TC07888

INCOME TAX – Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file a self-assessment return on time - validity of notice to file - whether taxpayer had a reasonable excuse for her default – appeal allowed in part. HMRC v Goldsmith followed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09383

BETWEEN

JANA NESTUPOVA **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 25 September 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 22 November 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 5 February 2020.

DECISION

INTRODUCTION

1. This is an appeal by Ms Jana Nestupova ('the Appellant') against fixed penalties totalling £1,600 imposed by the Respondents ('HMRC') under Paragraph 3, 4, 5 and 6 of Schedule 55 Finance Act 2009, for her failure to file a self-assessment ('SA') tax return on time for the tax year ending 5 April 2016.

2. HMRC do not seek to defend the daily penalties imposed, although it is not clear to me on what basis it is conceded that they should be cancelled. In the circumstances however, I do not go behind the concession and the appeal duly succeeds in relation to the daily penalties of £900.

BACKGROUND

3. The Appellant's return for 2015-16 was due on 1 June 2018.

4. The penalties for late filing of a return can be summarised as follows:

   (i) A penalty of £100 is imposed under Paragraph 3 of Schedule 55 Finance Act ('FA') 2009 for the late filing of the Individual Tax Return.

   (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.

   (iii) If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.

   (iv) If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

5. The Appellant's non-electronic return for 2015-16 was filed on 9 December 2019. It was therefore not filed on time and penalties of £100, £900, £300 and £300 were imposed under (i), (ii), (iii) and (iv) above.

6. HMRC do not contend that there was any deliberate withholding of information.

   Filing date and Penalty date

7. Under s 8(1G) TMA 1970 a return must normally be filed within three months of the date of a notice. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 FA 2009 and is the date after the filing date.

   Reasonable excuse

8. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

9. The law specifies two situations that are not reasonable excuse:

   (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and

   (b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

10. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all

the circumstances of the particular case" (*Rowland V HMRC* (2006) STC (SCD) 536 at paragraph 18).

11. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

12. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that she has a reasonable excuse for the late filing of her SA tax return.

The background facts

13. The Appellant's 2015-16 return was issued to her on or around 22 February 2018 and was due to be returned by 1 June 2018. The Notice to file a return was issued to the correspondence address provided by the Appellant.

14. The Appellant's grounds of appeal are that she should not have been asked to file a SA return. Accordingly, she had a reasonable excuse for the delay in filing the return.

15. The SA return was received electronically by HMRC on 9 December 2019. It was therefore 18 months late.

16. The Appellant appealed to the Tribunal on 28 November 2019.

PERMISSION TO APPEAL OUT OF TIME

17. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. HMRC refused consent under s49(2)(a) of TMA 1970. For the following reasons, I have decided to give permission for the appeal to be notified late:

18. The penalties under appeal are in respect of the year 2015-16. A penalty notice was issued to the Appellant on 14 January 2019. The appeal was not made until 28 November 2019 and therefore were over nine months late. In fact, the first penalty notice was issued in June 2018 and the appeal was therefore almost 18 months late. Although in her email to Rebekah Rovaretti dated 9 June 2019 Ms Nestupova indicates that she had been away for three months, that would not explain the delay from June to November 2019, or indeed the delay from June 2018. The delay is serious and significant.

19. Miss Nestupova indicated that the reason for that delay was "prevarication by HMRC", however I cannot find any evidence of prevarication. HMRC issued a notice to file and a return is therefore required. The Appellant's agent challenged the requirement, but HMRC have at no point been ambiguous in their response. Although Miss Nestupova's agent disagrees with the requirement to file, that does not justify failing to file.

20. The consequences to either party of an extension of time limits must be considered in light of my assessment of the merits of the substantive appeal. A cursory examination of the merits of the substantive appeal would suggest that it is unlikely to succeed. The Respondent is entitled to some finality in properly administering the SA tax regime and the time limits have been imposed by statute to provide that finality. The Appellant

would be prejudiced by a refusal to extend the time limits, however, I am not satisfied that Miss Nestupova had a good explanation for her delay in appealing.

21. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

    a) The length of the delay;

    b) Whether there is a good explanation for that delay;

    c) The consequences of permission to appeal;

    d) The consequences of refusal of permission.

22. HMRC have conceded the case in relation to the daily penalties and therefore that penalty appeal will proceed. However, in the circumstance I do not consider that the Appellant has a good explanation for her delay which is of some significant length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal in relation to the fixed penalties, and the application for permission to appeal out of time is refused.

The Appellant's case

23. The Appellant's grounds of appeal are that she was not required to file an assessment.

HMRC's Case

24. A late filing penalty is raised solely because a SA tax return is filed late in accordance with Schedule 55 FA 2009, even if a customer has no tax to pay, has already paid all the tax due or is due a refund.

25. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

Reasonable Excuse

26. Under Paragraph 23 (1) Schedule 55 FA 2009 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

27. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

> "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?" [Page 142 3rd line et seq.].

28. HMRC considers 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.

29. If there is a reasonable excuse it must exist throughout the failure period.

30. The Appellant has not provided a reasonable excuse for her failures to file her tax returns on time and accordingly the penalties have been correctly charged in accordance with the legislation.

31. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

Special Reduction

32. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. "Special circumstances" is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

33. In other contexts "special" has been held to mean 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

34. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC's decision was 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.

35. HMRC have considered the Appellant's grounds of appeal but assert that her circumstances do not amount to special circumstances which would merit a reduction of the penalties.

36. Accordingly, HMRC's decision not to reduce the penalties under paragraph 16 was not flawed. There are no special circumstances which would require the Tribunal to reduce the penalties.

FINDINGS OF FACT

37. A self-assessment record was set up for the Appellant on 23 September 2017, because she did not reply to a P800 (PAYE) calculation issued to her at 26 Knowles Hill Crescent on 7 March 2017. She had been assessed to have underpaid her tax by £349.60. A Voluntary Payment Letter was then issued on 9 March 2017 indicating that if payment of that amount was not made the underpayment would have to be collected through the self-assessment system. A further Voluntary Payment Letter was issued on 1 June 2017. That correspondence was not returned marked undelivered. There is no suggestion within the papers before me that there were any postal difficulties around the relevant time and the Appellant has received subsequent correspondence sent to the same postal address. It is likely therefore that she received the Voluntary Payment Letters. I conclude that the Voluntary Payment Letters were properly issued to the correspondence address provided by Miss Nestupova, and received by her.

38. On or around 22 February 2018 a notice to file for the tax year 2015-16 was issued to Miss Nestupova at 26 Knowles Hill Crescent. That correspondence was not returned marked undelivered. There is no suggestion within the papers before me that there were any postal difficulties around the relevant time and the Appellant has received subsequent correspondence sent to that address. It is likely therefore that she received the notices to file. I conclude that the notices to file were properly issued to the correspondence address provided by Miss Nestupova, and received by her.

39. On 13 June 2018 Miss Nestupova's agent made a telephone call to HMRC querying the underpayment of tax and the receipt of a penalty. I therefore conclude that by that date Ms Nestupova was aware of the penalty and the potential for further penalties to accrue, having received the penalty notice of 5 June 2018. Between March 2017 and June 2018, Miss Nestupova did not respond to any communication. Seven days later the agent contacted HMRC again asking for an explanation of the "criteria" used to request a return be filed. HMRC replied to that correspondence on 10 July 2018. On 13 July 2018 the agent wrote again challenging the information within the HMRC response, and HMRC replied on 31 July 2018. On 1 august 2018 the agent telephoned HMRC arguing that the issue of a return was unlawful. A written response was issued by HMRC on 10 August 2018 which made it clear that HMRC did not agree and explained the reasons for the Respondent's disagreement. Miss Nestupova's agent wrote again on 21 August 2018 asking for a copy of her P46 and seeking 'cancellation' of the notice to issue.

40. On 19 and 27 December 2018 the agent attempted to appeal the penalty notices, but that appeal was refused, the return still not having been filed. It is clear that a wealth of correspondence was entered into from June 2018 but no attempt was actually made to file the return until December 2019.

41. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable. I am satisfied that the penalty notices gave proper notice *(Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761) and were sent to the postal address linked to the Appellant's SA account.

42. It is agreed that the return was in fact submitted electronically on 9 December 2019. The HMRC computer system does not allow a customer to submit a tax return for the same tax year twice. Therefore, the return having been submitted on 9 December 2019 effectively, it must not have been submitted effectively prior to that. I accept that the return was not properly submitted on or around 1 June 2018, or prior to December 2019.

DISCUSSION

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

44. I have concluded that the tax return for the 2015-16 tax year was not submitted on time. It should have been submitted by 1 June 2018. The return was almost eighteen months late. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the remaining penalties imposed are due and have been calculated correctly.

45. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, which prevents him or her from complying with an obligation which otherwise they would have complied with.

46. S8 of the Taxes Management Act 1970 states:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board-
> (a) to make and deliver to the officer [...], a return containing such information as may reasonably be required in pursuance of the notice, and …"

47. In correspondence Miss Nestupova's agent has stated "The return was issued following the issue of a form P800 for the year to 5 April 2016 showing HMRC were aware of my income. Section 8 TMA 1970 gives the Revenue the right to issue a return 'for the purpose of establishing the amounts in which a person is chargeable'. Form P800 shows that the Revenue were aware of the income to be assessed".

48. I have had sight of a newsletter which refers to the case of *Michael Kenzie Griffiths v HMRC [2018] UKFTT 527 (TC*). In that case Mr. Griffiths was believed to have overpaid tax, and so monies were reimbursed to him. The Respondent then realised that that reimbursement was made in error. He was then explicitly told that the (created) underpayment would be "coded out". The Respondent was unable to do that and the Learned Judge accepted that the notice to file was invalid because the Respondent had not issued the notice for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year". This decision was made in August 2018 following a line of judgments including *Goldsmith [2018] UKFTT 005* and *Crawford [2018] UKFTT 0392.* I have also had sight of a newsletter which refers to the case of *Hurst [2019] UKFTT 286 (TC).* The decision of *Hurst* was made in May 2019. A First-tier Tribunal decision does not set a precedent. An Upper-tier Tribunal decision does. The case of *Goldsmith* was appealed to the Upper Tribunal, wherein it was held that in these specific circumstances notices to file a tax return were valid and penalties are therefore incurred for failure to file (*HMRC v Goldsmith [2019] UKUT 325 (TCC)).* The decision is one in which the employer was said to have failed to operate the PAYE system correctly resulting in an under-deduction of tax.

49. In *Goldsmith* at para 108:

> " we consider that on a correct construction of the relevant statutory provisions the FTT did have jurisdiction to consider whether the notice to file had been issued for the statutory purpose.
>
> A penalty is only payable under paragraphs 1 and 3 of Schedule 55 if a taxpayer has failed to make or deliver a "return *under* section 8(1)(a) TMA." Section 8(1)(a) TMA tells us that a return under that paragraph is one which a taxpayer is required to make and deliver by a notice given to him by an HMRC officer "[f]or the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax...." We consider that Parliament intended the purposive wording in section 8(1)(a) TMA to have a substantive meaning, rather than constituting a mere descriptive preamble. On that basis, a return under section 8(1)(a) TMA can only be a return made in response to a valid notice to file, i.e. a notice to file which was issued for a permissible purpose. Thus, it is only the giving of a valid notice to file which creates a legal obligation to deliver a return and if no legal obligation exists there can be no failure in respect of which a penalty can be determined."

50. The Upper Tribunal went on to confirm the analysis of Judge Mosedale in *Crawford:*

> "Moreover, it seems to me that 'establish' must not only be read as including assessment as well as calculation of tax, a notice to file issued simply to assess a known liability to tax would also be within the meaning of 'establish' as a self-assessment return secures/fixes/makes permanent the liability to tax by making it an enforceable debt". The notice to file is therefore valid and penalties were properly incurred."

51. Once a notice to file has been issued, the taxpayer is required to return it. "The fact that HMRC may have (or be able to obtain) some of the information does not relieve the taxpayer of his obligation to supply it in the return (*Moschi v Kensington General Commissioners [1980] STC 1; Osborne v Dickinson [2004] STC (SCD) 104*)."

52. The Appellant is not someone who has demonstrated expedition in dealing with her tax affairs. She did not respond to any of the correspondence prior to the issue of the penalty

notice. If she disputed the obligation to repay the underpaid tax then she could have entered into communication with the HMRC as early as March 2017. The fact that she did not do so does not suggest that she prioritised her tax affairs.

53. Having failed to respond until the issue of a penalty, she – through her agent – entered into a flurry of correspondence. There was no prevarication on behalf of the Respondent, but the Appellant did not agree with HMRC's interpretation of the law. It was open to the Appellant to file her return immediately and challenge the penalty as early as June 2018, and yet she still failed to file her return until December 2019.

54. It appears that the Appellant may have relied upon advice from her agent. No correspondence between the Appellant and her agent has been supplied. If the agent was negligent in their duties then Ms Nestupova may have some recourse against her agent, however, her reliance upon an agent cannot be a reasonable excuse unless she took reasonable care to ensure that her obligations were complied with. The responsibility for complying with her tax obligations rests with her. I am not however satisfied that the failure to file can be in anyway the responsibility of the agent, given the fact that the agent began to correspond with HMRC after the first penalty had been incurred. I do note that the return was finally filed within one month of the publication of the Upper Tribunal decision in *Goldsmith*. It appears that Miss Nestupova chose to follow the decision in *Goldsmith* at first instance, but by July 2018 the contrary determination of Judge Mosedale in *Crawford* was also published. It is not reasonable to select case authority which is beneficial to an argument and arbitrarily ignore case law which is not.

55. Tax returns were issued to the Appellant on 22 February 2018. Having been issued there is an obligation that they are submitted prior to the filing date, whether any tax is due or not.

56. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal had explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. In my judgment it is not objectively reasonable to have failed to respond to her tax correspondence throughout 2017 and the first half of 2018, and then to have refused to file for another 18 months. Miss Nestupova was new to the self-assessment regime and to dealing directly with HMRC, but she had the services of an agent and there appears to have been no reason for her to dispute that she had not paid sufficient tax in the relevant year.

57. I have also borne in mind the recent comments of the Tribunal in *Hesketh v HMRC* [2017] UKFTT 871 about whether ignorance of an obligation to file could excuse late filing. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. I agree with those conclusions and consider that if ignorance of the obligation cannot be a reasonable excuse, then awareness of the obligation but ignorance of the consequences also cannot be a reasonable excuse.

58. I conclude that Ms Nestupova does not have a reasonable excuse for the late filing of her return for the tax year to April 2016.

59. Even when a taxpayer is unable to establish that he / she has a reasonable excuse and he / she remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion.

60. Paragraph 22 of Schedule 55 provides that I am only able to interfere with HMRC's decision on special reduction if I consider that their decision was flawed (in the sense

understood in a claim for judicial review). That is a high test and I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Ms Nestupova.

61. I should add, that even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which Ms Nestupova relied upon was her belief that she was not required to file a tax return. I have explained above why I do not consider that failure to ensure her tax obligations were complied with can provide Ms Nestupova with a reasonable excuse for her late filing. The circumstances are not such as to make it right for me to reduce the penalty which has been imposed.

CONCLUSION

62. I therefore confirm the fixed penalties of £700. The appeal succeeds in relation to the daily penalties of £900 only.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

ABIGAIL HUDSON

TRIBUNAL JUDGE

RELEASE DATE: 16 OCTOBER 2020

APPENDIX
RELEVANT STATUTORY PROVISIONS

Finance Act 2009

64. 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.

65. 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).

66. 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.

67. 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.

68. 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.

69. 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.

70. 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.

Taxes Management Act 1970

71. Section 8 - Personal return- provides as follows:

> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-
>
> a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and
>
> b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1A) The day referred to in subsection (1) above is-
>
> (a) the 31st January next following the year of assessment, or
>
> (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]
>
> (1AA) For the purposes of subsection (1) above-
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

(1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

(1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.]

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

(1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

(b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

(a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

(4A)Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B)The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

(5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.