



[2019] UKFTT 0560 (TC)

TC07353

INCOME TAX—partner payment notice—penalty

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/00324

BETWEEN

STEPHEN BARRETT

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Bodmin on 1 April 2019

The Appellant in person

**Mr Paul Shea, litigator of HM Revenue and Customs' Solicitor's Office, for the
Respondents**

DECISION

(Amended pursuant to rule 37 of the Tribunal's Rules)

INTRODUCTION

1. This is an appeal against penalties imposed pursuant to s 226 of the Finance Act 2014 for failure to make the accelerated partner payments due under partner payment notices (“PPNs”) issued pursuant to Schedule 32 of that Act.

BACKGROUND

2. The Appellant was at material times a partner in the partnership Verona Film Partners (“VFP”).

3. On 8 August 2012, 3 October 2013, 19 May 2014 and 2 June 2015 respectively, HMRC gave notice, relying on s 12AC of the Taxes Management Act 1970 (“TMA”), that it was opening enquiries into the partnership tax returns of VFP for 2010-11, 2011-12, 2012-13 and 2013-14.

4. In a letter to the Appellant dated 1 October 2015, HMRC advised that they would in the following weeks be sending the Appellant PPNs requiring him to make payments relating to his share of VFP’s use of the tax avoidance scheme known as Further Film Sales & Leaseback Business Scheme (scheme reference number 95417331). The letter explained that the Appellant had no right of appeal against the PPNs, but that he could make representations objecting to the PPNs if he disagreed with them.

5. In a letter to HMRC dated 15 October 2015, the Appellant stated that the HMRC letter came as a complete shock to him as he was not even aware that VFP were subject to compliance checks. He asked HMRC a number of questions, including as to when the compliance checks were opened and the issues that were being checked by HMRC. He said that his health and economic circumstances prevented him from making accelerated payments.

6. On 20 November 2015, HMRC sent the Appellant four PPNs relating to income tax for tax years 2010-11, 2011-12, 2012-13 and 2013-14 respectively.

7. In a letter to HMRC dated 26 November 2015, the Appellant stated that he had not yet received a reply to his letter dated 15 October 2015, and asked some additional questions.

8. On 18 December 2015, HMRC sent the Appellant four PPNs relating to National Insurance contributions for tax years 2010-11, 2011-12, 2012-13 and 2013-14 respectively.

9. In a letter to HMRC dated 18 January 2016, the Appellant’s agent made representations against the 20 November 2015 PPNs.

10. In a letter to HMRC dated 15 February 2016, the Appellant’s agent made representations against the 18 December 2015 PPNs.

11. In a letter dated 26 May 2016, HMRC confirmed the 20 November 2015 PPNs.

12. In a letter to HMRC dated 10 July 2016, the Appellant stated that he had been suffering from health problems which had prevented him from responding to HMRC, and he requested further time to take advice.

13. On 1 August 2016, HMRC issued penalties under s 226(2) of the Finance Act 2014 for failure to make on time the accelerated payments due under the 20 November 2015 PPNs.

14. On 1 August 2016, the Appellant appealed against these penalties.
15. In a letter dated 17 August 2016, HMRC withdrew the 18 December 2015 PPNs relating to tax years 2010-11, 2011-12 and 2012-13, and confirmed the 18 December 2015 PPN relating to tax year 2013-14.
16. In letters dated 5 September 2016, HMRC dismissed the Appellant's appeals against the 1 August 2016 penalties.
17. In a letter dated 26 September 2016, the Appellant requested a review of that decision.
18. On 10 October 2016, HMRC issued a penalty under s 226(2) of the Finance Act 2014 for failure to make on time the accelerated payment due in respect of 2013-14 tax year under the 18 December 2015 PPN. On 28 October 2016, the Appellant appealed against that decision.
19. On 8 November 2016, the Appellant's agent provided representations in support of the review of the 18 December 2015 PPN.
20. In a review decision dated 15 November 2016, HMRC upheld the decision to dismiss the appeal against the 1 August 2016 penalties.
21. In a decision dated 22 November 2016, HMRC dismissed the appeal against the 10 October 2016 penalty.
22. In a letter to the Appellant dated 1 December 2016, HMRC provided a response to the Appellant's 5 October 2015 and 26 November 2015 letters.
23. In letters to HMRC dated 12, 20 and 31 December 2016, the Appellant stated that he challenged the formal validity of the PPNs.
24. On 14 February 2017, HMRC issued penalties under s 226(3) of the Finance Act 2014 for failure to make on time the accelerated payments due under the PPNs within 5 months of the due date.
25. On 8 March 2017, the Appellant chased a response to his December 2016 challenge to the validity of the PPNs.
26. In a review decision dated 17 March 2017, HMRC upheld the decision to dismiss the appeal against the 10 October 2016 penalty.
27. In letters dated 31 March 2017, HMRC dismissed the Appellant's appeals against the 14 February 2017 penalties.
28. In letters to HMRC dated 18 and 24 April 2017, the Appellant stated that he challenged the formal validity of the PPNs.
29. In a letter to the Appellant dated 22 May 2017, HMRC rejected the claim that the PPNs were invalid.
30. In a review decision dated 22 May 2017, HMRC upheld the decision to dismiss the appeal against the 14 February 2017 penalties.
31. On 14 June 2017, HMRC issued penalties under s 226(4) of the Finance Act 2014 for failure to make on time the accelerated payments due under the PPNs within 11 months of the due date.
32. On 20 July 2017, following representations from the Appellant, HMRC withdrew the 18 December 2015 PPN relating to tax year 2013-14, and withdrew the penalty for failure to pay

on time the accelerated payment under that PPN. In a letter dated 31 July 2017, HMRC informed the Appellant that it considered that the remaining PPNs were valid.

33. In further review decisions dated 8 August 2017, HMRC upheld the decision to dismiss the appeal against the 14 February 2017 penalties.

34. In letters dated 19 October 2017, HMRC dismissed the Appellant's appeals against the 14 June 2017 penalties.

35. In a review decision dated 8 January 2018, HMRC upheld the decision to dismiss the appeal against the 14 June 2017 penalties.

36. On 12 January 2018, the Appellant commenced the present Tribunal proceedings to appeal against the 14 June 2017 penalties. At the hearing, the Appellant sought permission to add appeals against the other penalties as well, and this was not opposed by HMRC. The Tribunal granted permission. Oral evidence given by the Appellant at the hearing has been taken into account in this decision.

37. In a letter dated 19 February 2018, the Appellant made further representations to HMRC.

APPLICABLE LEGISLATION

38. Paragraph 3 of Schedule 32 to the Finance Act 2014 ("**Schedule 32**") provides that a PPN may be issued if Conditions A to C are met.

- (1) Condition A is that a tax enquiry is in progress in relation to the partnership return or that an appeal has been made in relation to an amendment to the partnership return or a conclusion stated in a closure notice closing an enquiry into the partnership return.
- (2) Condition B is that the return or, as relevant, the appeal is made on the basis that a particular tax advantage ("asserted advantage") results from particular arrangements ("the chosen arrangements").
- (3) Condition C is that one or more of the requirements stipulated for purposes of that condition are met. The relevant stipulated condition for the purposes of the present appeal is that the chosen arrangements are DOTAS arrangements (paragraph 3(5)(b) of Schedule 32).

39. Paragraph 4(1) of Schedule 32 imposes requirements as to the contents of a PPN.

40. Paragraph 5(2) of Schedule 32 provides:

The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC—

- (a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met,
- (b) objecting to the amount specified in the notice under paragraph 4(1)(b), or
- (c) objecting to the amount specified in the notice under paragraph 4(1)(d).

41. Paragraph 5(3) and (4) of Schedule 32 provide that HMRC must consider the representations and either confirm or withdraw the PPN (if the representations were made under paragraph 5(2)(a) of Schedule 32) or confirm the amount specified, amend the amount specified or remove the amount specified in the PPN (if the representations are made under paragraph 5(2)(b) or (c) of Schedule 32).

42. Paragraph 6(2) and (4) of Schedule 32 provide that where a partner has been issued with a PPN they must make a payment to HMRC of that amount by the end of the payment period.
43. Paragraph 6(5)(b)(ii) of Schedule 32 provides that in cases where the recipient of a PPN makes such representations, the payment period for the amount due under the PPN is the period of 30 days beginning with the day on which the relevant partner was notified under paragraph 5 of HMRC's determination following the representations made.
44. Paragraph 7 of Schedule 32 applies the penalty regime in s 226 of the Finance Act 2014 to late payments of amounts due under a PPN. Under s 226(2), (3) and (4) of the Finance Act 2014 respectively, a person who has been given a PPN is liable to a penalty in the amount of 5% of the PPN liability that remains unpaid at the end of the payment period, at the end of the period of 5 months beginning from the penalty day, and at the end of the period of 11 months beginning from the penalty day. Section 226(5) provides that the penalty day is the day immediately following the end of the payment period. Section 226(7) provides that the paragraphs 9-18 (other than paragraph 11(5) of Schedule 56 to the Finance Act 2009 ("**Schedule 56**")) apply.
45. Paragraph 13(1) of Schedule 56 provides for a right of appeal to this Tribunal against such a penalty.
46. Paragraph 16 of Schedule 56 provides that liability to a penalty does not arise in relation to a failure to make a payment if the appellant satisfies the Tribunal that there is a reasonable excuse for the failure. However, it goes on to provide as follows. An insufficiency of funds is not a reasonable excuse unless attributable to events outside the appellant's control. Where the appellant relied on any other person to do anything, that is not a reasonable excuse unless the appellant took reasonable care to avoid the failure. Where the appellant had a reasonable excuse for the failure but the excuse has ceased, the appellant is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
47. Paragraph 9 of Schedule 56 provides that "If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule". However, it goes on to provide that "special circumstances" does not include ability to pay.
48. Paragraph 15 of Schedule 56 provides that if the Tribunal substitutes for HMRC's decision another decision that HMRC had power to make, it may rely on paragraph 9 of Schedule 56 to a different extent to HMRC only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed when considered in the light of the principles applicable in proceedings for judicial review.

THE APPELLANT'S ARGUMENTS

49. The notices to file the partnership returns were not valid because a notice to file under s 12AA(2) or (3) TMA (like a notice to file under s 8(1)(a)) TMA must be given by an individual HMRC "Officer of the Board" (such that a notice to file will not be valid for instance if it is computer generated).
50. Because no valid notice to file was issued, the partnership returns submitted were not statutory returns for purposes of s 12AC(1) TMA. Therefore the enquiry notices issued by HMRC were not valid, and therefore the PPNs were invalid because Condition A could not be met.
51. The penalty notices were invalid for the same reasons.

52. The Tribunal must apply the tax law in existence on the date that the PPNs were issued. The burden is on HMRC to establish that valid notices to file were issued. HMRC have withdrawn PPNs in other cases on the ground that an appropriate s 12AC notice was not issued and there was no relevant enquiry open for the year in issue. HMRC cannot rely on s 87 Finance Act 2019 to treat the returns as voluntary returns, since the returns were submitted more than 2 years prior to the enactment of that provision, such that reliance on it would create a retrospective penalty regime.

53. When the Appellant entered into the scheme, he understood it was lawful. He was under intense pressure from the banks following the worst property crash and recession in his lifetime. He was also suffering health issues at the time. At the time, tax planning was not frowned upon in the way that it is now.

THE HMRC ARGUMENTS

54. The PPNs satisfy the statutory requirements of paragraphs 2-4 of Schedule 32 to the Finance Act 2014.

55. The Tribunal has jurisdiction to determine whether a PPN *has* been issued, but has no jurisdiction to consider the correctness or validity of the underlying HMRC decision to issue the PPN. Nor does the Tribunal have jurisdiction to consider and make a decision on the validity of the partnership enquiry notices given under s 12AC TMA. Reliance is placed on *Nijjar v Revenue and Customs* [2017] UKFTT 175 (TC) (“*Nijjar*”) and *Beadle v Revenue & Customs* [2017] UKFTT 829 (TC). In any event, the Appellant did not challenge Condition A at the representations stage. Sending a letter on 15 October 2015 before the PPNs even issued was insufficient.

56. The penalty assessments have been issued in compliance with s 226 of the Finance Act 2014 and paragraph 11 of Schedule 56 to the Finance Act 2009.

57. The Appellant has no reasonable excuse for his failure to pay the accelerated partnership payments by the due date.

58. The fact that the Appellant hopes to establish in other proceedings that the PPN is invalid is not a reasonable excuse for not paying the accelerated partner payments, in circumstances where the Appellant did not have a sufficiently high degree of certainty of success in the other proceedings (reliance is placed on *Scheiling Properties Limited v Revenue and Customs* [2018] UKFTT 247 (TC) (“*Scheiling*”). The Appellant is not a party to any relevant judicial review proceedings in any event. The fact that he is a party to a restitution claim brought by more than 160 participants in the DOTAS scheme against the HMRC chief executive is insufficient.

59. HMRC accept that the Appellant has an ongoing health condition that started in October 2013. However, the Appellant has not established that this health condition affected his ability to make payment on time (reliance is placed on *Nijjar* at [31]-[32]). An Appellant living with a known condition can be expected to take appropriate steps to handle their affairs whilst living with their known condition.

60. Insufficiency of funds is not a reasonable excuse. The fact that the Appellant never intended to have to pay the tax due to use of the tax avoidance scheme is not a reasonable excuse (reliance is placed on *Rowe v Revenue & Customs* [2015] EWHC 2293 (Admin)). The Appellant has not shown why it was not reasonable for him to provision against the tax saving his participation in the scheme was seeking to achieve. The Appellant has not shown that any

insufficiency of funds was due to events outside his control (reference is made to *Raggatt v Revenue and Customs* [2016] UKFTT 391 (TC)).

61. The HMRC decisions that there are no special circumstances are not flawed. An argument that the Appellant thought that there was no valid PPN because no valid notice of enquiry was given to the partnership cannot give rise to a special circumstance. The Appellant did not challenge Condition A when making representations. Any issue over the effect of enquiry notices given to the partnership is a matter for the partnership and not for the Appellant in this appeal.

62. The Appellant's health issues do not give rise to a special circumstance.

THE TRIBUNAL'S FINDINGS

General

63. The Tribunal finds, HMRC having so contended and the Appellant having not disputed, that as at the date of the hearing of this appeal, no part of the payments due under the outstanding PPNs had yet been made.

64. It has not been disputed that each of the penalties is correctly calculated as 5% of the amount of the accelerated partner payment stated in the PPN.

65. The Tribunal is satisfied that the PPNs, on their face, satisfy the formal requirements of paragraph 4(1) of Schedule 32.

Applicable legal principles

66. The legislation provides no right of appeal to the Tribunal against a decision of HMRC to issue a PPN.

67. The statutory scheme concerning PPNs and penalty notices by necessary implication excludes the possibility of a challenge by the taxpayer to a PPN on public law grounds in the context of an appeal to the Tribunal against a penalty notice. (See *Beadle v Revenue & Customs* [2019] UKUT 101 (TCC) ("*Beadle*") at [44]-[45].)

68. The trigger for the imposition of the penalty is the failure to pay the amount specified in the PPN. In an appeal against a penalty for failure to make on time payment due under a PPN, the Tribunal cannot consider whether Conditions A to C in paragraph 3 of Schedule 32 are met. If a person in receipt of a PPN considers that one or more of Conditions A to C are not met, that person may make representations under paragraph 5(2) of Schedule 32, and if not satisfied with HMRC's response to those representations, may bring judicial review proceedings. (See *Nijar* at [27]-[29].)

69. For an appellant to have a reasonable excuse for purposes of paragraph 16 of Schedule 56, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account (see *Perrin v HMRC* [2018] UKUT 156 (TCC) at [71]). The focus must be on the circumstances in which the Appellant found himself, with a view to determining whether what the Appellant did was in all the circumstances reasonable. In other words, having regard to the experience, knowledge and other attributes of this particular Appellant, did he do all that could reasonably have been expected of him in the particular circumstances in which he found himself at the time in question? The Tribunal should bear in mind all relevant circumstances.

70. Paragraph 16 of Schedule 56 applies only where there is a reasonable excuse *for the failure to make payment*. A taxpayer is not entitled to be excused from a penalty by reason only of the fact that he or she has serious health problems. The burden is on the Appellant to prove the extent of his health problems and their effect on his ability to make payment on time. (See *Nijar* at [31].)

71. Where an appellant can demonstrate that, viewed objectively, there is a high degree of confidence that a PPN is invalid, the appellant might be able to establish the existence of a reasonable excuse for failing to comply with the PPN. However, in deciding how to respond to an PPN, a reasonable taxpayer would not lightly assume that HMRC have acted unlawfully in issuing a PPN, and a mere belief by the appellant that the PPN is invalid, even if genuinely and reasonably held, is unlikely to constitute a reasonable excuse. (See *Beadle* at [46]-[51]; *Scheiling* at [53].)

Application of legal principles to the facts

72. The Tribunal rejects the challenge to the validity of the PPNs, for the reasons given in paragraphs 65 to 68 above.

73. In this appeal against penalties imposed under paragraph 226 of Schedule 32, the Appellant cannot challenge the notices to file tax returns and the enquiry notices. His challenge to the validity of the PPNs on the grounds set out in paragraphs 49-52 above is therefore rejected.

74. As to the argument that HMRC have withdrawn PPNs in other cases, the Tribunal must in this case apply the law as it finds it to the facts of this case as it finds them. The Tribunal is not bound by the practice of HMRC in this or in any other case. A challenge to the PPNs or penalties on grounds of inconsistent conduct on the part of HMRC would be a public law challenge over which the Tribunal has no jurisdiction.

75. Therefore, and having regard to the findings in paragraphs 63-65 above, the Tribunal is satisfied that the penalties have been correctly imposed in accordance with the legislation, subject to the question whether the Appellant has a reasonable excuse for the non-payment, and the question whether there are special circumstances justifying a special reduction in the penalties.

76. The Appellant contends that even if he cannot in the present proceedings argue that the PPNs were invalid, the fact that he reasonably believed that the PPNs were invalid provides a reasonable excuse for failure to pay the amounts due under them. The Tribunal does not accept that the Appellant has established a reasonable excuse on this basis. A belief by an appellant that a PPN is invalid, no matter how reasonably and/or genuinely held, would not in the Tribunal's view without more justify an appellant in simply ignoring the PPN and declining to pay it. If the Appellant considered that the PPNs were invalid, it was open to him to bring public law proceedings to challenge them. Even if he had done so, that of itself would also not have provided him with a reasonable excuse for failing to pay the amounts due under the PPNs if they fell due while the public law proceedings were still pending. There might be a reasonable excuse if public law proceedings are brought to challenge a PPN only if there is a sufficiently high degree of certainty of success in those public law proceedings (see paragraph 71 above).

77. The burden of proof is on the Appellant to establish the existence of circumstances amounting to a reasonable excuse. This means that the burden would be on the Appellant in the present appeal proceedings to satisfy the Tribunal that he had a sufficiently high degree of

certainty of success in other proceedings challenging the validity of the PPNs. The Appellant has not established this in the present appeal.

78. As to whether the Appellant has a reasonable excuse on medical grounds, the Tribunal has considered with sympathy the evidence of medical conditions provided by the Appellant. However, the Tribunal is not satisfied that the Appellant has established that medical conditions prevented him from physically making payment of the amounts due to HMRC, either by the due date, or throughout the period of default (see paragraph 70 above). In particular, he has not provided documentary medical evidence in support of the medical conditions relied on.

79. The Appellant suggests that his health condition stopped him from earning for a period, and that it subsequently reduced his earnings as concerns about his health limited the amount of work he felt able to take on. This is in effect a claim of insufficiency of funds to pay the amounts due under the PPNs. An insufficiency of funds caused by diminished earning capacity due to a health condition might well be a reasonable excuse for late payment of amounts due under a PPN, given that health conditions are matters beyond the control of the taxpayer. However, the burden of proof is on the taxpayer to establish the existence of a reasonable excuse through adequate evidence. While the Tribunal is sympathetic to long term health conditions, it cannot accept that mere claims by appellants, unsupported by documentary evidence, are sufficient to establish a reasonable excuse of this kind, in the present case. The Appellant has not provided documentary evidence of the illness, or documentary evidence of how his earnings were affected by his illness. In the circumstances, the Tribunal is not persuaded on a balance of probability that the Appellant, but for an illness, could have and would have paid on time the amounts due under the PPNs.

80. The Appellant contends that he lost a lot of money due to the financial crisis, and due to actions of the Global Restructuring Group. He says that as a result his business was forced into insolvency, he was forced into selling properties at the worst possible time, and his business was forced into a company voluntary arrangement during which it could not trade. It appears that these matters occurred, or at least began, before the Appellant entered into the VFP partnership, since he says that due to these events “an opportunity to invest into a more diverse income stream with only a small initial investment in a ‘government approved’ film scheme ... seemed like a good idea”. The Appellant also contends that at the time that he invested in the VFP partnership, he believed that what he was doing was legitimate, and that tax planning was not frowned upon in the way that it is now.

81. However, it must be noted that the Appellant’s motivations for entering into the partnership, even if they could be shown to be wholly reasonable and blameless, are not without more relevant to the reasons why he failed to pay the amounts due under the PPNs on time. In any event, the Appellant has provided insufficient detail or supporting evidence to establish that, or even explain how, these matters could provide a reasonable excuse for failure to pay on time the amounts due under the PPNs. Matters such as these, which relate to the Appellant’s circumstances at the time of entering into the partnership, do not provide a reasonable excuse *for the failure to make payment* due under the PPNs.

82. The fact that the Appellant never intended to have to pay the tax due to use of the tax avoidance scheme is not a reasonable excuse for failure to pay the amounts due under the PPNs. The fact that the Appellant never expected to be issued with the PPNs, and therefore never expected that he would need to pay these amounts, is similarly not a reasonable excuse. The issuing of a PPN cannot of itself be considered as an event outside the Appellant’s control, for purposes of paragraph 16(2)(a) of Schedule 56.

83. Having considered the circumstances as a whole, the Tribunal finds that the Appellant has not established a reasonable excuse for failure to pay on time the amounts due under the PPNs.

84. For similar reasons, the Tribunal finds that the Appellant has not established the existence of any special circumstances justifying a special reduction in the penalties.

CONCLUSION

85. For the reasons above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

86. 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.

**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 30 AUGUST 2019