRC could prepare evidence to support their case. The hearing would have to be re-listed for a later date, and the new hearing would need to be long enough to permit the Tribunal to evaluate the additional evidence, which we anticipate would include the eBay and other records on which HMRC based their calculation of the amount of unpaid VAT.

24. Adding this new ground of appeal would therefore put HMRC to the time and expense of assembling additional evidence, and would extend the length of the hearing and consume greater Tribunal resources. This is not a conclusive reason to refuse the application, but is a relevant factor.

25. We place particular weight on the fact that there was no reason why Mr Hussain could not have raised this ground at an earlier stage. He is an accountant by training, and he should therefore have been aware that no failure to notify penalty would be due if GB-Gadgets had not exceeded the VAT registration threshold until April 2018. Not raising this point until the hearing is, in our view, too late.

26. We are conscious that in refusing this application, we are denying GB-Gadgets the opportunity to review the evidence on which HMRC calculated the VAT assessment, and to challenge it. Against this, however, we have weighed the question of whether the proposed amendment would have a reasonable prospect of success.

27. Mr Hussain acquired the shares in GB-Gadgets in December 2017 and became a director in January 2018. Therefore, most of the period to which the penalty relates (1 September 2013 to 31 March 2018) was before the time of his involvement with the management of the company. He told us that his conclusion that GB-Gadgets did not exceed the VAT registration threshold until April 2018 was based on statements for the bank account that GB-Gadgets opened in September 2016, and that he did not have any records that were older than that.

28. On the basis of Mr Hussain’s oral evidence, which we accept, that GB-Gadgets does not hold any records dating further back than September 2016, we conclude that the company

does not have evidence that would enable it to displace HMRC's central contention that the VAT registration threshold was exceeded in September 2013.

29. Even for the period from September 2016 to March 2018, our view is that the bank statements would not provide conclusive evidence of the whole of GB-Gadgets' turnover, particularly as on Mr Hussain's own submissions the company had been operating without its own bank account for the previous three years.

30. Based on Mr Hussain's submissions and oral evidence, therefore, we have concluded that the proposed new ground of appeal would have no reasonable prospect of success. As a result, there is no real injustice to GB-Gadgets in refusing permission to add the new ground.

31. Taking the above into account, permission for GB-Gadgets to add a new ground of appeal is refused. In the remainder of this Decision, when we refer to GB-Gadgets' grounds of appeal, we refer to the grounds that were included in the original notice of appeal.

THE LAW ON PENALTIES FOR FAILURE TO NOTIFY

32. FA 2008, Sch 41 provides for penalties to apply to a failure to notify various liabilities under tax legislation, including a failure to notify liability to be registered for VAT.

33. The amount of the penalty, and various other provisions of FA 2008, Sch 41, depend on whether the failure "involves a domestic matter". This is defined as a failure that results in a potential loss of revenue and does not involve either an offshore matter or an offshore transfer. The legislation also defines "offshore matter" and "offshore transfer". The penalties are, broadly speaking, higher for a failure that involves an offshore matter or an offshore transfer, than for one that involves a domestic matter. In this case, HMRC have not argued that the failure involves an offshore matter or an offshore transfer. For simplicity, therefore, the following summary covers only the provisions of FA 2008, Sch 41 which relate to failures that involve a domestic matter, as these are the provisions that are relevant to this appeal. Other provisions are also summarised only to the extent that they are relevant for present purposes.

34. FA 2008, Sch 41, para 5 is concerned with degrees of culpability, including the meanings of deliberate and concealed, and deliberate but not concealed. FA 2008, Sch 41, para 6 is about the amount of the penalty, which is:

- (a) for a deliberate and concealed failure, 100% of the potential lost revenue,
- (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
- (c) for any other case, 30% of the potential lost revenue.

35. FA 2008, Sch 41, para 7 defines "potential lost revenue". In the case of a failure to notify a liability to be registered for VAT, the potential lost revenue is the amount of VAT for which P (the person liable to the penalty) is, or but for any exemption from registration would be, liable for the relevant period. The relevant period is defined as the period beginning on the date with effect from which P was required to be registered, and ending on the date on which HMRC received notification of, or otherwise became fully aware of, P's liability to be registered.

36. FA 2008, Sch 41, paras 12 and 13 provide for penalties to be reduced where P discloses a relevant failure. Para 12(2) provides that P discloses a failure by telling HMRC about it ("telling"), giving HMRC reasonable help to quantify the unpaid tax ("helping"), and allowing HMRC access to records to check the amount of unpaid tax ("giving"). Para 12(3) distinguishes between unprompted and prompted disclosures, providing that a disclosure is

unprompted if it is made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the failure. Para 12(4) provides that in relation to disclosure, “quality” includes timing, nature and extent.

37. FA 2008, Sch 41, para 13 provides that if a person who would otherwise be liable to a penalty has made a disclosure, HMRC must reduce the penalty to reflect the quality of the disclosure. Para 13(2) provides that the penalty may not be reduced below a specified minimum. In the case of a 30% penalty for a non-deliberate failure, if HMRC become aware of the failure less than 12 months after the time when the tax first became unpaid by reason of the failure, the specified minimum is 10% for prompted disclosure and 0% for unprompted disclosure. If HMRC become aware of the failure 12 months or more after the time when the tax first became unpaid by reason of the failure, the specified minimum is increased to 20% for prompted disclosure and 10% for unprompted disclosure.

38. FA 2008, Sch 41, para 14 provides that HMRC can reduce a penalty if they think it right because of special circumstances. Under para 14(2), “special circumstances” does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

39. Under FA 2008, Sch 41, para 16, where a person is liable to a penalty, HMRC must assess the penalty, notify the person, and state in the notice the period in respect of which the penalty is assessed. The assessment must be made before the end of the period of 12 months beginning with the end of the appeal period for the assessment of tax unpaid by reason of the failure in respect of which the penalty is imposed.

40. FA 2008, Sch 41, paras 17 to 19 deal with rights of appeal, and the Tribunal’s powers. The Tribunal may on an appeal against the amount of a penalty affirm HMRC’s decision or substitute for HMRC’s decision another decision that HMRC had power to make. In substituting its own decision, the Tribunal may rely on special circumstances, but only if the Tribunal thinks that HMRC’s decision on the application of special circumstances was flawed. Para 19(4) defines “flawed” as flawed when considered in the light of the principles applicable in proceedings for judicial review.

41. A decision is flawed in this sense if HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision. A decision is also flawed in this sense if HMRC failed to think about the matter at all.

42. FA 2008, Sch 41, para 20 provides that liability to a penalty in the case of a non-deliberate failure does not arise if there is a reasonable excuse for the failure. Para 20(2) sets out circumstances, such as insufficiency of funds not attributable to events outside P’s control, which cannot constitute a reasonable excuse.

WHETHER THE PENALTY WAS DUE

43. GB-Gadgets has appealed on the grounds that there were special circumstances. However, the initial burden is on HMRC to establish that events have occurred as a result of which the penalty was due. Evidence of these events must be provided to prove the relevant facts on the balance of probabilities.

44. Under the provisions of FA 2008, Sch 41 summarised above, GB-Gadgets is liable to a penalty if it failed to notify HMRC that it was liable to be registered for VAT. The amount of the penalty is a percentage of the “potential lost revenue” (PLR), which for these purposes means the amount of VAT for which GB-Gadgets was liable for the period beginning on the date when it was required to be registered until the date on which HMRC were notified of the liability to be registered.

45. As stated above, HMRC assessed GB-Gadgets with £208,173 of unpaid VAT for the period from 1 September 2013 to 31 March 2018. When they sent the penalty assessment, HMRC mistakenly stated the PLR as £203,173. Ms Donovan told us that as this was HMRC's mistake, they would not seek to assess a penalty based on the higher PLR of £208,173.

46. Mr Hussain said that the assessment was not based on records from 1 September 2013 to 31 March 2018, but was estimated based on information provided to HMRC by GB-Gadgets relating to 2018, which he submitted was not an accurate basis for an assessment dating back to 2013. Ms Donovan said that the assessment was not estimated, but was based on actual records provided to HMRC by eBay, and possibly also by other third parties.

47. HMRC provided us with relatively little evidence of the basis on which they had concluded that GB-Gadgets should have been registered for VAT from 1 September 2013, or the way in which they calculated the PLR. HMRC's penalty explanation letter dated 21 December 2021 states: "The sales records provided show that you breached the VAT threshold in July 2013 and were liable to register for VAT on 1 September 2013". HMRC's review conclusion letter dated 9 June 2022 states: "The assessment for the pre-registration period 1 September 2013 to 31 March 2018 was raised on the basis that, according to e-bay sales, the VAT registration threshold was exceeded in July 2013, meaning you should have registered with effect from 1 September 2013." It states further that the failure to register "is shown by the evidence of the e-bay and Amazon sales that occurred after incorporation and before VAT registration".

48. While this evidence is relatively limited, GB-Gadgets did not supply evidence that would suggest that the statements in these letters were wrong, or that HMRC had calculated the PLR in any way other than by basing it on actual sales records provided by third parties.

49. We note that GB-Gadgets' grounds of appeal did not dispute the date from which it should have been registered, nor the amount of the unpaid VAT. GB-Gadgets did not appeal HMRC's assessment of the VAT that was due for the period from 1 September 2013 to 31 March 2018, nor did it request HMRC to review this assessment.

50. Mr Hussain explained that he had not challenged the assessment because GB-Gadgets could not afford the accountancy fees that would be required to demonstrate its turnover and/or the amount of any unpaid VAT in the relevant period. Given that GB-Gadgets has no records dating from before September 2016, we deduce that even if money had been no object, it would only have been able to make these calculations in relation to periods after that date. In any event, the Tribunal can only draw conclusions from the evidence before it, and GB-Gadgets has supplied no evidence of the value of its taxable supplies in the period from 1 September 2013 to 31 March 2018.

51. Based on the evidence available to us, we conclude that it is more likely than not that GB-Gadgets should have been registered for VAT from 1 September 2013, and that (subject to the transcription error substituting £203,173 for £208,173) HMRC calculated the PLR on the basis of actual sales records.

52. As to the transcription error, the combined effect of FA 2008, Sch 41, para 16(3) and section 114 of the Taxes Management Act 1970 is that an error of this nature does not invalidate the penalty assessment.

53. We were satisfied on the basis of the documentary evidence that the penalty was assessed within the time limit provided in FA 2008, Sch 41, para 16(4), and was correctly notified as required by FA 2008, Sch 41, para 16(1). Mr Hussain did not dispute that GB-Gadgets had received the notice of the penalty assessment.

54. We are therefore satisfied that GB-Gadgets was (subject to any special circumstances or reasonable excuse) liable to a penalty for failing to notify HMRC of its liability to be registered for VAT with effect from 1 September 2013.

55. As to the amount of the penalty, HMRC have not argued that the failure to notify was deliberate, which means that, subject to any reductions, the penalty is 30% of the PLR. This percentage must be reduced if GB-Gadgets made a disclosure to HMRC, to a percentage that reflects the quality of that disclosure. As described above, disclosure is defined for these purposes as telling HMRC about the failure to notify (“telling”), helping HMRC to quantify the unpaid tax (“helping”), and giving HMRC access to relevant records (“giving”).

56. GB-Gadgets has not disputed that HMRC only found out about the failure to notify as a result of their compliance check. This was, therefore, a prompted disclosure. In cases such as this, where HMRC became aware of the failure more than 12 months after VAT first became unpaid, the maximum permitted reduction would take the penalty percentage from 30% down to 20%.

57. HMRC have given 70% of the maximum permitted reduction: 20% for telling, 30% for helping, and 20% for giving. This brings the penalty percentage down to 23%.

58. As noted above, when HMRC began their compliance check in January 2020, GB-Gadgets supplied the information that was initially requested. However, when HMRC requested further information in February 2020, this was not supplied until HMRC had issued an information notice in November 2020. GB-Gadgets did not dispute that it had not assisted HMRC to calculate the amount of the unpaid VAT. We also consider that the evaluation of the quality of GB-Gadgets’ disclosure should take account of the number of years for which GB-Gadgets’ failure to notify persisted.

59. Taking the above into account, we do not consider that there is a basis to allow a greater reduction for disclosure than the 70% that HMRC have allowed.

60. Mr Hussain explained that he was relying on his agent to supply HMRC with the information they had requested, and that the coronavirus pandemic had made it difficult for his agent to comply with these requests. We accept that this was the case, but observe that there are no provisions allowing a greater reduction for disclosure in circumstances where there is a reasonable excuse for a failure to provide information.

SPECIAL CIRCUMSTANCES

61. GB-Gadgets’ grounds of appeal were that the penalty should be reduced because there are special circumstances.

62. We are only entitled to interfere with HMRC's decision in respect of special circumstances if that decision was “flawed”, when considered in light of the principles applicable in proceedings for judicial review.

63. *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC) was a case concerning late filing penalties under Schedule 55 of the Finance Act 2009 (“FA 2009”). FA 2009, Sch 55, para 16 contains provisions on special circumstances that are nearly identical to the provisions that apply in this case, in FA 2008, Sch 41, para 14 (see the summary at paragraph [38] above). In *Barry Edwards*, the Upper Tribunal cited and agreed with the statement made by Judge Vos in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UK FTT 0744 (TC):

“[101] I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However I can see nothing in

schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.

[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.”

64. The task of this Tribunal is, therefore, to assess the particular facts of this case and to determine, in our discretion but subject to the two exclusions in para 14(2), whether special circumstances justify reduction in the amount of the penalty.

65. GB-Gadgets’ notice of appeal stated that there were special circumstances relating to the fact that GB-Gadgets opened its first bank account in September 2016, and that before this period “the account was used by another individual and his company”.

66. Mr Hussain, at the hearing, explained that English was not his first language. Having listened to his oral submissions, we understood that the alleged special circumstances related not to the bank account, but to Mr Hussain’s contention that he was not responsible for GB-Gadgets’ activities in the time before he acquired the company on 27 December 2017. He told us, and we accept, that from September 2013 until his acquisition of GB-Gadgets he was in a different employment.

67. We explained to Mr Hussain that the penalty was not imposed on him personally, but on the company, GB-Gadgets, which for legal purposes is a separate entity. The fact that the company underwent a change of ownership at the end of 2017 did not remove its liability to the penalty. Mr Hussain told us that he had cooperated with HMRC, and we accept that most of the period to which the penalty relates pre-dates his time as GB-Gadgets’ owner and director.

68. However, we repeat that it is the company that is liable to the penalty, and not Mr Hussain. For this reason we do not consider that a change in the ownership and directorship of the company is a relevant factor that should be taken into account in determining whether there are special circumstances that would make it right to reduce the penalty.

69. Mr Hussain provided us with other information on his personal circumstances at various times. He told us that he had children who were born in 2016 and 2021, and that his wife had mental health problems that were diagnosed in December 2021, as a result of which he had to take on extra caring responsibilities for his family. He also made references to the coronavirus pandemic, which affected GB-Gadgets from December 2019, as from that date it became difficult to import from China.

70. We accept that these facts are true, but they do not have a bearing on GB-Gadgets’ failure to notify its liability to be registered for VAT from 1 September 2013 to 31 March 2018. Mr Hussain was not involved in the management of GB-Gadgets in 2016, so his personal circumstances at that time are not relevant. Any events that took place, or circumstances that applied, from 2019 to 2021 are outside the relevant time period. In our view none of these are relevant factors for this purpose.

71. We considered whether there could be any other relevant factors in this case, such as the effect of the coronavirus pandemic on the agent’s ability to supply HMRC with

information, or GB-Gadgets' inability to pay an accountant to challenge the VAT assessment.

72. We concluded that these were not relevant factors that should be taken into account in determining whether there were special circumstances in this case. The coronavirus pandemic post-dated the failure to notify, and while it may have affected the agent's ability to provide HMRC with information, for the reasons given in paragraph [58] above we do not consider the 70% reduction for disclosure given by HMRC to be unfair. As for GB-Gadgets' inability to challenge the VAT assessment, in our view it would not be right to reduce the penalty where there is no evidence that the amount of unpaid tax calculated by HMRC is wrong.

73. We are therefore unable to conclude that there were any relevant factors that should have been taken into account by HMRC when determining whether there were special circumstances for the purposes of the penalty legislation.

74. HMRC's penalty explanation letter, dated 21 December 2021, states: "Based on the information we have, we don't consider there are any special circumstances which would lead us to further reduce the penalty." HMRC's review conclusion letter, dated 9 June 2022, states: "I have considered the reasons you have provided for both the failure to notify and the inaccuracies, and do not consider you have demonstrated that special circumstances apply."

75. We are satisfied that this evidence demonstrates that HMRC did think about whether there were any special circumstances that would apply in this case, and we do not consider that they reached an unreasonable decision. We also have no evidence to suggest that they took into account irrelevant factors.

76. As a result, we do not consider that HMRC's decision on special circumstances was flawed, and our jurisdiction to make a special reduction is not engaged.

REASONABLE EXCUSE

77. We also considered whether any of the factors alleged by GB-Gadgets to be special circumstances might, instead, amount to a reasonable excuse for the purposes of FA 2008, Sch 41, para 20.

78. The test of what amounts to a reasonable excuse is an objective test, as described in *Perrin* (2018) UKUT 156 (TCC). In that case the Upper Tribunal held (at [81]) that this Tribunal (the "FTT") should:

"(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "Was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after

that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

79. We considered whether any of the following could amount to a reasonable excuse:
- (1) The fact that Mr Hussain only became the owner and director of GB-Gadgets from December 2017, and so was not personally involved in the company’s failure to register for VAT before that time.
 - (2) The birth of his children in 2016 and 2021, and his wife’s mental health problems diagnosed in December 2021.
 - (3) The harmful effect of the coronavirus pandemic on GB-Gadgets’ business.

80. We accept that these facts are proven, but are unable to accept that they amount to an objectively reasonable excuse for a failure to register for VAT that began in September 2013 and lasted until April 2018. In applying the quote from *Perrin* above, the taxpayer in question is GB-Gadgets, not Mr Hussain, and his lack of involvement with the company is not a reasonable excuse for the company’s failure to register. Events in 2021, and the coronavirus pandemic, all post-date April 2018 (the time when the failure ceased) and so cannot form a reasonable excuse for that failure. The birth of Mr Hussain’s child in 2016 was an event in his personal life at a time when he was not involved in the management of GB-Gadgets, so is not a reasonable excuse for a failure by the company at that time.

81. We are therefore unable to conclude that GB-Gadgets had a reasonable excuse for its failure to notify its liability to be registered for VAT between 1 September 2013 and 31 March 2018.

DISPOSITION

82. For the reasons set out above, the penalty is confirmed and the appeal dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

83. 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.

**RACHEL GAUKE
TRIBUNAL JUDGE**

Release date: 21st AUGUST 2023