



TC05921

Appeal number: TC/2013/01217

INCOME TAX – penalty for failure to make returns-whether return submitted on time- No - whether reasonable excuse for the failure –No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE GARDEN PARTNERSHIP

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AIIT**

The Tribunal determined the appeal on 17 May 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 13 February 2013 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 February 2017. The Tribunal wrote to the appellant on 16 February 2017 indicating that if he wished to reply to HMRC's Statement of Case he should do so within 30 days. No reply was received.

DECISION

5 1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual partnership self-assessment tax return on time.

2. 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 or around 14 February 2012

10 (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on or around 7 August 2012

(3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 7 August 2012

15 3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) The appellant argues that the relevant return was submitted on time.

(2) He argues that there was a “reasonable excuse” for any failure to submit the return on time.

20 (3) He argues that the penalties charged are disproportionate to the tax liabilities.

4. Findings of fact

Throughout the tax year 2010-2011 the partners for the Garden Partnership were Patrick McShane and his wife Samantha McShane. Patrick McShane was the representative partner.

25 5. A partnership tax return for the year ending 5 April 2011 was issued to the appellant on 6 April 2011. The filing date was 31 October 2011 for a non-electronic return and 31 January 2012 for an electronic return.

6. HMRC received the partnership’s non-electronic return late on 9 August 2012.

30 7. The appellant had been in regular contact with HMRC regarding earlier year’s returns which were outstanding. On 26 January 2012 the partnership return for the year 2009/2010 was still outstanding and the return for the year 2010/2011 was due to be submitted by 31 January 2012. Since the deadline for submission of a paper return for 2010/2011 had passed the nominated partner sent the details of the 2011 return by e-mail to the Tax Bureau who had the software to enable a partnership return to be submitted online. He received confirmation that the return had been submitted. It was not until August 2012 and the receipt of £1,200 penalty notices that it became
35 apparent that the information for the 2011 Partnership return had been sent by the Tax Bureau as a 2010 Partnership return,

8. The appellants agent had discovered errors on the 2010/11 figures and submitted a paper return showing the revised figures. This was received by HMRC on 9 August 2012 and taken as the figures for the outstanding 2010/2011 return.

5 **9. Appellant's submissions**

The Appellant genuinely believed throughout the period January to August 2012 that the 2011 Partnership tax return had been submitted

10. Mr. McShane sent information to the Tax Bureau in respect of the accounting year to 31 July 2010 which is the basis for the 2011 Partnership return.

10 11. The appellant was told by HMRC after receiving reminders that the return had not been received that they would check into it and inform him if further action was necessary. He was not advised at a later date that the return was still regarded as outstanding.

15 12. The appellant submits that the mis-match between Partnership and individual returns should have provided an opportunity for the problem to be apparent and rectified before penalties became substantial.

20 13. The revised figures for the 2011/2012 partnership return submitted by the appellant's agent did not form a complete return and this should have alerted HMRC to the fact that what was submitted as 2009/10 return on 26 January 2012 was in fact the 2010/2011 return.

14. HMRC's submissions

25 HMRC say that in accordance with Paragraph 25(4) Schedule 55 Finance Act 2009 an appeal under paragraph 20 in connection with a penalty payable by virtue of this paragraph may be brought only by the representative partner or a successor to the representative partner.

Mr McShane is the representative partner therefore in accordance with paragraph 25 (5) Schedule 55 Finance Act 2009 HMRC have treated this as an appeal against the determination of the penalties on all of the partners in respect of the failure.

30 15. On 2 April 2012 HMRC Debt Management wrote to the appellant in respect of the 2010-2011 return saying "you still have not filed this return or contacted us."

16. In a telephone call dated 20 April 2012 the transcript records HMRC saying to the nominated partner "there's no 10-11 return on record yet".

17. HMRC say they requested the 2010/2011 partnership return on 27 April 2012 and again on 21 June 2012.

35 18. In respect of reasonable excuse HMRC say that they consider the actions of a taxpayer should be considered from the perspective of a prudent person exercising

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

HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

HMRC say that they do not accept reliance on a third party to file the returns as a reasonable excuse.

HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*[1979]1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis*[2011] UKFTT 588 (TC) paragraph 40). HMRC consider that there are no special circumstances which would allow them to reduce the penalty

20. Discussion

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

After careful consideration I have concluded that the partnership’s tax return for the tax year 2010-2011 was not finally and accurately submitted until on or around 9 August 2012. It should have been submitted by 31 October 2011. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.

The figures for the 2010-2011 return were submitted on 26 January 2012 but wrongly submitted as the 2009-2010 figures. On that date HMRC had no way of knowing that a submission error had occurred.

The Tribunal has considered the appellant’s assertion that he was told by HMRC after receiving reminders that the return had not been received that they would check into it and inform him if further action was necessary. He says he was not advised at a later date that the return was still regarded as outstanding. The tribunal notes from papers in the bundle before it, that on 27 April and 21 June 2012 Mrs. McShane was notified that the return remained outstanding. HMRC say Mr. McShane was similarly notified. The tribunal considers that by 27 April 2012 the appellant should have realised that there was a problem concerning the submission of the 2010/2011 partnership return and made further checks and enquiries.

The appellant’s agent has argued that the penalties charged are disproportionate to the tax liabilities. She points out that the tax and National Insurance due by each

partner for 2010/2011 was £637.32 whereas the penalty charges for the late return were almost double that at £1,200 each. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal.

5 25. In respect of whether the appellant has reasonable excuse for the error The Tribunal is mindful of a statement made by Judge Hellier in the case of *Garnmoss Limited t/a Parham Builders v HMRC* [2012] UKFTT 315 (TC). He said:

10 “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. We cannot say that this confusion was a reasonable excuse.”

15 26. Similarly in this case there was a muddle over tax years. Filing figures for the wrong year is an easy and simple mistake to make but the legislation does not provide shelter for simple mistakes only for reasonable excuses. A muddle over tax years does not establish a reasonable excuse.

27. Schedule 55 paragraph 23 (2) (b) provides

“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,.....”

20 It is clear that the appellant relied on another (the tax bureau) to submit the 2010-2011 partnership tax return. The Tribunal has therefore to consider whether the appellant took reasonable care to avoid the failure. Unfortunately the appellant failed to check whether the correct tax year was referred to in the receipt he had obtained from the Tax Bureau. This cannot be considered as taking reasonable care.

25 28. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. HMRC consider that there are no special circumstances which would allow them to reduce the penalty. The Tribunal sees no reason to disagree.

29. **Conclusion**

30 HMRC has applied the late filing penalties in accordance with legislation. The Appellant has not established a reasonable excuse for the late submission of its tax return for the period 2010-11. There are no special circumstances to allow reduction of the penalty. Therefore HMRC’s decision is affirmed and the appeal against the late filing penalties totalling £1,300 is dismissed.

Application for permission to appeal

35 30. 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.

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PETER R. SHEPPARD
TRIBUNAL JUDGE

RELEASE DATE: 3 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.

5 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)—

10 (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.

15 (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

20 (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—

25 (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

30 (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—

35 (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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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:

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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

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(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

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(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:

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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—

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(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—

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(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

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(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.