



Neutral Citation: [2022] UKFTT 00401 (TC)

Case Number: TC08629

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/11357

Penalty for failure to deliver income tax return on time – whether taxpayer’s action deliberate – yes - whether taxpayer had a reasonable excuse – no – whether HMRC’s decision on special circumstances flawed – yes – whether there were any special circumstances – no – Appeal dismissed

Heard on: 17 October 2022

Judgment date: 03 November 2022

Before

**TRIBUNAL JUDGE MARK BALDWIN
MR LESLIE HOWARD**

Between

NEAL FUTCHER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For Mr Futcher: Mr Neill Staff of Raffingers LLP

For HMRC: Ms Mary Hendrick litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal by Mr Neal Futcher (“Mr Futcher”) against a tax-geared penalty of £51,324.23 imposed on him by HMRC under Schedule 55 to the Finance Act 2009 (“FA 2009”) for the late filing of his 2015/16 self-assessment tax return. This return was due on 31 January 2017 but was only filed on 16 August 2019, more than two and a half years late.

THE FACTS IN OUTLINE

2. The key events, which were not disputed, are set out below.
3. On 28 January 2016, Mr Futcher made a claim to reduce his payments on account to nil.
4. On 6 April 2016, HMRC issued a Notice to File to Mr Futcher. Mr Futcher’s self-assessment tax return for 2015/16 was due by 31 January 2017 if filed electronically.
5. On 24 May 2016, Mr Futcher signed off on his company accounts showing that £500,000 of dividends were voted to him.
6. On 7 February 2017, HMRC issued a notice of penalty assessment under paragraph 3 of Schedule 55 FA 2009 in the amount of £100 to the address held on file for Mr Futcher, as his 2015/16 SATR remained outstanding.
7. During the next year, further penalties were issued in accordance with the legislation at Schedule 55 to the Finance Act 2009.
8. On 1 July 2019, in the absence of any tax return figures, HMRC raised a determination in the amount of £253,341 under Section 28C Taxes Management Act 1970, based on information from other sources, to attempt to recover Mr Futcher’s tax liability.
9. On 16 August 2019, Mr Futcher filed his 2015/16 self-assessment tax return electronically. It was 927 days or 2 years, 6 months and 16 days late. The tax liability stated on the submitted return was for £171,137.82

THE LAW

10. There was no dispute before us as to the law, which we will summarise briefly. Schedule 55 to FA 2009 provides for a penalty regime in respect of returns and other documents which are required to be sent to HMRC by a relevant filing date and are filed late.
11. Under paragraph 1 of Schedule 55, a penalty is payable by a person where the person “fails to make or deliver a return ... on or before the filing date”.
12. Paragraphs 3 to 5 impose a series of escalating penalties starting with a fixed penalty of £100, daily penalties of £10 per day, where the return is more than 3 months late (capped at £900), and then a tax-geared penalty (the greater of 5% of any liability to tax which would have been shown on the return or £300) if the return is more than 6 months late.
13. This appeal is concerned with the penalty under paragraph 6 of Schedule 55 which is charged when the return still has not been filed after 12 months.
14. Paragraph 6 provides for tax-geared penalties, subject to a minimum amount “if (and only if) [the person’s] failure continues after the end of the period of 12 months beginning with the penalty date”. The term “penalty date” is defined in paragraph 1(1) as “the date on which a penalty is first payable for failing to make or deliver [the return] (that is to say, the day after the filing date)”. Where, by failing to make the return, the person “deliberately withholds information which would enable or assist HMRC to assess [the person’s] liability to tax” the penalty is determined under sub-paragraph 6(3) if the withholding is deliberate and concealed and under sub-paragraph (4) if it is deliberate but not concealed.

15. The percentage by which the penalty is calculated varies according to the category of information withheld by the failure to make the return and whether the withholding of information is done deliberately (and if so whether the withholding was “deliberate and concealed” or “deliberate but not concealed”).

16. There is no dispute that Mr Futcher was under an obligation to file his 2015/16 return by 31 January 2017 or that he filed it more than 12 months late on 16 August 2019. The income tax shown due on the return (£171,137.82) was paid in June 2020. The penalty HMRC charged was at 35%. That was the relevant minimum percentage for the category of information withheld on the basis the withholding was “deliberate but not concealed”.

17. Paragraph 23 of Schedule 55 prevents a penalty liability arising where the taxpayer has a “reasonable excuse”. That paragraph provides as follows, so far as relevant to this appeal:

“Reasonable excuse

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 [the person] 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)—

....

(c) where [the person] had a reasonable excuse for the failure but the excuse has ceased, [the person] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

18. In addition there are special reduction provisions in paragraph 16 of Schedule 55 and these provide:

“Special reduction

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.”

19. On appeal to the tribunal, where the person appeals the amount of the penalty, the tribunal may, under paragraph 22 of Schedule 55, either affirm HMRC’s decision or substitute it with another decision which HMRC had power to make. If substituting the decision, the tribunal can only (under paragraph 22(3) of that Schedule) apply the special reduction under paragraph 16 to a different extent if it “thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed”. Under paragraph 22(4) “flawed” means “flawed when considered in the light of principles applicable in proceedings for judicial review”.

20. Mr Futcher’s notice of appeal disputed that the penalty was chargeable “on the grounds that the late filing was not as a result of deliberate behaviour and that there are mitigating circumstances”. Although we do not lose sight of the first argument (that the late filing was not the result of deliberate behaviour), the appeal focused on whether Mr Futcher had a reasonable excuse for the admitted late filing or whether there are special circumstances justifying a reduction in the penalty under paragraph 16.

MR FUTCHER'S EVIDENCE

21. Mr Futcher submitted a witness statement, gave oral evidence before us expanding on his statement and was cross-examined by Ms Hendrick. We would say at the outset that no one who listened to Mr Futcher giving evidence could feel anything other than the greatest sympathy for the situation in which he currently finds himself. His anxiety was clearly visible as he gave evidence. We found Mr Futcher to be a conscientious, honest and wholly credible witness.

22. Mr Futcher explained that he chose to delay the submission of his tax 2015/16 return for financial reasons. The return showed a large tax liability that he could not afford to pay and his initial decision to delay submission of the return was for this reason. He confirmed that his intention was only ever to delay the submission for a few months.

23. Mr Futcher was experiencing severe problems keeping his business afloat throughout most of 2017 and 2018. Mr Futcher is the owner and Managing Director of a company called Branded Clothing International Limited ("BCIL"), which produces children's "character" clothing under licence from IP owners such as Disney. Mr Futcher referred to "his" business and we have adopted the same terminology, although (of course) the business belonged to BCIL. He said that the subsequent delay in submitting the tax return for 2015/16 was down to the fact that he was spending all of his time trying to stop his business ceasing to trade. He conceded that he should have been aware of his tax obligations during this time but his efforts in keeping his business afloat consumed all of his time and energy.

24. He explained that the period throughout 2017 and 2018 was an extremely stressful time for him and the business needed his complete attention. Mr Staff took Mr Futcher to three emails in particular. The first was dated 13 December 2017 from a licensing company indicating that they would be terminating the agreements for Mr Men and Gudetama. The second is dated 8 January 2018 and is from Toys R Us indicating certain stores in the UK likely to close in the next two to three months and suggesting that, as they would be marking down inventory "aggressively", Mr Futcher might want to remove his stock and fixtures. The final email is dated 14 January 2018 and concerns a redundancy exercise at BCIL. Mr Futcher explained that these are all significant in themselves, issues with a major licensor wanting to pull their licence because of the difficulties at Toys R Us (which represented 50% of BCIL's business), the difficulties with Toys R Us and then finally the internal issues this created for BCIL and the pressures it piled on him as senior staff left, often giving very little notice. Cross-examined by Ms Hendrick he accepted that the business has continued to trade and he continued to work in it and deal with various issues, such as refinancing, throughout the period from January 2017 to June 2019.

25. In early April 2019 Mr Fuchter suffered what appeared to be a heart attack at a trade show in Birmingham and was taken by ambulance to a hospital in Solihull. He was then referred to a cardiologist who confirmed his heart seemed to be fine and that it was most likely that he had suffered a very severe panic attack. The cardiologist prescribed beta blockers to calm him down. His GP prescribed Cognitive Behavioural Therapy and his name was put on a waiting list for treatment.

26. Whilst at a supermarket a month later Mr Fuchter suffered a second severe attack which was so bad that he said he could not believe it was not a heart problem, so he went to see another cardiologist for a second opinion. He was sent to London for a CT Angiogram which confirmed that his heart and arteries were fine. By June his symptoms were not improving, with daily attacks and several more severe ones, so he decided to see a clinical psychologist in private practice as there was still a long waiting list with the NHS. He saw Dr Emma Cosham, and she wrote a letter (for general use, not addressed to the tribunal) outlining her treatment of

Mr Futcher and this was provided to the tribunal. In her letter Dr Cosham indicated that she had seen Mr Futcher on 12 occasions since 28th June 2019 (she wrote on 25 October 2019) for individual sessions of psychological consultation. She observed that:

“In brief, you have utilised our meetings to understand how the course of numerous recent life events (those related to your business and financial situation, home building project and relationship concerns) had interacted to lead to a pronounced stress response leading to the distressing symptoms of panic disorder. There was evidence that the severity of your symptoms has had an impact on your functioning, including ability to conduct usual business roles and daily tasks as you would usually.”

27. Whilst the psychologist was able to help him control the severe attacks, he continued to suffer on an almost daily basis. Living alone during the pandemic did not help. Mr Futcher would force himself to take a one hour daily walk for exercise, but this almost always led to a panic attack. He described his symptoms as similar to a heart attack with hot sweats, difficulty breathing, light headedness, pain in the chest and left arm and sometimes nausea. Even though he had been thoroughly examined by two cardiologists, he found it hard to accept that such severe symptoms were caused by a mental health problem, and this made me fearful of leaving the house. Mr Futcher described himself as being in “survival mode” during this time. He said that everything beyond the business went “on hold” including basic personal administration. Where he lives in the countryside he needs to arrange gas supplies and refuse collections and pay for them. One night he went to cook and there was no gas as he had forgotten to pay to have the tank filled and the same happened with his bin collection once.

28. Ms Hendrick pressed Mr Futcher on what caused him to submit his tax return in August 2019. He said that he had taken a week off to catch up with “mundane things” and it had been on his mind to do this. At various times he had remembered that he needed to submit the return. Ms Hendrick asked whether this had anything to do with the determination HMRC issued in July 2019. Mr Futcher said this might have prompted him.

29. Ms Hendrick also pressed Mr Futcher on his reduction of his payments on account. He said that he had reduced these as he did not expect BCIL to pay a dividend as he could see business dropping off. However, later he had been re-mortgaging to keep the business afloat and needed to show income to meet the lender’s requirements. That was why the large dividend was declared.

30. In summary, Mr Futcher explained that, although the original decision not to file his 2015/16 tax return by the filing date on 31 January 2017 was due to the tax liability it showed, and his not being able to pay this by the due date for payment, this initial decision was quickly superseded by the events affecting his business and mental health.

MR SINGH’S EVIDENCE

31. Mr Namdeep Singh is an officer of HMRC in the Individuals and Small Business, Technical and Specialist team. He has worked for HMRC for six years and been a compliance officer in his current team since September 2016. Mr Singh submitted a detailed witness statement, which he adopted as his evidence in chief. He was cross-examined on aspects of his evidence by Mr Staff. What follows is taken from Mr Singh’s witness statement, augmented by his answers to Mr Staff’s questions where relevant. We should state at the outset that we also found Mr Singh to be a conscientious, honest and wholly credible witness.

32. Mr Singh inherited the compliance check into Mr Futcher’s 2015/16 return on 17 February 2021. The previous caseworker retired between the time the penalty assessment letter was issued on 4 June 2020 and the late appeal was received.

33. On 3 February 2021, Raffingers (Mr Futcher's agents) made a late appeal application against the penalty issued under paragraph 6 of Schedule 55 Finance Act 2009 on 4 June 2020. This appeal was received 8 months after the issue of the penalty assessment letter. Raffingers explained that the appeal was late due to a miscommunication between Mr Futcher and his previous agent. Mr Singh considered the late appeal and rejected it on the basis that HMRC guidance states that it is not a reasonable excuse for a customer to claim that the failure is due to their agent not acting in time and the appeal was made 3 months and 28 days after Raffingers were brought in as the new agent. On 19 February 2021, he issued a letter to Mr Futcher explaining his conclusions. Subsequently Mr Singh changed his mind and wrote to Mr Futcher and Raffingers explaining that he was accepting the late appeal and postponing collection of the penalty. He invited Mr Futcher and Raffingers to provide any information they wanted him to consider in relation to their appeal.

34. On 27 April 2021, Raffingers replied to Mr Singh explaining that it had been Mr Futcher's intention to delay the submission of his 2015/16 return by a few months for financial reasons. They stated that the original reason for not submitting the return had been superseded by Mr Futcher spending all his efforts trying to keep his business afloat.

35. Mr Singh analysed the information put forward by Raffingers. He considered whether a reasonable excuse existed. Raffingers had explained that Mr Futcher failed to file because of an accumulation of problems with the business. While Mr Singh accepted that the situation may have been stressful, he considered that it did not explain why Mr Futcher failed to take any action whatsoever in relation to his return when he knew he should have done so. Mr Singh believed a reasonable person who wanted to meet their obligation would have filed their return in the circumstances and so concluded no reasonable excuse existed.

36. Having concluded that there was no reasonable excuse, Mr Singh went on to consider the penalty under Schedule 55(6) Finance Act 2009. He first considered whether information was withheld and concluded that Mr Futcher withheld information by failing to file his 2015/16 return until 16 August 2019, more than 12 months after the 31 January 2017 filing date. Without this document, HMRC could not correctly assess Mr Futcher's liability to tax.

37. He then considered whether this withholding was deliberate. As the meaning of deliberate is not defined in legislation, he followed the meaning outlined in the tribunal decisions in *Clynes* and *McCabe* (discussed below), that deliberate behaviour involves an element of conscious or purposeful choice. He considered Mr Futcher's letter of 16 October 2019, where he stated that he was aware he should file his 2015/16 return but delayed in doing so because he was unable to pay the tax. He concluded that Mr Futcher knew the return was due and made a conscious decision not to file it. He took into consideration what Mr Futcher said in his letter of 16 October, that his business struggles continued into 2019 and the resulting negative impact on cashflow led to them further delaying filing his return. Mr Singh concluded that the conscious choice not to file returns due to an inability to pay tax continued into 2019.

38. Mr Singh considered Mr Futcher's filing history and that he was a professional person who had many years' experience of submitting self-assessment returns. He noted that Mr Futcher had made an application to reduce payments on account to nil on 28 January 2016 believing no dividends would be paid to him, but went on to sign off the Company accounts on 24 May 2016 which showed £500,000 dividends had been voted to him. However, Mr Futcher did not re-instate the payments on account. He concluded that Mr Futcher was familiar with the self-assessment system and would be readily aware that he would have to file returns but chose not to do so to delay payment of tax. Mr Singh also took into consideration that Mr Futcher had been issued with numerous penalties for failing to submit the return and yet continued to fail to file it. He concluded that Mr Futcher's conscious choice not to file his return

was reinforced at each of these points. A penalty was therefore due under paragraph 6 of Schedule 55 Finance Act 2009.

39. Mr Singh considered the quality of disclosure given. His review of the evidence showed Mr Futcher had been entirely cooperative throughout the check. Therefore, he agreed with the original decision that a full reduction for quality of disclosure should be given.

40. Mr Singh considered whether the circumstances of the case merited a special reduction. In his understanding, special circumstances are either special or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of the law. He did not consider the circumstances of this case were sufficiently special and did not consider the strict application of the law to lead to a result that is contrary to the underlying statutory purpose. He concluded there were no special circumstances in this case that would warrant a reduction in the penalty.

41. On 24 May 2021, Mr Singh delivered his conclusions to Mr Futcher and Raffingers in a view of the matter letter. He offered a review of his conclusions. This offer was taken up. On 9 October 2021, the review upheld Mr Singh's decision.

42. On 20 January 2022, Mr Singh received notification of Mr Futcher's appeal to the tribunal. He was provided with further information to consider regarding Mr Futcher's mental health. Raffingers provided evidence to demonstrate that Mr Futcher was diagnosed with F41.0 Panic Disorder and was referred to Dr Emma Cosham whom he met on 12 occasions from 28 June 2019 onwards. Recent life events led to a pronounced stress response manifested in symptoms of panic disorder. The severity of these symptoms had an impact on Mr Futcher's functioning.

43. Mr Singh considered whether this additional information engaged the 'reasonable excuse' provisions in paragraph 23, Schedule 55 FA 2009. While Mr Singh accepted that this may have been a stressful time, he did not see any evidence that Mr Futcher had a reasonable excuse that existed for the entire time he failed to file his return from 1 February 2017 until 16 August 2019. In coming to this conclusion, he took into consideration that Mr Futcher was able to carry on working for his business throughout this time. He further took into consideration that Mr Futcher had explained in a letter dated 16 October 2019, after he had been diagnosed with a panic disorder, that he originally made an active choice to avoid filing his return as he was unable to pay the tax due. He concluded that Mr Futcher demonstrated an acute awareness of his financial difficulties leading to failure to file rather than a lack of functioning being the cause. He concluded no reasonable excuse existed and sent a letter outlining his conclusions to Raffingers on 28 January 2022.

MR FUTCHER'S SUBMISSIONS

44. Mr Staff focussed on Mr Futcher's clearly evident distress and whether this gave him a "reasonable excuse". With so much else going on, it is easy to understand why Mr Futcher had not realised he should fill in his tax return; there were many other things in his life that Mr Futcher had not attended to, not just tax.

45. Mr Staff does not consider that Mr Futcher's reducing his payments on account for 2015/16 and then taking a large dividend is at all relevant.

46. The return was initially delayed for financial reasons, but the business difficulties were always there and were a distraction. HMRC had not considered the Mr Futcher's mental health. Mr Singh just ignored Dr Cosham's evidence. She had seen Mr Futcher 12 times by the time she wrote, and clearly mental health issues do not arise overnight. These reasons were building up throughout the period. Mr Staff thought they began to develop in the latter part of 2017.

The delay in filing the return started with Mr Futcher's financial reasons for a few months but he was quickly overcome by serious business issues.

47. As far as "special circumstances" are concerned, Mr Staff simply said that it was his understanding that this concept encompassed factors that would amount to a reasonable excuse and the two concepts overlap.

HMRC'S SUBMISSIONS

48. As far as reasonable excuse is concerned, Ms Hendrick accepts that mental health issues can clearly amount to a reasonable excuse in appropriate circumstances, but they must be severe enough to prevent the taxpayer complying with their obligations. In *Harrison v HMRC*, [2022] UKUT 0216 (TCC), the Upper Tribunal accepted that mental health problems might amount to a reasonable excuse, but whether they do will depend on the evidence before the tribunal. In that case, where there was no reasonable excuse, the individual had carried on running his business throughout the default period. Mr Futcher has carried on working in the business. His illness at the trade show in 2019 shows that he was able to carry on working in the business throughout the relevant time; he was at the show as part of his business activities. Someone who can function in the business for as long as this must be able to comply with their tax obligations.

49. Mr Futcher is an experienced businessman with a number of directorships. He has been filing self-assessment returns since 2000. He knows how the system works and what he needs to do. His reducing his payments on account in 2016 demonstrates this.

50. Most importantly, his decision not to file was quite deliberate.

51. As far as special circumstances are concerned, Ms Hendrick described paragraph 16 as a "catch all" designed to provide discretionary relief, but only in very special circumstances, which statute provides does not include an inability to pay (paragraph 16 (2) (a)). Although Mr Futcher had difficulty with his business, the circumstances here are not "special". In any event the tribunal can only interfere with HMRC's decision if it is "flawed" and there is no reason to conclude that it is.

52. In short, Ms Hendrick's argument is that Mr Futcher has been involved in running his tax affairs for many years. He knew what he needed to do in January 2017, but consciously decided to delay complying and continued in default until HMRC raised a determination in July 2019.

DID MR FUTCHER DELIBERATELY WITHHOLD INFORMATION THAT WOULD ENABLE OR ASSIST HMRC TO ASSESS HIS LIABILITY TO INCOME TAX?

53. Mr Futcher accepts before us, as he has acknowledged all along, that his decision not to submit his 2015/16 tax return on the due date was something he consciously decided to do. In *Clynes v HMRC*, [2016] UKFTT 0369 (TC), the Tribunal held that "deliberate" involves an element of conscious or purposeful choice. It does not have to be accompanied by an intention not to pay the tax. That interpretation was followed by the (differently constituted) Tribunal in *David McCabe v HMRC*, [2019] UKFTT 0269 (TC), which observed (at [13]) "A deliberate choice may be well motivated but, with hindsight, be revealed to have been an unwise choice in the circumstances."

54. We accept Mr Futcher's evidence that it was his intention in January 2017 to submit his return within a few months and pay his income tax at that time. Events, in the form of the financial position of his business and in due course his own health, overtook him. He did not submit the return until the Summer of 2019 or pay the tax until June 2020 and he was only able to do that with financial help from his mother. We accept that Mr Futcher intended to file his 2015/16 tax return later in 2017, albeit some months after it was due; he did not set out to delay

filing until the Summer of 2019. Nevertheless, by deliberately not filing his return when it was due, he withheld from HMRC information they needed to calculate his income tax liability.

55. Mr Futcher's return when filed contained information which enabled HMRC to calculate his income tax liability correctly, as demonstrated by the fact that Mr Futcher had reduced his payments on account to nil and the figures provided on the tax return allowed HMRC to assess his correct tax liability, which was lower than the figure HMRC had calculated for themselves using other information when they made the determination. By intentionally withholding these figures, Mr Futcher prevented HMRC from assessing his correct tax liability for more than 2 years. It is clear that depriving HMRC of this information was Mr Futcher's reason for not submitting the return when it was due. He knew it would reveal a large income tax liability and he did not at that stage want HMRC to know about it. The fact that this liability was smaller than the one HMRC originally calculated for themselves is nothing to the point.

56. We have considered whether, for him to incur a penalty under paragraph 6, Mr Futcher's behaviour must have amounted to deliberate withholding of information throughout the 12-month period. Put another way, if Mr Futcher ceased to act (or be able to act) consciously in relation to his tax return during that period, can he incur a penalty under paragraph 6? Paragraph 6(1) opens by stating that an individual is liable to a penalty if their "failure continues" beyond 12 months. The "failure" here is clearly the failure to file the return on time. Sub-paragraph 6(2) prescribes a particular penalty if "by failing to make the return" an individual deliberately withholds information. Those words strike us as being quite ambiguous. They could equally cover three situations:

- (1) Where the individual deliberately withheld information at the time they failed to submit the return, or
- (2) Where at any time during the 12-month period the individual deliberately decides to withhold information (so applying to situation (1) but also to a situation where the individual forgot to file their return to start with but subsequently deliberately decided not to), or
- (3) Where (and only where) the individual's deliberate behaviour continued throughout the 12-month period.

On balance, it seems to us that reading (1) is the correct approach. It is the most natural reading of the words "by failing to make the return" in sub-paragraph 6(2). Readings (2) and (3) require "failing to make" to refer to the person's continuing failure referred to in sub-paragraph 6(1). Reading (2) would be satisfied if at any point the person's withholding was deliberate, if at any point in that period the withholding had the quality of deliberateness about it, whereas "deliberately" in sub-paragraph 6(2) seems to refer to the whole failure. Reading (3) seems unrealistic as it would involve testing repeatedly whether the taxpayer was still consciously/deliberately withholding information and would seem to absolve anyone who forgot about their failure at least for a period during those 12 months. If our reading of this provision is correct (or if reading (2) is correct, and we can see an obvious policy attraction in reading (2)), it is clear that Mr Futcher's failure was, by his own admission, deliberate. But, if we are wrong and reading (3) is correct, so that a person who initially made a conscious decision to withhold information but who ceases to give or be able to give any conscious attention to their tax affairs during that 12 month period would not incur a penalty under paragraph 6, we would still consider, for the reasons discussed at [70] in relation to "special circumstances", that Mr Futcher was perfectly capable of making (and made) important decisions on a number of issues at least up until the end of the 12 month period and indeed beyond that time and remained aware of his tax obligations, so that his withholding of information was as deliberate throughout the 12 month period as it was on the filing date.

DID MR FUTCHER HAVE A REASONABLE EXCUSE FOR LATE FILING?

57. In *Christine Perrin v HMRC*, [2018] UKUT 0156 (TCC) (at [81]) the Upper Tribunal described the approach to be taken in considering a “reasonable excuse” case as follows:

“When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:

(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.”

58. In determining whether Mr Futcher had a reasonable excuse for late filing we need to bear in mind when the relevant circumstances obtained. The important point here is that a reasonable excuse must be made out by reference to one or more circumstances which existed at the relevant filing date. As the Upper Tribunal explained in *Matthew Harrison v HMRC*, [2022] UKUT 00216 (TCC) (at [31]):

“Before us, the parties were agreed that a reasonable excuse must be made out by reference to one or more circumstances which existed as at the relevant filing date. We agree and consider this is clear from the legislation (where the penalty in respect of the “failure” is a reference to the failure to file by the deadline set out in the Schedule). Events which take place after that deadline would not therefore be relevant (except so far as, as a matter of evidence, they throw light on relevant circumstances existing at and before the filing date). Circumstances that existed after the filing date could of course be relevant to the second part of paragraph 23, namely whether the failure to file the return had been remedied without unreasonable delay.”

59. At the filing date Mr Futcher was well aware of his obligation to file his 2015/16 tax return. The acute financial difficulties which followed Toys R Us' publicised difficulties did not start until later in 2017. His physical and mental illnesses did not manifest themselves in an extreme form until 2019. Whilst we accept that mental and physical illnesses of the type Mr Futcher described do not spring up overnight, there is no evidence before us to suggest that Mr Futcher was suffering from these conditions in the period running up to the filing date or that at that time the business was making the acute demands on his time it did later. Indeed, it is clear from the letter Mr Futcher wrote to HMRC on 16th October 2019 that in January 2017 he had time to consider his tax position and made a conscious decision not to file his return on

time. It was not illness or acute business pressures that prevented him filing his tax return in January 2017. He did not file his return because he had decided not to. In that letter he wrote:

“Back in January 2017 my intention was to file the return a few months late believing that my business would shortly generate the necessary cash as sales and cash flow were forecasted to improve by April/May. However, it turned out for various reasons that there was a shortfall in orders and the business made significant losses during the first half of that year.”

60. We also note that it was during the time of Mr Futcher’s illness, towards the beginning of the time when he was seeing Doctor Cosham in 2019, that he actually got round to filing his tax return and his own evidence is that he remembered the need to fill in his tax return from time to time (see [28] above). Because of our finding that Mr Futcher’s mental health and business issues did not present themselves until after the filing date and that he was (by his own admission) able to make a conscious decision about tax (non-)compliance at that point in time, we do not strictly need to come to a view on this point, but we record that we are far from satisfied that Mr Futcher’s mental health and business difficulties ever prevented him being aware of (and ultimately complying with) his obligations as far as his 2015/16 tax return was concerned.

SPECIAL CIRCUMSTANCES

61. Although taxpayers have a right of appeal against a special circumstances decision, the tribunal can only interfere if it “thinks that HMRC’s decision in respect of the application of paragraph 16 was ...flawed when considered in the light of principles applicable in proceedings for judicial review”. This was explained by the First Tier Tribunal in *Udlaw v HMRC*, [2020] UKFTT 52 (TC), as follows:

“What this means is that HMRC’ decision cannot be said to be “flawed” merely because the tribunal, were it to consider the question de novo, would disagree with HMRC’ decision. Instead, HMRC’ decision can be said to be “flawed” only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*, [1947] 2 All ER 680 (“Wednesbury”). In other words, the tribunal needs to consider whether, in reaching their conclusion, HMRC have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account or if HMRC have reached a decision that no reasonable person could have reached upon consideration of the relevant matters.”

62. In addition, HMRC needs to give reasons for a special circumstances decision. In *White v HMRC*, [2012] UKFTT 364 (TC), the tribunal held that the decision on special circumstances was flawed because of an absence of reasons, commenting:

“[68] It is true that the common law, 'at present', does not recognise a general duty to give reasons for administrative decisions (*R v Home Secretary ex p. Doody*, [1994] 1 AC 531, per Lord Mustill at page 564). However, in many cases if a public body, such as HMRC, fails to give reasons for its decision it will be found to have acted unlawfully. As explained in 'Administrative Law' (10th edition) Wade & Forsyth, there is no closed list of circumstances in which fairness will require reasons to be given.

[69] In this case, [the relevant statutory provision] envisages this Tribunal having to decide whether HMRC's decision is flawed, in the judicial review sense of that term. A failure to give reasons for a decision makes this task almost impossible. It would not then be possible to determine whether the decision-maker applied the correct legal test, whether he took account of all

relevant factors or whether he took account of irrelevant factors. In short, a failure to give reasons makes it almost impossible for the Tribunal to determine the issue of *Wednesbury* unreasonableness. Parliament must have envisaged that an officer of HMRC deciding whether to exercise the discretion in paragraph 11 would give reasons for the decision.”

63. This approach was followed by the First-Tier Tribunal in *Bluu Solutions Limited v HMRC*, [2015] UKFTT 95 (TC), where the First-Tier Tribunal observed (at [149] and [150]):

“We respectfully agree that a decision of HMRC in relation to special circumstances requires reasons: otherwise the tribunal cannot know whether the decision was flawed, and so cannot fulfil its obligations under para 15(3)(b).

The reasons do not need to be lengthy. Lord Brown's summary of the correct approach in *South Bucks DC v Porter*, [2004] 1 WLR at [36] is accepted as authoritative and includes the following guidance:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inferences will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration...”

64. *Bluu Solutions Limited* also helpfully addresses the position where HMRC made no decision on special circumstances, where they have failed to exercise their discretion. Although para 6(3)(b) gives the tribunal the jurisdiction to make a new decision on special circumstances only if “HMRC's decision in respect of the application of paragraph 9” was flawed, it seemed to the tribunal in *Bluu Solutions Limited* (at [125] and [126]), as it does to us, that the tribunal must also have jurisdiction to make a decision where HMRC have failed to exercise their discretion, so that they have made no decision about the application of para 16.

65. The tribunal has held on a number of occasions that HMRC's power under paragraph 16 to reduce a penalty can be exercised at any time from the time when the question whether a penalty should be imposed (and, if so, how large a penalty) was being determined right up to the conclusion of the tribunal hearing.

66. HMRC considered special circumstances on at least three occasions. Mr Singh's evidence is that he had considered special circumstances before sending his view of the matter letter on 24 May 2021, but this issue is not discussed in the letter at all. The next was in the review letter of 9 October 2021, which merely stated the reviewing officer's conclusion that “I have not seen anything to warrant a special reduction in this case.” Finally, we have Mr Singh's letter of 28 January 2022 in which he responds to Raffingers' additional information concerning Mr Futcher's mental health issues. This was sent to HMRC after the conclusion of the review on the date the notice of appeal was lodged. In this letter Mr Singh discusses the new information in the context of reasonable excuse, but does not mention special circumstances at all. On the first two occasions HMRC had not been made aware of Mr Futcher's mental health issues and there is no reason why they should have taken them into account. However, given the situation described in Raffingers' letter and that “special circumstances” had been addressed previously, we consider that Mr Singh should have

considered whether the circumstances described by Raffingers amounted to special circumstances when responding to their letter of 9 October 2021 and explained his conclusion on that point. His failure at that point to consider special circumstances, or to explain his decision if he had done so, means that his decision (or lack of decision) on that point is flawed and paragraph 22 therefore allows us to substitute our own decision on this issue if we consider it right to do so.

67. We have found that Mr Futcher did not have a reasonable excuse for his failure to file his tax return on time. There were financial issues surrounding his business, but Mr Fuchter's business pressures and ill health were not so severe as to be capable of constituting a reasonable excuse in January 2017. They became more acute with the failure of Toys R Us around the turn of 2017/18 and caused the mental and physical health issues which had manifested themselves by the Spring of 2019. It is clear that circumstances subsequent to a default (which therefore cannot provide a reasonable excuse for that default) can amount to "special circumstances" which can justify the reduction (potentially to nil) of a penalty triggered by the default. Whatever the special circumstances, however, "[their] existence alone is not sufficient to warrant a penalty reduction on the grounds of special circumstances. The [circumstance] must in some way be relevant to the facts of the case", as the First-Tier Tribunal put it in *Appellant v HMRC*, [2018] UKFTT 0103 (TC), at [58]. Applying that approach here, it follows that, however sympathetic we might be with Mr Futcher's current predicament, for the factors underlying that to amount to "special circumstances" they must do more than evoke sympathy; they must have some connection with the chain of events that led to the penalty being incurred or some other relevance to the penalty.

68. In *William McCullouch v HMRC*, [2018] UKFTT 277 (TC), Mr McCulloch registered online with HMRC on 18 January and was awaiting activation details for his account (so that he could file his return online) when he was rushed into hospital on 7 February 2017. He stayed in hospital until 17 May and on his discharge immediately began to attend to his tax affairs, filing his return on 5 June. The tribunal found that the severity of Mr McCullouch's illness prevented him filing his tax return while he was in hospital, and he submitted his return as soon after his discharge as the computer difficulties he was having with HMRC had been resolved. The tribunal held the Mr McCullouch's illness, whilst not a reasonable excuse (it came after the submission date), was a special circumstance which justified the cancellation of the daily penalties.

69. Turning to consider whether there are special circumstances here, we start by noting that, unlike Mr McCullouch, Mr Futcher had made a deliberate, conscious decision not to file his tax return. He was not a taxpayer who, on the filing date, was doing his best to comply with his obligations; he was a taxpayer who had already decided to default.

70. We have seen that the financial position of Mr Futcher's business worsened during 2017 and by the beginning of 2018 he was actively considering staff redundancies. He described 2018 as the worst year of his life. The pressures he was under increased enormously during 2018 and 2019 and led to his physical and mental illnesses in 2019. However, the penalty under paragraph 6 was triggered by the 2015/16 return being more than a year late, i.e. at the end of January 2018. Whilst it was triggered towards the beginning of the period of serious deterioration of the business (and in due course of Mr Futcher's health), Mr Futcher had had a period of many months in 2017 during which he could have put his failure right had he chosen to do so. Even if the acute trading difficulties of the business following Toys R Us' difficulties could have justified Mr Futcher's inattention to his tax affairs (and it is far from clear that they do provide such a justification), Toys R US UK did not go into administration until February 2018 and Mr Futcher's health issues did not manifest themselves in the extreme ways he described before the Spring of 2019 and even then, as we have noted, it was during this time

that he actually complied with his obligations and his own evidence is that he remembered the need to submit his tax return from time to time.

71. For the period before the paragraph 6 penalty was triggered Mr Futcher was working extremely hard in his business and the finances of the business were troubled, but he had the capacity to attend to his tax affairs (just as he did to his business affairs) had he chosen to do so. It does not appear to us that Mr Futcher's circumstances at any point before the paragraph 6 penalty was triggered could be described as "sufficiently special that it is right to reduce the amount of the penalty"; *Edwards v HMRC*, [2019] UKUT 131 (TCC) at [73].

DISPOSITION

72. We have determined the issues before us as follows:

- (1) Mr Futcher's failure to file his 2015/15 tax return on time was a conscious, deliberate act;
- (2) By that act he withheld from HMRC the information they needed to assess his liability to income tax, which was exactly as he intended;
- (3) He had no reasonable excuse for this failure;
- (4) HMRC's decision (or failure to consider or to explain their decision) on special circumstances was flawed; but
- (5) There are no special circumstances (as that term is correctly understood for these purposes) relevant to this appeal.

73. It follows that this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 03rd NOVEMBER 2022