UT Neutral citation number: **[2022] UKUT 216 (TCC)**

UT (Tax & Chancery) Case Number: UT/2021/000153

Upper Tribunal
(Tax and Chancery Chamber)

INCOME TAX - late filing penalty – whether FTT erred in law in relation to issues of reasonable excuse, special circumstances, and deliberate withholding of information – no – appeal dismissed

Hearing venue: Royal Courts of Justice, London

Hearing date: 30 May 2022
Judgment given on: 08 August 2022

Before

JUDGE SWAMI RAGHAVAN
JUDGE ANDREW SCOTT

Between

MATTHEW HARRISON

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ximena Montes Manzano, Counsel, instructed by Hazlewoods

For the Respondents: Joshua Carey, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

DECISION

1. The appellant, Mr Harrison, appeals against a decision of the First-tier Tribunal (Tax Chamber) ("FTT") issued on 15 May 2021 ("the FTT Decision"). Mr Harrison was, at the relevant time, a director of a small group of companies trading in residential care homes and supported living. The FTT Decision upheld a tax-geared penalty of £42,066.09, which HMRC imposed on him under Schedule 55 to the Finance Act 2009 ("FA 2009") for filing his 2014/15 self-assessment return well over 12 months late.

2. The FTT rejected Mr Harrison's case that a series of distressing events in Mr Harrison's personal and business life (which the FTT accepted took place) meant that under the relevant statutory provisions: 1) Mr Harrison had a reasonable excuse for filing the return late 2) there were special circumstances that would warrant a special reduction of the penalty 3) he had not deliberately withheld information that would enable HMRC to assess his tax liability.

3. Mr Harrison appeals, with the permission of the Upper Tribunal, in relation to each of these issues.

Law

4. Schedule 55 to FA 2009 provides for a penalty regime in respect of returns and other documents, which are required to be sent to HMRC by the relevant filing date and are filed late.

5. Under paragraph 1 of Schedule 55, a penalty is payable by a person where the person "fails to make or deliver a return…on or before the filing date".

6. Paragraphs 3 to 5 impose a series of escalating penalties starting with a fixed penalty of £100, daily penalties of £10 per day, where the return is more than 3 months late (capped at £900), and then a tax-geared penalty (the greater of 5% of any liability to tax which would have been shown on the return or £300) if the return is more than 6 months late.

7. This appeal is concerned with the penalty under paragraph 6 to Schedule 55 which is charged when the return still has not been filed after 12 months.

8. Paragraph 6 provides for tax-geared penalties, subject to a minimum amount. Paragraph 6(1) provides the person is liable to a penalty under that paragraph "if (and only if) [the person's] failure continues after the end of the period of 12 months beginning with the penalty date". The term "penalty date" is defined in paragraph 1(1) as "the date on which a penalty is first payable for failing to make or deliver [the return] (that is to say, the day after the filing date)".

9. The percentage amount by which the tax is calculated varies according to the category of information withheld by the failure to make the return and whether the withholding of information is done deliberately (and if so the withholding was "deliberate and concealed" or "deliberate but not concealed").

10. There is no dispute Mr Harrison was under an obligation to file his 2014/15 return by 31 January 2016 but that he filed it late more than 12 months later on 13 September 2018. The penalty HMRC charged was at 35%. That was the relevant minimum percentage for the category of information withheld and on the basis the withholding was "deliberate but not concealed". The penalty was the minimum amount within the 35%-70% range for such penalties on the basis of Mr Harrison's quality of disclosure.

11. Paragraph 23 prevents a penalty liability arising where the taxpayer has a "reasonable excuse". That paragraph provides as follows, so far as relevant to this appeal:

> **"Reasonable excuse**
>
> 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 [the person] 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)—
>
> ....
>
> (c) where [the person] had a reasonable excuse for the failure but the excuse has 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."

12. The Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) (at [81]) suggested the following four stage approach to the application of paragraph 23:

> "(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."

13. We deal with the legislation relevant to "special circumstances" and "deliberately withholding information" when we deal with the grounds concerned with those issues (Grounds 2 and 3 respectively).

Background and FTT Decision

14. The basic underlying facts which the FTT established regarding the events affecting Mr Harrison and his dealings with his accountant are not in dispute. Rather, in broad terms, and amongst other alleged errors, his case challenges the inferences the FTT drew from those facts and how those facts fell to be analysed under the legislation.

15. Mr Harrison filed a witness statement with exhibits and was cross-examined by HMRC's litigator (although Ms Montes Manzano appeared for the appellant, both before the FTT and us, Mr Carey, for HMRC did not appear below). There was no finding that Mr Harrison was not a credible witness, and we have, where indicated below, elaborated on the FTT's findings by reference to Mr Harrison's

evidence from his witness statement to help understand the detail of the factual background and to provide context for the discussion on the grounds of appeal.

16. It was accepted that HMRC's request for Mr Harrison's tax return was properly addressed and received by Mr Harrison. The return was due on 31 January 2016 but was not submitted until just over 2 years and 7 months later (on 13 September 2018).

17. In the run-up to that filing deadline, and in the period thereafter but preceding the date the return was filed, the FTT accepted that Mr Harrison suffered a series of distressing events and crises. In December 2015 he was subject to a violent carjacking. On 21 April 2016 he was involved in a car crash resulting in neck injuries which required ongoing treatment from a chiropractor. In June 2016 his mother was diagnosed with cancer passing away in January 2017. Mr Harrison was not, as a consequence, able to work full time from October 2016 to April 2017. In June 2017, Mr Harrison's daughter gave birth, she subsequently suffered from health problems, was sectioned, and Mr Harrison and his wife became carers of their grandchild (FTT [14]). In addition, the FTT accepted Mr Harrison's care home and assisted living business faced "considerable financial and operational difficulties" in the period 2015-2018. These included matters such as obtaining additional funding, trying to sell the business, and dealing with disputes with key employees and a shareholder, and also complaints to the Care Quality Commission and the Commission's suspension of Mr Harrison's personal authorisation (FTT [15]).

18. Mr Harrison had asked his former accountants (Financial Accounting Services (FAS)) to prepare his 2014/15 return. He was in the process of changing the business' accountants to new ones, Hazlewoods, and asked Hazlewoods to review FAS's computations. Hazlewoods advised that a deferred payment due in connection with a financial swap arrangement following a share-for-share exchange ought to be treated for tax purposes as a payment of a dividend rather than capital. FAS amended the tax computations, and in an e-mail dated 21 January 2016, agreed to file Mr Harrison's return on that basis. As far as Mr Harrison was concerned, FAS were to file the return by the 31 January 2016 deadline.

19. When Mr Harrison appointed (on 10 March 2016) Hazlewoods as his personal tax advisors they spotted that FAS had failed to file the return. Hazlewoods, who had not been engaged to file that return, suggested that Mr Harrison contact FAS to remedy the failure to file the return. This was because it was FAS who had been engaged to file the return but had not done so.

20. In relation to Mr Harrison failing to contact FAS, his witness statement [36] explained:

> "…this was one fight too many during a period where I was suffering personally and professionally. My main focus remained on the business, the livelihood of the employees and families that relied on me and my own health and family, during a horrible time. Sorting out my tax return was just at the bottom of my priorities' list."

21. Hazlewoods continued to advise of FAS's failure to file the return, pointing out that Mr Harrison should not have to pay for Hazlewoods to recreate the return when it was on FAS's system and all FAS had to do was submit it. Mr Harrison's evidence recounted that "with the passing of time and Hazlewoods receiving penalty notices now that they were authorised as my agent, they suggested I get them to recreate the return prepared by FAS, which they did and sent through to me for my approval on 20 September 2017". He explained that at this stage he was still suffering from depression due to his mother's death and his becoming a full-time parent due to his daughter's illness and that despite it being relatively simple to approve the return that "for reasons that [he] could only put down to mental anguish at the time [he] did not do so until [he] had started to come out of [his depression] and the return was finally submitted on 13 September 2018".

22. The FTT accepted Mr Harrison had been in a difficult and stressful position in 2016 and 2017 but considered the evidence and submissions regarding his difficulties (which the FTT accepted had to be considered in aggregate) did not establish a significant lack of capability or capacity on Mr Harrison's part during the whole of the period from late 2015 to September 2018. It found that Mr Harrison "remained on top of a range of difficult business matters during the period. Even allowing for his part-time working and his reliance on a key colleague, it was clear he remained involved in his business and was working to resolve the financial and operational problems" (FTT 26]).

23. At [28] the FTT concluded that:

> "whilst Mr Harrison faced real difficulties in managing all of the demands on him between 2016 and 2017, by September 2017 he was, by his own account, in a position where he had taken the initiative to ask his new accountant to prepare the return and had received a draft of his return. He understood its contents and regarded them as accurate, he knew that the return needed to be submitted and he was aware that he was paying fines for late submission. At that stage he just needed to sign the returns submitted to HMRC, but he did not do so for another year. During this year, the evidence shows that he was working, with others, on his business affairs and successfully resolving complex issues, notwithstanding the depression that affected him at this time."

24. The FTT then made its conclusions on the reasonable excuse, special circumstances and "deliberately withheld" issue which it is convenient to discuss below when we deal with the specific grounds of appeal on those respective issues.

Grounds of appeal

Ground 1: reasonable excuse – misdirection of law on the test applicable for reasonable excuse

25. The FTT's reasons for concluding that Mr Harrison did not have a reasonable excuse were expressed as follows:

> "[29] the Tribunal considers that Mr Harrison has to prove both that a reasonable excuse existed and that he had acted without any unreasonable delay once any excuse had ended. A reasonable excuse is something that stopped him from meeting a tax obligation on time despite him having taken reasonable care to meet that obligation. The Tribunal takes account of Mr Harrison's experience and relevant attributes, and his situation at the relevant time and the external pressures and the grief and stress that he faced. The *Perrin* case referred to above establishes 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.
>
> [30] The Tribunal recognises that Mr Harrison faced a number of personal issues, including bereavement and serious illness within his immediate family as well as prolonged business difficulties. These issues would have affected his ability and that of a reasonable person to deal with his tax affairs in a timely and efficient manner in the course of 2016 and 2017. However the Tribunal finds that Mr Harrison had the capability and initiative to manage his business affairs during most of this period. Whilst some delay in submitting the Return was understandable, the overall length of the delay in submitting the Return was unreasonable. For most of the period of the delay in submitting the Return, Mr Harrison was capable of managing his tax affairs and submitting the Return had he chosen to give this work sufficient priority when compared with his other business and financial responsibilities. The Tribunal concludes that there is no reasonable excuse for the delay in submitting the Return."

26. Under this ground, Ms Montes Manzano submitted that the FTT had erred in law in two ways. First, it wrongly adopted (as a sole determinant) a test of whether Mr Harrison had established he was suffering from a significant lack of capability or capacity during the whole of the relevant period instead of the correct four stage analysis identified by the UT in *Perrin*. The test was not concerned with showing an inability to function or work – that amounted to an extra hurdle. The FTT was required to evaluate all of the relevant circumstances but failed to take account of the relevant consideration of the existence and impact of the appellant's mental illness ignoring the fact that he had no choice but to work to support himself, his family and staff. The FTT did not ask itself if the failure to file was an objectively reasonable way for a taxpayer to respond where the taxpayer was suffering from the same mental/physical hardship and other business and family issues during the relevant period.

27. Second, the FTT wrongly approached the third stage in *Perrin* as though an unreasonable overall length of delay was the applicable test, wrongly eliding the third and fourth stages of *Perrin*. It is only at the fourth stage (whether the failure was remedied without unreasonable delay) that the length of delay became relevant.

Discussion on Ground 1

28. While it is accepted by the appellant that the FTT correctly stated the relevant legal principle (in that it set out an excerpt of the four stage *Perrin* approach) the appellant's case is that the FTT then failed to apply those principles correctly. Both parties referred us to the following extract from *DPP Law v Greenberg* [2021] EWCA Civ 67 (at [58]) dealing with how an appellate tribunal should deal with the situation where the tribunal has correctly stated the legal principles but there is an issue over the tribunal's application of the principles. In that case the appeal was from the Employment Appeal Tribunal in relation to a rejection of a claim for unfair dismissal:

> "Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

29. We observe that the appellant's two points made under this ground of appeal couch the error of law in terms of not following the approach in *Perrin*. Ms Montes Manzano's written submissions (her oral submissions did not press the point as vigorously) came close to elevating that approach to a statutory requirement. That was clearly not the purpose or the effect of the guidance the UT gave in *Perrin*. That guidance was put as the way in which the FTT could "usefully approach" the issue and appeared in the UT decision in the "Final comments" section after the UT had already concluded it could not interfere with the FTT's decision in that case. We agree with Mr Carey's submission that the *Perrin* approach is good practice but was not intended to be a strait jacket. Rather, it is a helpful way for the FTT to address the statutory questions.

30. Stages three and four of *Perrin* reflect the fact that paragraph 23 of Schedule 55 deals with two different questions: 1) whether there was a reasonable excuse and whether it ceased before the end of the period before the failure was remedied, and 2) whether, if there was a reasonable excuse and it

had ceased, the failure to file was then remedied "without unreasonable delay". *Perrin* confirms these questions are to be approached on an objective basis but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themselves at the relevant time or times.

31. Before us, the parties were agreed that a reasonable excuse must be made out by reference to one or more circumstances which existed as at the relevant filing date. We agree and consider this is clear from the legislation (where the penalty in respect of the "failure" is a reference to the failure to file by the deadline set out in the Schedule). Events which take place after that deadline would not therefore be relevant (except so far as, as a matter of evidence, they threw light on relevant circumstances existing at and before the filing date). Circumstances that existed after the filing date could of course be relevant to the second part of paragraph 23, namely whether the failure to file the return had been remedied without unreasonable delay.

32. The FTT did not make any explicit finding of what the reasonable excuse for the failure to file the return was and thus when any such excuse ceased. However, reading the decision fairly as a whole, the FTT must, we consider, be taken to have accepted that there *was* a reasonable excuse for the failure (in other words the failure to file the return by 31 January 2016) but that the reasonable excuse did not subsist throughout the period ending on 13 September 2018 and that the failure to file had not been remedied without unreasonable delay.

33. Although the way the case was argued before the FTT referred to a whole series of difficult events, the only possible candidates that could constitute a reasonable excuse that existed as at the filing date were: 1) the operational and financial difficulties (which started in 2015); 2) the aftermath of the car-jacking; and 3) reliance on the instructed accountant (who, despite being instructed to do so, had not filed the return in circumstances where Mr Harrison had no reason to believe that it had not been filed until his new accountants told him in March 2016 that it had not been).

34. Whichever circumstances, whether individually or in combination, the FTT considered to constitute a reasonable excuse, it is clear the FTT did not consider that any of them were reasonable excuses which lasted until 13 September 2018. It was then relevant to consider whether the failure to file was one that was remedied without unreasonable delay after the excuse had ceased. Thus, although the various events and Mr Harrison's mental state were advanced as a reasonable excuse, to the extent these occurred after the 31 January 2016 filing date, they could be more accurately understood in terms of the key issue which fell for resolution, namely whether the filing of Mr Harrison's return on 13 September 2018 was consistent with his having remedied the failure to file without unreasonable delay.

35. In resolving this question it is true that the FTT adopted the frame of reference of "capability" and "capacity". That was, however, how the issue was put by the parties - not just by HMRC but also by the appellant. We can see why that course was taken in the particular circumstances of this case: whether Mr Harrison had capacity or was capable of filing the return sooner conveniently framed the essence of the question of whether, once the reasonable excuse for failure to file by the 31 January 2016 had ceased, Mr Harrison had remedied the failure without unreasonable delay. As explained in *Perrin* (stage 4) this issue was to be decided objectively but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found themselves at the relevant time or times.

36. Ms Montes Manzano further submitted that the FTT failed to take into account as a relevant consideration the existence and impact of the appellant's mental illness and his financial and physical problems. The FTT did not ask itself if his "avoidance symptoms" (i.e. avoiding dealing with the

outstanding return) were an objectively reasonable way to respond for a taxpayer suffering from the same mental/physical trauma, business and family issues during the relevant period. In support, she referred to *AZ v HMRC* [2011] UKUT 17 (TCC). In that case the taxpayer was the victim of a vicious robbery and harboured a resentment towards the Inland Revenue who had pursued her for tax when the taxpayer's assailant had emptied the taxpayer's bank accounts of funds. Ms Montes Manzano referred us to an excerpt from [11] of that decision for the proposition that it is widely known and, in her submission, taken on judicial notice, that mental health problems cause widespread compliance difficulties for both taxpayers and HMRC. There is no reason in principle why mental health problems might not amount to a reasonable excuse. HMRC accept that. But whether that is so in a given case will depend on the evidence before the tribunal. Here, there was no specific evidence of Mr Harrison suffering from avoidance symptoms, and the FTT made no finding of fact on that matter. This case, where the FTT noted there was no medical evidence regarding the depression, contrasts with *AZ* where the UT accepted the consultant psychiatrist's evidence that the taxpayer's mental state had caused "avoidance symptoms" (which the UT explained meant avoiding all correspondence to do with the Inland Revenue and the Criminal Injuries Compensation Authority).

37. Here, the FTT clearly took account of the depression but came to the view (at [28]) that, notwithstanding his depression, Mr Harrison was still able to work. And if he was able to work, he was able to file his tax return. That was a conclusion, in our view, that was plainly open to the FTT on the evidence before it.

38. Ms Montes Manzano submitted that, even if Mr Harrison were to be regarded as able to continue working despite the various bereavement, family and medical issues, the FTT ignored the fact that he had no choice but to work to support himself, his family and staff. She drew our attention to an FTT decision *Christina Mary McDonald v HMRC* [2017] UKFTT 265 (TC) where the FTT noted that the taxpayer, who had caring responsibilities for both her parents, had nevertheless to work to support herself.

39. Whether, by reference to specified matters, a taxpayer's case on reasonable excuse, or the reasonableness of the delay in filing a return, is undermined by their continuing to do other things (such as continuing to work) plainly depends on evaluating the particular factual circumstances. It is not therefore surprising that different FTTs have reached different conclusions in this area. In *McDonald,* where the taxpayer was self-employed as a therapist and counsellor, the FTT found that the taxpayer having to care for her parents and attending to their needs was a requirement that took up almost every spare moment beyond dealing with her patients. In this case Mr Harrison's work role was different: for example, there were tasks that could be delegated. Moreover, as HMRC pointed out, the period of delay in filing in *McDonald* was in the order of 9 months whereas in this case it was just over 2 and a half years.

40. As to the appellant's second point under this ground of appeal, we agree with Mr Carey for HMRC that the FTT was not using the overall length of delay as some kind of benchmark. All the FTT was saying with respect to the length of delay was that Mr Harrison could not be said to have filed without unreasonable delay.

41. While we consider it would have been better if the FTT had separately made findings on what the reasonable excuse was, when the excuse had ceased and whether Mr Harrison had remedied the failure without unreasonable delay, we do not consider that, assessing the FTT decision as a whole, the FTT erred in law. The FTT clearly appreciated there were two aspects to the statutory test (see [29]) and, as HMRC point out, clearly had a reasonable person in mind ([30]) in carrying out its evaluation. Its recourse to whether Mr Harrison had the capacity to file the return was simply another way of addressing the core question as to whether someone in Mr Harrison's position was acting

without unreasonable delay in filing the return when he did. The logic of the FTT's decision was that a person who had been subjected to the events Mr Harrison had, and who was suffering from depression but who was nonetheless continuing to carry out significant and complex work-related tasks, would reasonably have been expected to remedy the failure to file sooner than Mr Harrison had done.

42. The FTT therefore grappled with the key question in view of the arguments being put to it. It did not make an error of principle. We therefore reject this ground of appeal.

43. If we are wrong in the above assessment, the error would not have been in failing to adopt the *Perrin* approach (which as we have discussed was guidance) but in not recognising the separate specific statutory questions in paragraph 23 of Schedule 55 by making explicit what constituted the reasonable excuse and then determining when the excuse ceased before moving on to consider whether the return was filed without unreasonable delay.

44. The parties' post-hearing submissions helpfully clarified what test should be applied if we did find there to be an error of law and the question then arose of whether the UT should exercise its discretion to set the decision aside. The "crucial, and usually decisive" test, as explained in the Court of Appeal's judgment in *Degorce v HMRC* [2017] STC 2226 per Henderson LJ (at [95]), is whether the error of law is "material". Although there was some disagreement in the detailed application of that test of materiality, it is clear from *Degorce* the UT should set aside the decision if it is satisfied the error of law "might (not would) have made a difference to that decision".

45. We are confident, however, that if there was an error in the way described above, and if it was rectified, the disposition of the issue by the FTT would have been the same. Mr Harrison's evidence of the difficulties he faced (including his depression) were accepted by the FTT but it concluded that, despite this, he was nevertheless able to carry out other demanding and complex work-related matters before the return was filed. The cure for the legal error, which would involve the FTT stating the reasonable excuse and then when it ceased (and it is clear the FTT considered it ceased well before September 2018), would make no difference to the analysis that Mr Harrison had not filed his return without unreasonable delay. The outcome – that paragraph 23 of Schedule 55 did not apply to remove the penalty liability - would remain the same. The error would not therefore be material and would not have resulted in our exercising the discretion to set the decision aside.

Ground 2: special circumstances

Relevant law

46. The special reduction provisions appear in paragraph 16 of Schedule 55 and provide:

> **"Special reduction**
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> 16
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (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."

47. On appeal to the tribunal, where the person appeals the amount of the penalty the tribunal may, under paragraph 22 of Schedule 55, either affirm HMRC's decision or substitute it with another

decision which HMRC had power to make. If substituting the decision the tribunal can only (under paragraph 22(3) of that Schedule) apply the special reduction under paragraph 16 to a different extent if it "thinks that HMRC's decision in respect of the application of paragraph 16 was flawed". Under paragraph 22(4) "flawed" means "flawed when considered in the light of principles applicable in proceedings for judicial review".

HMRC's decision on special circumstances

48. Although there was originally some dispute as to what set of communications between HMRC and Mr Harrison were to be regarded as setting out HMRC's decision on the special reduction issue, by the time of the hearing Ms Montes Manzano helpfully narrowed the scope of documents to the penalty assessment letter and HMRC's internal review conclusion. HMRC said it was also relevant to consider the penalty explanation letter. All were before the FTT and we set out the relevant parts of these documents in date order.

49. On 4 December 2018 HMRC wrote to Mr Harrison regarding the penalty which HMRC intended to charge inviting his views on any relevant information that had not already been taken into account which could affect HMRC's view on, amongst other matters, the circumstances that might lead to HMRC reducing the penalty. In the attached table next to the column "Other reductions or adjustments" HMRC stated that "Based on the information we have, we don't consider there are any special circumstances which would lead us to further reduce the penalty."

50. On 8 January 2019 HMRC issued a notice of penalty assessment to Mr Harrison. Mr Harrison's accountants responded on 6 February 2019 setting out details of various matters, such as the difficulties with the previous accountants and Mr Harrison's personal and business difficulties which they considered constituted a reasonable excuse for why a "deliberate" penalty should not be imposed. HMRC's detailed review conclusion letter of 28 March 2019 set out the relevant law and the facts which they had taken into account and considered the issue of reasonable excuse, Mr Harrison's behaviour and the nature and quality of the disclosure Mr Harrison had made for the purposes of calculating the penalty. The letter then included the following section under the heading "Special reduction":

> "Schedule 55 of FA 2009 requires HMRC to consider special reduction. Special circumstances are something that is not otherwise provided for in the legislation. Special circumstances are uncommon or exceptional circumstances that should be clearly recognisable as such and are completely separate from matters which relate to reasonable excuse.
>
> In the First-tier tribunal decision *Hesketh & Anor v HMRC* [2017] UKFTT 871 (TC) Judge Mosedale considered what a special circumstance is:
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> "…In summary, it seems to me that the alleged special circumstances must be an unusual event or situation which does not amount to a reasonable excuse but which renders the penalty in whole or parts significantly unfair and contrary to what Parliament must have intended when enacting the provisions"
>
> I have carefully considered the information available and having regard to the circumstances of this case, including your ill health, I have not found any circumstances which would merit a special reduction of the penalty."

51. Before the FTT, the appellant made various arguments, some of which he maintained before us as discussed below, that the FTT had jurisdiction to apply a reduction in accordance with the legislation because HMRC's decision on the special reduction was flawed.

52. The FTT Decision addressed the issue as follows:

> "31. Mr Harrison's claim that special circumstances existed for the delay in submitting the return was considered briefly by HMRC. HMRC considered this claim and the legal test that is required in forming a judgement on this point. HMRC stated that they had considered the information available, the circumstances in this case and Mr Harrison's ill health and had not found any uncommon or exceptional circumstances. Ms Montes Manzano explained the reasons for Mr Harrison's appeal on this point and the relevant legal analysis in the hearing and concluded that HMRC's decision on this point was flawed. The tribunal noted that in asserting that special circumstances exist, Mr Harrison relied on the same facts and arguments as were put forward in relation to his claim that a reasonable excuse existed. The tribunal concluded that the decision of HMRC on this point, whilst brief was not flawed as their reasoning was apparent to Mr Harrison. The tribunal also concluded that the level of incapacity that affected Mr Harrison during the period of delay in submitting the return was not so exceptional or unusual as to amount to special circumstances in the terms provided for in Schedule 55. Mr Harrison had the capability to understand and discharge his obligation to file a Self-assessment tax return."

53. Under this ground, Ms Montes Manzano submitted that the FTT's conclusion was wrong in law on various counts. The FTT did not recognise, as it ought to have done, that: 1) HMRC's decision had failed to give appropriate reasons and 2) the test HMRC adopted was wrong in law as it was contrary to authority (*Edwards v HMRC* [2019] UKUT 131 (TCC)) because it impermissibly glossed the relevant legal test. Furthermore, she submitted that the FTT had failed to deal with the appellant's submissions on these points – it was therefore unclear whether they were given any consideration and/or why they were disregarded or dismissed.

54. We will address the legal test first. The UT's decision in *Edwards* made clear there was no reason to add any gloss to the phrase "special circumstances". It endorsed the discussion of the interpretation of that phrase in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC) (at [72]-[74]) that:

> "…The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

55. The UT also agreed that "special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration".

56. That decision was published on 1 May 2019 before the FTT hearing in this matter but after HMRC's review conclusion regarding special circumstances on 28 March 2019. HMRC did not, as Ms Montes Manzano acknowledges, have the benefit of *Edwards* in contrast to the FTT. However, because of the declaratory effect of case-law, it is still relevant to consider whether the appellant's argument that the legal test HMRC used was wrong and therefore that the FTT was wrong not to recognise that decision as flawed.

57. *Edwards* ultimately confirmed that HMRC, and where appropriate the FTT, simply need to focus on the term used in the legislation. Beyond being relevant to the issue under consideration, the circumstances must be "special" – no more and no less. There is nothing special about the term "special". Although the test HMRC used was expressed in different terms, we consider it reflected the substance of the applicable test. HMRC referred to the circumstances being "uncommon or exceptional". Those terms, as pointed out by the FTT in *Advanced Scaffolding*, did not "really take the debate any further". In other words those terms did not add anything; neither did they detract from

the term "special". In so far as HMRC referred, by reference to *Hesketh*, to the circumstances not being ones which amounted to a reasonable excuse, that was not relevant as HMRC had not accepted that any of the circumstances amounted to a reasonable excuse. To the extent HMRC had in mind the suggestion in *Hesketh* that to be special the circumstance had to render the penalty "…in whole or part significantly unfair and contrary to what Parliament must have intended when enacting the provisions" we would note that there is plainly a great deal of overlap between that and the circumstances which HMRC or the tribunal might consider to be special. The appellant does not identify in what respect this imposed a more stringent requirement.

58. As to the allegation that HMRC's reasons were inappropriate, in that they left Mr Harrison in the dark as to why his case on special circumstances had been rejected, we consider there was little – and Ms Montes Manzano could not identify anything specific - that could meaningfully be said by way of additional explanation beyond explaining, as HMRC did, that they did not consider the circumstances put forward to be sufficiently special to warrant a reduction. It was clear from the communications between Mr Harrison's representative and HMRC what the circumstances were that fell to be considered. There were none in addition to those he had put forward in respect of his case on reasonable excuse which HMRC had already rejected earlier in the review conclusion. In those circumstances it would have served little useful purpose to repeat these in the special reduction section of the review letter. HMRC appreciated the need to give the matter due consideration and did so. The consideration of whether the circumstances advanced were sufficiently special to warrant a reduction was a straightforward matter of judgment entrusted to HMRC which they duly carried out. In the particular context of this case we consider the reasons HMRC gave were adequate.

59. Ms Montes Manzano also criticised the FTT's decision for being inadequately reasoned in that it neglected to mention the various points of controversy, in particular her submission on *Edwards* and HMRC's impermissible glossing of the test set out there. Mr Carey suggested that no permission had been given to challenge the adequacy of the FTT's reasoning but we note the point was dealt with in the grounds of appeal in relation to which the UT granted permission so we will deal with it.

60. The FTT simply noted "HMRC considered [the special reduction claim] and the legal test that is required in forming a judgement on this point". The FTT's reasoning (see above), like HMRC's as the FTT noted, was brief. That is no indication, however, of inadequacy. The FTT was clearly aware from the appellant's submission before it of *Edwards* and must be taken to have formed the view that HMRC's test, although formulated differently, was the same in substance. Although we have chosen above to elaborate on why that was the case, the FTT's position, and the reasons for the FTT's view that there was no legal error in HMRC's test, ought to have been apparent to the appellant given the terms of HMRC's decision and as *Edwards* was in essence simply an instruction to focus on the word actually used in the legislation.

61. As regards the FTT's consideration of whether the circumstances advanced by Mr Harrison amounted to special circumstances, Ms Montes Manzano argued that the FTT erred in applying a test of inability or incapacity with regard to filing the return – that was again inconsistent with *Edwards* and amounted to taking an irrelevant consideration into account. However, this argument would only become relevant if we agreed with the appellant that the FTT was bound to find that HMRC's decision on special circumstances was flawed, that the FTT's decision should be set aside, and that the UT should remake it. Had it become necessary to deal with this issue in this way, we would not have considered it necessary to disturb the FTT's view that the circumstances advanced did not amount to special circumstances on the basis that this was a conclusion that was clearly open to it. That Mr Harrison continued to work to the degree he did was plainly a relevant matter to consider in determining whether there were special circumstances just as much as it was in respect of whether

the failure to file had been remedied without unreasonable delay for the purposes of paragraph 23 of Schedule 55.

62. Ms Montes Manzano's criticism that the FTT was wrong to consider for itself whether there were special circumstances because this was relevant only if it found HMRC's decision to be flawed does not take matters further. This part of the FTT's decision must, we think, be regarded as the FTT giving its view on an obiter basis. Any error in this respect would not be material to the decision because if the matter were approached correctly (i.e. the FTT appreciated it had no jurisdiction to make a reduction where it found the decision was not flawed) this would simply mean the FTT would have made it clear that its view that the special circumstances were not special circumstances was given on an obiter basis.

Ground 3: information deliberately withheld

63. The statutory context for this issue is paragraph 6(2) of Schedule 55. That provides that "where by failing to make the return [the person] deliberately withholds information which would enable or assist HMRC to assess [the person's] liability to tax" the penalty is to determined according to further provisions. Those provisions then draw a distinction between situations where the withholding of information is "deliberate and concealed" and where the withholding of information is "deliberate but not concealed". In the first case the penalty amount, depending on the category of information, is a specified percentage of "any liability to tax which would have been shown in the return in question". The former situation results in the penalty being calculated by reference to higher percentages. In this case HMRC considered the withholding of information to be "deliberate but not concealed", which resulted in the percentage of 70% being applied. That, as already mentioned, was reduced to the minimum percentage possible under the legislation to 35% on the basis of the quality of Mr Harrison's disclosure.

64. Mr Harrison's case before the FTT was that, in failing to make the return, he had not deliberately withheld information. The FTT Decision addressed the issue as follows**:**

> "32. The Tribunal considered the question of whether HMRC were correct to conclude that Mr Harrison had deliberately withheld information which would enable HMRC to assess his liability to tax. The Tribunal considered the submission and evidence of the parties on this issue. The Tribunal's findings of fact as set out above are that by September 2017 Mr Harrison was, by his own account, in a position where he had taken the initiative to ask his new accountant to prepare the Return, he had received a draft of his Return, he understood its contents and regarded them as accurate, he knew that the Return needed to be submitted and he was aware that he was paying fines for late submission. The Tribunal found that Mr Harrison had the capability to take the steps required to fulfil his responsibilities with regard to filing the Return. In the light of these findings, the Tribunal concluded that Mr Harrison was aware of what he was required to do, and he would have been aware that he had prioritised other demands on his time ahead of submitting the Return. He was therefore conscious of the decision that he had made and must be regarded as having taken this decision deliberately. The tribunal does not suggest that this was a calculated act undertaken for gain, merely that Mr Harrison was aware of the delay in submitting the Return and the consequences that this would have for HMRC and for him and delayed for a lengthy period doing anything to resolve his failure. The Tribunal agrees that the penalty in this case should be assessed on the basis that Mr Harrison's failure was deliberate.

65. Mr Harrison's ground of appeal in relation to the conclusion that Mr Harrison deliberately withheld information takes the form of an *Edwards v Bairstow* challenge to a factual finding of the FTT. It is argued that the FTT erred in law because there was no evidence to support the finding that Mr Harrison deliberately withheld information or, alternatively, the evidence contradicted the finding.

The particular finding under challenge appears at [28] and was repeated at [32] of the FTT Decision (set out at [23] and [25] above) that:

> "by September 2017 [Mr Harrison] was, by his own account, in a position where he had taken the initiative to ask his new accountant to prepare the Return and had received a draft of his Return".

66. The finding was, it is submitted, significant to the FTT's conclusion as it led the FTT to wrongly conclude (at [32]) that Mr Harrison "had the capability to take the steps required to fulfil his responsibilities" and therefore he deliberately intended not to file his tax return. Ms Montes-Manzano highlights Mr Harrison's evidence that it was Hazlewoods who took the initiative (by suggesting that Mr Harrison get them to recreate the return prepared by FAS, which Hazlewoods then sent through to Mr Harrison for his approval on 20 September 2017). This was reflected in the way the FTT described (at [19]) how Mr Harrison "was persuaded" that Hazlewoods should recreate the return. Mr Harrison's evidence was that his approval of the return "should have been a relatively simple task" but that "for reasons [he could] only put down to mental anguish at the time, [he] did not do so until [he] started to come out of his depression". Mr Harrison was not challenged in that evidence in cross-examination. The FTT was not entitled to make the impugned finding because it was Hazlewoods who took the initiative to get the new return prepared and due to his poor mental health Mr Harrison was unable to instruct his representative properly or at all. There was no evidence that supported a finding that Mr Harrison, in his depressed state, had consciously decided to withhold information from HMRC.

67. We reject the submission that the FTT was not entitled to make the challenged finding of fact. The finding was one that was, at the very least, open to the FTT to make: there was sufficient evidence for it, and the evidence which the appellant says was contrary to it was evidence which the FTT could, and did, reject. The FTT did not have to, and did not, accept that Mr Harrison was unable to file his return in view of his mental state.

68. Regarding the suggestion that the evidence was not challenged, although HMRC do not dispute Ms Montes Manzano's record that there was no cross-examination challenging Mr Harrison's account of his mental state, they say it would have been clear from the way in which HMRC had put its case (both in its Statement of Case and subsequently in its skeleton argument) that HMRC were saying that Mr Harrison prioritised dealing with his business over his tax affairs. HMRC's Statement of Case did not, however, address Mr Harrison's lack of ability to deal with his tax affairs due to mental health (his evidence setting it out had of course not been served at that point). HMRC's skeleton argument made the point (in the context of whether depression amounted to a reasonable excuse) that there was no documentary evidence regarding the depression or that he was unable to carry out his director's duties. While it is possible to say in the light of this that HMRC did not accept that Mr Harrison's evidence was to be taken at face value, it was not clear why HMRC considered Mr Harrison's evidence on the effect of his depression was not as he had stated it to be.

69. HMRC's better answer to the appellant's point, which we understand Ms Montes Manzano conceded in reply, is that even if the evidence was not regarded as challenged, the FTT was not bound to accept the evidence but could reach its own view on it in the light of the totality of the evidence. Mr Carey referred us to *Peter Griffiths -v- TUI (UK) Ltd* [2021] EWCA Civ 1442, which concerned whether the trial judge had to accept an expert's "uncontroverted" report ("uncontroverted" was the term which the judge on first appeal had used, and which the Court of Appeal accordingly adopted, to mean there was no factual evidence undermining the factual basis of the report, no competing expert evidence and no cross-examination – see [34]). Asplin LJ, having surveyed the relevant authorities, rejected the suggestion that there was such a strict rule stating at [69] that "the approach

to such evidence all depends on the circumstances." Nugee LJ agreed with her conclusions and added this (at [81]):

> "As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."

70. The totality of the evidence included Mr Harrison's own evidence regarding the complex and demanding work tasks he carried out at the material times. That deals with his argument that there was no or insufficient evidence before the FTT to make its finding regarding Mr Harrison's capability to manage his tax affairs.

71. The evidence also included, as HMRC pointed out, Mr Harrison's admission that his "main focus remained on the business, the livelihood of the employees and families that relied on [Mr Harrison] and [his] own health and family, during a horrible time" and that "sorting the tax return was …at the bottom of [his] priorities list". As we have already mentioned, although the FTT accepted Mr Harrison suffered from depression, it made it clear that it considered Mr Harrison was capable of filing his tax return despite his difficulties. It therefore did not accept the evidence which the appellant advances to support his case that the finding was contrary to the evidence.

72. Furthermore, irrespective of whether Hazlewoods suggested that Mr Harrison instructed them to recreate the return, the fact remains that Mr Harrison clearly did then instruct Hazlewoods accordingly. That he was prompted to do that does not undermine the FTT's view that Mr Harrison, despite his mental health difficulties, was aware of the outstanding return and able to file it.

73. Ms Montes Manzano's oral submissions and reply included some additional criticisms. It was, she submitted, not clear what test the FTT had in mind with respect to the term "deliberately". She also clarified that although she accepted the tribunal could look at all the evidence before it the FTT had wrongly failed to explain which bits of the evidence it preferred and which it dismissed. Neither of these alleged errors were however points on which permission to appeal had been sought and granted and were not points on which we had the benefit of detailed submissions from both parties. We do not therefore address them in this decision.

74. The appellant's challenge to the FTT's conclusion that the withholding of information was deliberate, which was as we have explained above, grounded in a challenge to the above finding of fact as set out above, therefore fails.

Conclusion

75. The appeal is dismissed.

SIGNED ON ORIGINAL

JUDGE SWAMI RAGHAVAN

JUDGE ANDREW SCOTT

RELEASE DATE: 09 August 2022