



TC06315

Appeal number: TC/2015/02275

INCOME TAX – penalties for failure to make return – whether conditions for daily penalties satisfied – whether penalties properly notified – whether reasonable excuse or special circumstances – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAFIK ADAM PATEL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR G NOEL BARRETT**

Sitting in public at Alexandra House, The Parsonage, Manchester on 6 December 2017

No appearance by the Appellant or his representative

Mr Gareth McKinley of HM Revenue and Customs for the Respondents

DECISION

Introduction

- 5 1. When this appeal came on for hearing there was no appearance by the appellant or his representative. We were satisfied that notice of the hearing had been sent to the appellant's representative by email on 17 October 2017 and by post to the appellant himself on the same date. There was no indication on the Tribunal file that the notices of hearing had not been received.
- 10 2. Mr McKinley on behalf of HMRC confirmed that bundles had been sent to the Appellant's representative on 23 November 2017 by recorded next day delivery and had not been returned. He also confirmed that HMRC's covering letter identified the date of the hearing.
- 15 3. We were satisfied pursuant to Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, that reasonable steps had been taken to notify the appellant of the hearing and that it was in the interests of justice to proceed with the hearing in the absence of the appellant.
- 20 4. The appeal is against penalties imposed by HMRC for late submission of a partnership self-assessment return for tax year 2012-13 pursuant to Schedule 55 Finance Act 2009 ("Schedule 55"). Relevant statutory provisions are included as an appendix to this decision.
- 25 5. Penalties in relation to late submission of partnership returns are specifically dealt with by paragraph 25 Schedule 55, although we were not referred to paragraph 25. In relation to the operation of that provision the appellant, Mr Patel is the "representative partner". He and his wife are "relevant partners" in a partnership business known as "The Chocolate Box". The effect of paragraph 25 is that for late submission of a partnership return all relevant partners are liable to penalties. An appeal may only be brought by the representative partner and where such an appeal is brought it is treated as if it were an appeal in connection with every penalty payable in respect of the failure.
- 30 We therefore treat the present appeal as an appeal against all the penalties imposed on the appellant and Mrs Patel.
- 35 6. There is no suggestion that the appellant is challenging the obligation to deliver a partnership tax return to HMRC for tax year 2012-13. That obligation arises pursuant to section 12AA Taxes Management Act 1970. There was evidence before us which we accept that HMRC gave notice to the appellant on 6 April 2012 requiring a partnership return. The return was therefore due to be delivered to HMRC by 31 October 2013 in the case of a paper return or by 31 January 2014 in the case of an electronic return.
7. There is an issue between the parties as to whether a paper return was delivered to HMRC by the appellant on or before by 31 October 2013. We address that issue below.

8. HMRC contend that no return was delivered until 15 January 2015. It is on that basis that they imposed penalties on the appellant and Mrs Patel. There was some doubt on the papers before us as to what penalties were the subject of the present appeal. In the end HMRC were content to regard the appeal as being against all penalties imposed on Mr Patel and for the reasons given above we have treated it as an appeal against the penalties imposed on Mrs Patel. The penalties imposed were as follows and we understand that they were imposed in relation to each partner:

(1) a late filing penalty of £100 under paragraph 3 of Schedule 55 imposed on or about 18 February 2014.

(2) daily penalties at £10 per day totalling £900 under paragraph 4 of Schedule 55 imposed on or about 18 August 2014.

(3) a 6 month late filing penalty of £300 penalty under paragraph 5 of Schedule 55 imposed on or about 18 August 2014.

(4) a 12 month late filing penalty of £300 under paragraph 6 of Schedule 55 imposed on or about 24 February 2015.

9. The appellant's grounds of appeal to HMRC were set out in appeal documents dated 5 November 2014 and 2 December 2014. By letter dated 5 January 2015 HMRC refused the appeal. The appellant then requested a review of that decision setting out further grounds on 5 January 2015. In this latter document the appellant enclosed a copy of the partnership tax return. The review was dated 13 February 2015 and upheld HMRC's original decision to refuse the appeal. The appellant then notified his appeal to the Tribunal on 13 March 2015.

10. We have not limited ourselves to the grounds of appeal set out in the notice of appeal to the Tribunal. We have also taken into account the matters referred to in the appeal documents sent to HMRC. We can summarise the appellant's grounds of appeal as follows:

(1) The partnership return was sent to HMRC in good time before 31 October 2013. It is likely that HMRC mislaid the return and failed to update their records.

(2) Notifications given to the appellant in relation to the penalties, including reminder letters, quoted an incorrect unique tax reference ("UTR").

(3) HMRC had been using an incorrect UTR for the appellant for several years and failed to correct the position despite numerous telephone calls from the appellant. The appellant was entitled to ignore communications which included an incorrect UTR.

(4) Eventually HMRC removed the penalties from the incorrect UTR but placed them on the correct UTR. They were not entitled to do so.

11. HMRC have the burden of satisfying us that the penalties were properly imposed. In particular, that the partnership return was submitted late and that the failure

continued for the periods set out in paragraphs 4-6 Schedule 55. In relation to daily penalties they must satisfy us that the notice required by paragraph 4(1)(c) was given to the appellant and Mrs Patel. Further, they must satisfy us that the penalties were properly notified to the appellant and Mrs Patel pursuant to paragraph 18 Schedule 55.

- 5 12. If HMRC do satisfy us that the penalties were properly incurred and notified then it is for the appellant to satisfy us that there was a reasonable excuse for the partnership return being submitted late or that HMRC's decision in relation to special circumstances was "flawed".

10 ***Findings of Facts***

13. In order to determine this appeal we must first make relevant findings of fact. Our task is made more difficult by the absence of the appellant and his representative. We have taken into account all the documents before us, including those documents in which the appellant has set out his grounds of appeal. We find the following facts on
15 the balance of probabilities.

14. The appellant has been in the self-assessment regime since at least 2003-2004, trading in partnership with his wife as The Chocolate Box. The partnership has a UTR ending 2723. The appellant and his wife must also submit individual tax returns including their share of the partnership profits or losses. They each have their own
20 separate UTRs, although in the case of the appellant it was not "unique". No issue has been raised in relation to Mrs Patel's UTR. The following issues have arisen in relation to the appellant's UTR.

15. The earliest UTR allocated to the Appellant ended 1173. For reasons unknown the appellant was allocated a duplicate UTR ending 6764. HMRC were made aware of this
25 in March 2009 and took steps to close the 6764 reference. However, again for reasons unknown it seems that telephone contact between the appellant and HMRC continued to be logged under the 6764 reference, including queries about submission of the appellant's individual tax returns. An entry dated 17 April 2012 records the following:

30 "... T/P has duplicate UTR ... 6764 was previously closed but T/P has started filing rtns on it again – there are rtns for diff years on both UTRs and money on both it is a mess."

16. At about that time HMRC decided to close the 1173 reference. Thereafter both HMRC and the appellant considered that the correct UTR for the appellant was the 6764 reference. Despite this, penalty notifications, reminder letters and statements showing the penalties in relation to the late partnership return were sent to the appellant
35 in 2014 with his 1173 reference. This was because the partnership remained incorrectly linked with the appellant's 1173 reference.

17. The appellant stated in his appeal to HMRC dated 2 December 2014 as follows:

“ Every tax year I have been chased for non- filing. I can only file under one UTR (ending 764). Despite closing the incorrect UTR I still receive reminders and penalty notices

It is quite evident from that HMRC failed to update my records, as this has been going on for the past 3 years.

5 I have always filed our paper version of our partnership returns on time. We cannot stress enough that HMRC have mislaid our partnership tax return (2012-13) form and therefore please try and trace the form.”

18. In relation to being chased for non-filing, this was in relation to the appellant’s individual tax returns. We are satisfied that certainly in some years the appellant had
10 filed his individual tax return but because of the duplicate UTRs HMRC continued to chase him for the return. In at least one year they imposed penalties which were later removed.

19. We are satisfied based on the evidence before us that the following correspondence was sent to the appellant using the incorrect 1173 reference, albeit we make no finding
15 at this stage as to the content of this correspondence:

18 February 2014	notification of a £100 late filing penalty
3 June 2014	a 30 day daily penalty reminder letter
1 July 2014	a 60 day daily penalty reminder letter
18 August 2014	notifications of a 6 month late filing penalty of £300 and 20 of daily penalties of £900

20. On 27 November 2014 the three penalty notifications referred to above were “cancelled” on reference 1173 and moved to reference 6764.

21. In addition, the appellant received notification of a 12 month late filing penalty on or about 24 February 2015 using the correct 6764 reference.

25 22. We must first decide whether a partnership return on paper was delivered to HMRC on or before 31 October 2013. It is not suggested that the partnership return was delivered electronically. We accept that partnership returns for years prior to 2012-13 had been filed on time.

30 23. The appellant lodged his individual return for 2012-13 electronically. It was due by 31 January 2014 and was received shortly before 16 January 2014 under reference 6764. The individual tax return had an entry for profits from partnership of £5,920. We are satisfied therefore that as at 16 January 2014 the appellant’s share of partnership profits has been calculated and provided to HMRC so that he could be taxed accordingly. However, that in itself is not evidence that the partnership return had
35 already been sent to HMRC.

24. We were told and we accept that HMRC had no record of receiving the partnership return. There was no evidence of difficulty or confusion in relation to the partnership UTR. The appellant has not provided a copy of the paper return said to have been filed prior to 31 October 2013. He has not provided any proof of postage of the return despite
5 being prompted to do so in HMRC’s review letter dated 13 February 2015. Finally, he did not appear at the hearing to confirm in oral evidence when and in what circumstances the return was sent to HMRC.

25. On balance, we are satisfied that the partnership return for 2012-13 was not delivered to HMRC on or before 31 October 2013. It was delivered in January 2015
10 when the appellant sent what was described as a “further copy” to HMRC in his appeal letter dated 5 January 2015.

26. Next, we must consider whether as a matter of fact the conditions for imposing penalties were satisfied. Paragraph 4(1)(c) Schedule 55 provides that a taxpayer will only be liable to daily penalties if HMRC gave notice to the taxpayer specifying the
15 date from which the daily penalties are payable. Paragraph 4(3) provides that the date specified in the notice may be earlier than the date of the notice, but may not be earlier than 3 months after the “penalty date”, that is the date on which the first fixed penalty became payable pursuant to paragraph 3.

27. On the present facts, the penalty date was 1 November 2013 and daily penalties
20 were payable from 1 February 2014. The notice under paragraph 4(1)(c) had to be given some time before the date when the daily penalties were imposed, namely 18 August 2014. Having said that, it would not have been known in August 2014 whether a paper or electronic partnership return would be filed. If electronic, the penalty date would have been 1 February 2014 and daily penalties would have been payable from 1 May
25 2014. If paper, the penalty date would have been 1 November 2013 and daily penalties would have been payable from 1 February 2014.

28. The notice relied on by Mr McKinley at the hearing is headed “Daily Penalty Reminder”. It was exhibited to a witness statement of Mr Martin Delnon, the manager of the HMRC Self-Assessment Live Services Team. This witness statement described
30 the system for various reminders and penalty notifications given by HMRC for the purposes of Schedule 55 and exhibits pro forma versions. The witness statement was produced to us at the hearing and we were not told that it had been disclosed to the appellant. In the context of a penalty appeal where the burden to establish the penalties is on HMRC we do not consider it appropriate to admit the witness statement in
35 evidence where it has not previously been seen by the appellant. We note the tribunal in *Halfaoui v Commissioners for HM Revenue & Customs [2018] UKFTT 13 (TC)* at [48] reached the same conclusion.

29. In any event, the pro forma Daily Penalty Reminder (SA372-30) relied on by Mr McKinley states as follows:

30. “ Your tax return for the year ended 5 April 2011 is now more than three months late

31. After 30 April 2012, a daily penalty of £10 a day is payable for each day your online tax return is outstanding ...”

5 32. It appears that a document such as this was sent to the appellant but it refers to “your return” rather than the partnership return and it included the appellant’s incorrect UTR.

33. Further, in written submissions served after the hearing, which we invited Mr McKinley to make, he relied on different pro forma documents exhibited to Mr Delnon’s witness statement. These were a “Self Assessment Tax Return and Payment
10 Reminder” (SA 309A) and a “Self Assessment Partnership Tax Return Reminder” (SA 309B).

34. There is no evidence that the former document would be routinely sent to a partnership or the partners in a partnership and it refers to “your return” rather than the partnership return. We are not satisfied that it was sent to the appellant. The latter
15 document was from its face intended to be sent to the nominated partner shortly before the online filing deadline of 31 January 2014 if there was no record of the partnership return being received. It states:

“ If we receive your Partnership Tax Return **after 31 January, each partner will get an automatic £100 penalty.**

20 The longer you delay, the more each partner will pay. If your Partnership Tax Return is more than three months late each partner will get daily penalties of £10 per day and could pay up to £1600 each.”

35. There is no evidence that this reminder was sent to the appellant. In any event, on its own it does not specify the date from which daily penalties are payable and Mr
25 McKinley acknowledged as much in his written submissions. To establish the date he relied on a combination of the two documents but we are not satisfied that SA 309A was sent to the appellant.

36. In relation to Mrs Patel we have seen no evidence that a daily penalty reminder letter was sent to her or that the pro forma documents referred to above were sent to
30 her. We are not satisfied therefore that the notice required by paragraph 4(1)(c) was given to Mrs Patel.

37. We must finally consider as a matter of fact what notices of the penalties were sent to the appellant and Mrs Patel for the purposes of paragraph 18 Schedule 55. Paragraph 18(1)(c) requires the notice of a penalty to state the period in respect of which
35 it was assessed. It was held by the Court of Appeal in *Donaldson v Commissioners for HM Revenue & Customs [2016] EWCA Civ 761* at [25] that this refers to the period over which the penalty has been incurred in the context of daily penalties.

38. The evidence before us did not include evidence as to the form of the penalty notifications which were sent to the appellant, save in relation to the £100 fixed penalty. However, the form relied on for the £100 penalty (SA 326D) did not appear appropriate to a late partnership return. If it was sent to the appellant in that form then it referred to “your return” rather than the partnership return and there is no indication that it referenced the partnership in any way. It also would have included the incorrect UTR. We are not satisfied what notifications were sent to the appellant and Mrs Patel in relation to the £100 penalties.

39. In relation to the other penalties the only material identifying the form of the notices was contained in Mr Delnon’s witness statement. We have not admitted that evidence. We cannot therefore be satisfied that any notices were sent which complied with paragraph 18 Schedule 55.

Discussion

40. We must first consider whether HMRC has satisfied the burden of establishing that the penalties were properly imposed. We have found as a fact that the partnership return was filed late in January 2015.

41. In relation to the daily penalties, we have found that no notice complying with paragraph 4(1)(c) was given to the appellant or Mrs Patel. We must therefore set aside the daily penalties. Mr McKinley relied on the operation of section 114 Taxes Management Act 1970 and the decision of the Court of Appeal in *Donaldson*. In the light of our findings of fact the question of whether section 114 would cure any defect in a notice does not arise.

42. In relation to all the penalties we are not satisfied that the notices sent complied with paragraph 18 Schedule 55.

43. HMRC has failed to satisfy us that the penalties satisfied the conditions in paragraphs 4(1)(c) and 18 Schedule 55. We do not therefore need to consider whether the appellant had a reasonable excuse for late submission of the partnership return or whether HMRC’s decision on special circumstances was flawed. If it had been necessary we would not have found that confusion in relation to the appellant’s UTR for his individual return could have been a reasonable excuse for failing to submit the partnership return on time or that there were any special circumstances justifying a special reduction in the penalties.

Conclusion

44. For the reasons given above we allow the appeal. The penalties imposed on the appellant and Mrs Patel are therefore cancelled.

45. 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
5 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.

10 **JONATHAN CANNAN**
TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2018

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APPENDIX – RELEVANT STATUTORY PROVISIONS

5 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.

Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

- 4—
- 10 (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
 - 15 (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).
- 20 (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).

25 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.
- 30 (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.

35 Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

- 6—
- 40 (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).
- 45 (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.

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.

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.

5 Paragraph 18 of Schedule 55 sets out requirements for the notification of penalties as follows:

18 –

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

- 10 (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed

15 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:

20 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—

- 25 (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—

- 30 (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.

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

Paragraph 25 of Schedule 55 makes provision for appeals in connection with penalties imposed for late submission of partnership returns:

40 25 –

(1) This paragraph applies where—

- (a) the representative partner, or
- 45 (b) a successor of the representative partner,

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

(2) A penalty in respect of the failure is payable by every relevant partner.

(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.

5

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

(a) the representative partner, or

10

(b) a successor of the representative partner.

(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.

15

(6) In this paragraph —

“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;

20

“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;

25

“successor” has the meaning given by section 12AA(11) of TMA 1970.