



TC06078

Appeal number: TC/2016/04264

INCOME TAX – penalties for late filing of partnership return – Interpretation Act – return filed on time – HMRC’s unlogging return and sending back for arithmetical correction – no basis for penalty charge – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**TABREZ AKHTAR
t/a CRAWLEY NEWS AND POST OFFICE**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 23 August 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 8 July 2016 (with enclosures); HMRC’s Statement of Case sent to the Tribunal on 22 March 2017 (with enclosures) and the Response filed on behalf of the Appellant on 29 March 2017.

DECISION

1. Mr Akhtar is the nominated partner of a partnership trading as Crawley News and Post Office (“the partnership”). Through his agent, Ms Raji Manuell, he appealed
5 against penalties totalling £560 imposed by HM Revenue & Customs (“HMRC”) for his failure to submit the 2014-15 partnership self-assessment (“SA”) return on time.

2. The penalties charged on Mr Akhtar arose under Finance Act 2009, Schedule 55 (“Sch 55”) and were as follows:

- (1) a £100 late filing penalty, under para 3 of Sch 55; and
- 10 (2) daily penalties totalling £560, under para 4 of Sch 55.

3. Mr Akhtar’s appeal against the penalties is allowed and the penalties cancelled.

4. The papers before the Tribunal indicate that Mrs Manuell has also notified appeals to the Tribunal about penalties imposed on other clients in similar circumstances, and that a separate penalty may have been imposed on Mr Akhtar and
15 his business partner in relation to their personal returns. For the avoidance of any possible doubt, this decision relates only to the 2014-15 late filing penalties imposed on Mr Akhtar in his capacity as the nominated partner of the partnership.

The legislation

5. Taxes Management Act 1970 (“TMA”) s 12AA(2)(a) requires that a partnership
20 which receives a notice to file must submit a partnership return. The return at issue in this case was filed on paper, and TMA s 12AA (4A) provides that the date by which a paper return must be filed “must not be earlier than 31st October of Year 2”, where “Year 2” is the year after the tax year in question.

6. Sch 55 charges penalties for failures to file on time. Paragraph 1 is headed
25 “Penalty for failure to make returns etc” and reads, so far as relevant to this appeal:

- (1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.
- (2) Paragraphs 2 to 13 set out—
 - 30 (a) the circumstances in which a penalty is payable, and
 - (b) subject to paragraphs 14 to 17, the amount of the penalty.
- (3) If P’s failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).
- 35 (4) In this Schedule—

"filing date", in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

"penalty date", in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).

(5) In the provisions of this Schedule which follow the Table—

(a) any reference to a return includes a reference to any other document specified in the Table, and

(b) any reference to making a return includes a reference to delivering a return or to delivering any such document....

3	Income tax or corporation tax	(a) Return under section 12AA(2)(a) or (3)(a) of TMA 1970
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7. Sch 55, para 2 provides that paras 3 to 6 apply where, as here, the filing obligation falls within Items 1-5 of the Table. Partnership returns fall within Item 3.

8. Sch 55, para 3 provides that "P is liable to a penalty under this paragraph of £100". Thus, this fixed penalty applies where there is a failure to file a partnership return by the due date.

9. Sch 55, para 4 provides for daily penalties, and reads:

(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).

The facts

10. On 6 April 2014 Mr Akhtar was issued with a partnership return for 2014-15. The due date for filing that return on paper was 31 October 2015. Mrs Manuell's evidence is that she posted the return first class on Thursday 29 October 2015, and had put enough stamps on the envelope to ensure that was the case. She provided a

schedule (“the Schedule”) setting out when she had despatched her clients’ returns; some were listed as sent on 29 October, and some on 30 October. The partnership’s return is listed as sent on 29 October. None of this evidence is in dispute and I accept it.

5 11. HMRC logged the return on 10 November 2015. On 3 February 2016, they sent it back to Mr Akhtar, on the basis that the expenses claimed on page 4 of the return did not total £39,366.20, as shown on the return, but instead totalled £39,362.20, a difference of £4. The HMRC SA Notes for 3 February 2016 say:

10 “retn unlogged and sent back to Mr Akhtar as figures do not add up.
Profit figures incorrect and therefore partners profits incorrect.”

12. The Tribunal has not been provided with a copy of that letter, but it must also have stated that HMRC received the partnership return on 10 November 2017. This is because, when Mrs Manuell responded on 18 February 2016, she told HMRC that she had “sent the form on 29.10.15 for you to receive on 30.10.15 by first class. No way
15 you would have received on 10.11.15”. She also did not agree that that there was an arithmetical error of £4.

13. I make no finding on who is correct as to the arithmetical error, and it is not clear from the papers whether Mrs Manuell conceded the point, or whether HMRC gave way, but in either event HMRC’s computer system records that Mr Akhtar’s
20 return was (re)logged as having been received on 17 March 2016.

14. On 17 February 2016, HMRC issued Mr Akhtar with a £100 penalty. Although this was after the date on which the return was “unlogged”, it is clear from the correspondence that it had been imposed because HMRC did not accept that the return was received by the due date of 31 October 2016. HMRC’s letter of 25 April
25 2016 to Mr Akhtar reads:

30 “Your agent...told us that you didn’t send the Partnership Tax Return in on time [sic] because it was posted on 29 October 2015 via first class mail and HMRC should have received it the next day 30 October 2015. Your tax agent believes it is not possible for the tax return not to have been received until 10 November 2015...

35 I don’t agree that you’ve a reasonable excuse for not sending the Partnership Tax Return on time because customers are expected to allow sufficient time for returns to reach us. However, if the return was posted in good time and an unforeseen event occurred which disrupted the normal post service and led to loss or delay of the return, for example fire or flood at the Post Office where the return was handled, or prolonged industrial action by the Post Office, it would be considered a reasonable excuse. Or, if you or your agent are able to provide a certificate of posting which shows the return was posted in
40 good time and that there was a delay in delivery to us we would consider the appeal further on these grounds...HMRC’s view is that a reasonable excuse is usually when an unexpected or unusual event,

either unforeseeable or beyond your control, has prevented you from sending the tax return on time.”

15. On 26 April 2016, HMRC issued Mr Akhtar with a daily penalty of £460 under Sch 55, para 4, being £10 day for the 46 days from 1 February to 17 March 2016, noting that February was a leap year.

Whether the return was filed by the due date

16. HMRC’s position is that the return was not filed until 10 November 2015 and so was late. Mrs Manuell submits that it must have been received by the due date of 31 October 2015.

17. The relevant law here is the Interpretation Act 1978, s 7, which reads:

“Where an Act authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post”.

18. Mrs Manuell has given evidence, which I have accepted, about the stamps she put on the letter being sufficient for next day delivery by first class post, and has also given evidence, supported by the Schedule, of the posting date. HMRC’s only relevant comment is that they would “consider the appeal further” if she provided a certificate of posting.

19. But obtaining proof of posting is not a legal obligation. In its absence, it is a question of assessing the evidence, which has not been challenged. I find that Mrs Manuell properly addressed, pre-paid and posted Mr Akhtar’s return by first class post on 29 October 2015.

20. Royal Mail’s website states that first class post is delivered “the next working day, including Saturdays”. In the ordinary course of post, the return would therefore have been received by HMRC on 30 October 2015, so within the time limit. Thus, it is deemed to have been received on time, unless “the contrary is proved”.

21. In *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 at [33], Morgan J said:

“my interpretation of Section 7 when it uses the phrase ‘unless the contrary is proved’ is that this requires a court to make findings of fact on the balance of probabilities on all of the evidence before it”.

22. Although HMRC’s Statement of Case says that the return was not received until 10 November 2015, that is a mere assertion: no evidence has been produced. For example, there is nothing setting out HMRC’s procedures for logging post, no copy of

the envelope which contained the return, no evidence that Royal Mail had charged supplementary postage.

23. In short, HMRC have not proved Mr Akhtar's return was not received on 30 October 2015. It is therefore deemed to have been delivered within the ordinary course of post and so to have arrived within the statutory time limit. As a result, there is no basis for the £100 penalty and I set it aside.

24. It was disappointing to note that HMRC dealt with this case without any reference to the Interpretation Act. Instead, the HMRC Officer wrongly seeks to apply the law on reasonable excuse. That error is then compounded by his statement that "a reasonable excuse is usually an unexpected or unusual event, either unforeseeable or beyond your control". That is not the correct test, as this Tribunal has frequently reiterated: see for example *Electrical Installations v HMRC* [2013] UKFTT 419 (TC) (Judge Brannan and Mr Simon) at [50]-[54] and numerous other judgments.

15 **Whether HMRC's rejection of the return changes the position**

25. A penalty can only be levied for late filing if a person "fails to make or deliver a return" by the specified date, see Sch 55 para 1. If a return has been received by that specified date, HMRC cannot charge a late filing penalty if they subsequently "unlog" the return and return it to the taxpayer on the basis that they believe it contains a computational error.

26. Sch 55 para 4(1)(a) is also relevant. It provides that a daily penalty is only triggered if the "the failure *continues* after the end of the period of 3 months" after the filing date. Here, the partnership return had been held within HMRC's computer system from the filing date to 3 February 2016. It was only out of HMRC's hands between 3 February and 17 March 2017, and then only because HMRC decided to send it back to the taxpayer. It would be extraordinary if HMRC could charge a daily penalty based in part on the number of days a tax return had been held within their own system: that is self-evidently wrong.

27. HMRC can charge a penalty if there is a computational error in a return, by using Finance Act 2007, Sch 24. But those provisions are clearly inapplicable here. Even had HMRC identified an error in Mr Akhtar's return (which is unclear), the amount of the error was £4; the nature of the error was an expense claimed by a two person partnership, so the value of the error was £2 per partner. Even if both partners were additional rate taxpayers (which is unlikely), the tax consequence of the error for each partner was less than £1 – well below any assessing tolerance. Moreover, in order to assess a penalty under Sch 24, HMRC would have had to prove that Mr Akhtar had been at least careless, the burden being on them.

28. More relevant, on the facts of this case, is TMA s 12ABB(1), which HMRC appear to have overlooked. That provision allows HMRC to amend a return so as to

correct “obvious errors or omissions in the return (whether errors of principle, arithmetical mistakes or otherwise)”.

Decision and appeal rights

29. Mr Akhtar’s appeal is allowed, because the partnership return was filed by the
5 due date. HMRC’s subsequent unlogging of the return did not cause a late filing penalty to become due.

30. 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
10 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: 25 AUGUST 2017