



TC05752

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Appeal number: TC/2013/00972

*INCOME TAX – Whether reasonable excuse for late submission of
partnership self- assessment tax returns - Yes.*

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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DRUMROAMING CAMPING AND CARAVAV SITE Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
 PETER R. SHEPPARD FCIS FCIB CTA
 AIIT**

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**The Tribunal determined the appeal on 29 March 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 2 February 2013, and HMRC’s Statement of Case received by the
Tribunal on 31 January 2017 with enclosures. The Tribunal wrote to the
appellant on 2 February 2017 indicating that if he wished to reply to HMRC’s
Statement of Case he should do so within 30 days. No reply was received.**

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DECISION

1. Introduction

5 This considers an appeal against a penalties totalling £1,300 imposed by the respondents (HMRC) under Paragraphs 3, 4 and 5 of Schedule 55 Finance Act 2009 for the late filing by the appellant of his partnership tax return for the tax year 2010-2011.

2. Legislation

Finance Act 2009 Schedule 55
10 Taxes Management Act 1970, in particular Section 12AA –Partnership return.
The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009

3. Case law

Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967
15 Clarks of Hove Ltd v Bakers’ Union [1979] 1 All ER 152
Keith Donaldson v HMRC [2006] EWCA Civ 761
International Transport Roth GmbH v SSHD [2002] EWCA Civ 158
Rowland v HMRC [2006] STC (SCD) 536
Anthony Wood trading as Propave v HMRC [2011] UKFTT 136 (TC 001010)
20 David Collis [2011] UKFTT 588 (TC)

4. Facts

Schedule 55 of the Finance Act 2009 (“the Schedule”) makes provision for the imposition by Her Majesty’s Revenue and Customs (“HMRC”) of penalties on
25 taxpayers for the late filing of tax returns.

If a person fails to file an income tax return by the “penalty date” (the day after the “filing date” i.e. the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

30 Paragraph 4 provides:

“(1) A person is liable to a penalty under this paragraph if (and only if)–

- (a) The 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
- 35 (c) HMRC give notice to the person 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).

Paragraph 5 of the Schedule provides

(1) A person is liable to a penalty under this paragraph if (and only if) - the failure continues after the end of the period of 6 months beginning with the penalty date.

5 (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

10 The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

15 5. In this case in respect of the tax year ended 5 April 2011 HMRC issued a notice to file to the appellant on 6 April 2011. The filing date for a non-electronic return was 31 October 2011 whereas for an electronic return the filing date was 31 January 2012. The appellant failed to submit its tax return until 27 September 2012. As the return was not submitted by the latest filing date of 31 January 2012 HMRC issued a notice of penalty assessment on or around 14 February 2012 in the amount of £100. As the return had still not been received 3 months after the penalty date of 1 February 2012, HMRC issued a notice of daily penalty assessment of £900 on or around 7 August 2012, calculated at £10 per day for 90 days. As the return still had not been received 6 months after the penalty date HMRC issued a notice of penalty assessment of £300 on or around 7 August 2012.

25 6. HMRC's approach to daily penalties was the subject of an appeal by Keith Donaldson which culminated in a decision of the Court of Appeal. The Tribunal has read that decision and considers that its conclusions whilst informative have negligible effect on the matters considered in this appeal save that the absence of the correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice.

30 7. During the tax year 2010-2011 the partners in Drumroaming Camping and Caravan Site were Mr. Ralph Shell and Mrs. Lesley J Shell. Mr. Ralph Shell was the nominated partner.

8. Appellant's submissions

On 28 March 2012 the appellant's agent, Gordon Reid Accountancy wrote to HMRC PAYE & Self Assessment, Cardiff

35 "We understand from our clients that they have been issued with a penalty imposed for late filing of the Partnership Tax Return. The Partnership Self-Assessment Tax Return was submitted by post before the filing deadline for paper returns, the individual's Self-Assessment were submitted and accepted on line.

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If you require a replacement of the Partnership Return please advise us of the same and we will forward a copy, duly signed for you to process.

5 Under the circumstances we ask that you consider that a possibility exists that the original Partnership Return has been lost or misplaced and that the penalties imposed are waived. In addition we believe that our clients have submitted their returns promptly and have maintained their tax affairs in an orderly manner. We await your response in due course”

9. On 25 September 2012 the appellant’s agent wrote to HMRC

10 “We understand from our clients that they have been issued with further penalties imposed for late filing of the Partnership Tax Return

Please find enclosed a copy of our letter sent on 28th March 2012 to the Cardiff Office, amongst other matters requesting a response. No response was forthcoming in respect of the duplicate return.

15 We now enclose a replacement of the Partnership Return for 2011 duly signed for you to process

20 Under the circumstances we ask that you re-consider that a possibility existed that the original partnership return has been lost or misplaced and that the penalties imposed are waived. We also ask to consider that the Cardiff Office did not respond to our letter and this has in turn resulted in you imposing further unnecessary penalties.

We would also ask you to recognise that our clients have maintained their tax affairs in an orderly manner other than this single matter.

25 . We await your response in due course”

10. On 20 November 2012 the appellant’s agent submitted a request for review form SA634. On that form they said

30 “We refer to our letter of 28 March 2012 (copy attached) which did not receive any response.

Our contention is that the individual tax returns were submitted online & the partnership sent by 1st class post by the due date.

35 HMRC does not provide any facility for online filing of partnership returns other than using commercial software which is prohibitively expensive to small businesses.

The individual return includes the partnership losses resulting in no liability for income tax. Class 4 contributions of £130.64 were due. Therefore HMRC has never been deprived of tax due. It would be reasonable to accept that HMRC had the information for the partnership as it is included in the return.

We cannot recall having any notification that the return was not submitted until March and the lack of response has added significantly to the penalties which would have been addressed sooner.”

5 11. HMRC conducted a review and issued their review conclusion on 7 January 2013. The outcome was that the decision to impose penalties should be upheld.

They confirmed receipt of the appellant’s agent’s 28 March 2012 letter on 2 April 2012 and said they had issued an acknowledgement on 18 April 2012 and a full reply on 30 May 2012

10 They say partnerships have always had to use 3rd party commercial software since the introduction of self-assessment. HMRC would not consider the lack of free software to file a Partnership return or the cost of 3rd party commercial software as grounds for reasonable excuse.

12. The appellant’s Notice of Appeal dated 2 February 2013 contains no grounds of appeal but refers to the letters set out above.

15 **13. HMRC’s submissions**

HMRC say that in accordance with Paragraph 25(4) Schedule 55 Finance Act 2009 an appeal under paragraph 20 in connection with a penalty payable by virtue of this paragraph may be brought only by the representative partner or a successor to the representative partner.

20 Mr R. Shell is the representative partner therefore in accordance with paragraph 25 (5) Schedule 55 Finance Act 2009 HMRC have treated this as an appeal against the determination of the penalties on all of the partners in respect of the failure.

25 14. HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the nominated partner to ensure the partnership’s 2010-2011 tax returns was filed by the legislative date.

15. HMRC say that the SA return for the 2010-2011 year issued to the nominated partner on 6 April 2011 clearly showed the due dates for filing the return online or in paper format.

30 16. HMRC records show that the appellant’s agent submitted the partnership return on 27 September 2012.

17. HMRC say there is no proof of posting and nothing on their records to show that the Partnership return was submitted before 31 October 2011. They say that in cases where postal delays are cited as providing reasonable excuse it is reasonable expect some evidence of posting.

35 18. HMRC say the individual self-assessment returns for both partners were received before the electronic filing deadline of 31 January 2012 and did show their share of

the partnership income and that there was no tax liabilities, however it is not up to HMRC to take partnership information from individual returns.

19. In respect of reasonable excuse HMRC say that they consider the actions of a taxpayer should be considered from the perspective of a prudent person exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard”.

20. In respect of the penalty being unfair HMRC say for a penalty to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

21. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty.

22. Tribunal’s Observations

Tribunal agrees with HMRC that it is the Appellant’s responsibility to submit SA returns on time. The return for the periods 2010-2011 was due to be submitted by 31 January 2012 but HMRC did not receive a copy until 27 September 2012. Penalties totalling £1,300 are therefore due unless the appellant can establish a reasonable excuse for the delay as referred to in Paragraph 23(1) Schedule 55 Finance Act 2009.

23. The Tribunal also agrees with HMRC that the lack of free software to file a Partnership return or the cost of 3rd party commercial software provide the appellant with a reasonable excuse for the failure to submit the partnership return on time.

24. The Tribunal is mindful of Rule 2 of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009
“2.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.”

25. If the Tribunal accepts that the appellant posted the Partnership return so as to reach HMRC within the deadline then that establishes a reasonable excuse for the appellant and the appeal is dismissed.

If on the other hand the Tribunal accepts HMRC’s arguments and considers that they did not receive the return by the due date then a penalty is due. HMRC’s reason for not accepting the appellant’s contention that the return was sent so as to reach them on time is that the appellant has failed to provide proof of posting.

The appellant sent a letter dated 28 March 2012 to HMRC in which they requested HMRC to advise them if they required a duplicate. HMRC accept they received that letter on 2 April 2012.

5 In their statement of case HMRC say they sent an acknowledgement on 18 April 2012 and a full reply to the appellant's agent on 30 May 2012 and provide a copy of that letter.

Treating the parties with equal fairness the Tribunal observes that HMRC have not provided proof of posting of that letter.

10 It is clear from the Appellant's agent's letter of 25 September 2012 that they did not receive it.

15 26. During the period from 1 May 2012 to 7 August 2012 HMRC have calculated daily penalties of £10 per day. Assuming the letter of 30 May 2012 was sent the Tribunal observes that HMRC have provided no explanation as to why it took them 59 days (2 April to 30 May) to reply. In the letter of 28 March 2012 it is clear that the appellant's agent considered he had posted the return and therefore assumed it had either been lost in the post or mislaid by HMRC. In order to cover the last possibility the agent wrote "If you require a replacement of the Partnership Return please advise us of the same and we will forward a copy, duly signed for you to process."

20 The request by the appellant's agent was simple and straight forward, it did not require a long and complex answer. In the Tribunal's view it could have been answered by return. It certainly should have been answered within 4 weeks i.e. by 30 April 2012. The delayed response cost the appellant at least £300 in daily penalties (1 to 30 May). Had HMRC responded earlier the appellant may have also realised the situation he was in and taken steps to avoid the £300 six month penalty.

25 27. Having regard to all the circumstances in this case the Tribunal prefers to assume that all parties are being honest. That being the case the Tribunal accepts that the appellant's agent posted the Partnership tax return to HMRC in order for it to reach them before the deadline but the return was lost in the post. The agent had not received the response from HMRC dated 30 May 2012 and so did not realise that a replacement was required until the appellant notified him of the further penalties which had been imposed on 7 August 2012. He therefore wrote to HMRC on 25
30 September 2012 sending a replacement return. The Tribunal considers that the agent acted reasonably in the circumstances.

35 28. Therefore the appellant has established a reasonable excuse for the late submission of its tax return for the period 2010-2011 and the appeal is allowed.

29. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded there are
40 none. If the Tribunal had not considered the appellant had a reasonable excuse and allowed the appeal it would have disagreed with HMRC and found that there were

5 unusual circumstances. The time taken for HMRC to respond to a simple question was excessive and unusually long and had the effect of unnecessarily increasing the penalties assessed on the appellant by at least £300 in daily penalties and possibly a further £300 being the 6 month late penalty. The tribunal would have considered these special circumstances and would have reduced the penalty by £600.

10 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 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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**PETER R. SHEPPARD
TRIBUNAL JUDGE**

RELEASE DATE: 6 APRIL 2017