



TC04336

Appeal number: TC/2014/05955

INCOME TAX – appellant not representative partner - whether has a right of appeal against penalties for late filing – daily penalties charged – reference to Upper Tribunal decision in Donaldson – whether breach of Article 6 of the European Convention of Human Rights – held, no right of appeal – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JACK DYSON

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 23 February 2015 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 2 November 2014 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 5 January 2015 and the Appellant's Reply received by the Tribunal on 24 January 2015.

DECISION

Outline

1. In 2012-13 Mr Dyson and Mr Walker were students who formed a partnership
5 as part of their university course. Mr Walker was the representative (or nominated)
partner. The partnership's 2012-13 return was filed on paper on 21 May 2014.
HMRC issued each partner with a £100 penalty for missing the filing deadline, a daily
penalty of £900, and a penalty of £300 for being over six months late.

2. Mr Dyson sought to appeal the £900 daily penalty and the £300 six month
10 penalty but not the £100 penalty. HMRC submit that as Mr Dyson is not the
representative partner, he has no right of appeal.

3. For the reasons set out below, I agree that Mr Dyson has no right of appeal. I
also find that in consequence, Mr Dyson's rights under Article 6(1) of the European
Convention of Human Rights ("the Convention") have been breached. However, the
15 first-tier tribunal ("the tribunal") has no power to remedy that breach. As a result, I
have struck out Mr Dyson's appeal. Whether the statute provides other remedies is
considered at §42.

The law

4. The law on late payment penalties is at Finance Act 2009, Schedule 55 ("Sch
20 55"), and that relating to the filing of partnership returns is at Taxes Management Act
1970 ("TMA"), section 12AA. The two sets of statutory provisions interact. The
relevant parts of Sch 55 and TMA s 12AA are set out as an Appendix to this decision.

5. The 2012-13 deadline for filing a paper return was 31 October 2013, and the
25 deadline for filing an electronic return was 31 January 2014, see TMA s 12AA(4A)
and (4B).

6. Sch 55 sets out a range of penalties for late filing of returns, including daily
penalties under para 4 and six month penalties under para 5. Because many of the
penalties relate to the length of the delay after the filing deadline, a 2012-13 paper
return filed in April 2014 will trigger higher penalties than the same return submitted
30 electronically on the same day.

7. If a return is submitted late, Sch 55 para 25(2) says that HMRC can impose
penalties on all "relevant partners." Sch 55, para 25(6) defines a relevant partner as
"a partner in the partnership to which the return relates at any time during the period
in respect of which the return was required."

35 8. However, Sch 55, para 25(4) reads:

“(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

(b) a successor of the representative partner.”

9. Sch 55, para 25(6) defines “representative partner” as 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 by reference to TMA s 12AA.” That section merely provides that HMRC may give the Notice to file a partnership return to “such person as is identified in accordance with rules given with the notice.” The statute does not otherwise define “representative partner.” In practice, a new partnership is required to register with HMRC using form SA400, which asks the partnership to identify the representative partner.

10. As stated above, Sch 55, para 25(4) allows an appeal to be brought by “a successor” of a representative partner, and Sch 55, para 25(6) says that “successor” has the meaning given by TMA s 12AA(11). That subsection provides that when the relevant partner is “no longer available” a successor can be agreed by a majority of the relevant partners. Public guidance indicates that in practice HMRC may simply allow a partnership to change their representative partner, see www.gov.uk/set-up-business-partnership/partnership-changes.

11. In *Philips v HMRC* [2009] UKFTT 335 (TC) at [96] the tribunal (Judge Mosedale) found that the role of representative partner continues after the partnership has ceased. That conclusion is consistent with the structure of the partnership provisions in both the TMA and Sch 55. For example, if the role of representative partner ceased when the partnership ended, no partner would have a right of appeal against penalties incurred before that date which were levied subsequently. This cannot have been Parliament’s intention.

The facts

12. From the evidence provided, I find the following facts.

13. In 2012-13 Mr Dyson was a student at Sheffield Hallam University. Students had the option of setting up a business instead of engaging in a work placement scheme. Mr Dyson and another student, Mr Walker, formed a partnership. It ran for a year and its profit was £1,353.96.

14. Both students finished their university course in June 2013 and the partnership terminated at the end of 2013. Mr Dyson and Mr Walker have had only intermittent contact since that time.

15. There is no dispute that Mr Walker was the “representative partner” at inception and subsequently.

16. On 2 October 2013, Mr Dyson filed his personal Self-Assessment (“SA”) return, well before the statutory deadline. He copied all the information he had used, including bank statements and income and expenditure schedules, to Mr Walker.

17. On or around 18 February 2014 HMRC issued a late filing penalty of £100 to each partner. Mr Dyson received this in March 2014. He contacted Mr Walker and checked he had all the information previously sent. Mr Walker assured him that he would complete and submit the partnership return as soon as possible. Mr Dyson

subsequently called Mr Walker several times “to put pressure on him to complete and submit.”

18. Mr Dyson’s evidence is that “he understands” Mr Walker filed the return on 8 April 2014. HMRC’s evidence is that the return was not received by HMRC until 29 April 2014. Because HMRC actually received the document, and Mr Dyson is relying on Mr Walker’s statement, we prefer HMRC’s evidence, and find as a fact that the return was not received by HMRC until 29 April 2014. However, that return was incomplete and was sent back to Mr Walker. The completed return was received on 21 May 2014. It was filed on paper rather than electronically.

19. On or around 24 June 2014, HMRC issued a daily penalty to each partner, calculated at £10 per day for 90 days. On the same day they also issued a £300 penalty for being over six months late submitting the return.

20. On 6 July 2014, Mr Dyson wrote to HMRC seeking to appeal the £900 daily penalty and the £300 six month penalty. HMRC said that he had no right of appeal as he was not the representative partner, and this decision was upheld on review. On 2 November 2014 Mr Dyson notified his appeal to the Tribunal.

21. Mr Walker has paid the daily penalties and the six month penalty and has not appealed.

The submissions

22. Mr Dyson sought to argue that he had a reasonable excuse because he had “done everything that could reasonably be expected...to ensure that [his] partner filed the return on time.”

23. HMRC say that Mr Dyson has not disputed that Mr Walker is the representative partner, and under the legislation only the representative partner has a right of appeal. As a result, the appeal must be struck out.

Observations on current tribunal and court proceedings

24. The daily penalties charged by Sch 55 para 4 have proved controversial. In a case involving two unconnected taxpayers, *Morgan and Donaldson* [2013] UKFTT 317(TC) the tribunal (Judge Mosedale and Mr Thomas) found that the penalties had not been properly imposed, because Sch 55, para 4(1)(c) requires that HMRC “give notice specifying the date on which the penalty is payable.” They found that references to daily penalties in a reminder notice issued to both taxpayers, and in the £100 penalty notice, were insufficient to constitute “notice” of daily penalties. They decided the case in favour of the taxpayers.

25. However, HMRC appealed the tribunal’s decision in relation to Mr Donaldson to the Upper Tribunal. The decision in Mr Morgan’s case was not appealed because the tribunal had found that, in addition to the “notice” issue, there were also “special circumstances” in his case, which gave a further reason for allowing that appeal.

26. In December 2014, the Upper Tribunal allowed HMRC’s appeal and found that notice had been given to Mr Donaldson, so that the penalty was properly charged, see *HMRC v Donaldson* [2014] UKUT 536 (TCC).

27. However, that may not be the end of the matter, because:

5 (1) Mr Donaldson has been given permission to appeal to the Court of Appeal. That case is unlikely to be heard until 2016. All live appeals notified to the tribunal have been stayed behind Mr Donaldson’s case, so if Mr Donaldson wins his case it is likely that no daily penalty will be payable by these appellants; and

10 (2) in their decision at [38], the Upper Tribunal noted that there might be a further problem with the penalties: Sch 55 para 4(1)(c) requires HMRC to specify on the penalty notice, the date from which the penalty is payable, and it appeared on the evidence before the Upper Tribunal that this requirement had not been satisfied. This may mean that penalties issued to Mr Donaldson (and
15 to other taxpayers) are invalid. This point has not yet been tested in the tribunal.

Discussion

28. Although HMRC can levy late filing penalties on all “relevant” partners, Sch 55, para 25(4) explicitly states that only the representative partner or his successor has a right of appeal. There is no suggestion that Mr Walker was not, or was no longer,
20 the representative partner.

29. If Mr Walker appeals the penalties charged on Mr Dyson, Sch 55, para 25(5) provides that:

25 “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.”

30. An appeal by Mr Walker would therefore encompass the penalties charged on both partners, even if Mr Walker is not seeking to argue that he has a defence to the penalty charged on him.

31. The Office of Tax Simplification, in their interim report on partnerships
30 published in January 2014, commented on these provisions, saying at 5.18:

35 “Because the penalty is on the partnership return, only the representative partner is able to appeal. If the representative partner does not appeal – perhaps because they know there are no grounds for a ‘reasonable excuse’ defence, individual partners cannot appeal even if they believe they have a reasonable excuse in their own circumstances. This can cause significant unfairness, as demonstrated in some recent Tribunal cases.”

32. One of those tribunal cases is *Linda Jarvis v HMRC* [2012] UKFTT 483 (“*Jarvis*”), where the tribunal (Judge Brannan) considered the earlier penalty
40 provisions contained within the TMA.

The Convention

33. Article 6(1) of the Convention begins by saying:

5 “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

34. It is well established that even small penalties for tax offences are “criminal” within the meaning of Article 6, although they are classified as “civil” under UK legislation. The related case law is discussed at some length in *Bluu Solutions v HMRC* [2015] UKFTT 25(TC) from [52] to [76], as well as in *Jarvis* from [30] to [36] and it is not repeated here.

35. A person who has been issued with a tax penalty is therefore “entitled to a fair and public hearing” under Article 6(1). However, Sch 55, para 25(4) does not allow Mr Dyson to appeal against his penalty: the right of appeal rests only with Mr Walker. 15 The provision therefore does not comply with Article 6(1). In *Jarvis* Judge Brannan came to the same conclusion in relation to the earlier TMA penalty provisions.

36. The Human Rights Act 1998, s 3 reads:

20 “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

37. It is however not possible to read Sch 55, para 25(4) in a way which makes it compatible with the Convention, because it explicitly bars anyone other than the representative partner from making an appeal.

38. I gratefully adopt Judge Brannan’s analysis of the similar TMA provisions at 25 [39] of *Jarvis*:

30 “I have considered whether, in accordance with Section 3 of The Human Rights Act 1998, I can read Section 93A in a way which is compatible with Convention rights. In my view, I cannot. The clear legislative intent of Section 93A (6) is to exclude partners other than the representative partner from having a right of appeal. To construe subsection (6) in a way which permitted Mrs Jarvis to have a right of appeal in respect of the penalties imposed upon her would require me not only to ‘go against the grain/ of the legislation (see: *Ghaidan v Godin-Mendoza* [2004] 30 UKHL per Lord Nicholls at [33]) but to contradict the clear intention of Parliament.”

39. Judge Brannan continues his decision by considering whether there is a further conflict between the TMA partnership provisions and the Convention, because the tribunal’s jurisdiction was limited to confirming the penalties or cancelling them. The Sch 55 provisions are different, and give the tribunal a wider jurisdiction. It is not 40 appropriate to consider the question of “full jurisdiction” further in this appeal.

Decision

40. For the reasons given above, I find that Mr Dyson's rights under Article 6(1) have been breached, but I am unable to construe the law in a way which gives him those rights. As a result, I have no choice but to strike out his appeal.

5 41. Mr Dyson may have remedies outside the tribunal, which may include asking HMRC to cancel the daily penalties if invalidly levied, asking for a stay of the daily penalties until *Donaldson* has been finally decided, complaining to HMRC, judicial review, defences to county court proceedings, a civil claim against Mr Walker and/or an appeal to the European Court of Human Rights. Whether any of these are possible is entirely a matter for him.

42. In the context of the tribunal there are two possible solutions.

(1) Mr Dyson can try to persuade Mr Walker to appeal to the tribunal. This would be a late appeal, for which either HMRC or (failing that) the tribunal, would need to give permission.

15 (2) Although Mr Walker was, and remains, the representative partner, it may be possible for Mr Dyson and Mr Walker to agree that Mr Dyson is now the representative partner and for him appeal the penalties in that capacity, see §10-11 above. Of course, the appeal would be out of time, and either HMRC or (failing that) the tribunal would need to consider whether to give permission for a late appeal.

Appeal rights

43. 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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**ANNE REDSTON
TRIBUNAL JUDGE**

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RELEASE DATE: 19 March 2015

APPENDIX: LEGISLATION
Taxes Management Act 1970

12AA Partnership return

5 (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, and

10 (b) the amount in which each partner chargeable to corporation tax for any period is so chargeable,

an officer of the Board may act under subsection (2) or (3) below (or both).

(1A) ...

15 (2) An officer of the Board may by a notice given to the partners require such person as is identified in accordance with rules given with the notice or a successor of his—

(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

20 (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 the Board may by notice given to any partner require the partner or a successor of his

25 (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;

30 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.

(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

35 (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.

(5)-(10) ...

40 (10A) In this Act a "partnership return" means a return in pursuance of a notice under subsection (2) or (3) above.

(11) In this Act "successor", in relation to a person who is required to make and deliver, or has made and delivered, a partnership return, but is no longer available, means—

45 (a) where a partner is for the time being nominated for the purposes of this subsection by a majority of the relevant partners, that partner; and

(b) where no partner is for the time being so nominated, such partner as—

- (i) in the case of a notice under subsection (2) above, is identified in accordance with rules given with that notice; or
 - (ii) in the case of a notice under subsection (3) above, is nominated for the purposes of this subsection by an officer of the Board;
- 5 and "predecessor" and "successor", in relation to a person so nominated or identified, shall be construed accordingly.
- (12) For the purposes of subsection (11) above a nomination under paragraph (a) of that subsection, and a revocation of such a nomination, shall not have effect in relation to any time before notice of the nomination or revocation is given to an
10 officer of the Board.
- (13) In this section "relevant partner" means a person who was a partner at any time during the period for which the return was made or is required, or the personal representatives of such a person.

Finance Act 2009, Schedule 55

15 Para 1

A penalty is payable by a person ("P") where P fails to make or deliver a return...specified in the Table below.

3	Income tax or corporation tax	(a) Return under section 12AA(2)(a) or (3)(a) of TMA 1970
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Para 2

20 Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 3, 5 and 7 to 13 in the Table

Para 3

P is liable to a penalty under this paragraph of £100

Para 4

- 25 (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.
- 30 (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
 - 35 (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

Para 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--
 - 40 (a) 5% of any liability to tax which would have been shown in the return in question, and
 - (b) £300.

Para 18(1)

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

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

Para 20

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

10 (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

Para 25: "Partnerships"

(1) This paragraph applies where--

- 15 (a) the representative partner, or
 - (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.

20 (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
- (b) a successor of the representative partner.

25 (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.

(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;

30 "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;

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

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