



TC05156

Appeal number: TC/2014/00216

Income Tax – penalties – late submission of SA and partnership Returns – late payment of tax – whether reasonable excuse(s) – TMA 1970 and Finance Act 2009, Schedules 55 and 56 – Appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EUGENA PORTER

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: MS CELINE CORRIGAN, FCA**

Sitting in public at The Royal Courts of Justice, Belfast on Tuesday 10 May 2016

Appellant:- Mr T Penman, FCA with Mr J O'Rourke, FCA

**Respondents:- Miss Kate Murphy, HM Inspector of Taxes, Presenting Officer
with Miss Lynn Long**

DECISION

Introduction

1. This appeal relates to the imposition of penalties for the late submission of personal and partnership Returns by the appellant, Mrs Porter, and delays in payment of tax due. The Tribunal was invited to view this in the context of acrimonious divorce proceedings and the general lack of co-operation by the appellant's husband.

2. This appeal was continued from an earlier hearing on 23 February 2016 when the Tribunal sought further information and suggested further preparation. As suggested, a Witness Statement for the appellant was prepared together with some supporting documents. Also a Statement of Agreed Facts (Bundle p242) has been negotiated. Its terms were extended to admit that the appellant's husband was the nominated partner of their building and farming partnerships, and it was accepted that all copy documents referred to were accurate copies of originals. Some limited documentary evidence relating to Mrs Porter's financial circumstances at the relevant time was produced. Unfortunately it was less extensive than that sought, and we refer to the consequential difficulties *infra*. However, further such documentation may not be readily available and we proceeded with parties' approval to complete the hearing on the basis of the documentation so far produced.

The Law

3. We were referred generally to Sections 8 and 59B TMA 1970 and, more particularly, Schedules 55 and 56 FA 2009. Comparative reference was made to the decisions in:-

Donaldson v HMRC [2014] UKUT 536 (TCC)
Timothy Cooke v HMRC [2014] UKFTT 506 (TC)
Joanna Porter t/a Crafty Creations v HMRC [2015] UKFTT 170 (TC)
John Crangle v HMRC [2015] UKFTT 157 (TC)
Yusuf Budiadi v HMRC [2011] UKFTT 233 (TC)
Louise Fernandez v HMRC [2011] UKFTT 259 (TC)
Mr T J Fisher t/a The Crispin [2011] UKFTT 235 (TC)
Anthony Leachman t/a W Whiteley & Leachman v HMRC [2011] UKFTT 261 (TC)

The evidence

4. The only witness led was the appellant, Mrs Porter, herself. She read and confirmed her Witness Statement which should be referred to for its full terms. Broadly it narrates the circumstances of her being in two partnerships with her former husband in farming and building businesses. These both traded until 28 February 2013. The appellant attended to matters of administration and book-keeping and cast a general oversight over both businesses' operations, including two farms. She and her husband separated in January 2008 when he left the matrimonial home. Their relationship became increasingly embittered and from end August 2010 her husband excluded her from the businesses' premises and denied her access to the businesses' accounting records and bank accounts even although she had a substantial

balance at credit of her capital account. As Mrs Porter had no access to business records after August 2010 she could not, she explained, estimate profits. Further, her ex-husband changed the businesses' accountants without reference to her. She only received the draft 2010/11 Return for herself in May 2012 (appellant's production EP1).

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5. Apparently, although the appellant signed and delivered to the accountant the approved Return without delay, it was not submitted by them to HMRC until about August 2012. Because of business losses arising from another partnership (not involving the appellant) her husband had no liability to tax in 2010/11. Certain rental income due to the appellant alone was in fact paid into the bank account of the building partnership.

6. Mrs Porter stressed in her account that as her ex-husband had denied her access to all business records, it was impossible for her to comply with tax requirements. She referred to HMRC's letter of 3 June 2013 to her accountants (EP3), which indicates the complications arising because of her husband's lack of co-operation as *nominated* partner.

7. In elaboration of her Witness Statement Mrs Porter explained that apart from her capital in the partnership businesses, she had only modest resources, being a small balance in a current account. While she received drawings of £5,000 monthly from the building partnership, her husband had reduced this to £3,000 after August 2010. Her personal rental income of £500 monthly had been paid into the building partnership's account. In the meantime her husband had continued to enjoy a lavish lifestyle. She acknowledged that when she was visited by HM Collector of Taxes in about October 2012 she had paid over £25,000 towards settlement of tax due.

8. In cross-examination Mrs Porter explained that the partnership had a current account. She and her husband were both signatories, but in reality he kept control of the cheque book in the office. After January 2010 she had no access to it. It was suggested by Miss Murphy that from her familiarity with the business she could have estimated profits. Mrs Porter rejected this. She explained that she could not recall earlier accounts' details and these were no longer readily available for her reference. The problem of estimating was further compounded by the effect on land values of the recession at that time and the problems of valuing the partnership's "land bank". In response to the Tribunal Mrs Porter insisted that she had only become aware of the delays when she received Messrs Maneely McCann's letter of 29 May 2012 (EP1). She indicated that she signed and returned the enclosed Return to them immediately and in person. She could not explain why HMRC had not apparently received this until August.

9. The Tribunal then sought to clarify details of payments of tax. Mrs Porter stressed that she had set aside modest sums from the drawings received as a protection in case her husband further reduced or stopped these payments. Tax of about £25,000 relating to an earlier year and refunded in November 2011 had been applied to reduce the 2010/11 liability. In March 2013 £15,000 received as an early instalment of the financial settlement on divorce was also paid over to HMRC. A schedule of

payments made, starting in October 2012, is set out in para 6.5 of HMRC's Statement of Case. This was not in dispute. It appears that a Time to Pay arrangement was concluded earlier in October, but after the "trigger" date for penalties.

10. Mrs Porter's credibility was not in issue in cross-examination. We, as a
5 Tribunal, found her both credible and reliable, and the foregoing narrative of her evidence and the documentation may be taken as representing our **Findings-in-Fact**. There appeared to be four essentially factual issues for us to consider, viz the sufficiency of Mrs Porter's efforts to lodge Returns and make payment of tax due; the
10 availability of her funds, particularly in the context of the divorce; her ability to make estimates of profit; and whether at material stages (including after the expiry of a *reasonable excuse*) she had acted as soon as practicably possible. We explained all this to Parties and adjourned briefly to enable them to consider whether more precise information as to the quantification of assets and their availability might be obtained.

11. On resuming the hearing we were advised that an overall settlement of the
15 financial aspects of the divorce had been achieved in July 2012. A total payment of £220,000 was to be made by Mr Porter to his wife. An *interim* payment of £25,000 was made in December 2012 and the balance of £195,000 paid in February 2013.

Submissions

12. A Skeleton Argument was provided in advance for the appellant. Also on her
20 behalf we were addressed by Mr Penman. FA 2009, Schedules 55 and 56 provide respectively for penalties for late Returns and late payment of penalties. He urged us to mitigate in part or full any penalties because of the appellant's having a *reasonable excuse* and, also, *special circumstances* arising for the purposes of the legislation. He founded on the decisions in *Timothy Cooke*, *Joanna Porter*, and *John Crangle*. He
25 submitted that a *reasonable excuse* represented something preventing a reasonable diligent taxpayer, wishing to comply with his tax obligations, but being prevented from doing so. Mrs Porter's difficulties were not foreseeable. HMRC, he continued, had paid insufficient regard to Mrs Porter's circumstances. She had been excluded from the business premises, preventing her from complying with her responsibilities.
30 She could not calculate or even estimate liabilities. Estimates would have been "guess work", he argued. HMRC had refused to deal with Mr O'Rourke as he was not the nominated accountant and had not been authorised by Mr Porter. Mrs Porter had done all that a reasonably diligent taxpayer could do. Events were beyond her control, he added. She had signed and delivered personally the Return to
35 Messrs Maneely McCann promptly after it had been submitted to her in May 2012. Perfectly reasonably she had relied on them to submit it promptly to HMRC. She did not have access to the firm's bank account although she had a substantial balance in her capital account.

13. For all of these reasons the appeal should be allowed, Mr Penman concluded.
40 All penalties, surcharges and interest should be set aside.

14. In response on behalf of HMRC, Miss Murphy urged us to distinguish the circumstances of the cases cited by Mr Penman, particularly the decision in *Timothy*

Cooke. These decisions were in any event First-tier decisions and not binding. She invoked the arguments in reply set out on behalf of HMRC in the Statement of Case. The appellant had not contacted HMRC about her Return before the due date for submission of 31 January 2012. While she had income from property, which had
5 been paid into the partnership bank account, she could have re-directed it into a personal account. Further, the assets giving rise to that income might have been readily realisable. Although the appellant had joint right of access to the partnership bank account, she had chosen not to exercise that. Mrs Porter was an experienced
10 business woman and a more determined reaction to her husband's conduct might reasonably have been expected of her. With the help of independent professional advisers, she could have provided estimates of income, sufficient for a valid Return. Moreover, Mrs Porter had been late in negotiating a Time to Pay agreement. Miss Murphy stressed that the *onus* of proof of establishing a *reasonable excuse* rested on the appellant. That had not been demonstrated in the present case. Marital
15 breakdown and its consequences did not necessarily satisfy the test. Accordingly, the appeal should be dismissed.

Conclusion

15. There are three groups of penalties under appeal, *viz* those relating to late partnership Returns, those relating to Mrs Porter's personal Return, and those relating
20 to late payment of tax.

16. In the Statement of Case, para 9, HMRC seeks an order for only the personal SA Return and not the partnership Returns. That is contradicted by the schedule at para 1. Miss Murphy confirmed that she still insisted on the partnership return penalties being considered. Mr Penman did not strenuously resist this. In the event
25 we consider that this aspect can be readily resolved, and that in favour of Mrs Porter. She was not the nominated or *representative* partner. She was excluded from the management and direction of both partnerships at the material time. It was reasonable for her to assume that the firm's accountants, who were instructed regularly by her husband, would attend to its preparation and timeous submission. We consider that
30 Mrs Porter has a *reasonable excuse* here, and that the appeal so far as laid against the partnership penalties should succeed.

17. Next, we turn to the penalties in respect of the late personal Return. We accept Mrs Porter's account that she relied on the partnerships' accountants to prepare this on her behalf. She had done so in the past. We accept that she first became aware of
35 the failure in late May 2012 when she received the letter "EP3". HMRC had always sent correspondence to her at the partnership's address. We find the suggestion that she should have submitted a Return herself with estimated figures, strained. She did not have access to business papers since January 2010. She could not get copies of previous Returns. In any event the profits of the building partnership particularly
40 were volatile given the effects of the recession. Problems of valuing the partnership's land bank compounded this difficulty.

18. We are satisfied that Mrs Porter acted as soon as practicably possible after becoming aware of the failure to lodge the 2010/11 Return. She returned it, signed, to

the accountants promptly and in person. She was unaware of their delay thereafter in submitting it to HMRC. Again, we consider that the circumstances amount to a *reasonable excuse* and that these penalties should be cancelled. In this respect too the appeal succeeds.

5 19. Finally, we have to consider the penalties imposed for late payment of tax. This aspect we found to be the most problematical. The *onus* of proof rests on the taxpayer in this context, and in terms of para 16 of Schedule 56, FA 2009, an insufficiency of funds is not a *reasonable excuse* unless attributable to events outside the taxpayer's control. Evidence of Mrs Porter's financial means at the material dates is not entirely
10 satisfactory, and we accept that at this stage it may be unrealistic to expect further documentation. We explained our reservations to Mr Penman and Miss Murphy before the adjournment after Mrs Porter's evidence. After consideration they asked us to deal with the matter of late payment on the information presently available, making decisions in principle and giving guidance for a re-calculation of penalties if
15 we were unable to determine a precise amount.

20. Primarily we find that Mrs Porter was unaware of any delay in payment until she received the letter of Maneely McCann at the end of May 2012 (EP1). Only then did she become aware of the *quantum* of her tax liability and that it had not been paid. The firms' accountants had all along dealt with her tax affairs, and the firms had paid
20 her tax liability. She had no reason to believe that they would not continue to do so: at least she had not been told anything to the contrary, and HMRC did not contact her directly. She was unaware of her husband having changed the firms' accountants. On that basis we find that she had a *reasonable excuse* for non-payment until about the end of May 2012.

25 21. The next question which arises is whether she acted thereafter without unreasonable delay. She did make certain payments of tax over a period from October 2012 to early 2013 (see the Agreed Statement of Facts: Bundle p242). There were no payments during the period between June and October 2012 and there was a succession of payments to account thereafter. It is accepted that Mrs Porter was late
30 in making a Time to Pay arrangement.

22. Mrs Porter's assets, as we understand, consisted then of small personal savings which had been made out of drawings from the firms; certain properties which yielded rentals of £500 per month which she paid into the building partnership's account; the value of her capital account in the partnerships; and the amount of a
35 possible divorce settlement. There is not precise evidence of the value of the personal savings other than Mrs Porter's account (which we accept) that these were relatively modest. There is no evidence as to the value of her rental properties. The matter of the divorce settlement was imponderable and while a sum in settlement was agreed in July 2012 it was not paid for several months thereafter. The precise date of its
40 payment remained imponderable and to an extent was subject to the whim of Mr Porter. While Mrs Porter had a significant balance at credit of her capital accounts in the firms, the mechanics of realising this, given the intransigence of her husband were problematical. By letter dated 1 June 2012 (p257) the firms' solicitors, Messrs Peden and Reid, indicated –

“In view of the current overdraft facility for JW & J Porter & Co, which is very close to its limit it is essential that neither of our clients attempt to meet any personal tax liabilities from this account or any of the other business accounts. To do otherwise would jeopardise the banking arrangements for the businesses.”

5 23. In these circumstances we conclude that apart from the matter of personal savings, factors outside the control of Mrs Porter seriously affected her ability to realise the bulk of her assets in the context of para 16. However, we are not satisfied that Mrs Porter could not have made some earlier payments to account in the period from June to October 2012 and, also, some earlier payments to account thereafter.
10 We appreciate that the divorce proceedings and her husband’s hostility had prompted her as a matter of prudence to make personal savings. However, as we understand it, priority has to be given to the application of such realisable funds to the settlement of tax liabilities. We note that she was able to pay a single payment of £25,000 in October 2012 from her savings to meet the immediate demands of HMRC. She did
15 receive a tax repayment of about £25,064 in November 2011, but not all of this was applied to meet the outstanding liability.

24. For these reasons we consider it inappropriate to make a finding that the penalty for late payment has been correctly charged. We understand that it is accepted that the instant amount due as at the end of May 2012 was £ 87,099.56. We consider that
20 the penalty should then be recalculated having regard to the reservations expressed by us in the preceding paragraph about there being some modest capital available to the taxpayer during the relevant period. We stress our finding in the context of para 16 that the appellant’s ability to deal with the full value of her capital assets was severely restricted in view of the acrimonious circumstances of the divorce action. While each
25 decision must depend on its own peculiar facts, we have had regard to the decision in *Timothy Cooke*, which we found helpful. We hope that our conclusion and guidance will prove sufficient to enable parties to settle this third aspect.

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
30 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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Kenneth Mure
TRIBUNAL JUDGE

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RELEASE DATE: 7 June 2016