



TC07935

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/02327/V

BETWEEN

KAMRAN QURBAN

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE PETER HINCHLIFFE
SONIA GABLE**

The hearing took place on 20 October 2020. Aejaz Mussa represented the Appellant, Mr Qurban. Charles Asuelimen, litigator of HM Revenue and Customs' Solicitor's Office represented the Respondents, HMRC.

With the consent of the parties, the form of the hearing was agreed to be by video. The hearing took place with Mr Qurban, Mr Mussa, Muhammed Sufjan Moavia from Mr Qurban's accountants, Charles Asuelimen and Ross Kernohan from HMRC's Solicitor's Office, Carol Martin, a witness from HMRC and the tribunal members all present by video. The hearing used the Tribunal's video hearing platform.

A face to face hearing was not held because of the difficulties in assembling the parties in a single hearing room in the light of the impact of the COVID-19 pandemic. The parties confirmed in advance of the hearing and repeated at the hearing that they were content to proceed on this basis. The Tribunal found that a hearing by video was suitable for this case and avoided delay whilst being compatible with the proper consideration of the issues.

The documents to which the Tribunal was referred were included in a bundle in two parts totalling 770 pages containing the submissions and evidence from the parties and relevant legislation and legal authorities. These bundles were available to the parties and the Tribunal in electronic form and the parties confirmed that they had received such bundles.

The Tribunal directed that the hearing should be in private on the basis that it was not in the public interest during the COVID-19 pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

DECISION

1. The appeal succeeds in part.

Findings of fact and reasons for the Decision

INTRODUCTION

2. Mr Qurban submitted an appeal on 12 April 2019 against the penalties imposed by HMRC, for the late filing of tax returns for the tax years 2010/11, 2011/12, 2012/13, 2013/14, 2014/15 and 2015/16 (the “relevant years”). Mr Qurban appealed on the basis that his failure to submit his tax returns on time arose from special circumstances provided for in paragraph 16 of Schedule 55 of the Finance Act 2009, which gives HMRC the power to reduce penalties. In this case Mr Qurban stated that the “special circumstances” arose from the personal difficulties that Mr Qurban had endured over a number of years, his difficulties with the accountants dealing with his tax affairs and the resulting inability to cope with his affairs due to the stress and pressure that he was under during and after the relevant years.

3. In response to the appeal, HMRC submitted a statement of case that was last amended on 9 July 2020 setting out their justification for all of the penalties for late filing in the relevant years and explaining their reasons for rejecting Mr Qurban’s appeal. HMRC considered whether either special circumstances or a reasonable excuse contributed to the delay in the submission of the tax returns in the relevant years and concluded that they did not.

4. The parties agreed that the following table prepared by HMRC set out the details of the dates on which Mr Qurban’s tax returns for the relevant years were requested, became due and were received by HMRC.

Tax year ended	Return due date	Date return submitted	Number of days late	
5 April 2011	31 Oct 2011	24 Aug 2015	1393	
5 April 2012	31 Jan 2013	21 Aug 2015	932	
5 April 2013	31 Jan 2014	18 Nov 2015	656	
5 April 2014	31 Oct 2014	25 Feb 2016	482	
5 April 2015	31 Oct 2015	01 Oct 2018	1066	
5 April 2016	18 Jul 2017	01 Oct 2018	440	

5. The parties agreed that the following table prepared by HMRC set out the details of the penalties totalling £9,600 that HMRC had imposed on Mr Qurban in respect of the late filing of self-assessment returns in each of the relevant years (the “Penalties”).

Tax year ended 5 April			2011	2012	2013
Legislation	Description	Amount	Date of penalty		
Para 3, Sch. 55 FA 2009	Initial late filing penalty	£100	14 Feb 2012	12 Feb 2013	18 Feb 2014
Para 4, Sch. 55 FA 2009	Daily late filing penalty	£900	7 Aug 2012	14 Aug 2013	18 Aug 2014
Para 5, Sch. 55 FA 2009	6 Month late filing penalty	£300	7 Aug 2012	14 Aug 2013	18 Aug 2014
Para 6, Sch. 55 FA 2009	12 Month late filing penalty	£300	19 Feb 2013	25 Feb 2014	24 Feb 2015

Tax year ended 5 April			2014	2015	2016
Legislation	Description	Amount	Date of penalty		
Para 3, Sch. 55 FA 2009	Initial late filing penalty	£100	18 Feb 2015	17 Feb 2016	25 Jul 2017
Para 4, Sch. 55 FA 2009	Daily late filing penalty	£900	14 Aug 2015	12 Aug 2016	23 Jan 2018
Para 5, Sch. 55 FA 2009	6 Month late filing penalty	£300	14 Aug 2015	12 Aug 2016	23 Jan 2018
Para 6, Sch. 55 FA 2009	12 Month late filing penalty	£300	23 Feb 2016	21 Feb 2017	24 Jul 2018

THE APPEAL

6. Mr Qurban appealed against HMRC's decisions in respect of the Penalties on the basis that the delays in filing the tax returns arose as a consequence of the personal, health and family circumstances of Mr Qurban at the relevant times and the difficulties and delay that arose from the failure of one accountant dealing with his tax affairs and the death of another. The emotional and physical impact of these difficult circumstances on his ability to manage his financial affairs during this period gave rise either to;

- special circumstances, as provided for in paragraph 23 of Schedule 55 of the Finance Act 2009 ("Schedule 55"), that justified a reduction in the Penalties; or
- a reasonable excuse, as provided for in paragraph 16 of Schedule 55, that justified a waiver of the Penalties.

Mr Qurban asked that all of the Penalties be reduced to nil by the Tribunal.

7. HMRC responded to the substance of the appeal in their statement of case. They stated that they had considered Mr Qurban's arguments regarding the delay in submitting his self-assessment returns as constituting arguments that a reasonable excuse may exist for the late filing. HMRC state that Mr Qurban has to prove both that a reasonable excuse existed and that he had acted without any unreasonable delay once any excuse had ended. HMRC state

that they consider a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard. HMRC confirmed their decision that no special circumstances existed in respect of this appeal and argued that Mr Qurban had to demonstrate that this decision was flawed and he had not done so.

8. It is common ground between the parties that the Penalties became due because Mr Qurban failed to file his self-assessment tax returns on time. The contents of the tables set out at paragraphs 4 and 5 above are agreed. Having reviewed the submissions and evidence from the parties, the Tribunal accepted the contents of the tables are an accurate record of the penalties levied by HMRC on Mr Qurban. Mr Mussa accepted on behalf of Mr Qurban that the notices to file tax returns were all properly addressed and were received by him.

9. Mr Mussa initially claimed that Mr Qurban should receive a reduction to the late filing penalties on the basis of the quality of the disclosure that he made to HMRC. The Tribunal understood Mr Mussa to have accepted during the hearing that the late filing Penalties in this appeal were not eligible for reductions based on the quality of disclosure.

10. Subject to considerations of "reasonable excuse" and "special circumstances" which form the basis of this appeal and which are addressed below, The Tribunal finds that each of the Penalties is due and has been calculated correctly.

STATUTORY PROVISIONS

11. The penalties at issue in this appeal in relation to the failure to file self-assessment returns on time are imposed by Schedule 55 of the Finance Act 2009 ("Schedule 55"). The relevant provisions of Schedule 55 are set out in the Appendix below.

12. The tribunal's jurisdiction is under paragraph 22 of Schedule 55, which provides that the tribunal has the power to: (1) affirm or cancel the penalty imposed by HMRC; and (2) to substitute for HMRC's decision another decision that HMRC had power to make.

SPECIAL CIRCUMSTANCES

13. In considering whether a special reduction for special circumstances as envisaged by paragraph 16 of Schedule 55 existed, the Tribunal took account of the case of Haines [2018] TC 06649, in which the tribunal stated at paragraphs 58 to 60 that:

"There is no test in the legislation but various Tribunals have attempted to give a definition. They often start with what the Court of Appeal (in a different context) said in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at p. 1215H that: '... to be special the event must be something out of the ordinary, something uncommon; ...'

In *Rodney Warren & Co* [2012] TC 01754 the Tribunal said of 'special circumstances':

We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolute, it must be capable of encompassing circumstances in which there is some

culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.

The adjective “special” requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty.’

What was said in Warren seems right, if very general. In my view, it seems to me that to justify a reduction or remission of a penalty, special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions.”

REASONABLE EXCUSE

14. The Tribunal had regard to the decision of the Upper Tribunal in Perrin v HMRC [2018] UKUT 156 (TCC) that sets out guidance this Tribunal (the “FTT”) should follow when considering if a “reasonable excuse”, as provided for in paragraph 16 of Schedule 55, exists for any failure by a taxpayer that would otherwise give rise to a penalty. In this case the Upper Tribunal stated:

“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.”

FINDINGS OF FACT AND LAW

15. In order to determine this appeal, the Tribunal needs to decide if the reasons put forward by Mr Qurban for the delay in submitting his tax returns amount to a reasonable excuse or to special circumstances.

16. In his submissions before and at the hearing Mr Qurban offered a consistent explanation as to why he had been unable to deal with his affairs properly during the relevant

years. He referred to and gave details of a number of personal and medical factors and of the problems he had with professional advisers and HMRC.

17. Mr Mussa on behalf of Mr Qurban referred to the ill-health of Mr Qurban's father, who had a triple heart bypass in 1991 and whose ability to work and earn for his family was reduced after this. He added that both of his parents had fallen seriously ill in 2007 and his father had stopped work completely. He became responsible for maintaining the household finances and became a full-time carer for his parents. As a consequence, he has been physically, financially and emotionally drained since then. He provided a copy of the medical records of Mr Qurban's father.

18. Mr Mussa referred to the difficulties in Mr Qurban's marriage as a result of the caring responsibility for his parents and the stress that this produced. His son had been born with health problems and needed regular visits to the doctor. He provided a copy of his son's medical records. The stress and pressure arising from these factors added to his problems and gave rise to a mentally challenging period for him. He described deep anxiety and depression that he tried to fight, but which resulted in a complete breakdown in 2019. He consulted a therapist at this time to seek assistance with his mental health.

19. During the period Mr Qurban had further difficulties in attempting to set up a business with a partner and he had to leave the business as he was unable to contribute equally to the work of the business.

20. Mr Mussa stated that Mr Qurban had appointed an accountant to deal with his tax affairs in time to deal with his return for 2009/10. He said that the accountant had submitted an incorrect return for that year, which he then rectified. The same accountant made errors in the 2010/11 and 2011/12 tax returns and wanted additional payments from Mr Qurban to correct these mistakes, which he refused to pay. The accountant would not then communicate with Mr Qurban. He assumed that this accountant had submitted the outstanding tax returns on time. In July 2015 Mr Qurban said he instructed a second accountant, who contacted HMRC in July and August 2015 and discovered that returns for 2010/11 and 2011/12 had not been submitted. The new accountant filed these returns and a return for 2012/13 by November 2015. He then submitted Mr Qurban's return for 2013/14 by February 2016 after clarifying what was required. The second accountant died in 2017, which Mr Qurban was not aware of until November 2017. He had considerable difficulty in getting his papers back from the second accountant's office and he did not have his own copies of the information that he had provided to the accountant about the 2014/15 and 2015/16 tax years. When these papers were returned to him, Mr Qurban appointed a third firm of accountants, who submitted his returns for 2014/15 and 2015/16 in October 2018. The third firm are his current accountants and were represented at the hearing by Mr Moavia. Mr Qurban asked the tribunal to take account of his difficulties in dealing with his advisers as well as his personal problems.

21. Mr Qurban had sought to explain his problems to the HMRC, but they had merely carried on and brought bankruptcy proceeding against him, which further added to his difficulties in coping.

22. Mr Asuelimen stated on behalf of HMRC that Schedule 55 made it plain that neither a lack of funds nor reliance on a third party is a reasonable excuse. He said that Mr Qurban had not taken reasonable care to ensure that his representatives were complying with his obligation to file a return on time. Mr Qurban had contacted HMRC in August 2012, September 2014 and July 2015 and had on each occasion been told what was required of him.

A reasonable excuse is only valid if the failure is rectified without delay once the excuse has ended and Mr Asuelimen argued that Mr Qurban had not taken the steps required to avoid further penalties when he had been reminded or had become aware of his failures.

23. Mr Asueleiman referred to para 16 of Schedule 55, which sets out the basis upon which a taxpayer can request a reduction in penalties for special circumstances. It was necessary for Mr Qurban to establish that HMRC's decision to refuse such a reduction was flawed in law. Mr Asuelimen said that the personal and health difficulties that Mr Qurban had referred to were not exceptional or uncommon and were not so severe in their effects as to support a decision that special circumstances arose in respect of Mr Qurban's delay in submitting his tax returns.

24. Ms Martin gave evidence on behalf of HMRC and confirmed in response to questions from Mr Mussa that she accepted that Mr Qurban's second accountant had tried to work out all of the problems with Mr Qurban's tax returns and had acted reasonably swiftly after he was appointed. It was agreed that the tribunal did not have a full record of all contact between Mr Qurban and HMRC in the relevant years.

25. In his evidence Mr Qurban explained that he could not remember much about the dates on which he contacted HMRC in 2011 and 2012. However, he did recall receiving letters from HMRC regularly and he was aware that he was incurring penalties. Mr Qurban confirmed that he worked as an electrician during the relevant years, either on his own or through a company that he formed with another electrician in 2012 and from which he had to resign in 2016 as he was not able to put in the same effort as his partner. His earnings were modest due to the short hours that he could work. In addition, he let out property, either his home or that of his father, during some or all of the relevant years. However, the rental from his father's house went to his father, even though he had signed the tenancy agreement for that house.

26. In answer to questions from the Tribunal and Mr Asuelimen, Mr Qurban sought to remember when he had first become aware of the death of his second accountant. He thought that it was November 2017. He was not aware of why HMRC had a record of the death in June 2017.

27. Mr Asueliman referred to the tax records of Mr Qurban's father, which showed that he was working as a taxi driver during some of the relevant years. Mr Qurban accepted that this was the case from time to time.

28. The Tribunal considered Mr Qurban's description of the personal difficulties that he faced in the relevant years. The Tribunal noted that Mr Qurban's description of his father's ill-health had been overstated and that his father had continued to work. This cast doubt over Mr Qurban's account of his responsibility for his parents during the relevant years. The Tribunal did not find anything exceptional in his son's medical records, nor did Mr Qurban give details of any unusual or troubling level of ill-health for his son. Similarly, there was no evidence relating to any problems with Mr Qurban's marriage or with his household responsibilities that indicated that these were out of the ordinary range that might be experienced by any taxpayer. The Tribunal took into account that Mr Qurban had sought counselling in January 2019 and noted that the correspondence with his counsellor refers to his anxiety about family and financial matters.

29. The evidence established that Mr Qurban had worked throughout the relevant years. His earnings were low for an electrician and consistent with someone who was not able to work full time. The evidence also established that Mr Qurban had been capable of managing two properties during this period and earning some rental income for himself and his father.

30. The Tribunal's review of the evidence and submissions of the parties did not support a finding that Mr Qurban's difficulties with his first accountant were attributable to a failure or delay by his accountant. Mr Qurban must have been aware of the risk that he took in failing to make progress with his tax affairs via his first accountant after 2012. He then received confirmation from HMRC that was incurring penalties as a result of the delay in filing a tax return. He failed to act for a considerable period of time and it was not until mid-2015 that he appointed a new accountant. This accountant, Mr Qurban's second accountant, acted with due speed and diligence to file the outstanding tax returns. In doing so he must have had some assistance from Mr Qurban and had his fees paid by Mr Qurban. The evidence suggests that but for his unfortunate ill-health and death, Mr Qurban and his second accountant could have brought his tax affairs up to speed. The death of his second accountant and the delay in obtaining papers from his widow, or the relevant firm, are exceptional matters that a reasonable taxpayer trying to fulfil their obligations in respect of tax may well have been unable to resolve swiftly. However, the delay between the death of the accountant and Mr Qurban taking action to retrieve his papers from the second accountant and then appointing a third accountant was several months and longer than would be expected of a taxpayer seeking to discharge their obligations with reasonable diligence.

31. The Tribunal concluded that Mr Qurban faced a range of difficulties in managing all of the demands on him in the period covered by the Penalties and that these difficulties eventually led to him suffering with anxiety and stress. However, the personal, health, emotional and financial issues that affected him during this period were not so exceptional or unusual as to amount to special circumstances in the terms provided for in Schedule 55, nor were they sufficiently serious or unavoidable as to give rise to a reasonable excuse in the terms provided for in Schedule 55. A taxpayer taking reasonable steps to meet their obligations in respect of tax would normally be expected to deal with the sort of family, work and financial difficulties that Mr Qurban described. Whilst Mr Qurban did seek counselling in 2019, it is not clear from the evidence and submissions that his health had been adversely affected before that to any material extent. Mr Qurban retained the capability to work and to understand and discharge his obligations during the relevant years and these obligations included a responsibility to file tax returns when they were due.

32. With regard to the delays that Mr Qurban attributes to his professional advisers, paragraph 23 (2) of Schedule 55(c) establishes that where a taxpayer relies on any other person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure, and that the taxpayer must remedy any failure without unreasonable delay after the excuse ceased. The Tribunal finds that Mr Qurban failed to act with the required speed and diligence in dealing with and replacing his first accountant and in finding and instructing the third accountants. However, the death of Mr Qurban's second accountant did give rise to a reasonable excuse for a period of delay in meeting his obligations. As a consequence, he has a reasonable excuse for the delay in filing returns in late 2017 and early 2018.

CONCLUSIONS

33. In all of the circumstance of this appeal the Tribunal finds that, as stated above, subject to considerations of “reasonable excuse” and “special circumstances” each of the Penalties are due and have been calculated correctly.

34. The Tribunal does not find that any special circumstances arise in this appeal. The difficulties that Mr Qurban faced were not peculiar or distinctive even in aggregate and their effect individually, or in aggregate, is more suitable to be regarded as potentially providing a reasonable excuse for a delay in fulfilling his obligations.

35. The Tribunal finds that the death of Mr Qurban’s second accountant in 2017 did give rise to a reasonable excuse for delay over a period of some months, whilst Mr Qurban retrieved his papers and sought and briefed a new accountant. No other difficulties that Mr Qurban faced or suffered during the period to which the Penalties relate were so severe as to give rise to a reasonable excuse for the delay.

36. As a consequence of the Tribunal’s conclusion that a reasonable excuse existed for the failure to submit outstanding tax returns for a period of some months in 2017, the Tribunal determines that the late filing penalty of £100 imposed on 25 July 2017 and the daily penalties totalling £900 and the 6 month daily penalty of £300 imposed on 23 January 2018 are not payable.

37. All other Penalties remain due and payable by Mr Qurban.

38. The appeal succeeds in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

PETER HINCHLIFFE

TRIBUNAL JUDGE

RELEASE DATE: 12 NOVEMBER 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

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.

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).

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.

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

6—

- (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).

(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.

(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%.

(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.

(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%.

(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.

(6) Paragraph 6A explains the 3 categories of information.

Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

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

16—

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- (2) In sub-paragraph (1) “special circumstances” does not include—
 - (a) ability to pay, or
 - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
 - (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal’s jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of “special circumstances” as set out below:

22—

- (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may —
 - (a) affirm HMRC’s decision, or
 - (b) substitute for HMRC’s decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—
 - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - (b) to a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.