



TC05039

Appeal number: TC/2015/04816

Income tax – late filing penalties – reasonable excuse – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BRYAN THOMAS (in his personal capacity and as
representative partner of the firm BT Associates) (1)
JULIET HAMMOND SMITH (2)**

Appellants

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
ALBAN HOLDEN**

Sitting in public in Centre City Tower, Birmingham on 2 February 2016

The first appellant appeared on his own behalf and for the second appellant

Martin Foster, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal relates to late filing penalties imposed on the first appellant for
5 late filing of a partnership return for the tax years 2008-09 and 2009-10 and on both
appellants for the late filing of their individual self-assessment returns for the tax year
2010-11.

2. At the hearing, we indicated that the appeals were dismissed and, with the
consent of the parties, issued a short decision confirming that decision. The first
10 appellant, as is his right, has subsequently requested full findings of fact and reasons
for the decision. This document constitutes those findings and reasons.

The facts

Introduction

3. Initially at the hearing we requested the parties to confirm (as it was not clear
15 on the face of the papers provided to us) precisely what penalties were under appeal.
At that stage, it was confirmed to us that the penalties under appeal were as follows:

(1) The first and second late filing penalties of £100 each notified to the first
appellant in respect of the partnership return of BT Associates for the tax year
2008-09 (totalling £200);

20 (2) The first and second late filing penalties of £100 each notified to the first
appellant in respect of the partnership return of BT Associates for the tax year
2009-10 (totalling £200);¹

(3) The late filing penalty of £100 notified to the first appellant in respect of
his personal self-assessment tax return for the tax year 2010-11; and

25 (4) The late filing penalty of £100 notified to the second appellant in respect
of her personal self-assessment tax return for the tax year 2010-11.

(5) The late filing penalty of £100 notified to the first appellant in respect of
the partnership return of BT Associates for the tax year 2011-12;

4. The appeals had been notified to the Tribunal out of time, but HMRC did not
30 oppose the appellants' application for permission to appeal out of time, which we
formally granted.

5. Mr Foster went on to confirm that HMRC no longer wished to maintain the
penalty referred to at (5) above and we accordingly formally allowed the appeal in
relation to that penalty.

¹ We were not informed of any penalty for the same default imposed on the second appellant,
in respect of either year

Background

6. The appellant was at all material times the representative partner of the firm called BT Associates, which comprised the two appellants as partners. They are husband and wife.

5 *Partnership return late filing penalties*

7. The partnership returns for the firm BT Associates for the years ended 5 April 2009 and 2010 were due on 31 January 2010 and 2011 respectively (notices to file such returns having been issued to the first appellant, as representative partner, on 6 April 2009 and 2010 respectively). Both returns were filed on 21 February 2012 (over one and over two years late respectively). For the years up to 5 April 2008, the first appellant stated he had used a firm of accountants to deal with the filings, but then he had changed advisers. He was not clear about when he had instructed them, or the scope of the instructions he had given to his new advisers, but it transpires they only filed the personal returns for the appellants and did not deal with the partnership returns. The first appellant did not claim to have instructed them to do so, or to have taken any steps to ensure that the partnership returns were filed.

8. On 16 February 2010, shortly after the due date for the 2008-09 partnership return, HMRC issued a £100 penalty determination to the first appellant for the late filing. In the continued absence of a return, a second £100 penalty determination was issued to him on 3 August 2010.

9. On 15 February 2011, shortly after the due date for the 2009-10 partnership return, HMRC issued a £100 penalty determination to the first appellant for the late filing. In the continued absence of a return, a second penalty determination was issued to him on 2 August 2011.

10. It seems that nothing further happened in relation to these penalties until HMRC communicated with the first appellant by letter dated 27 September 2011 (which was referred to, but not included, in the documents before us); that letter appears to have been pursuing payment of the outstanding penalties. The first appellant replied to HMRC by letter dated 15 October 2011, in which he said that “all notices regarding tax matters, including these” were forwarded to his advisers for attention. He also said he had been “informed that even though a submission was a bit late as there was no tax liability due, such fixed penalty [*sic*] are withdrawn.” In that same letter, he said that “My wife and I have submitted our individual tax returns which included the self-employed partnership which has been in loss for the last 2 years... I trust this clarifies why no action has been taken on my behalf”.

11. There appears to have been some further contact from HMRC, as the first appellant wrote to them again on 12 November 2011 as follows:

“Further to my letter dated 15 Oct. 2011 and your phone call to me, as agreed these two returns for BTAssociates covering years to April 2009 and 2010 have now been submitted to the tax office.

When our individual returns were submitted by Shareworks Ltd, they included the claim for BTAssociates and I was clearly under the belief that the partnership return was attached.

5 For the year to April 2011, I will ensure this does not occur again. After a long and difficult period, we are back into profitability, thank goodness.”

12. It appears the first appellant had submitted the two missing returns himself, as a note in HMRC’s records dated 13 December 2011 states:

10 “2009 and 2010 partnership returns unlogged and sent back to TP as not fully completed and 2009 return completed on wrong version of return.”

13. The first appellant clearly rectified the problems and resubmitted the returns, which are shown on HMRC’s records as “captured” on 21 February 2012. A note on HMRC’s file dated 17 February 2012 also refers to a letter dated 25 January 2012 received from the first appellant which appealed the penalties. No copy of that letter
15 was in the papers before us, but we assume the appellant submitted the corrected returns with it. The note records that although HMRC had agreed the first appellant had a reasonable excuse for the late filing of the 2011 return “as tried unsuccessfully to file online”, the appeals relating to the earlier penalties were recorded as being “late so cannot be accepted” (though they appear to have ignored this point when they later
20 rejected the appeals formally in their letter dated 30 March 2012 – see below).

14. It would appear that HMRC’s note was embodied in a letter dated 21 February 2012 to the first appellant; although no copy of such a letter was included in the papers before us, we did have a copy of a letter dated 27 February 2012 from the first
25 appellant to HMRC. In that letter, he referred to his earlier letters, and said that his new advisers:

“...submitted personal tax returns on behalf of my wife and me for these two years electronically which included the trading loss of BT Associates and I thought and assumed that they attached at the same time the required returns.

30 [The advisers] assured me that no penalty would be imposed as there was a loss and that they would be withdrawn, hence my inaction. As soon as I realized the mistake and in agreement with Mr Bartholomew I completed the returns he sent to me for completion, only to find out that they were the incorrect forms!”

35 15. On 30 March 2012, HMRC wrote a formal letter to the first appellant rejecting his appeal in relation to the partnership return late filing penalties for 2008-09 and 2009-10. They did not consider the first appellant had a reasonable excuse for the late returns as “No reason has been given why the returns were late. It is not possible to reduce a partnership penalty based on tax liabilities as the partnership does not pay
40 income tax...”

16. The first appellant, in a request for a review of this decision which was, somewhat mysteriously, dated 28 March 2012 (i.e. two days before the date of the decision itself, though the request itself referred to HMRC's letter dated 30 March 2012), stated that he was not aware "until Oct/Nov 2011" that HMRC had not
5 received the partnership returns. He said that he had received advice "during this period" (though he was not specific about the period in question) that "as there was no additional tax due... that penalty notices for late submission would not be enforced", and that the advisers were "following up with you for their withdrawal".

17. At the hearing, the first appellant accepted there was "no good reason for
10 being one or two years late" with the returns. There was no evidence that he had instructed his new advisers to deal with the partnership returns and, even if he had done so, he clearly made no effort to check that the returns had been submitted, even after the issue of no less than four penalty notices which, according to his own letter dated 15 October 2011, he would simply have forwarded to his advisers for attention.

18. Accordingly we did not feel able to find that the first appellant had a
15 reasonable excuse for the late filing of the partnership returns referred to at 3(1) and 3(2) above.

Self-assessment return late filing penalties

19. The appellants' self assessment returns for the tax year 2010-11 were due to
20 be filed by 31 January 2012 (notices to file such returns in accordance with section 8 TMA having been issued to them on 6 April 2011). By that time, the first appellant had been in correspondence with HMRC for some time about the outstanding partnership returns from earlier years.

20. The appellants had instructed their advisers to deal with filing their personal
25 returns. The returns themselves were both filed electronically on 3 February 2012 by the advisers. The first appellant did not provide us with a detailed explanation of why the returns were late, simply saying it was due to the authentication codes (to enable electronic filing) being delayed. In a letter dated 2 April 2012 to him from his advisers, the following explanation appeared:

30 "I have checked the penalty position with HMRC and unfortunately these [*i.e. the penalties*] will stand as the Tax returns were submitted on 3rd February 2012 after the official deadline.

35 HMRC did extend the deadlines due to industrial action until 2 February 2012 however we were unable to submit the returns until we received the relevant codes from you and it was unfortunate that you were away from the UK in the week prior to this, they have also with effect from this year changed the penalty regime in that a penalty is payable regardless of whether tax is due or not."

21. We did not consider, on the basis of this evidence, that the appellants had
40 made out a reasonable excuse for missing the deadline by three days (compared to the

statutory deadline) or one day (compared to the extended deadline referred to in the advisers' letter).

Notice of appeal

22. In the appellants' notice of appeal, the grounds given for their appeals
5 included an assertion that the penalties were "unjust, unreasonable and out of
proportion [presumably intended to read "proportion"] to the very short delay on
submission. In the recent easing of review, this seems now to be recognised.... Their
has been no intent to delay return submission within the stated time limits and since
10 2011/2012 we have submitted on time with no technical difficulties arising." It was
also stated that "The reasons for withdrawing the penalties is that they are
unreasonable in view of the circumstances from which they arose."

The law

23. The partnership return late filing penalties were imposed under section 93A
15 Taxes Management Act 1970 ("TMA"), which provided, so far as relevant, as
follows:

93A Failure to make partnership return

(1) This section applies where, in the case of a trade, profession or
business carried on by two or more persons in partnership—

20 (a) a partner (the representative partner) has been required by a
notice served under or for the purposes of section 12AA(2) or (3) of this
Act to deliver any return, and

(b) he or a successor of his fails to comply with the notice.

(2) Each relevant partner shall be liable to a penalty which shall be
£100.

25 ...

(7) On an appeal against a determination under section 100 of this
Act of a penalty under subsection (2) ... above that is notified to the
tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act
shall apply but the tribunal may—

30 (a) if it appears that, throughout the period of default, the person
for the time being required to deliver the return (whether the
representative partner or a successor of his) had a reasonable excuse for
not delivering it, set the determination aside; or

(b) if it does not so appear, confirm the determination."

35 24. The relevant legislation in relation to the penalties for late filing of self-
assessment returns for the tax year 2010-11 is contained in schedule 55 to Finance Act
2009 ("FA09"), which provides (so far as relevant) as follows:

1—

(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

5 (2) Paragraphs 2 to 13 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

...

	Tax to which return etc relates	Return or other document
1	Income tax or capital gains tax	(a) Return under section 8(1)(a) of TMA 1970 (b) Accounts, statement or document required under section 8(1)(b) of TMA 1970

10 **2** Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 13 in the Table.

3 P is liable to a penalty under this paragraph of £100.

...

20—

15 (1) P may appeal against a decision of HMRC that a penalty is payable by P.

...

22—

20 (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

...

23—

25 (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,

5 (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

10 (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.”

25. It can readily be seen that section 93A TMA (in relation to the partnership return penalties) lays down a slightly different test from paragraph 23 of schedule 55 FA09. Section 93A requires, for a taxpayer to succeed in his appeal, that a reasonable excuse for the default be established in respect of the entire period of the default (in this case, the periods of a little over two years and a little over one year respectively); paragraph 23, on the other hand, makes no explicit reference to the “period of the default”, but does explicitly state (in summary) that reliance on a third party cannot afford a reasonable excuse unless the taxpayer himself/herself has taken reasonable care to avoid the failure.

20 26. In addition, there is a line of authority to the effect that penalties which are wholly disproportionate to the “offence” for which they arise should be set aside as a matter of human rights law. The leading authority in this area is the decision of the Court of Appeal in *International Transport Roth GmbH and another v Secretary of State for the Home Department* [2002] EWCA Civ 158, in which Simon Brown LJ at
25 [26] said this:

“...ultimately one single question arises for determination by the Court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted?”

30 **Decision**

27. In addition to our findings as to “reasonable excuse” set out above, we did not consider any of the other grounds so raised by the appellants to be sustainable grounds of appeal. Parliament has laid down a deadline for submission of the returns, and has provided for a £100 penalty in the event of a default. We do not consider such a
35 penalty to be “not merely harsh but plainly unfair”.

28. We accordingly gave an oral decision at the hearing, dismissing the appeals.

29. After we had delivered our decision orally at the hearing, the first appellant raised for the first time the argument that his wife had a reasonable excuse for her default (in relation to the £100 penalty for the late filing of her 2010-11 return),
40 founded upon her reliance upon him to deal with the return on her behalf. We had

5 already considered that issue in reaching our decision; we do not consider that simple delegation by the second appellant to the first appellant of responsibility for filing her tax return on her behalf could afford her a reasonable excuse for the default, unless she had herself taken reasonable care to avoid the failure occurring. We heard no evidence that the second appellant had done so.

30. The appeal is accordingly DISMISSED and the penalties are consequently CONFIRMED.

10 31. 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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**KEVIN POOLE
TRIBUNAL JUDGE**

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RELEASE DATE: 20 APRIL 2016

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