



TC06166

Appeal number: TC/2017/01820

INCOME TAX – application for permission to notify a late appeal – penalties for failures to make self assessment returns on time – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOHAMMAD AHMAD

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN AGBOOLA**

Sitting in Manchester on 22 August 2017

Mr Mohammad Ahmad appeared in person

Mr Philip Jones of HM Revenue & Customs appeared for the Respondents

DECISION

Background

5 1. The appellant seeks to appeal penalties imposed by HMRC for late filing of
partnership tax returns for 2004-05, 2005-06 and 2006-07 and for late filing of his
individual self assessment return for 2005-06. The penalties were fixed penalties
imposed pursuant to section 93 Taxes Management Act 1970 (“TMA 1970”) (the
individual returns) and section 93A TMA 1970 (the partnership returns). No daily
10 penalties were imposed.

2. The hearing before us was listed to consider whether the appellant should be
granted permission to notify a late appeal, and if so to then hear the substantive
appeal.

15 3. The penalties in relation to the partnership returns for each of the three tax years
are £100 penalties for failure to file the returns on time and £100 penalties because in
each case the failure continued for more than 6 months. The total penalty therefore in
relation to the partnership returns is £600. The penalties were notified to the appellant
as follows:

	2004-05	2005-06	2006-07
Initial Penalty	6/6/06	16/02/07	19/02/08
6 Month Penalty	28/11/06	31/08/07	5/08/08

20 4. The penalties in relation to the individual return for 2005-06 are a £100 penalty
for failure to file the return on time and a £100 penalty because the failure continued
for more than 6 months. The total penalty therefore in relation to the individual return
is £200. The penalties were notified to the appellant as follows:

	2005-06
Initial Penalty	16/2/07
6 Month Penalty	31/8/07

25 5. The notice of appeal was notified to the tribunal on 18 February 2017 and
indicates that the amount in dispute is £1,668.68. That figure appears on a statement
of account produced by HMRC on 14 June 2015. However it includes a £100 late
filing penalty for 2013-14 which was subsequently removed, tax on the appellant’s
self-assessment for 2005-06 and various amounts of interest. The appellant accepted
30 that he was not appealing the tax on his self-assessment and that the sum in dispute
was £800 of penalties together with the interest thereon.

6. It is not disputed that the returns were late and we set out below the circumstances in which they came to be made. Sections 93(8) TMA 1970 provides in the case of individual returns for the tribunal on appeal to set aside penalties where it appears throughout the period of default that the taxpayer had a reasonable excuse for not delivering the return. There is a similar provision in relation to partnership returns in section 93A(7) TMA 1970 which applies if “the person for the time being required to deliver the return (whether the representative partner or a successor of his) has a reasonable excuse for not delivering it”. Section 93A(7) reflects the fact that the person required to deliver a partnership return is the “representative partner” or his successor. That term is a shorthand adopted to describe the partner identified in a notice requiring a partnership return to be made pursuant to section 12AA TMA 1970.

Findings of Fact

7. We are satisfied based on the documentary evidence adduced by HMRC and on the balance of probabilities that in each case the relevant returns were filed late as follows:

Partnership Returns:	Date Issued	Due Date	Date Received
2004-05	6/4/05	31/1/06	1/5/07
2005-06	6/4/06	31/1/07	21/4/09
2006-07	6/4/07	31/1/08	21/4/09
Individual Return:			
2005-06	6/4/06	31/1/07	21/4/09

8. The appellant does not dispute that the returns were filed late and we are satisfied that subject to the question of reasonable excuse the appellant is liable to the penalties identified above.

9. The penalties were notified to the appellant on the dates identified above, between June 2006 and August 2008. We must consider what happened after the penalties were notified to the appellant for the purpose of the appellant’s application for permission to notify a late appeal. If we grant the appellant permission to notify a late appeal we must then consider why the returns were late in order to identify whether there is a reasonable excuse for filing the returns late. To some extent there is an overlap in the relevant facts and at this stage we shall simply find all relevant facts.

10. The appellant was in partnership with Mr Rehan Sajid carrying on business under the name “Dixy Fried Chicken” in Manchester. This was the appellant’s first business venture. The partnership dissolved in June 2006. By that time the 2004-05 partnership return was already overdue. We are satisfied from what the appellant told us that all the business records were held by Mr Sajid but that Mr Sajid did not co-

operate in bringing the partnership tax affairs up to date. Mr Sajid subsequently moved to the USA and could not be contacted. Mr Sajid was the representative partner for the purpose of making returns.

5 11. Given the passage of time, HMRC's records in relation to the partnership's tax affairs and the appellant's own tax affairs have been archived and are incomplete. Mr Jones has however been able to reconstruct the sequence of events to some extent from the available records. On the basis of those records we find as follows.

10 12. There is little documentary evidence as to what happened between June 2006 and October 2009. What we do find is that statements of account showing the penalties were regularly sent to the appellant throughout this period. In June and November 2006 and in February 2007 penalties were notified to the appellant. On 1 May 2007 the partnership return for 2004-05 was submitted to HMRC. In August 2007, February 2008 and August 2008 further penalties were notified to the appellant. On 21 April 2009 the remaining partnership returns were submitted together with the
15 appellant's individual return for 2005-06. All the partnership returns submitted contained an indication that they included provisional figures.

20 13. The time for notifying appeals against the penalties to HMRC was 30 days from the date of issue. An appeal against the earliest penalty for 2004-05 ought to have been sent to HMRC by 6 July 2006. An appeal against the latest penalty for 2006-07 ought to have been sent to HMRC by 4 September 2008.

25 14. The appellant told us that he understood that his accountants, FH & Co had spoken to HMRC in 2007 and had been told to submit estimated figures. There is no documentary evidence but that may well be because of the passage of time. We accept the appellant's evidence because the 2004-05 partnership return was submitted on 1 May 2007 with provisional figures. However there is no explanation as to why the returns for 2005-06 and 2006-07 were not made with provisional figures until 21 April 2009. The appellant thought that all the returns were submitted at the same time, however that is inconsistent with HMRC's records of receipt. There is also a note on
30 the appellant's self assessment file dated 7 September 2009 which records a telephone call from the appellant in which he says that the returns are "now sent in". We find that the remaining returns were not submitted until 21 April 2009.

35 15. There is no evidence that the appellant or his accountants gave any indication of an appeal against the penalties until October 2009. On 29 October 2009 FH & Co wrote to HMRC asking for the penalties to be cancelled. HMRC requested confirmation in writing of which penalties they wanted cancelled and on what grounds. The appellant later telephoned HMRC in November 2009 and was told that HMRC had written to his agent requesting details. It does not appear that the details requested by HMRC were provided and HMRC did not accept the letter as an appeal.

40 16. On or about 29 March 2010 collection of penalties in relation to the late partnership returns was suspended. It is not clear what prompted this, although the suspension lasted only until about 7 May 2010.

17. The appellant told us that he recalled receiving a statement of account which showed a balance due of £696.57 which he paid. The evidence before us included a statement of account dated 8 April 2010 showing that sum as due and the penalties as suspended. Subsequent statements did not show such a payment but Mr Jones did not
5 dispute that it had been paid. Subsequent statements also showed the penalties without suspension and the appellant told us that it was on receipt of a statement dated 22 June 2010 that he asked his accountant to appeal.

18. The appellant's recollection appears to us to be faulty because FH & Co lodged a formal appeal with HMRC on 5 May 2010. HMRC replied stating that in relation to
10 the partnership penalties the appeal must be made by the representative partner and they did not accept the appeal. Matters were allowed to rest there until the appellant telephoned HMRC on 7 February 2012. The appellant's evidence was that his accountant was dealing with matters during between May 2010 and February 2012 but there is no evidence of any contact during that period.

19. In his telephone call to HMRC on 7 February 2012 the appellant disputed the penalties. He told HMRC that he had previously appealed the penalties and that the penalties had been "deleted". We accept that there was a suspension for a short period
15 in early 2010 but otherwise the statements of account sent to the appellant showed the penalties as still owing and not suspended. Having said that Mr Jones himself acknowledged that the statements of account were confusing and it was not clear
20 whether the penalties remained suspended after 2010.

20. On 3 April 2012 FH & Co wrote to HMRC referring to a letter dated 13 March 2012. The April letter referred to Mr Sajid's failure to co-operate in bringing the partnership tax returns up to date. It also stated that the firm had communicated with
25 HMRC about submission of the partnership returns and the appellant's individual return and following those communications the returns were submitted with provisional figures. The letter concluded by asking that the late filing penalties be waived.

21. It is not at all clear what happened following FH & Co's letter. It does appear
30 that there was a reply dated 20 April 2012 inviting the appellant to negotiate with a debt collection agency which was by then chasing the debt. There was further contact in 2015 where the appellant was still disputing the penalties.

22. On 6 October 2016 the appellant telephoned HMRC to say that he had received a letter from a debt collection agency claiming £1,100. He told HMRC that he
35 understood he had no debt and that his accountant had appealed the penalties in April 2012. On 12 October 2016 the appellant wrote to HMRC enclosing a copy of the letter dated 3 April 2012 from FH & Co to HMRC and asking for the penalties to be suspended.

23. On 7 December 2016 the Appellant wrote to HMRC to say that he had appealed
40 the penalties in 2007, and subsequently in 2012. He asked for all the penalties to be waived.

24. On 19 January 2017 HMRC notified the appellant that they could not accept his late appeal. The appellant then lodged the present notice of appeal with the tribunal on 18 February 2017.

25. Based on our findings above we are satisfied that no steps were taken to appeal the penalties until October 2009. There was a further period of delay between May 2010 and February 2012 but the appellant may have reasonably understood during that period that the penalties were suspended. The position thereafter is unclear until October 2016 when the Appellant pursued his dispute of the penalties with more vigour.

Application for Permission to Notify Late Appeals

26. The Appellant's grounds of appeal are that he was unable to complete either the partnership returns or his own self assessment without the co-operation of Mr Sajid. Clearly the returns were eventually submitted using provisional figures without the co-operation of Mr Sajid. Effectively, therefore, the appellant's case is that he has a reasonable excuse for late submission of the returns in that his partner would not co-operate and he was not aware that he could submit the returns using provisional figures.

27. In determining an application for permission to notify a late appeal it is appropriate to consider the 3 stage test set out in *Denton v TH White Limited [2014] EWCA Civ 906* concerning relief from sanctions:

- Stage 1 is to assess the seriousness or significance of the breach.
- Stage 2 is to consider why the breach occurred.
- Stage 3 is to consider all the circumstances so as to deal justly with the application.

28. In relation to Stage 3 we have had regard to the factors set out by the Upper Tribunal in *Data Select Limited v Commissioners for HM Revenue & Customs [2012] UKUT 187 (TCC)* and to the observations of the Supreme Court in *BPP Holdings Ltd v Commissioners for HM Revenue & Customs [2017] UKSC 55*. In particular we have had regard to the purpose of the time limit, the length of the delay, whether there is a good explanation for the delay, the consequences for the parties if time is extended and the consequences for the parties if the extension of time is refused.

29. The period of delay prior to the appellant first challenging the penalties in October 2009 ranges from 3 years 3 months for the initial penalty in relation to the 2004-05 return to 1 year 2 months for the 6 month penalty in relation to the 2006-07 return. Those delays alone are serious and significant. Indeed, the Upper Tribunal in *Romasave (Property Services) Limited v Commissioners for HM Revenue & Customs [2015] UKUT 254 (TCC)* referred to a delay of 3 months as serious and significant.

30. There is no explanation as to why the appellant did not appeal the penalties within the 30 day time limits. It is not suggested that the appellant or his accountants

were unaware of the appeal rights or the time limits for appeals. They should certainly have been aware. The failure of Mr Sajid to co-operate with submission of the partnership returns cannot be taken as an explanation for failing to submit appeals against the penalties. No real explanation has been offered for the delay.

5 31. The purpose of the time limit of 30 days in which to appeal is clearly to promote
finality. Morgan J in *Data Select* stressed the desirability of not re-opening matters
after a lengthy interval where one or both parties were entitled to assume that matters
had been finally fixed and settled. The difficulties HMRC have had in identifying
10 correspondence and material relevant to this appeal serve to emphasise why it is not
desirable to re-open matters.

32. We are satisfied that HMRC will be prejudiced if the time for appealing is
extended. They will lose the finality they were entitled to expect back in October
2009. If appeals had been properly lodged in time then HMRC would have had
available all material relevant to the appeals. As it is, they are now in a position of
15 having to try and recreate the correspondence and their dealings with the appellant
back to 2006 with incomplete records.

33. We accept that the Appellant himself will be prejudiced if he is not permitted to
appeal out of time. He will lose his opportunity to pursue his appeal against the
penalties on its merits.

20 34. In relation to the partnership returns, Mr Jones submitted that because the
appellant is not the representative partner then he has no appeal rights in any event.
We do not consider that the position is as straightforward as that – see the decisions of
Judge Mosedale in *Phillips v Commissioners for HM Revenue & Customs [2009]*
UKFTT 335 (TC), Judge Cannan in *Mcashback Software 6 LLP v HM Revenue &*
25 *Customs [2013] UKFTT [2013] 679 (TC)* and Judge Redston in *Dyson v HM Revenue*
& Customs [2015] UKFTT 131 (TC).

35. For present purposes we shall assume that the appellant would have a right of
appeal against the penalties for late submission of the partnership returns. His grounds
of appeal are that he had a reasonable excuse for not submitting the returns on time. In
30 certain circumstances it is appropriate to consider the merits of an appeal in
determining an application to extend time. In *R (Dinjan Hysaj) v Secretary of State*
for the Home Department [2014] EWCA Civ 1633 Moore-Bick LJ stated at [46]

35 “ ... In most cases the merits of the appeal will have little to do with whether it is
appropriate to grant an extension of time. Only in those cases where the court can see
without much investigation that the grounds of appeal are either very strong or very
weak will the merits have a significant part to play when it comes to balancing the
various factors that have to be considered at stage three of the process.”

40 36. The present application was listed together with the appeal to follow if
permission for a late appeal was granted. We therefore heard evidence and argument
directed towards whether the appellant had a reasonable excuse for not submitting his
individual return on time and whether the representative partner had a reasonable

excuse for not submitting the partnership returns on time. We can set out our views on the merits briefly.

37. Mr Jones offered the following approach to deciding whether there is a reasonable excuse. He submitted that we should consider the particular circumstances of the case, including the particular circumstances and abilities of the taxpayer. In the light of those circumstances we should consider what a reasonable person in those circumstances would have done and whether the taxpayer met that standard.

38. The approach suggested by Mr Jones is consistent with *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

10 “ The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at
15 the relevant time, a reasonable thing to do?”

39. It is also consistent with the decision of the First-tier Tribunal in *Nigel Barrett* [2015] UKFTT0329 where Judge Berner said:

20 “ The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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.”

40. We take into account therefore that the appellant was not experienced in business or in dealing with HMRC. He relied on his accountant but he also dealt with HMRC directly in relation to the penalties.

41. In relation to the appellant’s own return, section 93(8) TMA 1970 provides that the tribunal may set aside a penalty if the taxpayer had a reasonable excuse for the default. It is clear that by 1 May 2007 FH & Co had been told that they should submit returns with provisional figures. However, the appellant did not submit his 2005-06 return, which was due by 31 January 2007, until 21 April 2009. Further, there is no reason why the appellant and/or FH & Co could not have contacted HMRC prior to the due dates to explain the position. If they had done, then we infer that they would have received the advice that FH & Co was given in or about May 2007. Namely to submit the returns with provisional figures.

35 42. In relation to the partnership returns, section 93A(7) TMA 1970 provides that the tribunal may set aside a penalty if the representative partner or his successor had a reasonable excuse for the default. There is nothing to suggest that Mr Sajid had any reasonable excuse for submitting the returns late. In any event, and again there is no reason why the appellant and/or FH & Co could not have contacted HMRC prior to the due dates to explain the position in which case they would have realised that the returns should be submitted with provisional figures.

43. In the circumstances we are not satisfied that there was any reasonable excuse for late submission of the returns and the appeal would be bound to fail. It is clearly not appropriate therefore to extend the time for appealing. Even if there was merit in the underlying appeal the prejudice to the appellant would not be such as to cause us to grant permission to appeal out of time in the face of the other factors and circumstances discussed above. In particular the serious and significant delay until October 2009 and the lack of any explanation for that delay.

Conclusion

44. In the circumstances and for the reasons given above we refuse permission to notify a late appeal.

45. 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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 16 OCTOBER 2017