



[2019] UKFTT 0344 (TC)

**TC07172**

***EMPLOYMENT RELATED SECURITIES – Section 421JC of Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') - fixed penalties for failure to file an ERS return on time – ignorance of requirement to file - whether taxpayer had a reasonable excuse for his default – appeal dismissed.***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00672**

**BETWEEN**

**TALKATIVE LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE ABIGAIL HUDSON**

The Tribunal determined the appeal on 20 May 2019 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 1 February 2019 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 26 March 2019.

## DECISION

### INTRODUCTION

1. This is an appeal by Talkative Limited ('the Appellant') against penalties totalling £800 imposed by the Respondents ('HMRC') under Section 421JC of Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'), for the late filing of two Employment Related Securities ('ERS') for the tax year ending 5 April 2018.

### BACKGROUND

2. The Appellant's return for 2017-18, was due no later than 06 July 2018.
3. The penalties for late filing of a return can be summarised as follows:
  - (i) A penalty of £100 is imposed under Section 421JC(2) of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') for the late filing of an ERS Return.
  - (ii) If after a period of 3 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Section 421JC(3) of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA').
4. The Appellant's returns for 2017-18 were not filed on time and penalties of £100 and £300 were imposed in relation to each ERS scheme, under (i), and (ii) above.

#### *Filing date*

5. Sections 421JA-421JF ITEPA 20113 were inserted by the Finance Act 2014 s51, Sch 8 paras 226, 228 with effect from 6 April 2014. Under s 421JA and JB ITEPA 2003 an electronic return must be filed by 6 July in the year following the end of the tax year.

#### *Reasonable excuse*

6. Subsection 8 of Section 421JC ITEPA 2003, 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.
7. The law specifies three situations that are not reasonable excuse:
  - (a) An insufficiency of funds, unless attributable to events outside the Appellant's control, and
  - (b) Reliance on a third party to do anything, unless the person took reasonable care to avoid the failure, and
  - (c) where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
8. 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).
9. 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.

### *The background facts*

10. The Appellant registered an Employer Related Securities scheme reference XM1100000141638 (Talkative share options) on 29 January 2018, and an ERS scheme reference XE1100000142076 (Talkative Enterprise Management Incentive) on 2 March 2018.

11. Once registered the appellant is required by ITEPA S421JA to submit an annual return by 6 July after the end of the tax year. The return was therefore due to be returned online by 6 July 2018.

12. The Appellant's agent avers that neither he nor the Appellant were aware that returns were required to be filed. Ian Walker of Ian Walker Accountancy Services asserts that no return was filed because notice to submit a return was not received.

13. The return for ERS scheme XE1100000141638 has not been received by HMRC. It is therefore over 12 months late. The return for ERS scheme XM1100000142076 was submitted on 23 October 2018 and was therefore over three months late.

14. HMRC imposed a fixed penalty of £100 in relation to each scheme when the returns were not submitted by the filing date. A penalty notice was sent to the appellant on 17 July 2018. The returns still having not been received three months after the filing date HMRC then imposed fixed penalty of £300 in relation to each scheme and a penalty notice was sent on 10 October 2018. The penalty notices were sent to the address on file for the Appellant.

15. The Appellant appealed to the Tribunal on 1 February 2019. It is not clear that it is appealing against the penalties in relation to each scheme, but for completeness, and given the excuse proffered, I have treated the appeal against both sets of penalties.

16. The appellant's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline. However, HMRC have now prepared a full Statement of Case which deals with the substantive appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a) TMA 1970.

### **The Appellant's case**

17. The Appellant's grounds of appeal are that he was unaware that he was required to submit ERS returns for the tax year 2017-18. Accordingly, he had a reasonable excuse for the delay in filing a return.

### **HMRC's Case**

18. Gifts and awards of shares in companies, often known as employment related securities ('ERS') are commonly used by employers to reward, retain or provide incentives to employees. Guidance on how to operate ERS schemes is available on HMRC's website, headed 'Tell HMRC about your employment related securities (ERS) schemes'. The guidance states that employers need to register their ERS scheme via Government Gateway and must submit an ERS return for each registered ERS scheme every year, even if there is no reportable event.

19. An ERS return must be submitted even if:

- (1) There have been no transactions;
- (2) A late filing penalty is under appeal;

- (3) The scheme has been registered in error, or there is a duplicate scheme;
- (4) No reminder from HMRC was received.

20. A late filing penalty is raised solely because an ERS return is filed late in accordance with Section 421 JC ITEPA 2003, including nil returns.

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

22. 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 he has a reasonable excuse for the late filing of his ERS return.

#### *Reasonable Excuse*

23. Under Section 421 JC ITEPA 2003 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

24. '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.].

25. 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.

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

27. The Appellant has not provided a reasonable excuse for his failure to file ERS returns for the year 2017-18 on time and accordingly the penalties have been correctly charged in accordance with the legislation.

28. 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*

29. Paragraph 16(1) of Schedule 55 Finance Act 2009 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.

30. 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).

31. 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'.

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

33. 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**

34. 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 within 12 months. I am satisfied that the penalty notices dated on or around 14 July 2018 and 10 October 2018 were sent to the postal address linked to the Appellant's account (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761).

35. The Appellant registered two ERS schemes between January and March 2018. ERS returns were therefore required and should have been filed. There is guidance available on the HMRC website as to how to operate such a scheme. The Appellant's representative did not file ERS returns as required and indicates that he was unaware of the requirement to do so. It is therefore likely that he did not make the Appellant aware of the necessity to do so.

36. Penalty notices were sent by post to the offices of the Appellant on the 17<sup>th</sup> July 2018 and 10 October 2018. The Appellant does not suggest that such documentation was not received, and indeed there is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries. In those circumstances, I find that the Appellant did receive those communications.

37. It is agreed that the returns were not submitted by 6 July 2018. I accept that the return for one of the schemes was submitted on 23 October 2018. Although Mr. Walker has indicated that the return for the other scheme was submitted at the same time, it has not been received by HMRC. In the circumstances no penalties have accrued post 23 October 2018 and it makes little difference whether that second return was submitted on that date. I accept that the returns were not properly submitted prior to 23 October 2018.

### **DISCUSSION**

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

39. 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.

40. I have concluded that the tax return for scheme XE1100000142076 for the 2017-18 tax year was not submitted until 23 October 2018. It should have been submitted by 6 July 2018. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly. In relation to scheme

XM1100000141638 HMRC contend that no return has been submitted, whilst Mr. Walker has indicated that the return for that scheme was also submitted on 23 October 2018. Again, it should have been submitted by 6 July 2018 and therefore subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

41. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal 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. Talkative Limited may have honestly believed that it was not required to file ERS returns, but having registered for the scheme, in my judgment it was not objectively reasonable to have failed to consider the ramifications of such registration. In those circumstances, the initial belief is not objectively reasonable. Although the Appellant may well have relied upon the advice of its representative, that does not absolve the Appellant from the responsibility of ensuring that its obligations are met. I am not told of any efforts by the Appellant to inform itself of the requirements of an ERS scheme other than to rely on the agent. In my judgment that is insufficient.

42. Following that initial failure to file, the first filing penalty notice was sent to the business premises of the Appellant on 17 July 2018. Although Mr. Wilson has indicated that he was unaware of that penalty notice, I conclude that it is likely that the Appellant received that notice, albeit then neglected to pass that to his accountant expeditiously, but that the notice should have prompted further action on the part of the Appellant or his agent which would have avoided the second set of penalties.

43. 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. The fact that neither the Appellant nor his agent were aware of their duties in relation to ERS schemes, does not constitute a reasonable excuse. The onus is upon an appellant to ensure that he or she properly understands their obligations under the law. I conclude that Talkative Limited does not have a reasonable excuse for the late filing of returns for the tax year 2017-18.

44. Even when a taxpayer is unable to establish that he has a reasonable excuse and he 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.

45. 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 Talkative Limited.

46. 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 the Appellant’s representative has relied upon was a mistaken belief that he was not required to file returns. I have explained above why I do not consider that erroneous belief for failing to comply with the law can provide Talkative Limited with a reasonable excuse for late filing. Similarly, I conclude that ignorance of the severity of the Section 421JC ITEPA 2003 penalty regime does not constitute a special circumstance which would make it right for me to reduce the penalty which has been imposed.

47. Although Mr. Walker has detailed the difficulties of both Talkative Limited and the representative's company being small businesses, I do not consider that inability to pay can form a reasonable excuse, or a special circumstance. The Appellant has argued that the penalties charged are disproportionate because it had no tax liability for the relevant tax year. As noted above, this Tribunal does, in certain circumstances, have the power to reduce a penalty because of the presence of "special circumstances". In *Barry Edwards v HMRC* [2019] UKUT 0131 (TCC), the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty. It follows that I have concluded that the mere fact that the appellant had no tax liability for the relevant tax year does not justify a reduction in the penalty either on the grounds of proportionality generally or because of the presence of "special circumstances" in relation to the penalty scheme under section 421 ITEPA.

#### **CONCLUSION**

48. I therefore confirm the fixed penalties of £100 and £300 in relation to each scheme, in total £800.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

49. 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: 31 MAY 2019**

**APPENDIX  
RELEVANT STATUTORY PROVISIONS**

**Income Tax (Earnings and Pensions) Act 2003**

50. The penalties at issue in the appeal are imposed by Section 421JC ITEPA 2003.
51. Section 421JA – Annual returns - provides as follows:
- (1) This section applies in relation to a person who is (or has been) a responsible person (see section 421L) in relation to reportable events (see section 421K).
  - (2) The person must give to Her Majesty’s Revenue and Customs (“HMRC”) a return for each tax year falling (wholly or partly) in the person’s reportable event period.
  - (3) The person’s “reportable event period” is the period –
    - (a) Beginning when the first reportable event occurs in relation to which the person is a responsible person, and
    - (b) Ending when the person will no longer be a responsible person in relation to reportable events.
  - (4) The return for a tax year must –
    - (a) Contain, or be accompanied by, such information as HMRC may require, and
    - (b) Be given on or before 6 July in the following tax year.
  - (5) The information which may be required under subsection (4)(a) includes (in particular) information to enable HMRC to determine the liability to tax, including capital gains tax, of any employee.
  - (6) If the person becomes aware that –
    - (a) Anything which should have been included in, or should have accompanied, a return for a tax year was not included in, or did not accompany, the return,
    - (b) Anything which should not have been included in, or should not have accompanied, a return for a tax year was included in, or did not accompany, the return, or
    - (c) Any other error or inaccuracy has occurred in relation to a return for a tax year,the person must give an amended return correcting the position to HMRC without delay.
  - (7) A person’s return for a tax year under this section need not contain, or be accompanied by, duplicate information and a person is not required to give a return for a tax year under this section if it would only contain, or be accompanied by, duplicate information.
  - (8) “Duplicate information” means information which is contained in or accompanies –
    - (a) A return which another person gives for the tax year under this section, or
    - (b) A return which any person gives for the tax year under any of the following provisions –
      - (i) Paragraph 81B of Schedule 2 (annual return for Schedule 2 SIP);



- (ii) Paragraph 40B of Schedule 3 (annual return for Schedule 3 SAYE option scheme);
- (iii) Paragraph 28B of Schedule 4 (annual return for Schedule 4 CSOP scheme);
- (iv) Paragraph 52 of Schedule 5 (annual return for company whose shares are subject to qualifying options under the EMI code).

52. 421JB Returns to be given electronically –

(1) A return under section 421JA, and any information accompanying the return, must be given electronically.

(2) But, if HMRC consider it appropriate to do so, HMRC may allow a person to give a return or any accompanying information in another way; and, if HMRC do so, the return or information must be given in that other way.

(3) The Commissioners for Her Majesty’s Revenue and Customs—

(a) must prescribe how returns and accompanying information are to be given electronically;

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

53. 421JC Penalties for late returns –

(1) This section applies if a person fails to give a return under section 421JA for a tax year (containing, or accompanied by, all required information) on or before the date mentioned in section 421JA(4)(b) (“the date for delivery”).

(2) The person is liable for a penalty of £100.

(3) If the person’s failure continues after the end of the period of 3 months beginning with the date for delivery, the person is liable for a further penalty of £300.

(4) If the person’s failure continues after the end of the period of 6 months beginning with the date for delivery, the person is liable for a further penalty of £300.

(5) The person is liable for a further penalty under this subsection if—

(a) the person’s failure continues after the end of the period of 9 months beginning with the date for delivery,

(b) HMRC decide that such a penalty should be payable, and

(c) HMRC give notice to the person specifying the period in respect of which the penalty is payable.

(The person may be liable for more than one penalty under this subsection.)

(6) The penalty under subsection (5) is £10 for each day that the failure continues during the period specified in the notice under subsection (5)(c).

(7) The period specified in the notice under subsection (5)(c)—

(a) may begin earlier than the date on which the notice is given, but

(b) may not begin until after the end of the period mentioned in subsection (5)(a) or, if relevant, the end of any period specified in any previous notice under subsection (5)(c) given in relation to the failure.

(8) Liability for a penalty under this section does not arise if the person satisfies HMRC (or, on an appeal under section 421JF, the tribunal) that there is a reasonable excuse for the person's failure.

(9) For the purposes of subsection (8)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person's control,

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the (first mentioned) person took reasonable care to avoid the failure, and

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

54. 421JE Assessment of penalties –

(1) This section applies if a person is liable for a penalty under section 421JC or 421JD.

(2) HMRC must assess the penalty and notify the person of the assessment.

(3) Subject to subsection (4), the assessment must be made no later than 12 months after the date on which the person becomes liable for the penalty.

(4) In the case of a penalty under section 421JD(1)(b), the assessment must be made no later than—

(a) 12 months after the date on which HMRC become aware of the inaccuracy, and

(b) 6 years after the date on which the person becomes liable for the penalty.

(5) A penalty payable under this Part must be paid—

(a) no later than 30 days after the date on which the notice under subsection (2) is given to the person, or

(b) if notice of appeal is given against the penalty under section 421JF(1) or (2), no later than 30 days after the date on which the appeal is determined or withdrawn.

(6) The penalty may be enforced as if it were income tax or, if the person is a company within the charge to corporation tax, corporation tax charged in an assessment and due and payable.

(7) Sections 100 to 103 of TMA 1970 do not apply to a penalty under section 421JC or 421JD.

55. 421JF Appeals -

(1) A person may appeal against a decision of HMRC that the person is liable for a penalty under section 421JC or 421JD.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person under section 421JC or 421JD.

(3) Notice of appeal must be given to HMRC no later than 30 days after the date on which the notice under section 421JE(2) is given to the person.

(4) On an appeal under subsection (1) which is notified to the tribunal, the tribunal may affirm or cancel the decision.

(5) On an appeal under subsection (2) which is notified to the tribunal, the tribunal may—

- (a) affirm the amount of the penalty decided, or
- (b) substitute another amount for that amount.

(6) Subject to this section and section 421JE, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to an appeal under this section as they have effect in relation to an appeal against an assessment to income tax or, if the person is a company within the charge to corporation tax, corporation tax.”

**Schedule 55 Finance Act 2009:**

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

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of the 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.

57. 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:

- (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.