Neutral Citation: [2023] UKFTT 00715 (TC)

Case Number: TC 08905

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/12586

*ANNUAL TAX ON ENVELOPED DWELLINGS ("ATED") – whether ATED return filed late – yes – whether ATED return required – no – whether reasonable excuse established – yes – appeal allowed*

**Heard on:** 5 April 2023
**Judgment date:** 14 August 2023

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**
**MEMBER IAN SHEARER**

**Between**

**DERRIDA HOLDINGS LIMITED**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Ms Shardy Zazzi

For the Respondents: Ms Iram Tariq, litigator of HM Revenue and Customs' Solicitor's Office.

## DECISION

**INTRODUCTION**

1. This is an appeal against late filing penalties charged under Schedule 55 to the Finance Act 2009 ("Schedule 55") in respect of the late filing of an annual tax on enveloped dwellings ("ATED") return relating to a property owned by the appellant ("the Property").

2. We have set out the relevant statutory provisions for ATED at Appendix 1 and for penalties at Appendix 2.

3. The penalties that have been charged can be summarised as follows:-

(1) A £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 25 February 2021.

(2) A £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 31 March 2021; and

(3) "daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 8 February 2022.

4. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

5. We had a Document Bundle extending to 104 pages, an Authorities Bundle extending to 166 pages and a Statement of Reason for HMRC.

6. Following the Hearing, on 20 April, we issued Directions seeking further clarification of details in relation to the Property and the return in question. Submissions in reply were received. The appellant was effectively a party litigant and Mr Hackett, who took over as litigator, very helpfully expanded on HMRC's understanding of the legislation.

7. Correspondence ensued as we continued to seek clarification of the value of the Property. We did so because the appellant's grounds for appealing against the penalties, attached to the Notice of Appeal dated 1 August 2022, were in a letter to HMRC dated 19 March 2021. Insofar as relevant it read:-

> "We only recently found out about ATED, and discussed this with our accountants. (sic) Who advised us that we would have no tax to pay as we didn't have any properties in the tax bracket. They also advised us that to comply with the ATED legislation that even though it would be a NIL return and filed after the submission date, that we should complete the return to ensure all our paperwork was in order.
>
> We want to ensure we keep all paperwork up to date with HMRC, and therefore submitted the NIL ATED return…".

**Summary of the Law**

8. The ATED legislation was introduced in the Finance Act 2013 ("FA 13"). It is an annual tax charge on UK residential properties over £500,000 which are held by companies, partnerships or collective investment schemes. In some cases an exemption from the charge is available but a return still has to be made in order to claim the exemption.

9. The appellant is a property developer and it would therefore be entitled to the exemption. All claims for relief must be made in an ATED return or an amendment to such a return. In

terms of section 159A FA 13, where a claim to relief reduces the charge to NIL, the claim may be made in a shorter type of ATED return called a Relief Declaration Return.

**The background facts**

10. The appellant is jointly owned by a husband and wife with Ms Zazzi being the wife. It is a property investment company. The first property was purchased in 2016 and is a house of multiple occupancy ("HMO") and, having been refurbished, has been a source of rental income. The appellant collects the rents and manages the lets. Ms Zazzi does the basic bookkeeping and forwards that to the accountants.

11. On 11 January 2017, for the sum of £265,000, the appellant purchased a derelict pub which had been abandoned for some five years. The purchase was financed by refinancing the first property. The refurbishment that was required was very extensive as the property had to be gutted. The material and labour costs amounted to £156,191.20 and the legal, architecture and planning fees amounted to £35,000, a total of £191,191.20. It too was turned into an HMO and was rented out from approximately August 2019.

12. The appellant's accounting year runs from 1 June in each year to 31 May in the following year. From incorporation, the appellant had used an accountant who was believed to specialise in property transactions and he had never mentioned ATED to them. The accounts to 31 May 2018 were finalised by those accountants in December 2018.

13. In the course of 2019 the appellant found that the accounting treatment of the information provided to the accountant had caused large problems. It transpired that the refurbishments had been charged to repairs and although the CIS returns were up-to-date and the builders' labour costs were known, the figures did not make sense to the appellant. Accordingly a new accountant was employed and then reviewed and amended the accounts up to and including 2019.

14. That accountant then set about reconciling the 2020 accounts on a month by month basis. Ultimately they did an adjustment in 2021 to reflect prior year errors.

15. In January 2021, in the course of a conversation with others, the husband discovered the existence of ATED. He promptly investigated the position and then telephoned the new accountant. That accountant was not aware of ATED. The appellant was advised to submit a return even if the value of the property was less than £500,000.

16. The husband is a member of a property network and asked about ATED but very few people knew anything about it.

17. The filing date for the ATED relief return for the year ending 31 March 2021 is 30 days after the first day of the period for which the appellant was within the charge to ATED in respect of the property. That would have been 30 March 2020 if the appellant was within the charge.

18. The return was received by HMRC on 31 January 2021. As we discovered in the course of written submissions, the return did not include a value for the property.

19. On 25 February 2021, HMRC issued only the £100 initial late filing penalty. On 19 March 2021, the appellant appealed that penalty (see paragraph 7 above). That letter of appeal was drafted by the new accountant.

20. On 30 March 2021, HMRC wrote to the appellant explaining that an ATED return has to be submitted and paid within 30 days of the first day within which the company became liable in a period. The 2020/21 ATED return stated that the first day in the period was 1 April 2020. Accordingly the return was due by 30 April 2020. HMRC pointed out that relief could have been claimed via the return but the relief return is subject to the same rules regarding due dates

as the liability return. In summary, all returns are due within 30 days of the first day in a period where the taxpayer has a liability to ATED regardless of whether they have to pay or can claim relief. The letter offered a statutory review or the option to appeal to the First-tier Tribunal.

21. The other penalty assessments were issued on 8 February 2022. On 10 March 2022, the appellant appealed the daily and six month penalties.

22. On 12 April 2022, HMRC issued their decision letter to the appellant upholding the decision to charge the penalties and offered a review or the option to appeal to the Tribunal.

23. On 20 April 2022, the appellant accepted the offer of a review and on 8 June 2022, HMRC issued their Review Conclusion letter upholding the decision to charge all of the late filing penalties.

24. On 20 June 2022, the appellant requested another independent review and Ms Zazzi argued that:-

(a) When the properties were purchased they were significantly below the ATED threshold but following extensive building works "…the value of one property now marginally exceeds £500,000".

(b) They had had to wait until the accounts were prepared before they could even know that the threshold had been exceeded.

(c) As property developers they are exempt from ATED.

(d) Under a "common sense approach", the penalties should be waived.

25. On 12 July 2022, HMRC replied pointing out that a decision can only be reviewed once.

26. On 1 August 2022, the appellant lodged an appeal with the Tribunal and as we have indicated the letter of 19 March 2021 furnished the Grounds of Appeal.

27. Technically that appeal is late but HMRC have offered no objection to the late appeal.

28. We have had due regard to Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") and have extended the time for lodging an appeal.

**The legal framework in relation to penalties and the parties' arguments**

29. This is an appeal by the appellant against the imposition of the late filing penalties. The initial filing penalty and the six months penalty are automatic and there is no doubt that the return was filed more than six months late (276 days). The daily penalty which applies where the return is more than three months late is subject to HMRC's discretion.

30. A taxpayer escapes liability for a penalty under Schedule 55 if HMRC or the Tribunal is satisfied that there is a reasonable excuse for the failure and the failure is remedied without unreasonable delay after the excuse ceased. Reliance by the taxpayer on any other person to do anything is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

31. If HMRC think it is right to do so because of special circumstances, they may reduce the penalty. On an appeal the Tribunal may only make a reduction for special circumstances if HMRC's decision on this aspect was "flawed" in a judicial review sense. In this case, HMRC decided not to make a reduction for special circumstances.

32. There is no statutory definition of reasonable excuse.

33. In their Statement of Reason, HMRC relied on paragraph 81 in *Perrin v HMRC* 2018 UKUT 0156 TCC ("Perrin") and we not only agree with, but are bound by, that decision. It reads as follows:-

> "81. 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."

34. We would add to that quotation the Upper Tribunal's reasoning at paragraph 82 which reads:-

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that 'ignorance of the law is no excuse', and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

35. The appellant's primary argument is that not only did they not know about the existence of ATED but that they were also unaware that they had risen above the threshold. Indeed, they believed not.

36. HMRC's primary argument is that a reasonable person seeking to check their tax obligations would visit the HMRC website. HMRC also contend that the guidance is easy to find on the website and the information is clear and unambiguous.

37. The appellant argues that there should be no penalty because there was no tax liability. However, HMRC rely on *Edwards v HMRC* [2019] UKUT 131 (TCC) where the Upper Tribunal considered whether the fact that significant penalties had been levied for late filing of returns where no tax was due was a relevant circumstance that HMRC should have taken into account. The Upper Tribunal concluded that the penalty regime in Schedule 55 established 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.

38. 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 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.

**Discussion**

39. At the outset, we make it clear that we found Ms Zazzi to be a very honest witness who was trying to do her best in a situation where, understandably, she was completely out of her depth.

40. She has co-operated fully with the Tribunal both during and after the hearing.

41. The bundle included a copy of the return and, as we have indicated and HMRC have confirmed, it does not identify the value of the property.

42. In the course of the hearing Ms Zazzi told the Tribunal that the property had been purchased in approximately 2018. The cost price was of the order of £300,000 and the refurbishment costs were approximately £195,000 or £196,000.

43. It was for that reason that on 20 April 2023, I issued Directions drawing the parties attention to those facts and to the fact that although the appellant had submitted the return, that had been done on the advice of an accountant who was not conversant with ATED and we had no evidence as to the value of the property and therefore the liability to ATED. It was also clear from the letter of 19 March 2021 that when submitting the return the appellant had not believed that they had exceeded the threshold.

44. Ms Zazzi replied promptly on 26 April 2023 enclosing a copy of the Title Register from HM Land Registry.

45. In the interim, on 24 April 2023, Mr Hackett had confirmed that the ATED return does not require that the valuation be included. He went on to argue that because it is a self-assessed tax, the onus is on the taxpayer to check and decide if they are liable to ATED and require to submit a return. Once a return is received, HMRC assume that the taxpayer meets the criteria for the ATED liability. He relied on the letter of 20 June 2022 where Ms Zazzi had indicated that the value of the property "now" was marginally over the threshold. He pointed out that HMRC's practice in those circumstances was to involve the Valuation Office Agency ("VOA") and an enquiry might then ensue.

46. On 5 May 2023, Mr Hackett provided a legal submission (see paragraph 50 below).

47. On the same day, Ms Zazzi was asked to provide confirmation as to the value of the property at the revaluation date for ATED periods from 2018/19, which was 1 April 2017. She requested that the value as at 11 January 2017 be accepted.

48. At all times we must have regard to Rule 2 of the Rules and we take the view that that is a very pragmatic suggestion. The property had to be gutted and consents obtained in order to do that. On the balance of probability the value of the property as at 1 April 2017 was certainly not above the threshold and was unlikely to have been very different to its purchase price and indeed might have been less.

49. As can be seen from paragraph 11 above, we have the total cost of refurbishment. In the course of the oral hearing, Ms Zazzi had indicated that the value of the property was believed to be the purchase price plus the refurbishment costs. That was not challenged by Ms Tariq and was in fact what instigated our enquiries about the value of the Property.

50. Mr Hackett's legal submission was to the effect that HMRC were correct to treat the conditions in section 159(4) FA 13 as having been met and therefore a return was due. He argues that because section 159(4) stipulates that a condition for relief declaration return is that the taxpayer is "within the charge" then if a taxpayer submits such a return HMRC are entitled to take the view that the taxpayer is within the charge and that therefore a return is required. The onus is on the taxpayer to prove otherwise.

51. Although the full text of the relevant legislation is set out at Appendix 1 it is helpful to focus on sub-sections (3) and (4) of section 159A Finance Act 2013 which read:-

> "(3)A relief declaration return delivered to an officer of Revenue and Customs on a particular day ("the day of the claim") is treated as made in respect of any single-dwelling interest in relation to which the conditions in subsection (4) are met (but need not contain information which identifies the particular single-dwelling interest or interests concerned).
>
> (4)The conditions are that—
>
> > (a) the person making the return is within the charge with respect to the single-dwelling interest on the day of the claim;
> >
> > (b) the day of the claim is relievable in relation to the single-dwelling interest by virtue of a provision which relates to the type of relief specified in the return (see subsection (9));
> >
> > (c) none of the days in the pre-claim period is a taxable day.

52. Of course, we accept Mr Hackett's argument that this is a self-assessed tax and so we would agree that *ex facie* HMRC would reasonably expect that if a return is submitted then the taxpayer thinks that they are within the charge. However, we do not accept the implicit argument that the appellant is within the charge simply because a return is submitted. Section 159A is not a deeming provision.

53. The return was submitted on 31 January 2021. As can be seen from paragraph 7 above, on 19 March 2021, a mere 47 days later, the appellant told HMRC explicitly that they had no properties within the charge. That letter was written on the advice of the accountant. Ms Zazzi did not think that they were within the charge, either in 2021 or in August 2022 when the Notice of Appeal was lodged. As we have recorded at paragraph 15 above, the appellant had been advised to submit a return even if the value of the property was less than £500,000.

54. In our view, it was a simple error that was swiftly rectified.

55. We certainly do note that in June 2022, Ms Zazzi said that they were then marginally over the threshold. The date that we are concerned with is the beginning of 2020. As can be seen from our narration of the sequence of events here, it was only when Ms Zazzi accessed the Land Registry records that she realised that the purchase price of the property was less than she had thought. Furthermore, it was only when she found the very precise figures for materials and labour that she realised that the figures were lower than she had previously estimated.

56. We find that as a matter of fact, although a return was submitted, the appellant was not within the charge and therefore there was no requirement for the return. Accordingly, there should be no penalties.

57. However, if we are wrong in that, we address the question of penalties. Adopting the approach in *Perrin* we accept that the appellant did not believe that they were within the charge but they had been advised to submit a return. Ms Zazzi has very clearly established that neither

accountant knew anything about ATED and they had been advised to submit a nil return in a situation where they were not within the tax bracket.

58. Clearly, the appellant should not have submitted a return. Because of what amounted to a retrospective effect of the legislation, inevitably the return was late. Equally clearly Ms Zazzi did not know that by submitting a return she would trigger the penalties. All she wanted to do was to comply with what she wrongly perceived as being a requirement in terms of having up to date paperwork for HMRC.

59. In some ways it is a circular argument but essentially since no return was necessary at that time we find that in these very unusual circumstances the appellant has established a reasonable excuse.

**Decision**

60. For all these reasons the appeal is allowed and the penalties are not upheld.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

61. 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.

**ANNE SCOTT**
**TRIBUNAL JUDGE**

**Release date: 14 August 2023**

**Finance Act 2013**

**94 Charge to tax**

(1) A tax (called "annual tax on enveloped dwellings") is to be charged in accordance with this Part.

(2) Tax is charged in respect of a chargeable interest if on one or more days in a chargeable period—

(a) the interest is a single-dwelling interest and has a taxable value of more than £500,000, and

(b) a company, partnership or collective investment scheme meets the ownership condition with respect to the interest.

(3) The tax is charged for the chargeable period concerned.

(4) A company meets the ownership condition with respect to a single-dwelling interest on any day on which the company is entitled to the interest (otherwise than as a member of a partnership or for the purposes of a collective investment scheme).

…

(8) The chargeable periods are—

(a) the period beginning with 1 April l2013 and ending with 31 March 2014, and

(b) each subsequent period of 12 months beginning with 1 April.

(9) See also section 95.

**159 Annual tax on enveloped dwellings return**

(1) Where tax is charged on a person for a chargeable period with respect to a single-dwelling interest the person must deliver a return for the period with respect to the interest

(2) A return under subsection (1) must be delivered by the end of the period of 30 days beginning with first day in the period on which the person is within the charge with respect to the interest.

(3) If the first day in the chargeable period on which the person is within the charge with respect to the interest ("day 1") is a valuation date only because of section 124 (new dwellings) or section 125 (dwellings produced from other dwellings)—

(a) subsection (2) does not apply, and

(b) the return must be delivered by the end of the period of 90 days beginning with day 1.

(3A) Where a person—

(a) would (apart from this subsection) be required in accordance with subsection (2) to deliver a return for a chargeable period ("the later period") by 30 April in that period, and

(b) is also required in accordance with subsection (3) to deliver a return for the previous chargeable period by a date ("the later date") which is later than 30 April in the later period,

subsection (2) has effect as if it required the return mentioned in paragraph (a) to be delivered by the later date.

(4) A return under this section must be delivered to an officer of Revenue and Customs, and is called an "annual tax on enveloped dwellings return".

**159A Relief declaration returns**

(1) "Relief declaration return" means an annual tax on enveloped dwellings return which—

(a) states that it is a relief declaration return,

(b) relates to one (and only one) of the types of relief listed in the table in subsection (9), and

(c) specifies which type of relief it relates to.

(2) A relief declaration return may be made in respect of one or more single-dwelling interests.

(3) A relief declaration return delivered to an officer of Revenue and Customs on a particular day ("the day of the claim") is treated as made in respect of any single-dwelling interest in relation to which the conditions in subsection (4) are met (but need not contain information which identifies the particular single-dwelling interest or interests concerned).

(4) The conditions are that—

(a) the person making the return is within the charge with respect to the single-dwelling interest on the day of the claim;

(b) the day of the claim is relievable in relation to the single-dwelling interest by virtue of a provision which relates to the type of relief specified in the return (see subsection (9));

(c) none of the days in the pre-claim period is a taxable day.

(5) The statement under subsection (1)(a) in a relief declaration return is treated as a claim for interim relief (see section 100) with respect to the single-dwelling interest (or interests) in respect of which the return is made.

(6) Subsection (7) applies where—

(a) a person has delivered to an officer of Revenue and Customs on any day a relief declaration return for a chargeable period with respect to one or more single-dwelling interests ("the existing return"), and

(b) there is a subsequent day ("day S") in the same chargeable period on which the relevant conditions are met in relation to another single-dwelling interest.

(7) The existing return is treated as also made with respect to that other single-dwelling interest.

(8) For the purposes of subsection (6)(b), the "relevant conditions" are the same as the conditions in subsection (4) to the day of the claim are to be read as references to day S.

(9) This table sets out the numbered types of relief to which the provisions specified in the left hand column relate—

…

| **Provision** | **Type of relief to which it relates** |
|---|---|

…

Section 138 or 139 (property developers) 3

(10) Where a person—

(a) has failed to make annual tax on enveloped dwellings returns in respect of two or more single-dwelling interests, and

(b) could have discharged the duties in question by making a single relief declaration return in respect of all the interests,

the failure may be taken, for the purposes of Schedule 55 to FA 2009, to be a failure to make a single annual tax on enveloped dwellings return.

(11) In this section—

- "pre-claim period" has the same meaning as in section 100;
- "taxable day", in relation to a person and a single-dwelling interest, means a day on which the person is within the charge with respect to the interest, other than a day which is relievable in relation to the interest.

**APPENDIX 2**

**Penalties - RELEVANT STATUTORY PROVISIONS**

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

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

> 4—
>
> (1) P is liable to a penalty under this paragraph if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

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

> 5—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

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

> 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.

5. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

23—

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

(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.

6. 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.

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

> 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.