



**TC05830**

**Appeal number: TC/2013/06011**

*INCOME TAX – penalties for failure to deliver partnership return – whether reasonable excuse: no – whether special circumstances justifying reduction – yes.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS ROSEMARY RENDALL (as representative partner of      Appellant  
MR I J & MRS R I RENDALL)**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**

**The Tribunal determined the appeal on 18 April 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 27 July 2013 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2017.**

## DECISION

1. This was an appeal by Mrs R I Rendall against the imposition of penalties of £3,200 against her and her husband as partners in a partnership trading in the Orkney Islands. The year concerned in 2011-12. Normally an appeal of such antiquity would have been dealt with long ago, but this appeal has been stayed behind a case which was heard eventually in the Court of Appeal in England and Wales last year and in relation to which the Supreme Court of the United Kingdom has refused leave (*Donaldson v HMRC* [2016] EWCA Civ 761) .

2. This case involves an appellant who was resident and a partnership which had a place of business in Scotland. I considered the case on the papers while I was physically in England and *Donaldson* was an English case, in fact one on which I also sat, as a member then not as a judge, at a hearing in England of the First-tier Tribunal. But I am mindful of the guidance given in eg *HMRC v National Exhibition Centre Ltd* [2015] UKUT 23 (TCC) at [31] to [34] and whether or not the Court of Appeal case is strictly binding on me deciding a Scottish case I follow it.

3. I have decided that all the penalties assessed on both partners are cancelled.

### Facts

4. What follows in the section is taken from the papers, primarily the HMRC statement of case and the exhibits to it and the Notice of Appeal, are not in dispute and they are my findings of fact.

5. The partners in the partnership of Mr I J and Mrs R I Rendall (“the partnership”) were issued with a notice requiring Mrs Rendall as representative partner (“the appellant”) to file a partnership return for the tax year 2011-12 on 6 April 2012. That notice required the appellant to deliver the return by 31 October 2012 if filed in paper form or by 31 January 2013 if filed electronically (“the due date”). An online return can only be made if the partnership purchases the software to enable them to do it.

6. On 12 February 2013 HMRC issued a notice informing each partner that a penalty of £100 had been assessed on them (totalling £200) for the failure by the appellant to file the return by the due date.

7. On 25 June 2013 HMRC issued a notice informing each partner that a penalty of £900 had been assessed on them (totalling £1,800) for the failure by the appellant to file the return by a date 3 months after the due date..

8. In that notice of 25 June 2013 HMRC also informed each partner that a penalty of £300 had been assessed on them (totalling £600) for the failure by the appellant to file the return by a date 6 months after the due date.

9. On 11 June 2013 the return was filed in paper form.

10. On 5 June 2013 the appellant appealed to HMRC against the penalties totalling £200 for the initial failure to file by the due date.

11. HMRC's response, on 24 June 2013, was to inform the appellant that the deadline had passed for appealing against the penalties, and for that reason the appeal could not be accepted. She was asked to explain, if she wished, why the return was not filed on time and why the appeal was not made in time. She was informed of her right to go to the Tribunal to seek permission to make a late appeal to HMRC.

12. On 1 July 2013 the appellant responded to HMRC to say she was "desperately" appealing the penalties and explaining what had happened.

13. On 18 July 2013 HMRC replied saying that they still could not accept her late appeal. That letter said that there were appeals made against the initial penalty and against the daily and 6 month penalties. She was again informed of her right to go to the Tribunal to seek permission to make a late appeal to HMRC. They added, cryptically, that if she did not send an appeal to HMRC by a date 29 days after the date on the letter, "we will treat your appeal as settled".

14. On 27 July 2013 the appellant sent a Notice of Appeal to the Tribunal. It did not specify the amounts of the penalties. Section 6 of the Notice did not show any time by which the appeal ought to have been made or notified nor did it request permission to give the appeal to HMRC, but it did contain a narrative to explain why the appeal was made late and it contained a further longer narrative under the heading "Grounds of appeal".

### **The law**

15. The law imposing the penalties is in Schedule 55 to the Finance Act 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 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.

16. Schedule 55 contains special rules for partnerships. Paragraph 25 (not included in the extracts from Schedule 55 in the HMRC statement of case) provides that where a representative partner fails to make a return under s 12AA of the Taxes Management Act 1970 ("TMA") a penalty is payable by each partner. It also provides that an appeal may be brought only by the representative partner.

17. Section 12AA TMA permits an officer of HMRC to require there to be made to them a return of amounts in which each partner in a partnership which carries on a trade, profession or business may be chargeable to income tax for any tax year. The notice may be addressed to all the partners and may require an identified partner to make the return (s 12AA(2) TMA) or it may be addressed to a single partner or more than one.

18. This return is additional to each partner's return under s 8 TMA which must show the income which according to the partnership return is that person's share of income.

19. A partnership is not charged to income tax as such, and the return under s 12AA TMA does not, unlike the income tax return made under s 8 TMA require a self-assessment of the tax payable. As a result it seems to me that in relation to paragraphs 5 and 6 of Schedule 55 the penalty will always be £300 as a return under s 12AA is not capable of showing any tax payable.

### **Reasons for my decision**

20. The grounds of appeal (and reasons for lateness) given by Mrs Rendall were:

(1) The appellant had entered all the partnership income and expenses on the individual tax returns but did not realise that this did not constitute a partnership return.

(2) The individual returns were filed by the due date.

(3) The appellant had tried to file online for the first time but had misunderstood the instructions regarding the partnership return.

(4) The appellant spoke to HMRC when she received the penalty notice and was told only to complete a form of confirmation of the nominated partner which she did, and then assumed all was OK.

(5) When she spoke to HMRC again she was given advice as to what to do and that she required software to complete the partnership return online.

(6) She completed the necessary paperwork immediately and submitted the paper return.

(7) She normally had a friend helping her submit returns but this time she thought she could manage.

21. Unusually in this current crop of post-*Donaldson* paper cases HMRC do not mention that what is before the Tribunal is apparently only an application to made a late appeal to HMRC against the initial penalties of £100 each, and even more unusually they do not say whether they object to or do not oppose the permission application. I therefore deal with that issue first.

22. I give permission for the appeal against the two £100 penalties to be made to HMRC. I do this on the basis that the appellant appears to have been misled by her first conversation with HMRC (§20(4)) following the issue of these penalty notices. These papers do not contain, as they often do, any "SA Notes" showing details of phone communications so I have only the appellant's account, which I accept.

23. Because the appellant gave "grounds of appeal" to the Tribunal as well as reasons for the lateness of the appeals, and in view of the ambiguity (perhaps inconsistency is a better word) in the HMRC letter of 18 July 2013, I also treat the Notice of Appeal as an anticipatory appeal to the Tribunal against those penalties. And further since HMRC's statement of case says the penalties issued in June 2013

are before the Tribunal and the appellant refers in her letter of 1 July 2013 to a bill of £1,200, I assume that HMRC have accepted appeals against those June penalties. The letter of 1 July referring to appeals not being accepted because of lateness cannot of course apply to the June penalties.

5 24. And I further accept that the June penalties are included in the Notice of Appeal. Further I accept that since only the representative partner, Mrs Rendall can appeal against the penalties imposed on both her and her husband, that appeals against the penalties on him are to be treated in the same way as those on her. I have thus considered appeals against all of the penalties by reference to the grounds of appeal given by Mrs Rendall. If there are any formalities about this that should have been followed I waive compliance with them under Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

15 25. The grounds given do not disclose any reasonable excuse for the failure to file on time. HMRC exhibit the first page of a sample copy of the notice sent under s 12AA. The appellant does not deny receiving it, and the HMRC's computer records which I have show it as issued. The form makes clear that a partnership return is required using either the form attached to the notice or using commercial software on the internet. The appellant did neither of those things.

20 26. HMRC appear to have addressed the question whether there were special circumstances. They say (verbatim):

“HMRC have considered not knowing that a partnership return was required as well as individual returns and submit that there are not special circumstances which would merit reduction of the penalties”.

25 27. This sentence appears to me to be incomplete, but in any case it seems to be addressing only one of the grounds of appeal which I have held does not constitute a reasonable excuse.

30 28. However HMRC do not seem to have considered or taken into account the fact that they have been given, in the individual returns made in time, all the information that the partnership return requires, including the share allocated to each partner, which in a “mom and pop” partnership of this sort is likely to have been 50:50 in the past and 50:50 in this year (which is in fact the final year). Nor have they taken into account that in any event a partnership return does not in itself disclose any income chargeable to tax about which HMRC would otherwise be ignorant.

35 29. In my view this failure not to take these matters into account makes the decision flawed in judicial review terms.

30. It is noteworthy that in their Compliance Handbook (“CH”) at paragraph 170600 HMRC say:

40 “Penalty legislation provides for common circumstances and these are therefore taken into account in establishing the liability to and/or level of a penalty.

Special circumstances are either  
uncommon or exceptional, or

**where the strict application of the penalty law produces a result  
that is contrary to the clear compliance intention of that penalty  
law.”** {My emboldening]

5

31. At CH170800 HMRC give an example of a situation falling within the type of  
circumstance I have emboldened in the previous paragraph. It is about partnerships  
and VAT returns, and a situation where former partner in a dissolved partnership  
continued to file using the partnership registration. The successor was in the example  
10 charged a late registration penalty. The important point in the example is that there  
was no loss of tax even as to timing but a technical breach of the law which led to a  
penalty. The read across to this case is obvious.

32. In my view the compliance intention of paragraph 25 Schedule 55 and of  
s 12AA TMA is to encourage timely submission of the amounts of income in which  
15 partners in a partnership are to be assessed to income tax. In the circumstances of this  
case I find that the appellant has complied with those requirements.

33. I therefore reduce all the penalties to nil.

34. I add here, although it is not necessary for my decision, that I cannot see that the  
notice of the initial penalty assessment (SA 371) in the papers gives any indication at  
20 all that could amount to specifying the date from which the daily penalties are payable  
and so seems not to comply with paragraph 4(1)(c) Schedule 55 as required by the  
decision of the Court of Appeal in *Donaldson v HMRC* which refers only to a  
different form SA 326D. Nor is there anything in the appears to indicate what an “SA  
Reminder” for a partnership return says or even if there is one, let alone whether it  
25 was issued.

35. 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  
30 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.

35

**RICHARD THOMAS  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 APRIL 2017**

40

**© CROWN COPYRIGHT 2017**