



TC05950

Appeal number: TC/2013/06756

*INCOME TAX – penalty for failure to make returns – partnership return –
whether reasonable excuse – yes – whether special circumstances - yes*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**MR J COONEY (as representative partner of
CITYGATE PARTNERSHIP)**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 27 May 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 30 September 2013 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 February 2017.

DECISION

1. This is an appeal by Mr J Cooney against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) on Mr Cooney and Mr P O’Regan as partners in the Citygate Partnership (“the partnership”). The penalties have been imposed for failure to submit a partnership return for the tax year ending 5 April 2012 on time.

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 12 February 2013;

(2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 20 August 2013; and

(3) “Daily” penalties totalling ££900 under paragraph 4 of Schedule 55 imposed on 14 August 2013.

3. The appellant’s grounds for appealing against the penalties can be summarised as follows:

(1) The partnership return was submitted during October 2012. It was returned by HMRC with a request for further information in December 2012. The requested information was supplied within two weeks. HMRC then apparently returned the return again with a further request for further information but the return was not received by the appellant or the partnership’s agent and it was assumed that the return, with the information provided in December 2012, had been accepted.

(2) When the first penalty notice was received it was assumed that this had been issued in error and the agent wrote to HMRC with a copy of the December correspondence, explaining that the return had been filed on time.

(3) When a subsequent penalty notice was received in April 2013, the appellant’s agent entered into correspondence with HMRC and, in late May 2013, it became clear that a duplicate return would need to be filed. The partnership return was sent to HMRC in July 2013.

(4) The appellant argues that the partnership return is an information return only. The partners’ individual tax returns were filed on time, and the tax due on those returns paid on time.

Findings of fact

4. What follows in the section is taken from the papers, primarily the HMRC statement of case and the exhibits to it and the Notice of Appeal, are not in dispute and they are my findings of fact.

(1) The partnership return was submitted to HMRC on 19 October 2012.

(2) The return was sent back to the partnership and its agent, received on 10 December 2012, as a supplementary page was missing. The additional information was supplied to HMRC on 22 December 2012.

5 (3) HMRC state that their records show that the return was sent back on 10 January 2013 as unsatisfactory. The appellant states that neither the agent nor the partnership received this correspondence. The documentation supplied by HMRC as attachments to their Statement of Case does not include any copies of any correspondence sent by HMRC in respect of the return in January 2013. In terms of HMRC's records, the attachments to their Statement of Case do not
10 make any specific reference to the return having been sent back but do include a "Return Summary" which lists a "Paper Return Deferral Date" of 3 January 2013, which is consistent with the return having been sent back in early December only. I therefore find that HRMC did not send the return back to the partnership and/or their agent in January 2013.

15 (4) The completed partnership return was received by HMRC on 30 July 2013.

Discussion

5. Statutory provisions relating to the general penalty regime in Schedule 55 are included as an Appendix to this decision.

20 6. Schedule 55 also contains special rules for partnerships. Paragraph 25 provides that where a representative partner fails to make a return under s 12AA of the Taxes Management Act 1970 ("TMA") a penalty is payable by each partner. It also provides that an appeal may be brought only by the representative partner.

25 7. Section 12AA TMA permits an officer of HMRC to require there to be made to them a return of amounts in which each partner in a partnership which carries on a trade, profession or business may be chargeable to income tax for any tax year. The notice may be addressed to all the partners and may require an identified partner to make the return (s 12AA(2) TMA) or it may be addressed to a single partner or more than one.

30 8. This return is additional to each partner's return under s 8 TMA which must show the income which according to the partnership return is that person's share of income.

35 9. A partnership is not charged to income tax as such, and the return under s 12AA TMA does not, unlike the income tax return made under s 8 TMA require a self-assessment of the tax payable. As a result, a penalty under either of paragraph 5 or paragraph 6 of Schedule 55 will always be £300 as a return under s 12AA will not show any tax payable.

40 10. I have concluded that the partnership tax return for the tax year ending on 5 April 2012 was first submitted on or around 19 October 2012. It was sent back to the partnership and/or their agent for further information at the beginning of December

2012, being received on 10 December 2012. At that time, a “Paper Return Deferral Date” of 3 January 2013 was set on HMRCs records.

11. The return, with the additional information requested, was sent to HMRC on 22 December 2013, before the deferral date set on the records. This re-sending of the return was, therefore, before that deferral date.

12. I have concluded that HMRC did not successfully send back the return requesting further information in January 2013. Accordingly, I find that the appellant had a reasonable excuse for the failure, as he could not be expected to have been aware that the return was considered by HMRC to be late.

13. However, a reasonable excuse may cease, in which case the return must be submitted within a reasonable time of that excuse ceasing. HMRC issued a penalty assessment on or around 12 February 2013. The partnership’s agent wrote to HMRC in response to that letter in March 2013. I note that HMRC state in their Statement of Case that the agent “thought the penalty notice was an error and took no further action”. This follows their review letter of 10 September 2013 which states that “penalty notices were issued ... in February ... steps should have been taken to check why this [*sic*] was issued. This would have alerted you that the partnership tax return was outstanding”

14. The appellant’s grounds of appeal do state that they thought that the first penalty notice was an error but the second part of HMRC’s statement (as well as the statement in their review letter) is, I consider, unsupported extrapolation on HMRC’s part as the attachments to HMRC’s statement of case include a copy of a March 2013 letter from the appellant’s agents responding to the penalty notice. It is clear that it is not the case that the appellant and their agent “took no further action” or took no “steps”.

15. With regard to the comments in the review letter, it should be noted that HMRC’s decision letter in respect of that appeal is dated 31 July 2013. Using HMRC’s view in that letter, the “alert” that the “return was outstanding” which would follow “steps” was therefore not in fact received by the partnership until several months after those steps were taken.

16. However, it appears that the partnership and their agent did in fact establish that there was a problem with the return submission before HMRC issued a response to their appeal. The partnership agent’s letter of March 2013 includes a copy of the correspondence which they had sent to HMRC in December 2012 in which it is clear that at that date they were not aware that HMRC had outstanding queries regarding the return. From the appellant’s evidence, it was not until May 2013 that it became clear that there were outstanding queries and further correspondence in May and June 2013 was then required to establish that a duplicate partnership return was required. HMRC have not disputed that evidence. The relevant return was then sent to HMRC on 25 July 2013 and shows on HMRCs records as received on 30 July 2013.

17. On balance, I find therefore that the reasonable excuse continued until June 2013 but, as the return was filed before the end of July 2013, that the return was submitted within a reasonable time of the excuse ceasing. On this basis, the penalties are dismissed.

5 18. Further, HMRC state that they have considered whether there were special circumstances. Their Statement of Case states that “there are no special circumstances ... as HMRC do not consider that the agent not being aware that the return had not been received by HMRC to be a special or unusual event”.

10 19. However, HMRC do not seem to have considered or taken into account the fact that they have been given, in the individual returns made in time, all the information that the partnership return requires, including the share allocated to each partner. Nor have they taken into account that in any event a partnership return does not in itself disclose any income chargeable to tax about which HMRC would otherwise be ignorant.

15 20. In my view this failure not to take these matters into account makes the decision flawed in judicial review terms.

21. In their Compliance Handbook (“CH”) at paragraph 170600 HMRC state that:

20 “Penalty legislation provides for common circumstances and these are therefore taken into account in establishing the liability to and/or level of a penalty.

Special circumstances are either
uncommon or exceptional, or

where the strict application of the penalty law produces a result that is
contrary to the clear compliance intention of that penalty law.”

25 22. In my view, HMRC have considered only whether there are “uncommon or exceptional” circumstances and not the second part of the test of “special circumstances”. The compliance intention of paragraph 25 Schedule 55 and of s 12AA TMA is to encourage timely submission of the amounts of income in which partners in a partnership are to be assessed to income tax. In the circumstances of this
30 case I find that the appellant has complied with those requirements.

23. Therefore, even if the appellant did not have a reasonable excuse, I consider that special circumstances would require that the penalties be reduced to nil.

Conclusion

35 24. The appellant has established a reasonable excuse for the late filing and the return was filed within a reasonable time of such reasonable excuse ending such that no penalties apply or, in the alternative, special circumstances apply to reduce the penalties to nil and so the appeal is upheld.

Application for permission to appeal

25. 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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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 14 JUNE 2017

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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.

- 5 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)—

- 10 (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.

15 (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)—

- 20 (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—

25 (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—

- 30 (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—

35 (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—

- 35 (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,
- (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.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of “special circumstances” as follows:

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—
 - (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—
 - (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:

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—
 - (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—
 - (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.

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

1.