



**TC05734**

**Appeal number: TC/2013/02154**

*INCOME TAX – penalty for failure to make returns – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KERRY THOMAS TRADING AS APOLLO ENTERPRISES      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE SARAH ALLATT**

**The Tribunal determined the appeal on 27 March 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 21 March 2013 (with enclosures), HMRC's Statement of Case [(with enclosures)] acknowledged by the Tribunal on 31 January 2017. The letters of 24 September from the Appellant's accountant to HMRC and the letter of 7 January 2013 from the Appellant to HMRC have also been considered.**

## DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit an annual self-assessment return for the year ended 5 April 2011 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 14 February 2012.
  - (2) a £300 “six month” penalty under paragraph 5 of Schedule 55 imposed on 7 August 2012.
  - (3) “Daily” penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 7 August 2012.
3. The appellant’s grounds for appealing against the penalties can be summarised as follows:
  - (1) He argues that there was a “reasonable excuse” for any failure to submit the return on time.
  - (2) He argues that the penalty charged is disproportionate, particularly due to the fact the business was making losses.

### **Findings of fact**

4. The return was due on 31 January 2012 and was submitted on 19 November 2012. The Appellant does not dispute this date.
5. On 24 September 2012 an appeal was made against the penalties by the agent for the Appellant.
6. The Appellant has historically submitted his return late. His 2008 return, due 31 January 2009, was submitted on 31 January 2010. His 2009 return, due 31 January 2010, was submitted on 1 December 2010. His 2010 return, due 31 January 2011, was submitted on 25 January 2012.
7. The Appellant ran two public houses and one nightclub during the period, but due to trading losses he sold one of the public houses in July 2010 and the nightclub in September 2011.

### **Discussion**

8. Relevant statutory provisions are included as an Appendix to this decision.

I have concluded that the tax return for the 2011 tax year was submitted on or around 19 November 2012. It should have been submitted by 31 January 2012. Subject to considerations of “reasonable excuse” and “disproportionality” set out below, the penalties imposed are due and have been calculated correctly.

The appellant has argued that the penalties charged are disproportionate. Following *HMRC v Anthony Boshier* [2013] UKUT 579 (TCC) I do not consider I have power to consider the proportionality of fixed penalties such as those charged in this appeal. Mr Justice Warren made clear 'it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair.'

9. Mr Thomas has put forward two matters which, in his view, should amount to reasonable excuse. The first is the fact that he was sustaining extreme cashflow difficulties during the period. This is raised mainly in relation to the disproportionality point which as stated above I do not have the power to consider, but also as he was having problems paying his accountants and therefore completing his tax return.

10. The second point is that his tax affairs are handled by two different accountants, as he needs to use one nominated by the pub company landlords (presumably to prepare the accounts relating to one or more of the public houses). His accountants had trouble dealing with each other and this delayed the completion of the return.

11. For completeness, I also note that Mr Thomas's agent has stated his mother was ill during the period. This was mentioned by them in passing and has never been stated as a ground of appeal by him. As I have no further information on this point I have not considered it as a ground of appeal.

12. I have considered whether each of these points separately, or both together, constitute a reasonable excuse for the late filing of the tax return.

13. It is clear from the legislation in Schedule 55, para 23 (2) (b) that reliance on any other person (the accountants) is not a reasonable excuse unless Mr Thomas 'took reasonable care to avoid the failure'. I have no evidence that Mr Thomas took such 'reasonable care'. Given the late filing of the previous three years tax returns, it appears that the late filing was not an unusual occurrence.

14. It is clear from the legislation in Schedule 55, para 23 (2) (a) that lack of funds is not a reasonable excuse unless attributable to events outside Mr Thomas's control. He was continuing to trade, and no particular reason other than trading losses was given for his cash flow problems. I note that the business also suffered trading losses in the year to 5 April 2010. I have not been made aware of any unforeseen event that gave rise to this lack of funds.

15. I do not consider either of these situations, separately or together to constitute a reasonable excuse.

### **Conclusion**

16. For the reasons set out above, I affirm HMRC's decision to issue the 3 penalties that are the subject of this appeal. The appeal is dismissed.

### **Application for permission to appeal**

17. 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.

**SARAH ALLATT  
TRIBUNAL JUDGE**

**RELEASE DATE: 30 MARCH 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-  
5 assessment return is submitted late.

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)—
- (a) may be earlier than the date on which the notice is given, but
- 20 (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—
- (a) 5% of any liability to tax which would have been shown in the
- 30 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
- 40 with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

5 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

10 (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%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

15 (a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

20 (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%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

25 (a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

30 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,

40 (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.

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

16—

10 (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

15 (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.

20 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—

25 (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

30 (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—

35 (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.

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