



TC06560

Appeal number: TC/2017/02541

INCOME TAX – Late Payment Penalties - Daily penalties - Six month penalties - Twelve month penalties - Schedule 55 Finance Act 2009 - Whether HMRC has met the burden of proof in relation to daily penalties? - No, not in relation to all the years in dispute - Whether a reasonable excuse in relation to the other penalties? - No - Whether special circumstances? - No - Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR RICHARD JONES

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR MOHAMMED FAROOQ**

**Sitting in public at Llandudno Magistrates' Court / Llys Ynadon Llandudno,
Conway Road / Heol Conwy, Llandudno LL30 1GA on 14 June 2018**

No appearance by on on behalf of the Appellant

**Mr Phil Jones, HM Inspector of Taxes and Appeals Litigator, for the
Respondents**

DECISION

1. Mr Richard Jones is a sole trader, trading as "Condessa", who are liquor manufacturers. He appeals against penalties amounting to £6,400 that HMRC have imposed on him under Schedule 55 of the *Finance Act 2009* in relation to his failure to submit annual self-assessment returns for four successive years (ending 5 April 2011, 5 April 2012, 5 April 2013, and 5 April 2014) on time. We set out the relevant legislation in the Appendix.

2. This appeal was notified very late, but we extend the time for appealing. HMRC confirmed that it had no objections to this step.

Non-attendance by the Appellant

3. There was no appearance by or on behalf of Mr Jones at the hearing. A telephone call was made by the Tribunal's clerk to the firm of accountants and tax consultants (Cooper Christian and Sykes in Bangor) who were named as the Appellant's representatives on the Notice of Appeal.

4. The initial response to the Tribunal's clerk was that the firm was not aware of the hearing. However, the Notice of Hearing on the Tribunal's file was sent to that firm's Mr Kevan Cooper on 23 April 2018 by email. The Tribunal's clerk was told that Mr Cooper was in Pwllheli and was not available.

5. When we canvassed HMRC's views as to whether the hearing should proceed, we were told (albeit, as Mr Phil Jones stated, at second hand) that the Appellant's agents had phoned HMRC on Tuesday (that is to say, two days before the hearing) to say that they felt that the hearing should not go ahead, and that the appellant's agent (presumably, Mr Cooper) would only be available in his office for a short time on the day of the hearing. HMRC's impression following that call was that the Appellant's agents did not intend to come to the hearing.

6. We have the power under Rule 33 to proceed with the appeal in the absence of the Appellant or his representatives. We decided to do this. We were satisfied that the Appellant's representatives had received notice of the hearing. It had been sent Notice of Hearing by the Tribunal; and they had communicated with HMRC shortly before the hearing in a manner which indicates that the Appellant's representatives were well aware of the hearing.

7. We are also satisfied that it was in the interests of justice to proceed. There had already been considerable delay since the Notice of Appeal was filed (March 2017) (and this followed letters from even earlier - December 2016). An earlier hearing (22 November 2017) had been postponed at the Appellant's request. HMRC had prepared for the hearing before us and had attended. There was no indication that the Appellant's representatives would attend any adjourned hearing.

8. There was sufficient material before us, advanced on the Appellant's behalf, both in his Notice of Appeal, the letters which his representatives had written, and

HMRC's notes (in the bundle) of discussions with his representatives, to permit us to deal with the appeal fairly and justly.

9. There is no rule which provides that an appellant *must* be present or represented at any hearing. If the appellant's representatives had decided (for whatever reason) that they would not attend the hearing, or found themselves in the position that they could not attend the hearing, then there were a number of options open to them, even at a relatively late stage. Contacting the Tribunal as a matter of urgency would have been an obvious first step. We do not know whether that was done in this case. If it had been, the information was not transmitted from the Tribunal's administration to us - the panel convened to hear Mr Jones' appeal.

10. If it had been known that neither the appellant nor his representatives were going to come, and were - in effect - simply proposing to rely on the information and material already filed, then a hearing listed to be heard, at a hearing, by a full panel of the Tribunal could potentially have been re-allocated and re-listed to have been dealt with by a single judge as a default paper case (as many appeals against late filing penalties are). Alternatively, if a hearing was still wanted, but the appellant's representatives found themselves unable to attend the hearing venue for some good reason, a hearing using the Tribunal's video-conferencing facilities could perhaps have been arranged.

11. In the absence of any other information, it would not be fair for us to speculate why the appellant was not represented. Nor, to avoid any doubt, do we regard the circumstances of non-attendance as relevant to our determination of the substantive issues.

The Penalties

12. In relation to three of the four years in question (2010/11; 2011/12; 2012/13) the penalties that have been charged are as follows:

- (1) An individual tax return late filing penalty of £100, issued pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;
- (2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days) issued pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;
- (3) A 6 month late filing penalty of £300 issued pursuant to Paragraph 5 of Schedule 55 of the 2009 Act;
- (4) A 12 month late filing penalty of £300 issued pursuant to Paragraph 6(5) of Schedule 55 of the 2009 Act.

13. In relation to the fourth year in question (2013/14) the penalties that have been charged are as follows:

- (1) An individual tax return late filing penalty of £100, issued pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;

- (2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days) issued pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;
- (3) A 6 month late filing penalty of £300 issued pursuant to Paragraph 5 of Schedule 55 of the 2009 Act;
- 5 (4) A 12 month late payment penalty of £300 issued pursuant to Paragraph 6(5) of Schedule 55 of the 2009 Act.
14. The filing dates for the year ending 5 April 2011 were 31 October 2011 for a non-electronic (paper) return and 31 January 2012 for an electronic return.
15. The filing dates for the year ending 5 April 2012 were 31 October 2012 for a
10 non-electronic (paper) return and 31 January 2013 for an electronic return.
16. The filing dates for the year ending 5 April 2013 were 31 October 2013 for a non-electronic (paper) return and 31 January 2014 for an electronic return.
17. The filing dates for the year ending 5 April 2014 were 31 October 2014 for a non-electronic (paper) return and 31 January 2015 for an electronic return.
- 15 18. Mr Jones' returns for 2010/11 and 2011/12 were received on paper on 22 August 2016.
19. Mr Jones' returns for 2012/13 and 2013/14 were received online on 18 August 2016.
20. Those returns are all very late indeed - from 18 months late (in the case of
20 2013/14) to almost five years late (in the case of 2010/11).
21. All were filed more than one year after the due date. But we note and take into account that HMRC does not argue that there was any deliberate withholding of information by Mr Jones. This is not a case in which any dishonesty or lack of integrity is alleged against him.
- 25 22. HMRC have produced evidence, in the form of a print-out from their computer systems, that, on 6 April 2011, 6 April 2012, 6 April 2013, and 6 April 2014, they sent Mr Jones notices under section 8 of the *Taxes Management Act 1970* requiring him to file a self-assessment return for each of the tax years in question. HMRC bear the burden of proving that such notices were sent. Mr Jones has not disputed that he
30 received those notices. We have concluded that HMRC's records in that regard are correct and that such Notices were sent.
23. Before the question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. Mere assertions in Statements of
35 Case or at the hearing by Presenting Officers are not sufficient. Evidence is required, and, unless sufficient evidence is provided to prove the relevant facts relating to the lawful imposition of a particular penalty on the balance of probabilities, then that penalty must be cancelled without any question of 'reasonable excuse' becoming

relevant: see the decision of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC) at Para [69] and the decision of this Tribunal (Judge Redston and Mr Simon) in *Halfaoui v HMRC* [2018] UKFTT 0013 (TC). Whilst the latter case is not binding, we have found the Tribunal's painstaking approach (especially at Paragraphs [27]-[29]) to the evidence placed before it to be instructive.

24. Therefore, in order to be able to charge daily penalties under Paragraph 4 of Schedule 55, HMRC must first establish (on the balance of probabilities) that the statutory conditions in that Paragraph are satisfied.

25. We are satisfied from HMRC's print-out that SA326 Notices (informing Mr Jones of the £100 late filing fixed penalty notice) were sent on 14 February 2012 (2010/11); 12 February 2013 (2011/12); 18 February 2014 (2012/13); and 18 February 2015 (2013/14).

26. However, an evidential problem emerges here. We consider that we need to be satisfied, albeit only to the appropriate standard, that the Appellant was actually given notice which can be shown to actually meet the statutory conditions. This comes down to what the forms SA326 actually said.

27. For 2010/11, we have been shown, in evidence, a generic or template form SA326D for 2010/11. Having considered its wording, we are satisfied that appropriate notice compliant with Paragraph 4(1)(c) of Schedule 55 was given to the appellant for 2010/11. The generic SA326D in evidence contains the same wording considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761. We bear in mind the careful attention to the wording of the notices which the Court undertook in that case.

28. Even if our conclusion on that point were wrong, the Tax Return SA100 actually issued to Mr Jones dated 6 April 2011 for the year ending 5 April 2011 has the following information, which we consider satisfies Paragraph 4(1)(c):

"Deadlines

We must receive your tax return by these dates.

If you are using a paper return, by 31 October 2011 (or 3 months after the date of this notice if that's later), or

If you are filing online - by 31 January 2012 (or 3 months after the date of this notice if that's later)

If your return is late you will be charged a £100 penalty.

If your return is more than 3 months late, you will be charged daily penalties of £10 a day.

If you pay late, you will be charged interest and a late payment penalty"

29. The other generic forms SA326D put before us in evidence do not discharge the evidential burden imposed on HMRC in relation to other years. One was ostensibly drafted in 05/11 but the year to which it relates is not populated, so we do not know

and we are not prepared to speculate. The other was ostensibly drafted in 07/15, and is headed, in handwriting, "from July 2015", and so postdates the years in question.

30. The front page of the paper Tax Return actually issued to Mr Jones for that year on 6 April 2012 does say (identically to that for 2010/11 referred to above):

5 **"Deadlines**

We must receive your tax return by these dates.

If you are using a paper return, by 31 October 2012 (or 3 months after the date of this notice if that's later), or

10 If you are filing online - by 31 January 2013 (or 3 months after the date of this notice if that's later)

If your return is late you will be charged a £100 penalty.

If your return is more than 3 months late, you will be charged daily penalties of £10 a day.

15 If you pay late, you will be charged interest and a late payment penalty"

31. We consider that satisfies the requirements of Paragraph 4(1)(c). Hence, for 2011/12, HMRC has discharged the evidential burden placed upon it in relation to daily penalties.

20 32. For the sake of completeness, the other evidence filed for 2011/12 does not satisfy us of the point. Neither of the generic payment reminder Forms SA309A or SA309E placed before us in evidence give penalty details sufficient to satisfy Paragraph 4(1)(c) so as to enable daily penalties to be lawfully charged. The generic SA316 Notice to File for 2011/12 placed before us in evidence does not assist since it is headed 'draft 2013' and therefore is not evidence as to the Notice to File which was
25 actually issued for that year.

33. For 2012/13, all that is before us is a generic form Notice to File SA316. However, this is marked (in the lower right hand corner) 09/15 indicating that it is a version or iteration which postdates the year 2012/13, and which as such cannot be relied upon as proving the wording of the Notice to File actually issued for 2012/13.
30 We do not know, and we are not prepared to speculate.

34. Hence, for 2012/13, HMRC has failed to discharge the burden placed upon it in relation to daily penalties.

35 35. For 2013/14, the situation is materially identical. There is simply a generic Notice to File SA316 marked 09/15 in the lower right hand corner indicating that it is a version or iteration which postdates the year 2013/14, and which cannot be relied upon as proving the wording of the Notice to File actually issued for 2013/14. Again, we do not know, and we are not prepared to speculate.

36. Hence, for 2013/14, HMRC has failed to discharge the burden placed upon it in relation to daily penalties.

37. Therefore, and subject to whether there is any reasonable excuse and special circumstances, we find that only the daily penalties for 2010/11 and 2011/12 were lawfully imposed.

38. HMRC has failed to establish that the daily penalties for the other years in dispute were imposed following the giving of the notice required by Schedule 55 Paragraph 4(1)(c) and accordingly the daily penalties for those years must be quashed.

The Grounds of Appeal

39. The Grounds of Appeal, in full, are as follows:

10 *“Mr Jones is over 80 years old and from time to time over several years has suffered ill health. During that time the business continued to tick over as his wife is active in the business. Paperwork for preparing accounts slipped behind at that period and figures for tax returns were not prepared on time. HMRC has not lost revenue as the business has not realised taxable profits. We believe HMRC have been unsympathetic in this case. If it had been possible to submit returns on time no tax was due. These penalties are draconian and are causing stress to our client.”*

40. This followed letters dated 14 December 2016 and 16 January 2017 from Cooper, Christian and Sykes which said:

25 *“...our client is 82 years of age and in recent years has had serious health problems which resulted in a considerable delay in our being able to prepare financial accounts. The current demands being made by your selves are causing considerable concern to Mr Jones” (14 December 2016)*

30 *“[the business was continuing to trade] entirely due to the fact that Mr Jones’ wife, daughter and son-in-law helped in the running of the business to keep it ticking over. Mr Jones is responsible for the book keeping although his wife was able to produce sales invoices...” (16 January 2017)*

Reasonable Excuse

41. The Tribunal must therefore decide whether Mr Jones had a reasonable excuse for the late filing. This is a matter in respect of which Mr Jones bears the evidential burden.

35 42. Although there is no statutory definition of reasonable excuse, its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd QC stated (in the analogous context of VAT penalties):

40 *“It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible*

trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

5 43. We apply that test here.

44. In our view, there was no reasonable excuse.

45. In and of itself, the taxpayer's age is not a reasonable excuse. The requirements of the self-assessment system are the same regardless of the taxpayer's age. There is no special rule for those of a certain age.

10 46. Whilst ill-health can potentially amount to a reasonable excuse (as HMRC acknowledged in its review letters), no evidence at all has been placed before the Tribunal in this case as to the actual state of Mr Jones' health during this period, and in particular whether it was responsible for the late filings. Assertions of ill-health made by his representatives in their letters are not evidence for these purposes.

15 47. There is no evidence of any stress, or that this was responsible for the late filings.

48. Mr Jones was a businessman, in business manufacturing liquors under the trade name "Condessa". A reasonable businessman would have known that he would need to comply with his tax obligations in the same way as he has to comply with other
20 obligations associated with his business. If he did not feel able to comply with those obligations himself, then he would either have paid for professional help or obtained help from friends and family in good time before the deadline.

49. We reject the suggestion that the appellant's business was just 'ticking over'. Its turnover increased year-on-year, significantly, over this period – from £95,803 in
25 2010/11 to £233,894 in 2013/14. It was not 'ticking over' in any ordinary sense of the expression.

50. Even if Mr Jones was not personally attending to the running of his business, then nonetheless it is clear that someone was – and, moreover, that they were doing a good job of it. There was no evidence from any of those persons as to why, given that
30 the business was prospering, no-one involved in its operation saw fit to file tax returns. If there were persons in a position to run this business so well over these years, so as to produce such a growth in turnover, showing commercial good sense, then there were persons who could have kept the paperwork, and filed returns, or given instructions to accountants to do so. This is a business which will have been
35 generating paperwork over the entire period in question.

51. It is not clear whether Mr Jones is arguing that he was relying on someone else to file his returns for him. But, if he was, then this is not capable of amounting to a reasonable excuse unless he can show that he took reasonable care to avoid the failure. There is simply no evidence of this in this case.

52. The Appellant had an agent acting for him with HMRC from at least January 2005. Mr Cooper is named in HMRC's printouts in February 2005. In November 2011, an agent phoned HMRC and spoke to an Allocation Officer about returns from 06/07 onwards. An agent filed returns for 2008, 2009 and 2010 on 8 January 2012 (which was within the filing window for 2010/11, which is the first year attracting a penalty in this appeal).

Special Reduction

53. We have also considered whether there are any 'special circumstances', within the meaning of Paragraph 16 of Schedule 55 which would have justified reduction of the penalty.

54. In *Clarks of Hove Ltd v Bakers' Union* [1979] All ER 152 the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "... *to be special the event must be something out of the ordinary, something uncommon ...*". Similarly, in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 in the context of share valuations for the purposes of capital gains tax, Lord Reid said "*special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'.*" In the same case, Viscount Dilhorne said "*for circumstances to be special they must be exceptional, abnormal or unusual ...*".

55. HMRC considered the position in its review on 20 February 2017. We do not consider that HMRC's decision in this regard is flawed in a public law sense.

56. We do not consider that anything which Mr Jones has put forward amounts to special circumstances, in the above meaning of the expression, which would merit reduction of the penalties below the statutory amount.

57. For these reasons, and for the reasons set out above in relation to reasonable excuse, we do not consider there to be any arguable basis for a special reduction.

Proportionality

58. The final argument is that there is little to no tax due, and so the penalties are draconian and disproportionate.

59. The obligation to file a self-assessment return applies equally to all taxpayers who are in the self-assessment regime, irrespective of whether any tax is due or not. For the years up to and including 2009/10, late filing penalties were linked to the tax liability (with the penalty being reduced to the amount owing for the year, if any): section 93 of the *Taxes Management Act 1970*. But Parliament decided to change that situation with effect from 2010/11: *Schedule 55 of the Finance Act 2009*.

60. In *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) the Upper Tribunal held that the First-tier Tribunal has no discretion to adjust penalties because of a perception that they are unfair.

61. In *HMRC v Anthony Boshier* [2013] UKUT 0579 (TCC) the Upper Tribunal held that the First-tier Tribunal had no jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal.

5 62. We are bound by those decisions, and therefore we are bound to reject the argument as to proportionality.

Decision

63. Accordingly, and for the above reasons, the appeal is allowed in relation to the daily penalties for 2012/13 (£900) and 2013/14 (£900), amounting to £1,800.

10 64. The remainder of the appeal is dismissed and we affirm all the other penalties.

65. 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.

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20 **DR CHRISTOPHER McNALL**
TRIBUNAL JUDGE

RELEASE DATE: 23 JUNE 2018

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APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

4—

(1) P is liable to a penalty under this paragraph if (and only if)—

- (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
- (b) HMRC decide that such a penalty should be payable, and
- (c) HMRC give notice to P specifying the date from which the penalty is payable.

(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).

(3) The date specified in the notice under sub-paragraph (1)(c)—

- (a) may be earlier than the date on which the notice is given, but
- (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

5—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of—

- (a) 5% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

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(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.

- (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).
- 5 (3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 10 (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- 15 (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 20 (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- 25 (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—
- (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- 30 (6) Paragraph 6A explains the 3 categories of information.

5. 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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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.

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

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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—

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(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—

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(a) staying a penalty, and

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

7. 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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.