



TC05863

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Appeal number: TC/2013/04057
TC/2013/04059

*INCOME TAX – Whether reasonable excuse for late submission of
partnership self- assessment tax returns - Yes.*

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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**CREATIVE EYE PHOTOGRAPHY LLP
HELIPIX LLP**

Appellants

- and -

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

Respondent

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**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB
CTA AIT**

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The Tribunal determined the appeal on 18 April 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 Notices of Appeal both dated 5 June 2013, and HMRC's Statements of Case both received by the Tribunal on 3 February 2017 with enclosures. The Tribunal wrote to the appellants on 7 February 2017 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. No reply was received from either appellant.

DECISION

1. Introduction

On 11 July 2013 the Tribunal Registrar issued directions which said:-

5 “The Tribunal hereby DIRECTS that:

1.The appeals by Creative Eye Photography LLP (TC/2013/04057) and Helipix LLP (TC/2013/04059) against late filing penalties shall be joined and determined together at the same time by the same Tribunal.

10 2.The appeals are assigned to the default paper category and the Respondents are required to supply a joint statement to the appellants within 42 days of the date of this direction.

3.Any party may apply at any time for these DIRECTIONS to be amended, suspended or set aside.”

15 The appeal was suspended pending a decision in the Donaldson case which was finalised on 21 December 2016.This is referred to further at paragraph 10 below.

Notwithstanding paragraph 2 of the Directions of 11 July 2013 the respondents (HMRC) have not issued a joint statement of case but rather have issued a separate statement of case for each appellant.

20 The tribunal having read the documents can immediately see why the Registrar issued the directions. The cases involve two Limited Liability Partnerships. The partners for both of them were Stephen J Galvin and his wife Janette Galvin and the facts are very similar if not identical.

25 In respect of Creative Eye Photography HMRC say that the nominated partner is Mr. S J Galvin. In the documents provided to the Tribunal is a Self Assessment confirmation of nominated partner form SA670 dated 26 March 2013 which confirms Mrs Janette Galvin is the nominated partner for Creative Eye Photography LLP.

HMRC say Mr. S.J. Galvin is the nominated partner for Helipix LLP.

30 This considers an appeal against penalties totalling £170 imposed by HMRC under Paragraphs 3, and 4 of Schedule 55 Finance Act 2009 for the late filing by Creative Eye Photography LLP of its partnership tax return for the tax year 2011-2012. It also considers an appeal against penalties totalling £170 imposed by HMRC under Paragraphs 3, and 4 of Schedule 55 Finance Act 2009 for the late filing by Helipix LLP of its partnership tax return for the tax year 2011-2012.

35 The reason for the appeals and their histories are almost identical. Therefore the Tribunal has proceeded in accordance with the Registrar’s direction and determined the appeals together.

2. Legislation

Finance Act 2009 Schedule 55

Taxes Management Act 1970, in particular Section 12AA –Partnership return.

5 3. Case law

Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967

Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152

Keith Donaldson v HMRC [2006] EWCA Civ 761

International Transport Roth GmbH v SSHD [2002] EWCA Civ 158

10 Rowland v HMRC [2006] STC (SCD) 536

David Collis [2011] UKFTT 588 (TC)

4. Facts

15 Section 12AA of the Taxes Management Act gives provisions in respect of Partnership Tax returns. These may be briefly summarised as follows:-

In order to establish the amount in which each partner chargeable to income tax for any year of assessment is so chargeable and the amount payable by way of income tax by each such partner, and the amount in which each partner chargeable to corporation tax for any year of assessment is so chargeable, an officer of HMRC may by notice
20 require a partner or partners to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such a day as may be so specified a return containing such information as may reasonably be required in pursuance of the notice. HMRC may specify different days depending on whether a return in respect of a year of assessment (Year 1) is electronic or non-electronic. The
25 day specified for a non-electronic return must not be earlier than 31 October of Year 2. The day specified for an electronic return must not be earlier than 31 January of Year 2.

Schedule 55 of the Finance Act 2009 (“the Schedule”) makes provision for the imposition by Her Majesty’s Revenue and Customs (“HMRC”) of penalties on
30 taxpayers for the late filing of tax returns.

If a person fails to file an income tax return by the “penalty date” (the day after the “filing date” i.e. the date by which a return is required to be made or delivered to HMRC), paragraph 3 of the Schedule provides that the person is liable to a penalty of £100.

35 Paragraph 4 provides:

“(1) A person is liable to a penalty under this paragraph if (and only if)–

(a) The 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 the person specifying the date from which the penalty is payable.”

5 (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).

The filing date for an individual tax return is determined by Section 8 (1D) of the Taxes Management Act 1970.

10 5. In these cases in respect of the tax year ended 5 April 2012 HMRC issued a notice to file to the appellants on 6 April 2012. The filing date for a non-electronic return was 31 October 2012 whereas for an electronic return the filing date was 31 January 2013.

15 HMRC say that the appellants failed to submit their partnership tax returns until 7 February 2013. As the returns were not submitted by the latest filing date of 31 October 2012 HMRC issued notices of penalty assessment on or around 12 February 2013 to both partnerships each in the amount of £100. As the returns had still not been received 3 months after the penalty date of 1 November 2012, HMRC issued to each partnership notices of daily penalty assessment of £70 on or around 19 February 2013, each calculated at £10 per day for 7 days (1 to 7 February inclusive is 7 days).

20 6. On 21 February 2013 Janette Galvin wrote to HMRC requesting that the penalties issued to both partnerships be withdrawn. She pointed out that the returns had been included with her personal return submitted online and acknowledged by HMRC on 19 January 2013. She also said “in addition to this a paper copy was also sent.....just to make doubly sure these were received, again sent in plenty of time. I do not understand why I have received a late filing notice when clearly you have received
25 my forms both on-line and in paper format.”

30 7. On 26 March 2013 HMRC replied saying “I do not agree that you have a reasonable excuse for not sending the Partnership tax return in on time because we have not received the online return. We have only received the paper return which we received on 7 February 2013. If a paper return is submitted, the due date for this is the 31 October 2012.”

8. On 2 April 2013 Janette Galvin writing on behalf of both partnerships appealed against HMRC’s decision in the 2 March 2013 letter. Her letter included

35 “The Partnership returns were attached as PDF documents as additional documents along with our Short Partnership return and our self assessment forms. We added these to our return following contact with the Tax Office last year to check that this was an acceptable means of delivering our Partnership Returns. As we were told this was acceptable, we sent our returns the same way this year.

40 Despite being instructed by the Tax Office to file our (2011/2012) return in this manner, we were charged with a similar late filing fine even though we had submitted our online returns on time.”

The letter also included

“Once again I have attached the receipt from your website which states I filed my return online on 19th January. In addition to this I attach the receipt from your website for my business partner whom also filed on 19 January 2013.”

5 The Tribunal notes that the attached receipts were for individual tax returns and make no mention of the partnership returns.

9. On 15 May 2013 gave the conclusion of their review which was that the decision to charge penalties was correct. The letter included

10 “....this is not an acceptable method of filing your Partnership Tax return. I do appreciate that you state you were told by us last year that it was acceptable to your Partnership Returns this way however I am unable to trace any record of this advice being given. Our records do show that on 19 March 2012 your business partner was advised that you cannot attach a partnership return to an individual return.”

15 The Tribunal observes that this is supported by a transcript of a telephone conversation between Steven J. Galvin and Matthew of HMRC on 19 March 2012.

10. HMRC’s approach to daily penalties was the subject of an appeal by Keith Donaldson which culminated in a decision of the Court of Appeal. The Tribunal has read that decision and considers that its conclusions whilst informative have negligible effect on the matters considered in this appeal save that the absence of the correct period for which the daily penalties have been assessed in the notice of assessment does not affect the validity of the notice.

11. Appellant’s submissions

The appellants’ Notices of Appeal both dated 5 June 2013 repeat many of the statements in the letters referred to above. The Notices included

25 “ We complied with the law and submitted our Partnership Tax Return electronically on 19 January 2013. We did this by attaching a PDF SA800 form which was freely available on the HMRC website and attached this to our self assessment forms (using HMRC software) in exactly the same way we did last year. Last year this method of submission was accepted and the fines incurred were cancelled..... We did not receive written notification until 15th May 2013 telling us that this method of returning was not acceptable.

35 In 2012 we were told verbally after a telephone to the tax office that this was an acceptable method of sending in our Partnership Returns – that we were able to attach our Partnership Tax Return SA800 to our personal self assessment forms. Therefore in January 2013 we did exactly the same as we did in January 2012. We attached the SA800 PDF as additional information.

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12. HMRC's submissions

5 HMRC say that in accordance with Paragraph 25(4) Schedule 55 Finance Act 2009 an appeal under paragraph 20 in connection with a penalty payable by virtue of this paragraph may be brought only by the representative partner or a successor to the representative partner.

10 13. HMRC say that for both appellants “an appeal was received on 2 March 2012 against 2010-2011 late filing penalties charged for late partnership returns for that year. The grounds for appeal was that the partnership return for Helipix LLP had been attached to his individual return (as a PDF document), and the partnership return for Creative Eye Photography LLP had been attached to the individual return (as a PDF document) of his wife, who was the only other partner at that time, and filed online by the online filing date being 31 January 2013.”

14. Pausing there the Tribunal observes that this date must be incorrect as the online filing date for a 2010-2011 return would have been 31 January 2012.

15 HMRC continued “This appeal was accepted and the late filing penalties cancelled. HMRC issued a letter to Mr. Galvin, as the representative partner on 24 March 2012. This letter advised him to make sure future returns were submitted on time so that late filing penalties would not be charged. With hindsight HMRC could have taken this opportunity to educate Mr. Galvin to reiterate that the partnership return must be submitted on its own (not attached to an individual return) on paper by 31st 20 October or online using 3rd party software by 31st January following the date of issue. However HMRC contend that as Mr. Galvin has been in various partnerships since 1999, he should be aware of the need to submit a separate return for the partnership and not as an attachment to an individual return. HMRC appreciates that Mr. Galvin 25 may have engaged the services of an agent in the past, but that does not relieve him from his responsibility to file a satisfactory return for the partnership by the due date.”

15. The letter of 24 March states

“Appeal against penalty for sending your self assessment return in late

30 Thank you for the appeal against the partnership late filing penalty for not completing your 2010-2011 Self Assessment tax return on time.

I have accepted your appeal, which is determined under Section 54 Taxes Management Act 1970. I have cancelled the penalty.

Please make sure that you send in your tax returns on time in the future so that we do not need to charge you penalties.

35 You can find more information on penalties on our website at hmrc.gov.uk/sa/deadlines-penalties.htm.”

16. HMRC say that full Self Assessment partnership returns for the 2011-2012 year were issued to the nominated partner of each partnership on 6 April 2012 clearly showed the due dates for filing the returns online or in paper format.

5 HMRC say that the returns clearly state that to file the partnership return online “you will need to use commercial software which you may have to buy”.

17. HMRC records show that both appellants submitted an unsigned non-electronic return in January 2013. HMRC say they returned these on 1 February 2013 and then received completed and signed non-electronic returns from the appellants on 7 February 2013.

10 18. HMRC say the individual self-assessment returns for both partners were received on 19 January 2013 that is before the electronic filing deadline of 31 January 2013.

15 19. In respect of reasonable excuse HMRC say that they consider the actions of a 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 on 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 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”.

20 20. HMRC have considered the fact that the partnership returns were attached to the partner’s individual tax return, which was received by the due date, as not being reasonable excuse. They say that a partnership return must be submitted in its own right, and submit that these are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances.

25 21. HMRC say “If Mr. Galvin did not want to have the expense of purchasing commercial software, he had the option to submit a paper partnership return by 31 October 2012.

30 22. HMRC say “Mr. Galvin asks in his appeal to the Tribunal why they can have the 2010 to 2011 penalties cancelled but not the 2011-2012 when the same method of submission had been used. HMRC contend that as Mr. Galvin received late filing penalties for filing the 2010 to 2011 partnership return online with his wife’s individual return for 2010-2011, he should have realised that this was not the correct process for filing a partnership return.”

35 23. In respect of the penalty being unfair HMRC say for a penalty to be disproportionate it must be “not merely harsh but plainly unfair.” They refer to the decision in *International Transport Roth GmbH v SSHD*.

40 24. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be “exceptional, abnormal or

unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC say that special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis v HMRC*). HMRC consider that there are no special circumstances which would allow them to reduce the penalty in either of these cases.

25. Tribunal’s Observations

It is the Appellant’s responsibility to submit Self Assessment returns on time. The partnership return for the periods 2011-2012 was due to be submitted online by 31 January 2013 or non-electronically by 31 October 2012. The individual returns were submitted online and receipt acknowledged by HMRC on 19 January 2013 so these were in time and therefore no penalty was incurred or imposed in respect of them.

26. The appellant argues that the partnership returns were attached to the individual returns as PDF files. The Tribunal has considered whether an attached PDF file constitutes an electronic or non-electronic return.

To submit an electronic return a user needs to create a government gateway account. In order to access the gateway a user needs a User ID and password. The partnership will need its ten digit Unique Taxpayer Reference number. The nominated partner will need to register the partnership and get a government gateway activation code from HMRC. HMRC’s website advises there is a different way to register a partnership for LLPs.

The web-site says “If you have problems opening the online forms you can use the PDF version. You’ll have to print this and fill it in by hand before posting it to HMRC.”

It is clear from this that to complete a PDF version of the return the appellants have not accessed the government gateway and were unable to submit the partnership return by that means. Attachment of a PDF is therefore a non-electronic return.

27. The appellants’ non-electronic returns should have been submitted by 31 October 2012.

Electronic returns go through the government gateway which involves identity and security checks including Unique taxpayer reference number, a password and an activation code. They therefore do not need a signature. Non-electronic returns do not go through these identity and security checks so a signature is required.

Unfortunately the non-electronic returns submitted by the appellants did not bear a signature so on 1 February 2013 HMRC sent them back to the appellants who signed them and returned them to HMRC on 7 February 2013.

28. The appellants have therefore both incurred penalties of £100 for submitting the non-electronic returns after 31 October 2012. They have also both incurred daily

penalties of £10 per day for every day the return remains outstanding 3 months after the penalty date. The penalty date is the day after the return was due which is 1 November 2012. Therefore as the completed returns remained outstanding until 7 February 2013 penalties of £70 are due from each appellant being a daily penalty of £10 for the 7 days 1 to 7 February 2013 unless the appellants can show that they had reasonable excuse for the late submissions.

29. The appellants have contended that they don't have to establish a reasonable excuse because the returns were submitted in time in accordance with what had been established in respect of their submissions of the 2010-2011 return that is that it is acceptable to attach a PDF version of the partnership return to an online submission of an individual return. They therefore say the returns were submitted on time therefore reasonable excuses for late returns are not necessary.

30. The Tribunal has shown above why it considers that the returns were late. It has therefore considered whether the taxpayers believe that the precedent set in the previous year led the appellants to believe that if they followed what they had done in 2010/2011 by attaching a PDF version of the partnership return to the online individual return that would be acceptable to HMRC providing it was submitted before the 31 January 2013 deadline.

31. The Tribunal notes that HMRC say in respect of the letter dated 24 March 2012 "With hindsight HMRC could have taken this opportunity to educate Mr. Galvin to reiterate that the partnership return must be submitted on its own (not attached to an individual return) on paper by 31st October or online using 3rd party software by 31st January following the date of issue."

The tribunal considers that the letter of 24 March 2012 is brief and by missing that opportunity the appellants were not alerted to the fact that what they had done was not acceptable to HMRC. In their minds they had appealed against the penalties for 2010/11. Their appeals had been accepted by HMRC and the penalties had been withdrawn. HMRC contend that as Mr. Galvin received late filing penalties for filing the 2010 to 2011 partnership return online with his wife's individual return for 2010-2011, he should have realised that this was not the correct process for filing a partnership return. The Tribunal considers that without further clear guidance in writing it is understandable that the appellant would consider that what they had done in respect of submission of the 2010-2011 return would again be acceptable for 2011-2012. It might be said that the wording of the front page of the tax return for 2011-2012 received by the appellant on or around 7 April 2012 should have alerted them to the fact that third party software was needed to submit a partnership return. However the Tribunal notes that that wording was no different to the wording on the 2010-2011 return and less than two weeks before the appellants had just been advised that their appeal had been allowed. They were therefore not alerted to the fact that HMRC required the partnership return to be submitted separately and that HMRC did not accept that a partnership return could be submitted by attaching it as a PDF file to an individual partner's return. The first time they suspected that the practice was unacceptable to HMRC was when their appeal against the penalty notices issued in February 2013 was rejected on 26 March 2013. They did not receive written

notification that this method of returning was not acceptable until the review letter of 15 May 2013.

5 32. The Tribunal accepts that the appellants believed that they had established through appeal to HMRC that it was acceptable to submit partnership returns by attaching them as a PDF file to individual partner's returns. The Tribunal is also mindful that the appellants assert that on two occasions they obtained verbal confirmation over the telephone that this method of submission was acceptable to HMRC, although HMRC say they have no record of these conversations, HMRC had failed to confirm in writing that it was unacceptable and that the partnership return must be submitted on 10 its own (not attached to an individual return) on paper by 31st October or online using 3rd party software by 31st January following the date of issue Therefore the Tribunal considers that the appellants have established a reasonable excuse for the late submission of their tax returns for the period 2011-2012 and the appeals are allowed.

15 33. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there any special circumstances in these cases which would allow them to reduce the penalty and have concluded there are none. As the Tribunal has found that the appellants have a reasonable excuse for not submitting the returns on time it has not needed to consider whether that decision 20 was flawed.

34. 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 25 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.

30 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE:10 MAY 2017