



**TC06559**

Appeal numbers: TC/2012/10977  
TC/2012/10978

*INCOME TAX – Partnership and Individual Partner - Late Payment Penalties - Daily penalties - Whether HMRC has met the burden of proof in relation to the daily penalties? - No - Whether a reasonable excuse in relation to the other penalties? - No - Whether special circumstances? - No - Appeals allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**(1) SPACIA GROCERS (A Partnership)  
(2) MRS RUQIA MUGHAL**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**

**Sitting in public at Manchester Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 15 June 2018**

**Mr Mughal on behalf of the Appellants**

**Mr Barry Sellers, Appeals Litigator, for the Respondents**

## DECISION

1. Mrs Mughal and her husband, Mr Mughal, have been trading in partnership as 'Spacia Grocers' in Ellesmere Port since 1998.

5 2. These are two appeals, each made by way of Notices of Appeal dated 29 November 2012, and directed to be heard together. They are brought against penalties amounting to £730 imposed on Mrs Mughal and amounting to £1300 imposed on Spacia Grocers (the Partnership) under Schedule 55 of the *Finance Act 2009* in relation to their respective failures to submit annual self-assessment returns for the  
10 year ending 5 April 2011 on time. I set out the relevant legislation in the Appendix.

3. Insofar as either appeal was filed out of time, I extend the time of my own initiative to 29 November 2012.

### **The Penalties**

15 4. The penalties that have been charged against Mrs Mughal are as follows:

(1) An individual tax return late filing penalty of £100, issued pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;

(2) Daily penalties totalling £630 (being a daily penalty of £10 multiplied by 63 days) issued pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;

20 5. The penalties that have been charged against the Partnership are as follows:

(1) An individual tax return late filing penalty of £100, issued pursuant to Paragraph 3 of Schedule 55 of the 2009 Act;

(2) Daily penalties totalling £900 (being a daily penalty of £10 multiplied by 90 days) issued pursuant to Paragraph 4 of Schedule 55 of the 2009 Act;

25 (3) A 6 month late filing penalty of £300 issued pursuant to Paragraph 5 of Schedule 55 of the 2009 Act.

6. The filing dates for the year ending 5 April 2011 were 31 October 2011 for a non-electronic (paper) return and 31 January 2012 for an electronic return.

7. Mrs Mughal's individual self-assessment return was filed online on 3 July 2012.

30 8. The Partnership's self-assessment return was filed in paper copy on 27 July 2012.

9. Both returns were therefore late.

10. The Partnership's return was more than six months late.

35 11. These are penalty appeals. Therefore, and before any question of reasonable excuse can come into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima

facie, due. Mere assertions in Statements of Case or at the hearing by Presenting Officers are not sufficient. Evidence is required, and, unless sufficient evidence is provided to prove the relevant facts relating to the lawful imposition of a particular penalty on the balance of probabilities, then that penalty must be cancelled without  
5 any question of 'reasonable excuse' becoming relevant: see the discussion in the decision of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC) at Para [69].

12. HMRC have produced evidence, in the form of print-outs from their computer systems, that on 6 April 2011 they sent both Mrs Mughal and the Partnership notices  
10 under section 8 of the *Taxes Management Act 1970* requiring each of them to file a self-assessment return for that tax years in question.

13. HMRC bear the burden of proving that such notices were sent. It is not disputed that those notices were received. I have concluded that HMRC's records in that regard are correct and that such Notices were sent. However, I do not know what those  
15 Notices actually said, since nothing has been put in evidence about them. Nor have I been shown a copy of the returns actually filed.

14. In order to be able to charge daily penalties under Paragraph 4 of Schedule 55, HMRC must establish (again, on the balance of probabilities) that the statutory conditions in that Paragraph are satisfied. This is the case even though the point has  
20 not been raised by either Appellant: see *Burgess and Brimheath Ltd v HMRC* [2015] UKUT 0578 (TCC) (Judges Berner and Scott); *Islam t/a Zainub Takeaway v HMRC* [2017] UKFTT 0337 (TC) and *Sudall v HMRC* [2017] UKFTT 404 (TC) (both being decisions of Judge Jonathan Richards).

15. It is trite that cases are decided on the basis of evidence, and not on the basis of  
25 guesswork. In short, on the evidence which has been placed before me, I am not satisfied, either in relation to Mrs Mughal or the Partnership, that notices satisfying Schedule 55 Paragraph 4(1)(c) were given so as to justify the imposition of the daily penalties which are under appeal.

16. Bearing in mind (as I must) that this is an adversarial jurisdiction and therefore  
30 it is for the parties to decide what evidence they wish to introduce to satisfy the burdens placed upon them, I limit myself simply to observing that no material has been placed before me by way of evidence which would permit me to undertake the sort of exercise of the kind performed by the Tribunal (Judge Redston and Mr Simon) in *Halfaoui v HMRC* [2018] UKFTT 0013 (TC).

17. To my eyes, the painstaking and reconstructive approach in that appeal reflects  
35 the careful attention to the wording of notices undertaken by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761. Whilst, in the present appeal, HMRC's internal print-outs indicate that correspondence and documents were sent out to the Appellants, there is nothing to establish (even generically) what the content of those  
40 documents was, and in particular whether they gave appropriate notice that daily penalties would be charged.

18. Therefore, HMRC has failed to establish that the daily penalties were imposed following the giving of the notice required by Schedule 55 Paragraph 4(1)(c) and accordingly the daily penalties of £630 as against Mrs Mughal and £900 as against the Partnership must be quashed.

5 **Reasonable excuse**

19. In relation to the remaining penalties, the Tribunal must now decide whether either Appellant had a reasonable excuse for the late filing. This is a matter in respect of which the Appellants bear the evidential burden. In the discussion below, I follow  
10 the guidance set out by the Upper Tribunal in *Christine Perrin*, loc.cit. at Paragraph [81].

*Step one*

20. These are the facts which the Appellants assert give rise to a reasonable excuse.

15 21. The Grounds of Appeal (which are identical in both appeals) say, in full, as follows:

20 *"I had an accountant who has served me for the last 35 years, but unfortunately due to non payment over several years to my accountant I was refused further assistance as far as my accounts preparation. My accountant would not release any information regarding submitting self-assessment. He would not release any information and consequently the delay in sending the assessment, and major contribution to submit....I am not an accountant myself as I am a shopkeeper and was dependent on the information provided by my accountant."*

25 22. At the hearing, Mr Mughal, who appeared both on behalf of the Partnership, and on behalf of his wife, handed up a letter from those former accountants, T Nawaz & Co Ltd, dated 12 June 2018, and addressed 'To whom it may concern'. It says that the firm had acted for Mr Mughal and the Partnership (there is no mention of Mrs Mughal individually) from 1980, but had ceased work in February 2011 as its costs had not  
30 been paid for work done since August 2005. Mr Mughal told me that approximately £27,000 had been owed, and in support of this handed up a summary coming to £26,848.25. That document also has written on it "*Filed Mr and Mrs but not aware of partnership*". That letter betrays no knowledge that it would be placed before the Tribunal for its consideration. Nor does that letter make any reference to a lien.

35 23. Mr Mughal told me that he could not afford to go to other accountants, and that although he had done his own return and VAT return, he did not know that he had to file a partnership return. He told me that the failures were not done deliberately, but that the situation at the time had been one of '*total confusion*', and that the returns in question '*had slipped through somehow*'.

40 24. I asked Mrs Mughal whether she had anything which she wished to add to what her husband had told me on her behalf. She did not want to add anything.

### **Step Two**

25. I find that the following facts are proven:

- 5 (1) The Partnership had been in the self-assessment system since 27 July 1998. Mr and Mrs Mughal had been partners throughout that entire period. As of 6 April 2006, they were the only two partners;
- (2) Mr Mughal was the representative partner;
- (3) Mrs Mughal individually had been in the self-assessment system since 27 July 1998;
- 10 (4) Mr Mughal and the Partnership engaged accountants until March 2011;
- (5) Until March 2011, filings had been done by the accountants on behalf of Mr Mughal and the Partnership;
- (6) 2011 was not the first year for filing by the Partnership. There are HMRC records of partnership returns being filed for 2004/5, and 2006/7;
- 15 (7) 2011 was not the first year of filing a self-assessment return by Mrs Mughal;
- (8) Mr Mughal filed his own self-assessment return for 2010/11 on time;
- (9) Mrs Mughal's return was not filed on time;
- (10) The Partnership's return was not filed on time;
- 20 (11) Mr Mughal phoned HMRC on 30 July 2012 concerning the late penalty notices received in relation to the Partnership's late return.

### **Step 3**

26. I must now decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the failures, and, if I find that there  
25 was a reasonable excuse, I must go on to decide when any objectively reasonable excuse ceased. In doing so, I should take account the experience and other relevant attributes of the taxpayers and the situation in which the taxpayers found themselves at the relevant time or times. In this context, I can ask myself "*was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those*  
30 *circumstances*"?: see *Perrin* at Paragraph 81(3).

27. In my view, and applying that test, there was no reasonable excuse for the late filings.

28. Mr Mughal and the Partnership and their accountants parted company in March 2011. That was over six months before the filing deadline for a paper return (31  
35 October 2011) and nine months before the filing deadline for an electronic return (31 January 2012). This was not a case in which the accountants had 'pulled the plug' a short time before the deadline for a return. In my view, there was sufficient time for Mr Mughal and Mrs Mughal to put their affairs in order.

29. To my mind, it is significant that Mr Mughal, even without the assistance of his former accountants, was still able to complete and file his own individual self-assessment return for 2010/11, and on time. The inability to pay the accountants (nor any issue as to whether the accountants exercised any form of lien over the books and records of the Partnership) did not stand in the way of him doing that. Mr Mughal clearly had enough information available to him to allow him to complete his return. He knew that there was an obligation to file, and that is what he did.

30. Whilst recognising that they owed their accountants a significant sum of money, nothing has been placed before me by the Appellants to allow me to assess their financial position at the time. I do not know (for example) the extent of the Partnership's continuing economic activity. It has not been argued that this is a case in which, as matters eventually emerged, no tax in fact was due.

31. It is not entirely clear to me whether the accountants were also acting on behalf of Mrs Mughal in her individual capacity. The letter referred to above does not expressly mention her. I have assumed - most favourably to Mrs Mughal - that the accountants were also, until March 2011, completing and filing her individual self-assessment returns for previous years, and that she was not doing these tasks herself.

32. Mr and Mrs Mughal are business people, and at the time had been in business and in the self-assessment regime for about 15 years. The obligations to file and complete returns were far from new to them. They decided to conduct their business in a partnership. The partnership was a separate entity from its partners. Having made the choice to structure and conduct their business in that way, they were (in years previous to 2010/11) each filing individual returns, and a return was also being filed on behalf of the Partnership. Nothing in the business structure changed when the accountants ceased to act. No good reason has been put before me as to why they simply did not carry on doing what had been done in previous years.

33. Against this background, I do not accept that Mrs Mughal was unaware or ignorant of her obligation to file an individual tax return, and I do not accept that Mr Mughal, as the representative partner of the Partnership, was unaware or ignorant of his obligation to file a tax return on behalf of the Partnership.

34. I have accepted what Mr Mughal told me was a situation of '*total confusion*', in which Mrs Mughal's return and that of the Partnership were overlooked. At best, it seems me that a mistake was made. People make mistakes. But the Finance Act does not give shelter for mistakes, only for reasonable excuses. Whilst I understand the position which the Appellants found themselves in, and there is no suggestion of any bad faith or dishonesty on anyone's part, I do not accept that there was a reasonable excuse not to file.

#### ***Step 4***

35. This step only arises when the reasonable excuse ceased. I have found here that there was no reasonable excuse, and hence this question does not arise.

## Special Reduction

36. I have also considered whether there are any 'special circumstances', within the meaning of Paragraph 16 of Schedule 55 which would have justified reduction of the penalty.

37. In *Clarks of Hove Ltd v Bakers' Union* [1979] All ER 152 the House of Lords considered the meaning of "special circumstances" in the context of employment law. Geoffrey Lane LJ said that "... to be special the event must be something out of the ordinary, something uncommon ...". Similarly, in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 in the context of share valuations for the purposes of capital gains tax, Lord Reid said "'special' must mean unusual or uncommon – perhaps the nearest word to it in this context is 'abnormal'." In the same case, Viscount Dilhorne said "for circumstances to be special they must be exceptional, abnormal or unusual ...".

38. The copy of HMRC's review letter (31 October 2012) with which I have been provided is incompletely copied. But, and on the assumption that HMRC did not expressly consider special circumstances, I do not consider that anything which has put forward in these appeals amounts to special circumstances, in the above meaning of the expression, which would merit reduction of the penalties below the statutory amount.

39. For these reasons, and for the reasons set out above in relation to reasonable excuse, I do not consider there to be any arguable basis for a special reduction.

## Decision

40. Accordingly, and for the above reasons, each appeal is allowed in relation to the daily penalties: £630 in the case of Mrs Mughal; and £900 in the case of the Partnership. Those penalties are quashed.

41. The remainder of the appeal is dismissed and I affirm the other penalties: £100 in the case of Mrs Mughal, and £400 in the case of the Partnership.

42. 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.

**DR CHRISTOPHER McNALL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 23 JUNE 2018**

## 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).
- 5 (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.
- 10 (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%.
- 15 (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.
- 20 (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%.
- 25 (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.
- 30 (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.
- 35 (2) For the purposes of sub-paragraph (1)—
- (a) an insufficiency of funds is not a reasonable excuse, unless
- 40 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

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(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:

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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—

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(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—

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(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:

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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—

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(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—

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

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(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.