



TC07863

Late filing penalties – appellant says return submitted on time –no certificate of posting – assessment of evidence overall – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/06122

BETWEEN

HAMID PROPERTY INVESTMENTS

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE TRACEY BOWLER

The Tribunal determined the appeal on 23 January 2020 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 16 September 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 15 November 2019.

A summary decision was issued on 7 February 2020. The Appellant wrote to the Tribunal on 17 February 2020 seeking to appeal the decision. There has been delay in processing that letter as a result of the processes put in place to deal with the Covid-19 pandemic. Before the Appellant can appeal the decision, a full decision must be provided. This is the full decision.

DECISION

INTRODUCTION

1. This is an appeal by the representative partner on behalf of the partnership known as Hamid Property Investments (“Hamid”) against penalties totalling £1300 imposed by the Respondents (‘HMRC’) under Paragraphs 3, 4 and 5 of Schedule 55 Finance Act 2009 (“Schedule 55”) for the late filing by the Appellant of the partnership tax return for the tax year ending 5 April 2018.

2. The penalties that have been charged can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 26 March 2019 and issued to each of the partners in Hamid;

(2) “daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 9 August 2019 and issued to each of the partners in Hamid; and

(3) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 9 August 2019 and issued to each of the partners in Hamid.

GROUND OF APPEAL

3. In essence, Hamid has put forward one ground of appeal which is that the partnership tax return was submitted on time.

FINDINGS OF FACT

4. Having read the evidence provided by the Appellant and the Respondent I make the following findings.

5. Hamid started trading as a partnership on 6 April 2015.

6. A paper partnership return was submitted on time for the tax years 2015-16 and 2016-17.

7. The notice to file for the year ending 5 April 2018 was issued to Hamid on 6 April 2018. The due date for filing the return was 31 October 2018 for a paper return, or 31 January 2019 for an electronic return.

8. The paper partnership return was not filed by the due date although the individual tax returns for the partners were filed electronically on time on 18 October 2018. The decision to file the partnership tax return by post was to save the cost of using commercial software needed for electronic filing of partnership returns. That was a matter of choice; it was not caused by a shortage of funds to pay for the software.

9. HMRC imposed a £100 penalty by the notice issued on 26 March 2019 to each of the partners in Hamid.

10. On an unspecified date or dates in April 2019 HMRC issued self-assessment statements to each of the partners in Hamid which included the £100 late filing penalty and that penalty was identified as being for the failure to file the partnership return.

11. On 16 April 2019 Hamid’s agent wrote to HMRC to say that the tax returns for listed individual taxpayers, including the partners of Hamid, had been submitted on time on 18 October 2018 and therefore the penalties imposed on those taxpayers should be cancelled. The letter referred not only to the individuals who are partners of Hamid, but also to penalties imposed on other taxpayers represented by that agent. However, the letter did not refer to the partnership tax return due from Hamid.

12. On 4 June 2019 a 30 day penalty reminder letter was issued by HMRC to each of Hamid's partners.

13. On 2 July 2019 a 60 day penalty reminder letter was issued by HMRC to each of Hamid's partners.

14. On 15 July 2019 Hamid's agent wrote to HMRC to appeal the penalties.

15. On 16 July 2019 HMRC responded to the notice of appeal saying that the partnership tax return had not been received. Only the partners' individual tax returns had been submitted.

16. On 31 July 2019 Hamid's agent completed the form requesting a review of HMRC's decision, stating again that the partnership tax return was submitted by post on 18 October 2018. The form was accompanied by: (i) a copy of a letter dated 18 October 2018 from the agent to HMRC stating that the partnership tax return was enclosed; (ii) some, but not all of the pages from the partnership tax return for Hamid – pages 1-3 and 6; and (iii) a copy of confirmations of receipts of the online filing of each of the partner's tax returns.

17. On 9 August 2019 the daily penalty notice and the six month penalty notice were issued to each of the partners in Hamid.

18. On 6 September 2019 HMRC issued a letter maintaining its decision to impose the £100 late filing penalty. The letter stated again that the records had been checked and the partnership tax return had still not been received by HMRC.

19. On 16 September 2019 the partnership tax return was filed online.

THE LAW

20. The burden of proof is on HMRC to show that the necessary conditions were met for the issue of penalties. The burden of proof is on Hamid to show that its return was sent to HMRC on time, or it had a reasonable excuse for the late filing, or that "special circumstances" apply. In each case the standard is the usual civil standard of balance of probabilities.

21. Whether a taxpayer has a reasonable excuse depends upon the application of paragraph 23 of Schedule 55 and the guidance provided in case law and, in particular, the case of *Christine Perrin v HMRC Commissioners* [2018] UKUT 0156, to the facts.

22. The provisions in Schedule 55 state that:

- (1) a reasonable excuse does not include an insufficiency of funds unless attributable to events outside a taxpayer's control;
- (2) where a taxpayer relies on another person to do anything that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure;
- (3) where a taxpayer had a reasonable excuse, but the excuse ceased the taxpayer is treated as continuing to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

23. In *Perrin* the Upper Tribunal held as follows:

"81. When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:

- (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question ‘was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?’

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

24. HMRC can also reduce a penalty because of “special circumstances”. “Special circumstances” do not include an inability to pay. The Tribunal can only interfere with HMRC’s decision about special circumstances if it thinks that the decision in respect of the application of the special circumstances provisions is “flawed” when considered in the light of the principles which apply in the context of judicial review. “Special circumstances” are not defined, although Schedule 55 states that it does not include an ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another. In other contexts “special” has been held to mean “exceptional, abnormal or unusual”. The special circumstances must apply to the appellant in this case and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis v HMRC* [2011] UKFTT 588).

DISCUSSION

Ability of HMRC to impose the penalty

Issue of the Notice to file

25. The first issue is whether HMRC has shown that the notice to file a tax return was issued and the other requirements for the issuance of penalties were met.

26. On the basis of HMRC’s computer records showing that a notice to file a tax return was issued on or around 6 April 2018 and Hamid’s implicit acceptance of that having taken place in the evidence from Hamid I have found the notice to file a partnership return was issued by HMRC.

27. I am also satisfied on the basis of the records provided by HMRC and the recognition by Hamid of their issue, that the penalty notices were validly issued.

28. These conclusions mean that HMRC has discharged the burden of proof on it.

The Appellant’s case

Submission of the partnership return in time

29. Under Section 115 TMA 1970:

“Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person by HMRC may be so served addressed to that person..... at his usual or last known place of residence, or his place of business or employment.....”

30. Under Section 7 of the Interpretation Act 1978:

“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 to be 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”

31. Hamid says that the return was sent by post in time on 18 October 2018. No certificate of posting has been provided and I have therefore assessed Hamid’s claim in the light of the evidence overall. I have found that the evidence does not support a finding that the partnership tax return was posted on or before 31 October 2018 for the following reasons.

32. Hamid has provided a copy cover letter and a copy of some pages of the tax return which are stated to show that the return was posted to HMRC in time. I am not satisfied that this is sufficient to show that the original was posted to HMRC when viewed in the context of the evidence overall for the following reasons:

(1) First and foremost, if Hamid’s agent had posted the return, as claimed on 18 October 2018, it would have been a simple and obvious matter to have provided a copy of the letter and return when the agent wrote on 16 April 2019. However, that was not done. A full copy of the paper return has not been provided by Hamid or its agent to HMRC, or the Tribunal, to date. Only pages 1-3 and 6 were attached to the request for a review of the decision. In addition, there was delay in sending the copy cover letter and the few return pages. They were not sent until 31 July 2019, more than 4 months after the first penalty was imposed. There is no explanation for the failure to provide a full copy of the return, or the delay in providing the cover letter and extract from the return. Even though this issue was identified in HMRC’s Statement of Case, Hamid has not responded by providing a copy of the full return or by explaining the position;

(2) In addition, the letter written by Hamid’s agent on 16 April 2019 listed various taxpayers (including the partners of Hamid) with their individual tax references and stated that their tax returns had been submitted on time. It did not identify Hamid and its tax reference. The agent showed in the later request for review of HMRC’s decision that it was aware of the difference in the taxpayer reference numbers as it specifically identified the taxpayer reference for Hamid, stating the number used in HMRC’s letter was the representative partner’s personal reference. There was therefore no reason for the letter of 16 April 2019 to omit the reference to the partnership return for Hamid if this was, in fact, sent on 18 October 2018;

(3) The letter of 16 April 2019 shows some confusion on the part of Hamid’s agent between returns sent by post and submitted electronically and between individual tax returns and partnership tax returns. The letter lists taxpayers who had received penalty assessments, including the partners of Hamid with their individual tax references, saying their returns were “sent” on 18 October 2018. A copy of the confirmations of the electronic submission of the individual partners’ returns is also enclosed. The individual tax returns for the Hamid partners were, indeed, submitted electronically and HMRC have accepted that this took place. While it is more usual to describe electronic filing of returns as having been “submitted” rather than “sent” as Hamid’s agent has, more importantly, the fact

that the individual returns were submitted does not show that the partnership tax return was posted. The letter also states that returns for four other individual taxpayers were “sent” on two other days and asks for cancellation of their penalties as well. Three of them appear to be partners in another partnership. It is therefore likely that the agent prepared a paper partnership return for that partnership as well, given the agent’s comments about cost of software (addressed further below). The fact that the agent is therefore claiming that post has gone astray on more than one occasion (and only two weeks apart) suggests it is more likely that the problem lay at the sender’s end;

(4) In the notice of appeal Hamid’s agent says that the postal system is always used for submission of partnership returns because there is no free software for partnership returns. If that is so, obtaining a certificate of posting (which costs nothing) would be an obviously prudent step to show that returns have been posted.

33. I therefore conclude, on the basis of the evidence overall, that it is more likely than not that the partnership tax return due for Hamid was not posted on 18 October 2018, or any other date on or before 31 October 2018. Consequently, I have found that the partnership tax return due for Hamid was not submitted on time.

Reasonable excuse

34. The appeal has not articulated a ground of appeal based on there having been a reasonable excuse for the late submission of the partnership tax return, but I have considered whether the evidence supports such a conclusion. I address three possible bases: reliance by Hamid on its agent; a belief that the return was submitted in time by post; and the cost of using software to file the return electronically.

35. As noted above, Hamid’s agent responded on 16 April 2019 to the £100 penalty, although he failed to mention Hamid’s partnership return in the letter dealing with several taxpayers. The obvious step to have taken at that point would have been to provide a copy of the partnership return. If, following discussions, HMRC maintained that the return had not been received and they would not accept the copy, the next obvious step would have been to submit the return online to prevent further penalties from being applied. However, the electronic return was only submitted on 16 September 2019. The copy of the few pages from the return and the cover letter were only provided with the request for review on 31 July 2019. Those delays are not consistent with a taxpayer remedying the failure to file the return, based on a belief that the return had been posted, without unreasonable delay.

36. There is no evidence that Hamid is claiming that it had a reasonable excuse in relying on its agent. In any event, paragraph 23(2)(b) of Schedule 55 states that reliance on another person is not capable of being a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. Hamid’s representative partner was responsible for ensuring that its obligation to file the partnership return was met and the evidence does not show that he took reasonable care to do so. Even if the representative partner relied on Hamid’s agent to file the return on time and was told that it had been, it was then clear when the first penalty notice was issued that the filing had not happened. At that point a responsible taxpayer would have ensured that the steps described earlier were taken to rectify the problem. The evidence therefore does not show that reliance on the agent gave rise to a reasonable excuse for Hamid.

37. In the Notice of Appeal it is said that the agent always submits paper returns as there is no free software. In fact, I am aware that there is software which would cost much less than £100 per partnership. There is no evidence that Hamid was unable to pay for the use of

software. Indeed, the extract from the partnership tax return shows profits in excess of £31,000. I have therefore found that the decision to file a paper return was a matter of choice and not caused by an inability to pay for the software. I therefore also conclude that the cost of software did not contribute to the existence of a reasonable excuse for the initial failure to submit the return on time or thereafter.

38. Therefore, for all of these reasons, I am satisfied that no reasonable excuse has been shown by the evidence.

Special circumstances

39. HMRC has concluded that there were no special circumstances and in the light of the evidence and my findings I am satisfied that that conclusion is not “flawed”.

CONCLUSION

40. Therefore for all the reasons stated in this decision I dismiss the appeal and CONFIRM the decisions to impose the penalties totalling £1300 set out at the start of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

**TRACEY BOWLER
TRIBUNAL JUDGE**

RELEASE DATE: 05 OCTOBER 2020