



**TC07194**

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**Appeal number: TC/2015/02868**

*Income tax - Schedule 55 Finance Act 2009 - fixed and daily penalties for failure to file partnership return on time - nominated partner unable to obtain consent of her partner to accounts and return - partner abroad receiving treatment for serious illness - whether reasonable excuse - yes - appeal allowed*

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**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

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**ANSHAM WHITE SOLICITORS**

**Appellant**

**- and -**

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

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**TRIBUNAL: JUDGE: MICHAEL CONNELL  
MEMBER: HELEN MYERSCOUGH**

**Sitting in public at Tax Appeals Tribunal, Taylor House, Rosebery Avenue,  
London on 15 January 2018**

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**The Appellant did not attend and was not represented**

**Mr David Miles, Officer of HMRC, for the Respondents**

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## DECISION

1. This is an appeal by Ansham White Solicitors LLP ('the Appellant') against penalties totalling £1,300 imposed by the Respondents ('HMRC') under Paragraphs 3,4 and 5 of Schedule 55 Finance Act 2009, for its failure to file a partnership self-assessment return on time, for the year ending 5 April 2013.

2. The Appellant did not attend the hearing and was not represented. The Tribunal was however satisfied that the Appellant had been given notice of the time, date and venue of the hearing and that it was in the interests of justice to proceed.

### Background

3. The Appellant partnership was formed on 2 November 2012. The partners (until its dissolution in October 2015), were Ms Anna Patel and Ms Shamim Ibrahim.

4. The Appellant's 2012-13 self-assessment partnership return was issued on 6 April 2012. If filed in paper form, the return was due by 31 October in that tax year. If filed electronically, the return was due no later than 31 January 2014.

5. The Appellant's return was not filed until 23 September 2014.

6. A late filing penalty is chargeable where a taxpayer is late in filing their tax return. The 'penalty date' is defined at Paragraph 1(4) Schedule 55 Finance Act ('FA') 2009 and is the date after the filing date.

7. The penalties for late filing of a return can be summarised as follows:

- i. A penalty of £100 is imposed under Paragraph 3 of Schedule 55 FA 2009 for the late filing of the Individual Tax Return.
- ii. If after a period of 3 months beginning with the penalty date the return remains outstanding, daily penalties of £10 per day up to a total of £900 are imposed under Paragraph 4 of Schedule 55 FA 2009.
- iii. If after a period of 6 months beginning with the penalty date the return remains outstanding, a penalty of £300 is imposed under Paragraph 5 of Schedule 55 FA 2009.
- iv. If after a period of 12 months beginning with the penalty date the return remains outstanding, a penalty £300 is imposed under Paragraph 6 of Schedule 55 FA 2009.

8. In summary, penalties of £100, £900, and £300 were imposed, under (i), (ii), and (iii) above, for the year 2012-13

9. The Appellant was issued with a £100 late filing notice on 18 February 2014. This would have also advised the Appellant that if the delay continued and its return was more than three months late, HMRC would begin charging a penalty of £10 for each day it remained outstanding for a maximum of 90 days.

10. As the Appellant's 2012-13 return had still not been filed after a period of 3 months beginning with the penalty date, daily penalties of £10 per day up were imposed and on 18 August 2014, a notice of penalties totalling £900 was issued to the Appellant. A 6 months late filing penalty of £300 was also imposed on the same date.

5 11. On 23 September 2014 Ms Anna Patel wrote to HMRC filing the partnership return and submitting form SA371 by way of appeal against the penalties on behalf of the partnership. She referred to herself as the nominated partner. Both partners signed the appeal.

10 12. On 21 October 2014 HMRC responded that the appeal was out of time having been submitted later than the 30 day time limit following each penalty, and that in any event, any appeal had to be by the partner previously notified as the nominated partner, which was Shamim Ibrahim.

13. On 9 December 2014 Ms Shamim Ibrahim re-lodged the partnership's appeal with HMRC. The grounds of appeal were that:

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- The partnership had not received a partnership return or notice to complete a return, and no reminders had been received until the £100 penalty notice.
  - Ms Ibrahim said that it was the first year of partnership and that the accounting period of the partnership ended on 31 October 2013. Because tax for a tax year is based on the profits of the twelve months to the partnership's accounting date in that tax year, they only had a relatively short three month period within which to prepare their accounts and returns, if they were to be filed by the due date of 31 January 2014.
  - During that period, Ms Patel, who had undertaken responsibility for maintaining accounts, had to travel overseas for urgent medical treatment (for pre-cancerous cells).
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14. On 18 December 2014, HMRC rejected the appeal. Officer Watson said that if Ms Ibrahim had been able to manage the rest of her private and business affairs, and there be no unexpected or unusual event, either unforeseeable or beyond her control, no reasonable excuse had been shown for the late filing of the partnership's return. In any event the appeal was out of time.

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15. Ms Ibrahim asked for a review of the decision.

16. On 24 March 2015, Officer Pink for HMRC said that he was unable to undertake a review because the appeal had been made out of time.

17. On 20 April 2015 Ms Ibrahim, on behalf of the Appellant partnership, lodged an appeal with H M Courts & Tribunals Service. The grounds of appeal as set out in the notice of appeal, reiterated the grounds referred to in the appeal to HMRC. Ms Ibrahim said that it had not been possible for Ms Patel to approve the accounts and the return because she had been indisposed due to illness and was receiving urgent medical treatment abroad. Ms Patel had in fact resigned from the partnership on 31 October 2014, and so far as Ms Ibrahim was aware the individual penalty issued to

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Ms Patel had, in the circumstances, been waived by HMRC. She said that HMRC had been kept fully informed throughout. She had personally notified HMRC of the reason for the delay in submitting the partnership return on numerous occasions, both in writing and by telephone.

5 18. Daily penalties had been the subject of appeal in the case of *Donaldson v Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ. 761 (the “*Donaldson*” case). Mr Donaldson challenged aspects of HMRC’s standard approach to these penalties and at the date of the Appellant’s Notice of Appeal, *Donaldson* was due to be heard by the Court of Appeal.

10 19. Because the outcome of the *Donaldson* appeal was relevant to the Appellant’s appeal against daily penalties, the First-tier Tribunal directed on 6 June 2015 that the appeal should be stood over until the *Donaldson* appeal was determined.

15 20. The Court of Appeal decision in *Donaldson* was that HMRC had satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) of Schedule 55 and despite the omission, in the notice of assessment, of the correct period for which daily penalties had been assessed, the omission did not affect the validity of the notice.

20 21. On 15 December 2017, the Appellant was advised that the Court of Appeal’s decision in the *Donaldson* case had been released and that accordingly the Appellant’s case was to be listed. A notice of hearing at 10.30am, Taylor House, Rosebery Avenue, London was issued to the Appellant on 15 January 2018.

#### *Relevant statutory provisions*

#### **Taxes Management Act 1970**

22. Section 8 - Personal return- provides as follows:

25 (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board-

30 a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may, reasonably be required in pursuance of the notice, and

b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) the 31st January next following the year of assessment, or

35 (b) where the notice under the section is given after the 31st October next following the year, the last [day of the period of three months beginning with the day on which the notice is given]

(1AA) For the purposes of subsection (1) above-

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

5 (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which [section 397(1) [or [397A(1)] of ITTOIA 2005] applies.]

10 (1B) In the case of a person who carries on a trade, profession, or business in partnership with one or more other persons, a return under the section shall include each amount which, in any relevant statement, is stated to be equal to his share of any income, [loss, tax, credit] or charge for the period in respect of which the statement is made.

15 (1C) In subsection (1B) above "relevant statement" means a statement which, as respects the partnership, falls to be made under section 12AB of the Act for a period which includes, or includes any part of, the year of assessment or its basis period.

(1D) A return under the section for a year of assessment (Year 1) must be delivered-

(a) in the case of a non-electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2.

20 (1E) But subsection (1D) is subject to the following two exceptions.

(1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered-

(a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or

25 (b) on or before 31st January (for an electronic return).

(1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

(1H) The Commissioners-

30 (a) shall prescribe what constitutes an electronic return, and

(b) may make different provision for different cases or circumstances.

(2) Every return under the section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

35 (3) A notice under the section may require different information, accounts and statements for different periods or in relation to different descriptions of source of income.

(4) Notices under the section may require different information, accounts and statements in relation to different descriptions of person.

5 (4A) Subsection (4B) applies if a notice under the section is given to a person within section 8ZA of the Act (certain persons employed etc. by person not resident in United Kingdom who perform their duties for UK clients).

(4B) The notice may require a return of the person's income to include particulars of any general earnings (see section 7(3) of ITEPA 2003) paid to the person.

10 (5) In the section and sections 8A, 9 and 12AA of the Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

### **Schedule 55 Finance Act 2009:**

23. The penalties at issue in the appeal are imposed by Schedule 55 FA 2009.

24. Paragraph 1 (4) states that the 'penalty date' is the date after the 'filing date'.

15 25. Paragraph 3 of Schedule 55 imposes a fixed £100 penalty if a self-assessment return is submitted late.

26. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

(1) P is liable to a penalty under the paragraph if (and only if)-

20 (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.

25 (2) The penalty under the 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).

30 (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  
(b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

35 27. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

(1) P is liable to a penalty under the paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.

40 (2) The penalty under the 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.

28. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

5 (1) Liability to a penalty under any paragraph of the 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)-  
10 (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.

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

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

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(2) In sub-paragraph (1) "special circumstances" does not include-

25 (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.

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(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.

30 30. 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:

35 (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-

40 (a) affirm HMRC's decision, or  
(b) substitute for HMRC's decision another decision that HMRC had power to make.

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(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

45 (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.

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

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## **The Appellant's case**

31. The Appellant's grounds of appeal are as set out in the Appellant's correspondence with HMRC and the Notice of Appeal, as referred to above.

## **HMRC's Case**

5 32. Although the appeal was out of time, HMRC do not object to the appeal being heard.

33. HMRC accepts that the onus rests with it to demonstrate that the 2012-13 partnership tax return was issued to the Appellant and that the Appellant failed to submit the return on time.

10 34. HMRC's records show that a partnership tax return for the year 2012-13 was issued to the Appellant partnership on 6 April 2013 and as such the partners were legally bound to complete and file the return by the legislative deadline of 31 January 2014, if filed electronically.

15 35. Paragraph 23 of Schedule 55 FA 2009, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure, and they put right the failure without unreasonable delay after the excuse ceased.

36. The evidential burden is therefore on the Appellant to show that it has a reasonable excuse for the failure to file on time.

20 37. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* (2006) STC (SCD) 536 at paragraph 18).

38. The law specifies two situations that are not reasonable excuse:

25 (a) An insufficiency of funds, unless attributable to events outside the Appellant's control and

(b) Reliance on another person to do anything, unless the person took reasonable care to avoid the failure.

30 39. The actions of the 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 upon 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  
35 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. Reasonable excuse was considered in the case *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by the Tribunal Chairman Judge Medd:



5 “It has been said before in cases arising from default surcharges that 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 the relevant time, a reasonable thing to do?” [Page 128 3rd line et seq.].

10 41. AS HMRC said, when rejecting the Appellant’s appeal of 9 December 2014, if Ms Ibrahim was able to manage the rest of her private and business affairs, and there was no evidence that the solicitor’s firm had ceased to operate, there was no reason why the partnership return could not have been filed on time.

42. The Appellant has not provided a reasonable excuse for its failure to file the partnership tax return for the year 2012-13 on time and that the penalties have been correctly charged in accordance with the legislation.

15 *Special Reduction*

20 43. Paragraph 16(1) of Schedule 55 allows HMRC to reduce a penalty if they think it is right because of special circumstances. “Special circumstances” is undefined save that, under paragraph 16(2), it does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

25 44. In other contexts “special” has been held to mean “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or “something out of the ordinary run of events” (*Clarks of Hove Ltd v Bakers’ Union* [1979] 1 All ER 152). The special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFTT 588 (TC), paragraph 40).

30 45. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if they think HMRC’s decision was “flawed when considered in the light of the principles applicable in proceedings for judicial review”.

46. HMRC have considered the Appellant’s grounds of appeal but these do not amount to special circumstances which would merit a reduction of the penalties.

35 47. HMRC’s decision not to reduce the penalties under paragraph 16 was not flawed and there are no special circumstances which would require the Tribunal to reduce the penalties.

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## **Conclusion**

48. When a person appeals against a penalty they are required to have a reasonable excuse which existed for the whole period of the default. Whether there was a reasonable excuse, which lasted for the entire period of default, is a matter to be considered in the light of all the circumstances of the particular case. In this matter the partnership tax return was filed eight months late.

49. Ms Ibrahim was the nominated partner for the purposes of filing the partnership's tax returns. She was however unable to do so, as Ms Patel was abroad receiving medical treatment. We were not provided with any details relating to the period Ms Patel was abroad or when she returned to the UK to approve the accounts.

50. HMRC did not raise these points, or take issue with the Appellant's grounds of appeal, save to say that there was no reason why Ms Ibrahim could not have filed the partnership return.

51. HMRC failed to address the fundamental point that Ms Ibrahim needed Ms Patel's approval of the accounts and the 2011-12 return before they could be filed.

52. The rejection of the Appellant's appeal on 9 December 2014 and the review of 24 March 2015 were based on the fact that the appeal was out of time, whereas HMRC no longer object to that. However no argument has been presented as to why Ms Patel's illness and absence abroad should not amount to a reasonable excuse for the late filing of the partnership's return.

53. We find on the facts, that the Appellant has shown a reasonable excuse for the late filing of the partnership's 2012-13 return.

54. The appeal is therefore allowed and the late filing penalties discharged.

55. 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.

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 10 JUNE 2019**