

[2017] UKFTT 532 (TC)



TC05981

Appeal number: TC/2015/05317

INCOME TAX – penalty for failure to make returns

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JANE ELSDEN

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S Respondents

REVENUE & CUSTOMS

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 2 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 5 August 2015 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 March 2017 and the Appellant's Reply dated 3 April 2017.

© CROWN COPYRIGHT 2017

DECISION

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 a partnership self-assessment return for the tax year 2011-12 on time.
2. India Rose is a partnership; the partners being Mrs J E Elsdon and Mrs V A Kelly. Mrs Elsdon is the representative partner and, accordingly, is the person required to submit the partnership return and the only person who can appeal against the penalties. Under paragraph 25 of schedule 55, if the representative partner fails to make a return in time, penalties are chargeable to each of the partners. An appeal by the representative partner is then treated as an appeal made by all the partners.
3. The penalties that have been charged can be summarised as follows:
 - (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 19 August 2014.
 - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 27 January 2015
 - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 27 January 2015
4. The appellant’s grounds for appealing against the penalties can be summarised as follows:
5. She argues that there was a “reasonable excuse” for any failure to submit the return on time on the basis that HMRC failed to issue the partnership with a UTR (Unique Taxpayer Reference) despite numerous reminders and so the partnership’s accountant was unable to submit the return online.
6. The individual partners’ self-assessment returns were submitted on time and these provided HMRC with all the information they required in relation to the partnership.
7. The partnership was trading at a loss, so there was no tax to pay. Indeed, the individual partners received tax repayments.
8. The penalties are unreasonable and the penalty regime aggressive and impractical.
9. The Reply submitted by the appellant’s accountant reiterated these grounds and also applied for the suspension of the penalties subject to conditions. The provisions relating to suspension of penalties to which he referred are contained in paragraph 14 of schedule 24 Finance Act 2007 and relate to the suspension of penalties imposed for careless inaccuracies contained in a tax return. Schedule 55 does not make provision for the suspension of penalties and it is not possible

to suspend the penalties under appeal. I cannot therefore consider this further (nor can HMRC).

10. The appellant's appeal to HMRC under s31A TMA 1970 in relation to the late filing penalty was made outside the statutory deadline. HMRC initially refused consent under s49(2)(a) of TMA 1970 in relation to the late filing penalty under paragraph 3 of schedule 55. The appeals against the six month late filing penalty and the daily penalties were in time, though HMRC rejected the appeals. HMRC have now prepared a full Statement of Case which deals with the substantive appeal in relation to the late filing penalty as well as the other penalties (and does not suggest that the Tribunal should refuse to deal with this aspect of the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a) to the appeal under paragraph 3 of schedule 55.
11. The appellant's appeal was notified to the Tribunal late. However, since HMRC have stated that they are not objecting to the late notification, I give permission under s49G(3) of the Taxes Management Act 1970 for the appeal to be notified late.

Findings of fact

12. India Rose entered the self-assessment regime on 17 September 2013. On 26 September 2013, a notice to file the **2012-13** tax return was issued, which was filed online on 27 March 2014. The appellant/the partnership's agent must have had the partnership's UTR in order to do so.
13. The **2011-12** tax return was issued on 15 April 2014, that is, shortly after the 2012-13 return had been filed online. The appellant was issued with a full paper return which HMRC say included the partnership's UTR.
14. The due date for filing the 2011-12 return was 22 July 2014 whether the return was submitted in paper form or online.
15. The return was submitted, online, on 31 January 2015.
16. The penalties were imposed on the dates stated in paragraph 3 above.
17. Dyer & Co, the appellant's accountant appealed against the penalties on 5 February 2015 (not 20 April 2015 as stated in HMRC's statement of case, although there was another letter from Dyer & Co of 20 April 2015 which repeated the grounds of appeal). Only the appeal against the late filing penalty was therefore out of time.
18. HMRC sent three letters on 29 April 2015. The first rejected the appeal against the six month late filing penalty on the ground there was no reasonable excuse for the late return. The second letter said HMRC did not consider there was a reasonable excuse in relation to the daily penalties but that that appeal would be stayed behind the *Donaldson* case. The third letter refused to accept the appeal against the late filing penalty, but as noted above, I find that HMRC have now agreed that the appeal can proceed.

19. The grounds for finding there was no reasonable excuse was the same in each case: “...the partnership UTR was sent to the partnership on 17 September 2013 and was shown on the 2011 to 2012 tax return sent on 15 April 2014. There is no record of yourself or your agent contacting HMRC to obtain this at any time.” . The letter was copied to Dyer & Co.
20. As noted, the 2012-13 tax return (which should have been submitted by 31 January 2014) was submitted late, on 27 March 2014. A late filing penalty was issued in respect of this return. The penalty was appealed on the grounds that the accountant did not have the partnership UTR. The appeal was refused by a letter from HMRC of 14 April 2014 (which showed the UTR as both “our ref” and “your ref” but did not identify it as such). The grounds of refusal were that a notice to file a partnership return for 2012-13 was issued on 26 September 2013 which showed the partnership UTR. It also emphasised that it was the taxpayer’s responsibility to ensure they had all the details needed to make a timely return.
21. HMRC do not dispute that the individual returns were submitted on time, or that the partnership made a loss.
22. HMRC reviewed the April decisions on 30 June 2015 and upheld the decisions. The appellant appealed that decision to the tribunal by a notice dated 5 August 2015 although it was not received by the tribunal until 7 September 2015.
23. As noted above, the 2012-13 partnership return was submitted online before the 2011-12 return was issued. The appellant must therefore have had the partnership’s UTR.
24. HMRC wrote to the appellant on 14 April 2014 with a copy to Dyer & Co enclosing a 2011-12 partnership return (paper return) and stating that the return must be submitted by the deadline of 22 July 2014 in order to prevent penalties being charged.
25. The partnership’s UTR was included in that letter, although it is only shown as “our ref” and is not identified as the UTR.

Discussion

26. Relevant statutory provisions are included as an Appendix to this decision.
27. I have concluded that the tax return for the 2011-12 tax year was submitted on or around 31 January 2015. It should have been submitted by 22 July 2014. Subject to considerations of “reasonable excuse” and “special circumstances” set out below, the penalties imposed are due and have been calculated correctly.
28. The appellant has argued that the penalties charged are unreasonable and disproportionate. 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. The fixed penalties are laid down by statute and do not depend on the amount of tax due, nor whether any tax is due.

Neither HMRC nor the Tribunal have power to alter them. The system of tax-gear penalties which provide for suspension are not applicable in this case.

29. I have found that the appellant did have their UTR as the correspondence referred to above indicates that the UTR was sent on various occasions and appeared on the notice to file and the tax return. In particular, the appellant's agent submitted the later year's tax return online, which would have required the UTR, shortly before the return for the current year was issued.
30. Even if that was not the case and the UTR had somehow been mislaid and there were problems finding out what it was, the appellant was issued with a full paper tax return in April 2014 and the return could have been submitted in paper format by the deadline. The appellant has not put forward any reason why she failed to do this.
31. I do not therefore consider that the appellant had a reasonable excuse for submitting the 2011-12 partnership return late.
32. Dyer & Co have emphasized that Mrs Elsdon acted honestly and that her subsequent returns have been dealt with promptly. I do not doubt Mrs Elsdon's honesty, but the penalties in this case apply without reference to honesty or culpability (except insofar as there may be a reasonable excuse).
33. HMRC considered whether it was appropriate to reduce the penalty because of special circumstances under paragraph 16 of schedule 55. Ability to pay is precluded from being a special circumstance by paragraph 16 itself. HMRC, relying on case law consider that "special" means "exceptional, abnormal or unusual" or "something out of the ordinary run of events". They took into account the partnership not being issued with a UTR (though it was part of their case that it was), the partnership making a loss and the figures being included in the individual partners returns and concluded that these did not amount to special circumstances for these purposes. The Tribunal can only interfere with this decision if it considers that the decision was "flawed" in the judicial review sense. I consider that the decision on special circumstances was well within the range of reasonable decisions open to HMRC and I do not consider that the decision was "flawed" and so cannot alter it.
34. **Conclusion**
35. For the reasons set out above, I have concluded that the penalties were properly chargeable and the appellant did not have a reasonable excuse for submitting the return late.
36. Accordingly I dismiss the appeal.

Application for permission to appeal

37. 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.

**TRIBUNAL JUDGE
MARILYN MCKEEVER**

RELEASE DATE: 28 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—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- (3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 100%,
 - (b) for the withholding of category 2 information, 150%, and
 - (c) for the withholding of category 3 information, 200%.
- (4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—
- (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- (4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—
- (a) for the withholding of category 1 information, 70%,
 - (b) for the withholding of category 2 information, 105%, and
 - (c) for the withholding of category 3 information, 140%.
- (5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—
- (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.
- (6) Paragraph 6A explains the 3 categories of information.
5. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

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

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—

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

(b) to a different extent, but only if the tribunal thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed.

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