



TC06709

Appeal number: TC/2018/02536

INCOME TAX – penalties for late delivery of partnership returns – whether evidence that appellant was the person required to deliver the return by s 12AA(2) Taxes Management Act 1970 – penalties cancelled.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JENNIFER LEVERINGTON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 30 August 2018 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 17 April 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 19 June 2018.

DECISION

1. This is an appeal by Mrs Jennifer Leverington (“the appellant”) against penalties
5 totalling £1,500 assessed on her in the capacity of “representative partner” of a
partnership “Collectable Times”.

2. I have cancelled the penalties for the reasons set out below.

Facts

3. I take the facts from the bundle of documents attached to the “Paper hearing
10 submission” in the form of a statement of case (“SoC”) prepared by the respondents
 (“HMRC”). The appellant was invited to comment on the SoC but has not done so.

4. HMRC records show that a notice to file a partnership return for the partnership
 “Collectable Times” for the tax year 2015-16 was issued on 6 April 2016. That notice
 required delivery of the return by 31 October 2016 if filed in paper form or by 31
15 January 2017 if filed electronically (“the due date”).

5. HMRC’s records show that on 7 February 2017 they issued a notice informing
 the appellant that a penalty of £100 had been assessed for her failure to file the
 partnership return by the due date.

6. HMRC’s records show that on 11 August 2017 they issued a notice informing the
20 appellant that a penalty of £900 had been assessed for her failure to file the partnership
 return by a date 3 months after the due date.

7. Also on 11 August 2017 the records show that HMRC issued a notice informing
 the appellant that a penalty of £300 had been assessed for her failure to file the
 partnership return by a date 6 months after the due date.

25 8. On 28 January 2018 the appellant, through her accountant, Gooding Accounts,
 appealed to HMRC against the daily penalty of £900 and the 6 month penalty of £300.

9. On 16 February 2018 HMRC told the appellant that her appeal was out of time
 and would not be treated as given. They informed her that she could request permission
 from the Tribunal to make a late appeal.

30 10. HMRC’s records show that on 20 February 2018 they issued a notice informing
 the appellant that a penalty of £300 had been assessed for her failure to file the
 partnership return by a date 12 months after the due date.

11. On 26 February 2018 the appellant offered her excuse for the failure to file the
 return in time.

35 12. On 20 March 2018 HMRC rejected the excuse.

13. On 17 April 2018 the appellant notified her appeal to the Tribunal.

Late appeal application

14. The position is that the appeal made by the appellant was notified to HMRC after the time allowed by section 49 Taxes Management Act 1970 (“TMA”), namely 30 days from the date the relevant notices of assessment were issued. HMRC have not accepted that the appellant had a reasonable excuse for making the appeal late, and have refused to accept it. The appellant was informed of her right to seek permission from the Tribunal to require HMRC to accept the appeal and has used the online facility to apply to be allowed to notify HMRC of her late appeal. That application needs to be considered first. I do so even though HMRC have not indicated that they oppose the application.

15. To do so I must apply the three stages set out in *Denton & others v T H White Ltd & others* [2014] EWCA Civ 906.

16. The first stage is to ask whether the delay is serious and significant. It is 4 and 10 months compared with the 3 months treated as serious and significant in a binding authority, *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC). In my view, judged against a time limit of 30 days the delay here is serious and significant.

17. The second stage is to ask what the reason for the delay is. The appellant says that her mother was seriously ill in the period around the deadline and then died. Previously she had said that that appellant was confused about the position of a partnership and had in fact filed her own return with the partnership pages.

18. The third stage is to weigh up all the circumstances, including the prejudice to the parties and the merits if they reveal a very strong case either way. I have taken into account:

- (1) The seriousness of the delay.
- (2) The reasons given for the delay (see §17).
- (3) That the prejudice to HMRC is very limited. HMRC have prepared a comprehensive statement of case which will need to be considered if I grant permission, but they would have done that anyway had the appeal not been late. Thus there is little if any harm to the efficient conduct of litigation.
- (4) The prejudice to the appellant is obviously that she will have to pay £1,300 in penalties, a substantial amount.
- (5) The merits of the underlying appeal and the likely ability of the appellant to succeed on the basis of lack of proper notice to file and other procedural issues.

19. Having considered these circumstances and bearing in mind the need to conduct litigation efficiently, the need to uphold time limits laid down for good reason and the lack of opposition by HMRC, I give permission to make the appeals late.

20. I add that the appeal was not late insofar as it was against the 12 month penalty. In fact the appeal was made before that penalty was issued, but as HMRC included it in their SoC I have treated it as included in the appeals I am dealing with. Strictly the other appeals are only at the stage of having been allowed to be notified to HMRC, but

I waive any formalities that might be necessary to enable me to deal with them, as HMRC plainly want me to do that.

The law in brief

21. The law imposing these penalties is in Schedule 55 Finance Act 2009 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.

22. The Appendix contains relevant parts of Schedule 55. But it is worth setting out here the special rule for partnerships in paragraph 25:

“(1) This paragraph applies where—

(a) 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.

(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, ...

...

(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;

“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;

...”

Grounds of appeal

23. The grounds of appeal are as set out in §17.

Discussion

24. HMRC say that the notice to file a partnership return for 2015-16 was issued to the appellant because she was “the representative partner” of Collectable Times. There was another partner, Mr Fryer, but HMRC say that they have not created a record for him. They add that Mr Fryer has not been issued with any penalty assessment for the failure, and that they do not intend to raise any.

25. The statement of case says (under “Facts”) that:

“During the tax year 2015-16 the partners in Collectable Times were Mrs Jennifer Leverington and Mr Anthony Fryer. An extract from HMRC’s computer records for ‘Collectable Times’ showing the partners is at Folio 3. Mrs Leverington was the representative partner.”

26. Folio 3 simply shows:

“Mr A J Fryer Start Date 01/09/2014
Mrs J Leverington Start Date 01/09/2014”

27. “Representative partner” is a term used in Schedule 55 FA 2009. It is not the term used in s 12AA TMA which deals with partnership returns. Section 12AA(2) says that a notice to file such a return may be given to the partners requiring:

“such person as is identified in accordance with rules given with the notice or a successor of his”

to provide the information in a return. But a notice to file a partnership return may alternatively be given under s 12AA(3) to “any partner” and may be given to just one partner or separate notices may be given to each partner or such number as HMRC thinks fit.

28. By saying that the appellant is the representative partner HMRC must be saying that she is, as paragraph 25(6) Schedule 55 puts it:

“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”

29. The notice to file was issued, according to HMRC’s records in the bundle, to an address which is the business address, HMRC say, of the partnership. It is therefore more likely to be a notice given to the “partners” and so a s 12AA(2) notice.

30. The “Return Summary” in the bundle shows that the “Return Issued Type” is “Notice to file”. In the case where a s 8 TMA return is required, “Notice to file” means a notice in the form of a letter (or email) separate from the return form itself, and where a return form itself is issued, “Return Issued Type” is “Full return”.

31. The bundle contains a specimen notice to file for 2015-16. This relates to a s 8 TMA return and makes no mention of a partnership. What is more the notice to file that is provided does not seem to be the standard one issued usually on 6 April 2016. I say this because it starts:

“We’re sending you this letter because you owe tax from your Pay As You Earn (PAYE) income or we’ve looked at your circumstances and need you to complete a Self Assessment tax return.

5 If you owe tax from your PAYE income, we’ll have previously explained that if you didn’t pay the tax you owe, we’d collect it through self-assessment. As you’ve still not paid, you need to complete a tax return. We will not be sending you a paper return so please file your return online.”

10 32. This wording reinforces my view that no actual return was sent to the appellant, and that there was a standard letter, but it was not this one.

15 33. I do not therefore know what rules are given with the notice that identify who the s 12AA(2) person is, or indeed if any are. For all I know from the bundle the rules in the relevant notice to file might show that the first named person on HMRC’s records is the s 12AA(2) partner and that is Mr Fryer. Since the return had not been filed at the date of the statement of case HMRC cannot even point to the person who filed it (and even if it had been filed by the appellant that cannot be decisive as to who the s 12AA(2) partner is).

20 34. Nor is it relevant that it was the appellant who appealed against the penalties. She was the only one who had received a penalty and would naturally wish to appeal even if she was not the “representative partner” who was the only one allowed to appeal.

35. It is impossible to tell from the evidence in the bundle whether the appellant was the s 12AA(2) partner or the representative partner, so I cannot tell whether the notice to file was properly issued to the right person. That being so there can be no penates for the failure to file by that person.

25 **Decision**

36. Under paragraph 22(1) Schedule 55 Finance Act 2009 I cancel the daily penalty of £900 and the 6 month and 12 month penalties of £300. There is no appeal against the £100 penalty.

30 37. 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
35 and forms part of this decision notice.

**RICHARD THOMAS
TRIBUNAL JUDGE**

40

RELEASE DATE: 10 September 2018

APPENDIX

Schedule 55 FA 2009

5 **1**—(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—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

...

10 (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;

15 “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

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

	Tax to which return etc relates	Return or other document
3	Income tax or corporation tax	(a) Return under section 12AA(2)(a) or (3)(a) of TMA 1970 (b) Accounts, statement or document required under section 12AA(2)(b) or (3)(b) of TMA 1970

AMOUNT OF PENALTY: OCCASIONAL RETURNS AND ANNUAL RETURNS

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

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.

5 (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

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

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—

15 (a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

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.

20 (5) ... 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.

...

25

SPECIAL REDUCTION

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

30 (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—

5 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

ASSESSMENT

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.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

15 (3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

20 **19**—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is the last day of the period of 2 years beginning with the filing date.

(3) Date B is the last day of the period of 12 months beginning with—

25 (a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or

(b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.

(4) In sub-paragraph (3)(a) “appeal period” means the period during which—

- (a) an appeal could be brought, or
 - (b) an appeal that has been brought has not been determined or withdrawn.
- (5) Sub-paragraph (1) does not apply to a re-assessment under paragraph 24(2)(b).

APPEAL

5 **20**—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

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

10 **21**—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

15 (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

22—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC’s decision.

20 (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC’s decision, or

(b) substitute for HMRC’s decision another decision that HMRC had power to make.

25 (3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—

(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.

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

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

REASONABLE EXCUSE

5 **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,

10 (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.

15 DETERMINATION OF PENALTY GEARED TO TAX LIABILITY WHERE NO RETURN MADE

20 **24**—(1) References to a liability to tax which would have been shown in a return are references to the amount which, if a complete and accurate return had been delivered on the filing date, would have been shown to be due or payable by the taxpayer in respect of the tax concerned for the period to which the return relates.

(2) In the case of a penalty which is assessed at a time before P makes the return to which the penalty relates—

(a) HMRC is to determine the amount mentioned in sub-paragraph (1) to the best of HMRC’s information and belief, and

25 (b) if P subsequently makes a return, the penalty must be re-assessed by reference to the amount of tax shown to be due and payable in that return (but subject to any amendments or corrections to the return).

...