



TC05916

Appeal number: TC/2014/00006

INCOME TAX – Late Filing Penalties - Daily penalties - Schedule 55 Finance Act 2009 - Whether a reasonable excuse? - No - Whether special circumstances? - Yes, but only in relation to the 12 month penalty - 12 month penalty quashed - Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS YVONNE MARSHALL

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

The Tribunal determined the appeal on 23 May 2017, without a hearing, and under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read:

HMRC's Statement of Case / Paper Hearing Submission received by the Tribunal on 23 February 2017 and its attachments, including letters sent by or on behalf of the Appellant on 1 November 2013, 21 November 2013, and 21 December 2013

DECISION

1. The Appellant appeals against penalties amounting to £1600 that HMRC have imposed on her under Schedule 55 of the Finance Act 2009 ('the 2009 Act') in relation to her failure to submit an annual self-assessment return for the year ending 5 April 2011 on time. I set out the relevant legislation in the Appendix.

2. The penalties that have been charged are as follows:

(1) An individual tax return late filing penalty of £100, imposed pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;

(2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days), imposed pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;

(3) A 6 month late filing penalty of £300, imposed pursuant to Paragraph 5 of Schedule 55 of the 2009 Act;

(4) A 12 month late filing penalty of £300, imposed pursuant to Paragraph 6 of Schedule 55 of the 2009 Act.

3. The filing dates for the year ending 5 April 2011 were 31 October 2011 for a non-electronic (i.e., paper) return and 31 January 2012 for an electronic return.

The Grounds of Appeal

4. Insofar as this appeal is filed out of time, and HMRC take no apparent objection to the same in their written case, I extend the time for filing, of my own initiative.

5. The principal grounds of appeal are:

(1) The appellant was involved in a partnership, the financial year of which ran from 1 October to 30 September, and tax returns were always based on this period. The business closed on 24 June 2010, and the return for 09/10 included that period. The 2010/11 returns were erroneously created since no trading had occurred and therefore the penalties should be cancelled;

(2) The partnership's business was running at a loss;

(3) The other partner, Mr Owen Trimmer, was responsible for administration and accounts, and he encountered personal circumstances such as the need to move house which led to a delay in drawing up the final accounts for the business;

(4) The appellant was unaware that a partnership return had been issued by HMRC since all letters were sent to the business address. The partners phoned HMRC when they left that address telling them not to send any further letters there;

(5) She was not even aware that she had a personal tax return to complete;

(6) Pursuit of the penalties has caused stress and affected her health.

Findings of Fact

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6. On the basis of the information and materials before me, and applying the usual civil standard of proof (the balance of probabilities) I make the following findings of fact:

- (1) Mrs Marshall had been in the self-assessment regime since 2002/3;
- 5 (2) A notice to file for the year ending 5 April 2011 was issued to the appellant on 6 April 2011;
- (3) The 2010/11 return was due by no later than 31 October 2011, if filed non-electronically, and 31 January 2012, if filed electronically;
- (4) A reminder letter was sent in December 2011;
- 10 (5) On 14 February 2012, HMRC issued a notice of penalty assessment in the sum of £100;
- (6) On 23 April 2012, Mrs Marshall phoned HMRC and was informed (according to the full transcript of that call) that her individual and partnership returns were still needed;
- 15 (7) On 5 June 2012, HMRC issued a 30 day daily penalty reminder letter to Mrs Marshall at her home address;
- (8) On 3 July 2012, HMRC issued a 60 day daily penalty reminder letter to Mrs Marshall at her home address;
- 20 (9) On or around 7 August 2012, HMRC issued a notice of daily penalty assessment in the sum of £900 (calculated at £10 per day for 90 days);
- (10) On or around 7 August 2012, HMRC issued a notice of penalty assessment in the sum of £300;
- (11) On or around 15 January 2013, HMRC issued a notice of penalty assessment in the sum of £300.
- 25 7. The 2010/11 return was initially received in paper form on 24 October 2012, but was unsigned and was not accepted by HMRC as complete.
8. A signed paper return was filed on 12 December 2012.
9. The signed return was therefore filed late, and was filed more than 12 months after the final due date.
- 30 10. Therefore, and subject to any considerations of 'reasonable excuse' and 'special circumstances', I find that the penalties imposed are due and have been calculated correctly.

Reasonable Excuse

- 35 11. The question for me is whether Mrs Marshall had a reasonable excuse for the late filing.
12. Although there is no definition of "reasonable excuse" in the statute, its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners*

[1991] VATTR 234, HHJ Medd QC stated (in the analogous context of VAT penalties):

5 “ 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
10 the taxpayer and placed in the situation that the taxpayer found himself
at the relevant time, a reasonable thing to do?”

13. I apply that test here.

14. Whilst there is nothing to suggest that Mrs Marshall acted in any way
dishonestly or in bad faith, I have nonetheless concluded, applying the above test, that
she did not, measured against the above test, have a reasonable excuse for the late
15 filing.

15. I find that the 2010/11 return was issued to Mrs Marshall at the address which
HMRC held on record for her. HMRC has held that address on file since March 1987
and I accept its case that no correspondence has been returned to it from that address
undelivered. The point about post not being sent to the business address is a red-
20 herring, since the letters to which I am invited to have regard were sent to Mrs
Marshall's home address, on record for the whole of the relevant period.

16. Having been in the self-assessment regime since 2002/3, I consider that Mrs
Marshall can reasonably be expected to have known what was required of her in terms
of filing returns.

25 17. The Tax Return itself and the Tax Return and Payment Reminder (of which
there are specimens in the file before me) both make clear what had to be done, when,
and what would happen in terms of penalties if that was not done.

18. Moreover, I am satisfied that Mrs Marshall was given several warnings, as
detailed above, but did not act on them.

30 19. As a matter of law, the argument that another partner was responsible, and had
failed to discharge that responsibility, does not assist Mrs Marshall. Whatever the
internal division of labour between partners, both the partners to this business were
equally responsible to HMRC for making sure that the partnership complied with its
taxation responsibilities.

35 20. I do not ignore what Mrs Marshall told HMRC in her call on 23 April 2012, and
especially the fact that she had no paperwork for the partnership. She was advised to
fill in both an individual return and a partnership return. Even without the paperwork
immediately to hand, it was still open to her to file a return with provisional figures. I
note that in November 2013, Mr Trimmer was still in touch with Mrs Marshall to the
40 extent that he was able to write a letter on her behalf, apparently from her home
address.

21. I do not consider that the returns for 10/11 were erroneously created. Self-assessment returns are issued and returnable with reference to the Government's financial year, which begins on 6 April. Since the Winchester Snooker Centre did not cease business until 24 June 2010 (that is, part way through the financial year 10/11) then a return needed to be filed for the part-year. In my view, the fact that the business had a different trading year does not affect the underlying position.

22. Having said that, I accept that there was obviously some sort of muddle, which seems to have been occasioned (at least in part) by the confusion between Mrs Marshall's individual returns, and the partnership's returns. However, as the Tribunal (Judge Hellier) said in *Garnmoss Ltd trading as Parham Builders v HMRC* [2012] UKFTT 315 (TC) at Paragraph [12] "*What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses.*" I agree. In my view, the muddle in this case does not amount to a reasonable excuse.

23. The penalties are not geared to the tax payable, and so it does not make any difference that the partnership was trading at a loss. The penalties are imposed because of the failure to file the return on time, which is an obligation which applies equally to all taxpayers in the self-assessment regime, irrespective of income.

24. No medical evidence is put before me. But in any event the stress is said to have arisen as a result of the imposition of the penalties (that is, afterwards) and is not said to have been a cause (that is, beforehand) of the failure to file.

Special Circumstances

25. I have also considered whether there are any 'special circumstances', within the meaning of Paragraph 16 of Schedule 55 which would have justified reduction of the penalty.

26. In *Clarks of Hove Ltd v Bakers' Union* [1979] All ER 152 the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "... *to be special the event must be something out of the ordinary, something uncommon ...*". Similarly, in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 in the context of share valuations for the purposes of capital gains tax, Lord Reid said "*'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'.*" In the same case, Viscount Dilhorne said "*for circumstances to be special they must be exceptional, abnormal or unusual ...*".

27. HMRC has set out a series of circumstances which it considered in relation to special reduction. However, what HMRC does not seem to have considered was the fact that Mrs Marshall had, on 24 October 2012, and therefore within 12 months of the due date (31 October 2012), sought to file a return, which was returned by HMRC since it was unsigned.

28. To my mind, that is a material feature which should have been considered by HMRC when it came to assessing whether there were any special circumstances. I consider that omission by HMRC therefore renders the decision to impose the £300

12-month penalty (but not any of the other penalties) unreasonable in the light of the principles applicable for judicial review.

29. Therefore, I quash the £300 12 month penalty.

Decision

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30. To that limited extent, the appeal is allowed.

31. But, for the reasons already set out, the remainder of the appeal is dismissed and I affirm the other penalties.

10 32. 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)”
15 which accompanies and forms part of this decision notice.

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**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 01 JUNE 2017

APPENDIX – 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—

- 5 (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—

- 10 (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—

- 15 (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—

- 20 (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—

- 25 (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.

5 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.

10 (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.

15 (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.

25 (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.

30 (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

35 (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.

40 (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.