

[2018] UKFTT 40 (TC)



TC06318

Appeal number: TC/2017/06715

INCOME TAX – failure to file partnership return – penalty under paragraphs 3 and 4 Schedule 55 FA 2009 – whether there was a partnership in the tax year – held not – penalties cancelled.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ZAKIR AHAMMED
(as representative partner of Rangeela Spice)

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 26 January 2018 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 24 August 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 3 November 2017.

DECISION

5 1. This was an appeal by Mr Zakir Ahammed (“the appellant”) against the assessment of penalties on him and a Mr B Babul as a result of the failure by the appellant, as the nominated partner of Rangeela Spice, a partnership, to file a partnership return by the due date.

Facts

2. From the bundle of papers I had I find the facts as follows.

10 3. Rangeela Spice, a partnership notified to HMRC as being between the appellant and Mr B Babul, was issued with a notice to file a partnership return for the tax year 2011-12 on 6 April 2012. That notice required the appellant, as the nominated partner, to deliver the return by 31 October 2012 if filed in paper form or by 31 January 2013 if filed electronically (“the due date”).

15 4. On 12 February 2013 HMRC issued a notice informing each of the partners that a penalty of £100 had been assessed on him for failure to file the return by the due date.

5. On 14 August 2013 HMRC issued a notice informing each of the partners that a penalty of £900 had been assessed on him for failure to file the return by a date 3 months after the due date.

20 6. It appears from the bundle that there may have been an assessment on a penalty of £300 for a failure to file more than 6 months after the filing date. It is not mentioned in the Statement of Case.

7. The return was filed electronically on 7 August 2013. Screenshots of the computer record of the partnership statement (not the return as a whole) show

- 25
- (1) the accounting period 1 September 2011 to 31 March 2012
 - (2) profit from trade £3,150
 - (3) no UTR for the partnership
 - (4) a declaration showing the number of partners as 2, the nominated partner as the appellant declaring himself to be a partner.

30

 - (5) “individual partner details” for the appellant showing his UTR and his share of the profits as £3,150 (ie all of them)

No individual partner details are given for Mr Babul.

8. There is also a page from the appellant’s own tax return. This is from the Employment supplementary pages of a return, and shows the employer as Rangeela Tandoori, the pay from this employment as £3,150 and “tax taken off” (HMRC babyspeak for “tax deducted under PAYE”) as £7. A PAYE reference, 948/NA39702 is given.

35

9. On 8 April 2014 the appellant, through his accountants, appealed to HMRC against penalties of £1,314 (this figure was entered in the “12 months late filing penalty amount” box on the HMRC appeal form SA670).
10. On 17 April 2014 HMRC rejected the appeal against the daily penalties as they said that the appellant had shown no reasonable excuse for the failure to file on time. They informed him that because of the case of *Morgan and Donaldson v HMRC* they were not able to finalise the appeal yet, but would write once the outcome of the appeal to the Upper Tribunal was known.
11. On 8 May 2017, about 30 months after that outcome was known, HMRC wrote again to the appellant saying the daily penalties were validly imposed unless the appellant had a reasonable excuse, but once again they did not agree that he did. He could either accept an offer of a review or go to the Tribunal directly, both to be done by 7 June 2017.
12. On 13 June 2017 the appellant, through his accountants, accepted the offer of a review and gave further information. The review “request” form SA634 was used and showed the name of the appellant as Mr B Babul. (There might have been one from each partner, but I do not have any other SA634 in the bundle)
13. On 9 August 2017 wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld
14. On 24 August 2017 the appellant notified his appeals to the Tribunal, showing the amount of the penalty as £996.
15. The Self-assessment (“SA”) Notes for the appellant show on 23 September 2011 “SA401 & 64-8 rec’d and processed for partner”
16. The SA Notes for Mr B Babul show:
- (1) 23/9/2011: “SA401 & 64-8 rec’d and processed for partner”
 - (2) 24/1/2013: SA record closed on 24/01/2013 following automatic selection”
 - (3) 8/5/2013: BF Review from Wk5 re Pship LFFixedP for 2012. See Pship record for action taken.”
17. The SA Notes for Rangeela Spice start with, relevant to this appeal, on 15 March 2013 an entry showing “Appeal recvd from agent for 11/12 late filing pship pen” and “APP11 issued to agent.”
18. On 8 May 2013 the notes say that the return was still outstanding and no response received from agent to APP11. Various forms including SA633(p), 634 and 670 were issued to the appellant and copied to the agent.
19. On 16 July 2013 the notes record that there was no response to the issue of the forms SA633(p)/634 so the appeal was closed and the penalty released on both partners, and SA636 issued to the appellant and agent.

20. On 15 April 2014 the notes record that an SA370 received from agent “re 11-12 p’ship LFFixedP, LFDailyP and 6LFTaxGP appeal. SAPP-04 issued to nominated partners and agent for 12 LFFixedP and 6LFTaxG”. It also said “for LFDailyP as per Newsboard 277/13 SA834 issued”. The note also says “no RE”

5 The law

Partnership returns

21. Section 12AA TMA provides:

10 “(1) Where a trade, profession or business is carried on by two or more persons in partnership, for the purpose of facilitating the establishment of the following amounts, namely—

(a) the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner, ...

...

15 an officer of [HMRC¹] may act under subsection (2) or (3) below

...

(2) An officer of [HMRC] may by a notice given to the partners require such person as is identified in accordance with rules given with the notice ...—

20 (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and

25 (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(3) An officer of [HMRC] may by notice given to any partner require the partner ...—

30 (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts and statements as may reasonably be so required;

35 and a notice may be given to any one partner or separate notices may be given to each partner or to such partners as the officer thinks fit.

...

¹ By virtue of s 50(1) Commissioners for Revenue and Customs Act 2004 reference to “the Board” (which was what s 12AA TMA as enacted said) are to be treated as references to the Commissioners for Her Majesty’s Revenue and Customs, which I have abbreviated to HMRC in the text of s 12AA TMA.

(4) In the case of a partnership which includes one or more individuals, a notice under subsection (2) or (3) above may specify different days depending on whether a return in respect of a year of assessment (Year 1) is electronic or non-electronic.

5 (4A) The day specified for a non-electronic return must not be earlier than 31st October of Year 2.

(4B) The day specified for an electronic return must not be earlier than 31st January of Year 2.

...

10 (5D) For the purposes of this section “relevant period” means the period in respect of which the return is required.

...

(6) Every return under this section shall include--

15 (a) a declaration of the name, residence and tax reference of each of the persons who have been partners—

(i) for the whole of the relevant period, or

(ii) for any part of that period,

and, in the case of a person falling within sub-paragraph (ii) above, of the part concerned; and

20 (b) a declaration by the person making the return to the effect that it is to the best of his knowledge correct and complete.

...

(10A) In this Act a “partnership return” means a return in pursuance of a notice under subsection (2) or (3) above.

25 ...”

22. As to the penalties the law imposing them penalties is in Schedule 55 Act (“FA”) 2009 (“Schedule 55”) and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). The penalties may only be cancelled, assuming they are
30 procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC’s decision as to whether there are special circumstances was flawed.

23. There is a special rule for partnerships in paragraph 25 Schedule 55

“(1) This paragraph applies where—

35 (a) the representative partner, ... ^[1]_[SEP]

...

fails to make a return falling within item 3 in the Table (partnership returns).

40 (2) A penalty in respect of the failure is payable by every relevant partner. ^[1]_[SEP]

(3) In accordance with sub-paragraph (2), any reference in this Schedule to P is to be read as including a reference to a relevant partner. ^[L]_[SEP]

(4) An appeal under paragraph 20 in connection with a penalty payable by virtue of this paragraph may be brought only by—

5 (a) the representative partner, ... ^[L]_[SEP]

...

10 (5) Where such an appeal is brought in connection with a penalty payable in respect of a failure, the appeal is to be treated as if it were an appeal in connection with every penalty payable in respect of that failure. ^[L]_[SEP]

(6) In this paragraph— ^[L]_[SEP]

“relevant partner” means a person who was a partner in the partnership to which the return relates at any time during the period in respect of which the return was required; ^[L]_[SEP]

15 “representative partner” means a person who has been required by a notice served under or for the purposes of section 12AA(2) or (3) of TMA 1970 to deliver any return;

...”

What appeals are before me?

20 24. Where do I start?

25. The first page of the Statement of Case (“SoC”) lists one £900 daily penalty and shows the name of the appellant as Mr Zakir Ahammed followed by Rangeela Spice.

26. On page 4 the SoC says that a penalty of £100 and one of £900 was issued to both partners. I assume that means severally not jointly.

25 27. The SoC makes no mention of the appeal made against the £100 fixed penalties and nothing is enclosed except the SA Notes about them. In particular nothing is said about why the appeal was not considered and was unilaterally closed.

30 28. On page 7 HMRC (correctly) point out that paragraph 25(5) Schedule 55 FA 2009 has the effect that an appeal can only be made by the representative partner, ie the appellant, and that in accordance with that paragraph they have treated this appeal as “against the determination (sic) on all of the partners.” So why do they refer only to one penalty of £900? And why does the evidence of the issue of that penalty shown under the name Rangeel Spice with the partnership UTR refer to £900?

35 29. While on that evidence, the screenshot “View/Cancel Penalties” shows the Late Filing Penalty of £100, and a 6 month penalty of £300 which is otherwise not mentioned at all.

30. The three penalties are however shown for each partner severally in a screenshot “View Statement” for each partner. These statements also show that in contravention of paragraph 21(2)(a) Schedule 55 FA 2009 no suspension of collection of the daily

penalties was put into effect by HMRC and that they are shown as outstanding for collection on 19 October 2017.

31. Further down page 7 of the SoC it is stated that “the partnership” was served with notices of penalty assessment for £100 on 12 February 2013 and for £900 and £300 on 14 August 2013. “Both” of these penalty notices were issued to the address on record.

32. From this utterly confused and confusing SoC and the documentation in the bundle I find that, HMRC having agreed that an appeal by the nominated partner is an appeal against penalties on all partners, it must be the case that two lots of daily penalties, one assessed on the appellant and one on Mr Babul are in issue here. I disregard here the fact that both on the appeal notice on Form SA670 and on the Notice to Appeal the amounts given are less than £1,800.

33. Because the 6 month penalty was shown in the same notice as the daily penalties and because the accountants showed the amount of the penalties in their appeal as £1,314 it is obvious that the 6 month penalty was appealed against, and the SA Notes show that to be the case. I so find.

34. The only explanation for HMRC not including the 6 month penalty as under appeal and before the Tribunal is that they dealt with them (or it) in 2013 by the issue of a SAPP-04. HMRC do not include a SAPP-04 in the papers. The SA Notes say “no RE” so I could assume that it is a letter which says that there is no reasonable excuse and offers the usual trinity – provide further information, ask for a review or go to the Tribunal within 30 days (or so). That there was in HMRC’s view no reasonable excuse is apparent from the separate daily penalties letter issued on the same day.

35. However I have found an SAPP-04 in another bundle of papers for another case I dealt with on the same day. SAPP-04 says that the appeal is late and cannot be accepted, but that permission to make the appeal to HMRC can be sought from the Tribunal.

36. The appeal was about seven months late so HMRC were correct. However by a decision of the utmost illogicality HMRC have decided not to apply s 49 TMA (late appeals) to the daily penalty appeal, even though the daily penalties were included in the very same notice as the 6 month penalty.

37. In these circumstances I regard the decision to issue the SAPP-04 in relation to the 6 month penalty as an irrational decision. As s 49(2)(b) TMA does not specify that an appellant receiving a SAPP-04 must apply to the Tribunal for permission, I give it of my own motion under Rule 5 of the Tribunal Rules.

38. As to the £100 penalty there are differences. The SA Notes for Rangeels Spice strongly suggest that the SAPP-04 would have dealt with the £100 penalty and the 6 month penalty in the same letter, and would have taken the appeal to cover both as well as the daily penalties.

39. But unmentioned by HMRC in the SoC, there was an appeal against the £100 penalty on 15 March 2013. By s 31A(1) TMA the time for making an appeal is 30 days

from the specified date, and where s 31(1)(d) applies, as it does here by virtue of paragraph 18(3)(a) Schedule 55, that date is the date of issue of the assessment. HMRC say that it was “on or around” 12 February. If it was 12 February, 30 days takes one to 16 March so the appeal was in time. And in practice HMRC allow days of grace.

5 40. That appeal was never properly addressed by HMRC, because of an erroneous practice of not dealing with an appeal until a return was received. HMRC purported, say the SA notes, to “close the appeal” and release the penalty for collection. That action is not lawful. As no review was offered, the valid and open appeal can be notified to the Tribunal.

10 41. However the appellant, through his accountant, has only sought expressly to notify the daily penalties. Because of the over three year delay of HMRC in dealing with the appeal that they did not reject, I am reading the appeal to the Tribunal as covering the £100 and £300 penalties as well.

15 42. But that is not the end of the difficulties. It seems clear from his SA Notes that Mr Babul was issued with a £100 penalty. It is far less clear that he was issued with any other penalties as the SA Notes record that he was removed from SA in March 2013, before the daily penalties were issued to the appellant.

20 43. Mr Babul had no right of appeal himself (see paragraph 25(4)(a) Schedule 55 in §21). HMRC say they have treated the appeal by the appellant as an appeal on behalf of all the partners, as they are required to do by paragraph 25(5) Schedule 55. This will obviously apply to the £100 penalty and therefore this appeal is before me.

25 44. If and to the extent that Mr Babul was issued with daily and 6 month penalties his appeals are also before me. If it turns out there were no such penalties, no harm is done. If the appeal succeeds then the effect will be the same as if they did not exist. If the appeal fails then if there were in fact no penalties there is nothing to enforce.

45. To summarise I propose to deal with:

- (1) Initial, daily and 6 month penalties assessed on the appellant
- (2) The initial penalty assessed on Mr Babul

and any decision will cover any other penalties that Mr Babul was assessed on.

30 **Grounds of appeal**

46. The grounds of appeal are

- 35 (1) although a SA400 (registering a partnership for self-assessment) was filed in September 2011, the partnership was not agreed until May 2012. Before then the appellant was operating the restaurant on his own account and has returned the profits as his own on his personal return, while Mr Babul has not and remained taxed as an employee
- (2) the agents were not given the UTR
- (3) there is no partnership income in the tax return, because there was none

- (4) individual tax returns were submitted before the filing date
- (5) the accountants only submitted the partnership tax return in May 2012 because of the penalty notice. Mr Babul is not shown as a partner.

HMRC's response

5 47. HMRC say in response that

- (1) a notice to file the partnership return was issued on 6 April 2012 to the partnership address on file
- (2) notices of the penalties were also issued to that address
- (3) the partnership return was not filed until August 2013
- 10 (4) the appellant as nominated partner would [sic – *should?*] have made himself aware of his responsibilities for filing the return.
- (5) the partnership record was set up because both partners registered as partners with HMRC. No SA 400 was ever received which explains why a partnership UTR was not issued to the appellant, but he could have found it by
15 contacting HMRC
- (6) the return filed shows commencement date of 1 September 2011 and an accounting period of 1 September 2011 to 31 March 2012. It shows partner details for the appellant, and his profit as £3,150. This is also the amount shown on his personal return but as employment income
- 20 (7) it is not necessary for all partners to share equally.

Discussion

48. Before I consider the question whether there was a reasonable excuse for the failure to file, because of the grounds of appeal I need to consider an anterior question, whether there was a partnership at all in 2011-12. Unlike the position with an individual
25 trading in his own right or a company, where there is no doubt whether they exist in a given tax year or not, a partnership does not exist until the contractual agreement establishing the partnership comes into existence. As is well known such an agreement need not be in writing. It is also well established in a number of cases that an agreement in writing that there is a partnership is not valid if it is not in fact the way the business
30 is operated – see for example *Dickenson v Gross* 11 TC 614 and *Alexander Bulloch & Co v CIR* 51 TC 563 and for a case not involving infant children purportedly taken into partnership, *Saywell & others v Pope* 8 TC 450.

49. Nor can a signed partnership deed be treated as having retrospective effect – see
35 *Ayrshire Pullman Motor Services Ltd & Ritchie v CIR* 14 TC 754. This is the case in which Lord Clyde famously or notoriously, depending on one's point of view, said

“No man in the country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or property as to enable the Inland Revenue to put the largest possible shovel in his stores.

40 The Inland Revenue is not slow, and quite rightly, to take every advantage which is open to it under the Taxing Statutes for the purposes

of depleting the taxpayer's pocket. And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue."

50. If there was no partnership in the tax year 2011-12 then the notice to file beat the air because there was no one who fitted the description of the person required to file it, and indeed no persons on whom it could be served under s 12AA TMA. And if there later existed such person and persons respectively, that could not have retrospective effect. Of course if a written agreement merely ratified or embodied a pre-existing oral agreement that might be different.

51. As this is a penalty appeal the burden is on HMRC to show that the notice to file and the penalty notices are valid and that there was a relevant person who failed to file a partnership return that they were legally obliged to file by the due date.

52. For the proposition that there was a real partnership in existence before 6 April 2012, HMRC point to the registering of the partnership for self assessment. The evidence relating to this in the bundle is

(1) a screenshot TDC079B headed "Partners for Partnership" showing a name Rangeela Spice and a UTR starting 51549, and showing two partners, the appellant and Mr Babul as starting from 1 September 2011.

(2) a "Return Summary" RET005B showing details for the tax year 2011/12 and that a notice to file was issued on 6 April 2012.

(3) SA Notes for the appellant showing an single entry for 23 September 2011 saying: SA401 & 64-8 rec'd & processed for partner.

(4) an identical SA Note on the same day for Mr Babul.

(5) a specimen SA 401. The form says at the start and in bold:

"This form should be completed by an individual becoming a partner in a partnership, to register for Self Assessment and Class 2 NICs."

It asks for information about the partnership "you have joined" including the question "When did you join the partnership". It has a declaration of truth.

(6) a specimen SA 400. This says at the start: This form should be used to register a new partnership for Self Assessment. It asks a number of questions, relevantly:

(a) When did the business commence?

(b) What is the partnership's accounting date

(c) Name of nominated partner.

53. I point out here that HMRC have admitted that no SA400 was filed in this case, only SA401s for each partner. I take no notice of the specimen.

54. The evidence to which HMRC point shows at least that there was an intention by the appellant to take Mr Babul into partnership to operate the restaurant which he had been operating himself as a sole trader hitherto.

55. But HMRC have not produced any evidence from outside the four corners of the SA system to demonstrate that there was a partnership actually in operation in 2011-12. I think in particular of VAT registration details and VAT returns, and there may be other similar evidence available such as from PAYE and NIC systems.

5 56. There is of course some PAYE evidence in the screenshots exhibited by HMRC (see §8). This supports to an extent the appellant's contention that there was no partnership as it shows the appellant declaring himself to be an employee in the relevant period.

10 57. Considering all the evidence including the unchallenged evidence of the appellant's accountant, I consider than HMRC have not persuaded me that it is more likely than not that there was an operating partnership. There is in particular no evidence that the appellant agreed to share profits or losses with Mr Babul, who remains a very shadowy figure.

58. As a result all the penalties must be cancelled.

15 59. I do not need then to decide if there might have been a reasonable excuse for the failure to file if there had been a partnership. I am inclined to think not.

20 60. But as to the daily penalties there is no "SA reminder" or "SA 326D" in the papers, so HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with. (See *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)). I would therefore have cancelled them.

61. HMRC have addressed the question whether there were special circumstances, but have found none. I cannot say that this decision was flawed. But it is not relevant issue any more.

25 62. 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
30 and forms part of this decision notice.

**RICHARD THOMAS
TRIBUNAL JUDGE**

35

RELEASE DATE: 6 FEBRUARY 2018