



**TC02286**

**Appeal number: TC/2011/04888**

*Corporation Tax – Flat-rate and tax-geared penalties for late submission of company tax returns under Schedule 18 Finance Act 1998 – whether tax return incomplete – whether Director’s report under Companies Act 1985 and Companies Act 2006 required in order for return to be complete- yes – whether company had reasonable excuse for late submission of returns –no - relevance of previous concession given by HMRC considered – whether error in HMRC witness statement in county court collection proceedings effected withdrawal of penalty- no- whether encashment by HMRC of cheques sent in by appellant settled appeals – no – appeals dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GOODTIME PRINT AND DESIGN LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE SWAMI RAGHAVAN  
                     ELIZABETH BRIDGE**

**Sitting in public at the Appeal Service Venue, Ashford, Kent on 30 March 2012**

**Mr Gregory, director of the Appellant company for the Appellant**

**Mr Ratcliff for the Respondents**

## DECISION

1. This appeal concerns appeals against fixed and tax-geared penalties for accounting periods ending 3 August 2005 to 3 August 2009 for late filing of company tax returns.
2. HMRC argue penalties are chargeable because the appellant did not submit the full accounts required by the legislation. By the time sufficient information had been filed for the returns to be regarded as complete returns, the returns were late.
3. The Appellant argues HMRC were wrong to not have accepted the abbreviated accounts which were sufficient to satisfy the Companies House filing requirements. It had accepted the returns in those formats for the accounting period ending 2006 and it should have continued to accept the returns as complete for the following years.

### *Evidence*

4. We had before us correspondence between the parties including some of the appellant's returns, and print outs from HMRC's records. In relation to a contention raised by the appellant we also had copies of a witness statement and exhibits in relation to a county court enforcement action initiated by HMRC against the appellant (which we were told was stayed pending the outcome of this appeal). In addition some of the submissions made by Mr Gregory amounted to evidence and to that extent HMRC were given the opportunity to ask Mr Gregory questions on that evidence.

### **Law**

5. The legislation relating to filing of returns and penalties and appeals is set out below. The relevant parts of the Companies Act 1985 and Companies Act 2006 which are referred to in this decision are set out in an annex at the end of this decision.
6. Paragraph 3 Schedule 18 Finance Act 1998

3—

(1) an officer of Revenue and Customs may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports—

- (a) relevant to the tax liability of the company, or
- (b) otherwise relevant to the application of the Corporation Tax Acts to the company,

as may reasonably be required by the notice.

(2) Different information, accounts, statements and reports may be required from different descriptions of company.

(3) A company tax return must include a declaration by the person making the return that the return is to the best of his knowledge correct and complete.

(4) The return must be delivered to the officer of the Board by whom the notice was issued not later than the filing date.

...

7. Paragraph 4 Schedule 18 Finance Act 1998

References in this Schedule to the delivery of a company tax return are to the delivery of all the information, accounts, statements and reports required to comply with the notice requiring the return.

8. Paragraph 11 Schedule 18 Finance Act 1998

In the case of a company which—

(a) is required to deliver a company tax return for a period,

(b) is resident in the United Kingdom throughout that period, and

(c) is required under the Companies Act 2006 [*prior to 6 April 2008 the Companies Act 1985*] to prepare accounts for a period consisting of or including the whole of that period,

the power to require the delivery of accounts as part of the return is limited to such accounts, containing such information and having annexed to them such documents, as are required to be prepared under that Act.

9. Para 17 Schedule 18 Finance Act 1998

(1) A company which is required to deliver a company tax return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.

It may also be liable to a tax-related penalty under paragraph 18.

(2) The penalty is—

(a) £100, if the return is delivered within three months after the filing date, and

(b) £200, in any other case.

(3) The amounts are increased to £500 and £1000 for a third successive failure, that is, where—

(a) the company is within the charge to corporation tax for three consecutive accounting periods (and at no time between the beginning of the first of those periods and the end of the last is it outside the charge to corporation tax),

(b) a company tax return is required for each of those accounting periods,

- (c) the company was liable to a penalty under this paragraph in respect of each of the first two of those periods, and
- (d) the company is again liable to a penalty under this paragraph in respect of the third period.

...

#### 10. Para 18 Schedule 18 Finance Act 1998

(1) A company which is required to deliver a company tax return for an accounting period and fails to do so—

- (a) within 18 months after the end of that period, or
  - (b) if the filing date is later than that, by the filing date,
- is liable to a tax-related penalty under this paragraph.

This is in addition to any flat-rate penalty under paragraph 17.

(2) The penalty is—

- (a) 10% of the unpaid tax, if the return is delivered within two years after the end of the period for which the return is required, and
- (b) 20% of the unpaid tax, in any other case.

(3) The “unpaid tax” means the amount of tax payable by the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-paragraph (1).

(4)...

#### 11. Section 117 Finance Act 1998

Company tax returns, assessments and related matters

(1) The provisions of Schedule 18 to this Act have effect in place of—

- (a) the provisions of Parts II and IV of the Taxes Management Act 1970 (returns, assessment and claims), so far as they relate to corporation tax,
- (b) certain related provisions of Part X of that Act (penalties), [and]
- (c) ...

(2) Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act.

...

#### 12. Section 100 Taxes Management Act 1970

100 Determination of penalties by officer of Board

(1) ...an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty

under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

(2) ...

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

...

### 13. Section 100B Taxes Management Act 1970

#### 100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to ...the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

(i) if it appears ... that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears ... to be correct, confirm the determination, or

(iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount,

...

### 14. Section 118 Taxes Management Act 1970

#### 118 Interpretation

(1) ...

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased ...

...

## Facts

15. The appellant is a small print business company which was incorporated on 16 February 1993.

16. Mr Gregory and his wife are directors of the company. The company has 3 high volume print presses, Mr Gregory attends to the print presses and his wife does the artwork and answers the telephone. The company does not employ an accountant.

17. The accounting periods of the company for corporation tax purposes run to 3 August of each year. The company is a small company for the purpose of the Companies Acts 1985 and the Companies Act 2006.

18. The penalties under appeal are as follows:

<b>Accounting period ending ("APE")</b>	<b>Type of penalty under appeal and issue date of notice</b>	<b>Amount under appeal</b>
3 August 2005	Flat rate penalty for late return  Notice issued 28 August 2006 and 21 November 2006	£1000
3 August 2005	Tax related penalty for late return  Notice issued 24 January 2008	£3.60 (20% of unpaid tax of £18.00)
3 August 2006	Flat rate penalty for late return  Notices issued 29 August 2007 and 20 November 2007	£1000
3 August 2006	Tax related penalty for late return  Notice 30 March 2009	£22.04 (20% of unpaid tax of £110.20)
3 August 2007	Flat rate penalty for late return  Notice 26 August 2008	£1000

	and 19 November 2008	
3 August 2007	Tax related penalty for late return  Amended penalty notice on receipt of return issued on 19 May 2010	£14.20 (10% of unpaid tax of £142.00)
3 August 2008	Flat rate penalty for late return  Notice 26 August 2009 and 19 November 2009	£1000
3 August 2009	Flat rate penalty for late return  Notice 26 August 2010	£500

19. We consider the issue of whether a return is a complete return for the purpose of the tax and penalties legislation further below. Where we refer to a return being sent in this includes documents purporting to be a return and does not necessarily indicate a finding that those documents amounted to a complete return for the purposes of the tax and penalties legislation.

20. We were referred to extensive correspondence between the appellant and HMRC and also to copies of HMRC records showing when returns were received.

*APE 2005*

21. A standard form Notice to file a return was issued by HMRC to the appellant on 19 September 2005.

22. For the accounting period 3 August 2005 the return was due on 3 August 2006. The appellant sent in a return on 9 July 2007. HMRC did not accept this, maintaining that it did not comply with the requirements to file a return.

23. HMRC's letter of 28 August 2007 indicated the following requirements which had not been complied with and which meant that a complete return had not been filed:

- (1) Declaration with an original signature
- (2) Full accounts as required by the Companies Act
- (3) Tax computation to show how chargeable profit has been arrived at from the profit per the accounts

(4) Capital Allowances claimed in the computation to be shown in boxes 105 to 114 of the return.

24. In a letter dated 10 September 2007 the appellant returned the original form of the return and completed box 105 but took issue with the HMRC's point on full accounts being required as in previous years accounts which had been filed in the same format as for APE 2005 the returns had been accepted. The appellant also took issue with HMRC's point on the tax computation.

25. On 8 January 2008 HMRC indicated that it had accepted the return as having been filed with a receipt date of 11 September 2007. HMRC's letter pointed out that this treatment was incorrect because the identified deficiencies remained unresolved. The letter did not however press for the return to be filed again and so to that extent it represented a concession on HMRC's part.

26. The two previous returns for accounting periods ending 3 August 2003 and 3 August 2004 were both delivered late. The return for APE 3 August 2003 was due on 3 August 2004 and the return for APE 3 August 2004 was due on 3 August 2005. Neither was received until 14 December 2005. Although there is no penalty appeal in respect of APE 2003 and APE 2004 before us we make findings in relation to those prior returns because if a penalty is due in respect of the return for APE 2005 then whether this is a "third successive failure" (as set out in Paragraph 17(3) Schedule 18 Finance Act 1998) affects the amount of the penalty.

#### *APE 2006*

27. A standard form Notice to file a return was issued on 18 September 2006.

28. No direct evidence was put forward on when the appellant first sent in a return . But, from an HMRC letter dated 12 February 2008 which refers to the return having to be sent back to the appellant on 5 September 2007 because it did not contain full accounts or tax computation, it may be inferred that the appellant had sought to file a return prior to 5 September 2007 and that as of 12 February 2008 the appellant had not filed a return which HMRC accepted as complete.

29. A return dated 6 August 2008 was received by HMRC on 7 August 2008.

30. On 13 August 2008 HMRC notified the appellant that the Directors' Report and computation were missing from the return.

31. On 4 September 2008 HMRC received a resubmitted return. This contained a Directors Report but did not contain a computation for capital allowances.

32. At some point thereafter but before 22 April 2010 the appellant sent in a return.

33. On 22 April 2010 HMRC wrote to the appellant to ask that page 3 of the return be attached as it was missing. Page 3 of the return precedes the page dealing with overpayments and repayments and the declaration, and deals with variously tax



calculation, reconciliation, capital allowances and balancing charges and losses deficits and excess amounts.

34. HMRC records show the return was received on 29 April 2010.

*APE 2007*

35. A standard form Notice to file a return was issued on 24 September 2007.

36. At some point prior to 18 May 2010 the appellant submitted a return given that on 18 May 2010 HMRC wrote to the appellant to say that page 3 of the return was missing and should be submitted.

37. HMRC records show it received the return on 29 April 2010.

*APE 2008*

38. A standard form Notice to file a return was issued on 22 September 2008.

39. At some point prior to 22 April 2010 the appellant submitted a return given that on 22 April 2010 HMRC wrote to the appellant to say that the return which had been submitted needed to be resubmitted with a director's report.

40. HMRC records show it received the return on 29 April 2010.

*APE 2009*

41. A standard form Notice to file a return was issued on 3 August 2009.

42. HMRC records show the date the return was received on 30 June 2011.

43. No evidence was put forward suggesting a return incomplete or otherwise was put forward before that date.

44. The amounts of unpaid tax as at 18 months after the end of the APE were not in dispute and are as stated in the final column of the table at [18] above in so far as they are relevant to the tax-gear penalties under appeal.

*Appellant's arguments*

45. HMRC's treatment of the submitted returns does not take into account the original submission date for each return.

46. Submission of accounts which were accepted by Companies House should be sufficient for the purposes of the appellant's tax return. It should have therefore been sufficient to send in abbreviated accounts and not to send a director's report. It was not clear to the appellant what difference a director's report which was only one line

long should make to HMRC or why it was necessary at all given Mr Gregory and his wife are both directors and members of the appellant company.

47. HMRC treatment is inconsistent in that they have accepted returns without the Director's report before.

48. There are discrepancies with an HMRC witness statement filed in county court proceedings with HMRC's case as set out in these proceedings. In the former the witness statement states the penalty for APE 2008 was reduced to nil. If that is the case the appellant argues the penalties should be reduced for all years upon payment of tax due or receipt of accepted return.

49. HMRC had cashed cheques which the appellant had sent in under cover of a letter which stated that encashment would be taken as acceptance of the appellant's offer for a settlement.

50. HMRC now have online filing requirements which are not as stringent as previously. The returns in this appeal which were rejected would have been accepted under the new regime.

51. HMRC should have tackled any issue they had with the returns before letting the amounts build up to the amount they had.

#### *Respondents' arguments*

52. Even taking account of the earliest dates the returns had been submitted those returns were still late.

53. Abbreviated accounts are not sufficient for the purposes of the company's tax return. The legislation requires the filing of accounts *prepared* under the Companies Act not those which are *delivered* to the company registrar.

54. To the extent any concessions were given in relation to previous periods it was made clear that these would not continue for the years under appeal.

55. The appellant does not have a reasonable excuse for not filing the returns on time. If the appellant was not able to do it itself it should have sought advice / obtained appropriate assistance elsewhere.

56. Even if the director's report is brief, the legislation requires it to be provided with the return. Given it is brief there was even less of an excuse for it not being filed on time.

57. The subsequent regime for on-line filing does not affect the requirements that were in place in relation to the paper-based regime during the relevant period.

## Discussion

### *Submission dates*

58. In order to determine whether the appellant is liable for fixed and tax geared penalties in this matter the Tribunal must consider whether the appellant has failed to deliver its company tax return to HMRC according to the deadline imposed by the legislation and also the date when the return was delivered, that date being relevant to the amount of the penalty. In reaching determinations on the delivery dates the Tribunal must also consider whether documents the appellant sent in constituted a “company tax return”. To the extent there has been a failure to deliver the return we consider below whether the appellant may be deemed not to have failed to deliver the return by virtue of the reasonable excuse provisions in s118 TMA 1970.

59. It is apparent to us that for some but not all of the years in dispute, (namely the returns for APE 2005 and APE 2009), the appellant was late in delivering its returns whatever view is taken of whether the documents sent in by the appellant constituted a “company tax return”.

### *APE 2005*

60. Irrespective of the nature of the documents which were filed by the appellant on 9 July 2007 with HMRC there was no evidence before us which would enable us to find that a company tax return was filed with HMRC before that date. On this basis subject to any argument on reasonable excuse this means the appellant failed to deliver a return by the due date of 3 August 2006 and did not deliver a return within 3 months of that date. It was therefore liable to a flat-rate penalty of £1000, the failure being longer than 3 months from the due date, and the failure being the appellant’s “third successive failure” for the purposes of the paragraph 17 of Schedule 18 Finance Act 1998.

61. Having failed to file within 18 months after the end of the accounting period, (3 February 2007) the appellant is also liable for a tax geared penalty under paragraph 18 Schedule 18 Finance Act 1998. Whether the documents filed on 9 July 2007 constituted a “company tax return” is relevant to the amount of the tax geared penalty. If it did file a ‘proper’ company tax return on 9 July 2007, the penalty would be 10% of the unpaid tax, whereas if it was later than 3 August 2007 then the penalty would be 20% of the unpaid tax.

62. We did not receive direct evidence on whether documents containing the deficiencies identified by HMRC had been sent in. But, taking account of HMRC’s letter of 28 August 2007 on the balance of probabilities we find that the appellant did send documents in and that those documents did not include a tax computation to show how chargeable profit has been arrived at from the profit per the accounts, and did not set out the Capital Allowances claimed in the computation in boxes 105 to 114

of the return. It was not clear to us from HMRC's letter in what respect the accounts did not meet the relevant Companies Act requirements so we do not think we are in a position to consider that deficiency for this accounting period.

63. Certainly though, in relation to points raised on computation and capital allowances we think that such omissions and deficiencies would mean that the return filed on 9 July 2007 was not a complete one for the purposes of the legislation. We were shown a copy of the standard form "Notice to deliver a return". This very clearly states the completed return must be accompanied by computations showing how the entries on the Return have been calculated from the relevant figures in the accounts.

64. On the evidence before us the return which was accepted as a "company tax return" was not received until 11 September 2007. This was after the 2 year deadline set in paragraph 18 of Schedule 18 Finance Act 1998 and means that the appellant is liable for a penalty amount of 20%.

#### *APE 2009*

65. Except for HMRC records which show the date the return was received was 30 June 2011 we had no evidence before us that any documents capable of constituting a company tax return were filed and if so when they were filed.

66. On the balance of probabilities and in view of there being no evidence to the contrary we find that the return was filed on 30 June 2011. Subject to any arguments on reasonable excuse the appellant was therefore liable for the £500 flat rate penalty under appeal in these proceedings given the return was not filed by the due date of 3 August 2010.

#### *APE 2006, 2007 and 2008: Were documents sent in "company tax returns"?*

67. For each of the above periods, while there is evidence in the form of HMRC letters sending the appellant's documents back on dates which fall after the due dates for the relevant years we had insufficient evidence before us as to the date the appellant actually submitted those documents. We therefore cannot find that the appellant was liable for penalties simply on the basis that no return was filed by the relevant dates. The issue of whether the documents, were in any event not capable of constituting "company tax returns" is relevant though because if the documents were not so capable there would be no company tax return filed whatever the date on which the documents were sent.

68. On the balance of probabilities we find from the letters HMRC sent to the appellant returning the appellant's documents that those documents lacked the various matters as set out in the HMRC letters.

#### *APE 2006*

69. In relation to APE 2006 the documents filed at some point before 5 September 2007 were lacking full accounts and the tax computation. As discussed above the lack

of tax computation would we think render the return invalid as a “company tax return”.

70. To the extent any reliance is placed on the return dated 6 August 2008 we note that the return lacked a director’s report (the significance of which is considered below) and a computation. Even if this return were to be regarded as a valid return (which would go against our conclusions on the significance of tax computations and inclusion of the director’s report), the return would still result in liability for flat rate and tax geared penalties in the amount assessed, it having been delivered more than 2 years from the end of APE 2006 (3 August 2008).

#### *APE 2007*

71. The documents which were filed at some point before 18 May 2010 lacked page 3 of the return. Page 3 of the return precedes the page dealing with overpayments and repayments and the declaration, and deals with variously tax calculation, reconciliation, capital allowances and balancing charges and losses deficits and excess amounts. A return which missed this page would not be a complete return so we cannot find that a valid return was filed by the due date or by dates 3 months following the due date, or 18 months or 2 years after 3 August 2007 such that the filing of the return would affect the liability to further flat rate or tax geared penalties.

72. In the absence of evidence to the contrary we find that a return was filed on the date stated by the HMRC records namely 29 April 2010.

#### *APE 2008*

73. The documents which were filed at some point before 22 April 2010 lacked the appellant’s director’s report. The issue of whether the lack of a director’s report means the return is incomplete is also potentially relevant to APE 2006 . We consider the requirements as set out in the Companies Act 1985 and also the corresponding provisions of Companies Act 2006.

#### *Companies house requirements vs. Tax legislation requirements*

74. Prior to 6 April 2008 paragraph 11 Schedule 18 FA 1998 required “such accounts, containing such information and having annexed such documents as are required to be prepared under the Companies Act 1985”. With effect from 6 April 2008 the reference to Companies Act 1985 (“CA 1985”) was replaced by a reference to the Companies Act 2006. The following paragraphs refer to the Companies Act 1985 provisions. The corresponding Companies Act 2006 provisions are set out in the annex to this decision.

75. Section 226(1) CA 1985 requires directors to prepare a balance sheet and a profit and loss account.

76. Section 234 CA 1985 requires a director’s report be prepared.

77. Section 246(3) CA 1985 permits abbreviated accounts to be prepared for small or medium sized company.

78. Section 246(5) exempts a small or medium sized company from having to include either a profit or loss account or a director's report in the accounts it must deliver to the Registrar.

*Was inclusion of the director's report necessary for the return to be a valid one?*

79. Paragraph 3 of Schedule 18 Finance Act 1998 enables HMRC by notice to require a company to deliver a return of such "information, accounts, statements and reports - a) relevant to the tax liability of the company, or b) otherwise relevant to the application of the Corporation Tax Acts to the company, as may reasonably be required by the notice.

80. Paragraph 4 provides that references to the delivery of the company tax return are to the delivery of all the information, accounts, statements and reports required to company with the notice requiring the return.

81. Paragraph 11 of the schedule then limits the power to deliver accounts to accounts containing such information and having annexed to them such documents, as are required to be prepared under the Companies Act 1985 (as from 6 April 2008 the Companies Act 2006).

82. The Notice to file the return states the completed return must be accompanied by " a copy of the accounts of the company" for the period covered by the Return. Further down the notice it is explained that :

“ ‘Accounts’ required are:

- for companies resident in the UK throughout the period covered by the Return and required by company law to prepare accounts covering that period, those accounts including a copy of any directors and auditors report similarly required...”.

83. General notes to the notice to file include the following:

“accounts required are for companies resident in the UK throughout the period covered by the return and required by the law of the territory in which they are established...to prepare covering that period, those accounts including a copy of any director's and auditor's report similar required. These are the accounts that a company is required to prepare under company law for its members and not the abbreviated accounts it may be permitted to file with the Registrar of Companies.”

84. The Companies Act 1985 legislation requires the directors of the company to prepare accounts (s226 CA 1985) and specifies that those accounts must include a balance sheet and a profit and loss account.

85. The requirement to prepare a director's report is set out separately in s234 CA 1985, subsection 1 of which requires a report comply with the general requirements of s234ZZA CA 1985 and the business review specified in s234ZZB CA 1985.

86. Section 246(4) CA 1985 sets out various provisions which relieve small companies from disclosing certain contents of the directors report requirements but not all of them. Directors of the small company still have to prepare a director's report albeit in relation to a smaller subset of information than would otherwise be required.

87. Section 246(5) CA 1985 provides that notwithstanding the obligation to file documents with the registrar the directors of the company do not need to deliver various items. In particular they do not need to deliver a copy of the company's profit and loss account or a copy of the director's report.

88. The appellant's argument is that given the companies registrar is satisfied with not receiving the director's report, this should also be sufficient for company tax return purposes. HMRC say the Companies Act legislation draws a distinction between what must be prepared for Companies Act purposes and what must be delivered to the registrar.

89. Having considered the legislation it is clear to us that HMRC's contention is correct. It seems clear to us that a small company is not absolved from having to prepare a director's report even if it does not have to file a copy of this with the registrar.

90. It is also clear that for the purposes of the corporation tax return that HMRC's notice is able to fasten on information and documents "as are required to be prepared under the Companies Act". We think that the reference to "prepared" is intended to dovetail with those documents which must be prepared under the Companies Act as opposed to those documents, copies of which must be filed with the Registrar.

91. Given the scope of the return is framed by what is in the notice (which is itself curtailed by certain legislative requirements) we also considered whether the Notice to file does in its terms make it clear that the Companies Act director's report is to included with the return. We consider that it does precisely that.

92. We also considered whether the requirement for the director's report met the terms of paragraph 3 Schedule 18 FA 1998 namely whether it was a report which was a) relevant to the tax liability of the company, or b) otherwise relevant to the application of the Corporation Tax Acts to the company, as may reasonably be required by the notice. Although we did not receive specific submissions on the point the appellant did indirectly touch upon the issue in his argument that given his director's report had been a small paragraph it was difficult to understand why it had in HMRC's view rendered his return incomplete.

93. Noting that a director's report, which even for small companies would have to contain for instance a statement of the principal activities of the company in the course of the year and therefore of relevance to the tax liability of the company, or the application of the Corporation Tax Act to it, and that the report was something that

the directors were obliged to prepare for the purposes of the Companies Act legislation we were not persuaded that the information failed the requirements of paragraph 3. Further we did not think the appellant's submission to the effect the report was of no consequence because the directors and members of the company were one and the same took the matter any further. In particular we were not taken to anything which suggested that the statutory responsibilities of the directors were to be relieved because they were also members.

94. To the extent the provisions of the Companies Act 1985 are relevant we have also considered the corresponding provisions of the Companies Act 2006. While those provisions are worded differently, for the purposes of the matter we consider the 2006 Act provisions are materially the same as the 1985 Act provisions and the analysis above is equally valid.

95. From HMRC's letter of 18 May 2010 telling the appellant the return which had been filed needed to be resubmitted because it did not contain a director's report we infer that although a return was submitted prior to that date no complete return containing such a report was sent before that date. The HMRC records show a return was not received until 29 April 2010 and in the absence of any evidence of a complete return being filed before then or at some other point in time we find that the return was received by HMRC on 29 April 2010.

*Effect of concessions given in relation to returns for previous years*

96. As mentioned above at [25] a receipt date of 11 September 2007 appears to have been accepted by HMRC in respect of APE 2005 even though the return did not meet with the necessary requirements. Leaving aside any issue as to whether HMRC have discretion to make such a concession, and having considered the statements HMRC made in correspondence, we do not see how the appellant can reasonably have considered that whatever concessionary practice had been applied for past years would continue.

97. Even if we were able to find that the appellant could have reasonably thought the concession would continue for future years we do not consider that would permit us to depart from analysing whether complete returns were filed as a matter of objective fact, although that issue if it were established might be relevant in the context of whether the appellant had a reasonable excuse for any failure to comply (as to which see below.)

*Reasonable excuse*

98. On the face of it the appellant failed to comply with the obligations to file returns by the relevant deadlines. We must consider whether the appellant had a reasonable excuse through the duration of the period between that date when returns were due through to the date when they were filed such that it can be deemed not to have failed under s118(2) TMA 1970.



99. Having considered the Notices to file and the comprehensive general notes accompanying the notice we are not persuaded that any of the deficiencies in the returns, (whether that be the failure to submit a directors report, all of the pages of the return, the required computations and completed boxes) were ones which the appellant could not reasonably have addressed in order to get the return filed on time.

100. To the extent the appellant had doubts as to what to send in, despite the clear notices and general notes, it was open to it to seek further advice. We did not have any evidence before us which suggested that the appellant had done so. Indeed Mr Gregory was candid in telling us that as the owner of the appellant which was a small business, his priorities lay in running the business of the company and not sorting out its tax returns.

101. The correspondence we have seen indicates that the appellant has repeatedly had deficiencies in the returns drawn to his attention by HMRC. He has stuck to his guns in disputing the reasons put to him as to why his returns were incomplete and in particular has disregarded the explanations put to him as to the distinction between accounts which are apt to satisfy Companies house filing requirements and those which are required for the purposes of a company tax return.

102. In relation to previous concessions given by HMRC, it may be that in some cases this might enable an appellant to argue that given such representations the appellant had a reason to act or not act as he did, but this is not such a case. Here the appellant has seized upon a concession offered by HMRC in order to argue that the concession should continue. We consider that those concessions were given with a view to enabling the appellant to draw a line under past breaches and we do not think they provide the appellant with a reasonable excuse which under the legislation deems its compliance failures not to have happened.

103. In relation to the argument that the regime for online filing is less strict, we do not see that the content and application of a subsequent regime is of relevance. We must make our determination on the basis of the regime which applied during the periods under appeal.

104. The appellant's argument that tax had been paid does not assist him either given the regime is quite clearly directed towards non compliance with taxpayers' obligations to file returns on time. Paying the tax does not remove the obligation to file the return. If the return which is regarded as complete is not submitted by the statutory deadlines then the legislation provides for late filing penalties.

*Relevance of witness statements in county court proceedings stating that one of the penalties reduced to nil*

105. We were shown a copy of a witness statement of Karen Robinson, an HMRC Officer dated 4 July 2011 made for the purposes of collection proceedings by HMRC against the appellant in the Ashford County Court.

106. In a table headed “Penalties for late submission of returns” it states in respect of APE 3 August 2008 “penalty reduced to nil after return received”

107. The statement is at odds with a letter in the exhibit KR4(2) to the statement in which it is confirmed by HMRC in a letter dated 8 September 2010 that the penalty determination remained in place.

108. It was later clarified in letter dated 12 September 2011 from HMRC to the appellant that there were typing errors in the witness statement and that the collection proceedings in the county court are stayed pending the outcome of this appeal.

109. The appellant says it would be reasonable to assume that something which someone has signed a statement of truth would be correct. We of course agree with that. It is unsatisfactory that such errors were made but we have difficulty seeing how such errors assist the appellant’s case.

110. Effectively an erroneous statement has been made in collection proceedings. Those proceedings are stayed pending the outcome of these appeals because it must first be established whether the appellant is liable for penalties and the amount of any penalties. HMRC have made it clear the statements were made in error and have apologised. The context of the statement the appellant relies on suggests to us it should not be interpreted as effecting a withdrawal of the penalty or further that, as the appellant suggests, it should mean that the penalties for other years should be removed.

*Relevance of cheques sent in by appellant to these proceedings*

111. In a letter dated 13 June 2011 and included in the bundle of papers before the Tribunal the appellant had written to HMRC on a letter headed “Corporation tax £4482.62”. In the letter the appellant enclosed a cheque of £500. Two further cheques for £500 each were sent in. The letter referred to a “ full and final settlement offer of £1500” being made and went on to state that “Encashment will be taken as acceptance of the offer to your CT Operations in Croydon”. We understand the cheques were cashed by HMRC.

112. The appellant has in his subsequent correspondence copied to the Tribunal referred to the *Rule in Clayton’s Case (Devaynes v Noble [1816] 1 Mer 572)*.

113. We understand the purpose of the appellant referring to the rule (which deals with allocation of sums against debts in relation to the order the debts were incurred) was to dispute the way in which the cheques which had been cashed by HMRC were applied to sums said to be due by the appellant to HMRC.

114. It is not clear to us how the application of the cheques is relevant to the proceedings before us. The proceedings before this Tribunal relate to the appellant’s liability to penalties for late submission of returns. The treatment of the above cheques is not relevant to whether the appellant is *liable* for such penalties. Further it can be of no relevance to the amount of tax upon which tax geared penalties have

been calculated given the date the cheques were sent and the dates of the tax geared penalties in issue.

115. For the sake of completeness we have also considered whether the encashment of the cheques could be regarded as having settling any of the appeals before us under s54 TMA 1970 thereby depriving the Tribunal of jurisdiction to consider such appeals. Reviewing the correspondence between HMRC and the appellant in relation to the cheques there was however nothing which indicated to us that there was any kind of agreement as between HMRC and the appellant in relation to the appeals before us being settled. HMRC's letter of 12 September 2011 and subsequent correspondence clearly indicate to us that HMRC was not accepting the offer. To the extent the cashing of the cheques sent in with the appellant's offer letter gave rise to a rebuttable presumption of acceptance of the appellant's offer (see *Inland Revenue Commissioners v Fry* [2001] STC 1715) we find that any such presumption is rebutted and no agreement to settle the appeals was reached.

### **Conclusion**

116. The penalties under appeal are determined correctly and in the correct amount. We therefore confirm the penalty determinations. The appellant's appeals are accordingly dismissed.

117. 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.

**SWAMI RAGHAVAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 1 October 2012**

## **Annex – Companies Act legislation**

### ***Companies Act 1985***

#### **226 Duty to prepare individual accounts**

(1) The directors of every company shall prepare accounts for the company for each of its financial years.

Those accounts are referred to in this Part as the company's 'individual accounts'.

(2) A company's individual accounts may be prepared—

(a) in accordance with section 226A ('Companies Act individual accounts'), or

(b) in accordance with international accounting standards (IAS individual accounts').

This subsection is subject to the following provisions of this section and section 227C (consistency of accounts).

(3) The individual accounts of a company that is a charity must be Companies Act individual accounts.

(4) After the first financial year in which the directors of a company prepare IAS individual accounts ('the first IAS year'), all subsequent individual accounts of the company must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance.

(5) There is a relevant change of circumstance if, at any time during or after the first IAS year—

(a) the company becomes a subsidiary undertaking of another undertaking that does not prepare IAS individual accounts,

(b) the company ceases to be a company with securities admitted to trading on a regulated market, or

(c) a parent undertaking of the company ceases to be an undertaking with securities admitted to trading on a regulated market.

In this subsection 'regulated market' has the same meaning as it has in Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

(6) If, having changed to preparing Companies Act individual accounts following a relevant change of circumstance, the directors again prepare IAS individual accounts for the company, subsections (4) and (5) apply again as if the first financial year for which such accounts are again prepared were the first IAS year.

## **226A Companies Act individual accounts**

(1) Companies Act individual accounts must comprise—

- (a) a balance sheet as at the last day of the financial year, and
- (b) a profit and loss account.

(2) The balance sheet must give a true and fair view of the state of affairs of the company as at the end of the financial year; and the profit and loss account must give a true and fair view of the profit or loss of the company for the financial year.

(3) Companies Act individual accounts must comply with the provisions of Schedule 4 as to the form and content of the balance sheet and profit and loss account and additional information to be provided by way of notes to the accounts.

(4) Where compliance with the provisions of that Schedule, and the other provisions of this Act as to the matters to be included in a company's individual accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them.

(5) If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the directors must depart from that provision to the extent necessary to give a true and fair view.

(6) Particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts.

### **234 Duty to prepare directors' report**

(1) The directors of a company shall for each financial year prepare a report (a 'directors' report') complying with the general requirements of section 234ZZA and containing—

(a) the business review specified in section 234ZZB, and

(b) if section 234ZA applies to the report, the statement as to disclosure of information to auditors required by that section.

(2) For a financial year in which—

(a) the company is a parent company, and

(b) the directors of the company prepare group accounts,

the directors' report must be a consolidated report (a 'group directors' report') relating, to the extent specified in the following provisions of this Part, to the company and its subsidiary undertakings included in the consolidation.

(3) A group directors' report may, where appropriate, give greater emphasis to the matters that are significant to the company and its subsidiary undertakings included in the consolidation, taken as a whole.

(4) ...

(5) If a directors' report does not comply with the provisions of this Part relating to the preparation and contents of the report, every director of the company who—

(a) knew that it did not comply or was reckless as to whether it complied, and

(b) failed to take all reasonable steps to secure compliance with the provision in question,

is guilty of an offence and liable to a fine.

#### **234ZZA Directors' report: general requirements**

(1) The directors' report for a financial year must state—

(a) the names of the persons who, at any time during the financial year, were directors of the company,

(b) the principal activities of the company in the course of the year, and

(c) the amount (if any) that the directors recommend should be paid by way of dividend.

(2) In relation to a group directors' report subsection (1)(b) has effect as if the reference to the company was a reference to the company and its subsidiary undertakings included in the consolidation.

(3) The report must also comply with Schedule 7 as regards the disclosure of the matters mentioned there.

(4) In Schedule 7—

Part 1 relates to matters of a general nature, including changes in asset values, directors' shareholdings and other interests and contributions for political and charitable purposes;

Part 2 relates to the acquisition by a company of its own shares or a charge on them;

Part 3 relates to the employment, training and advancement of disabled persons;

Part 5 relates to the involvement of employees in the affairs, policy and performance of the company;

Part 6 relates to the company's policy and practice on the payment of creditors.

Part 7 specifies information to be disclosed by certain publicly-traded companies.

(5) A directors' report shall also contain any necessary explanatory material with regard to information that is required to be included in the report by Part 7 of Schedule 7.

**234ZZB Directors' report: business review**

(1) The directors' report for a financial year must contain—

- (a) a fair review of the business of the company, and
- (b) a description of the principal risks and uncertainties facing the company.

(2) The review required is a balanced and comprehensive analysis of—

- (a) the development and performance of the business of the company during the financial year, and
- (b) the position of the company at the end of that year, consistent with the size and complexity of the business.

(3) The review must, to the extent necessary for an understanding of the development, performance or position of the business of the company, include—

- (a) analysis using financial key performance indicators, and
- (b) where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters.

(4) The review must, where appropriate, include references to, and additional explanations of, amounts included in the annual accounts of the company.

(5) In this section, 'key performance indicators' means factors by reference to which the development, performance or position of the business of the company can be measured effectively.

(6) In relation to a group directors' report this section has effect as if the references to the company were references to the company and its subsidiary undertakings included in the consolidation.

#### **246 Special provisions for small companies**

(1) Subject to section 247A, this section applies where a company qualifies as a small company in relation to a financial year.

(2) If the company's individual accounts for the year are Companies Act individual accounts and—

(a) comply with the provisions of Schedule 8, or

(b) fail to comply with those provisions only in so far as they comply instead with one or more corresponding provisions of Schedule 4,

they need not comply with the provisions or, as the case may be, the remaining provisions of Schedule 4; and where advantage is taken of this subsection, references in section 226A to compliance with the provisions of Schedule 4 shall be construed accordingly.

(3) The company's individual accounts for the year—

(a) may give the total of the aggregates required by paragraphs (a), (c) and (d) of paragraph 1(1) of Schedule 6 (emoluments and other benefits etc of directors) instead of giving those aggregates individually; and

(b) need not give the information required by—

(i) paragraph 4 of Schedule 5 (financial years of subsidiary undertakings);

(ii) paragraph 1(2)(b) of Schedule 6 (numbers of directors exercising share options and receiving shares under long term incentive schemes);

(iii) paragraph 2 of Schedule 6 (details of highest paid director's emoluments etc); or

(iv) paragraph 7 of Schedule 6 (excess retirement benefits of directors and past directors).

(4) The directors' report for the year need not give the information required by—

(a) section 234ZZA(1)(c) (directors' report: amount to be paid as dividend) and 234ZZB (directors' report: business review);

(b) paragraph 1(2) of Schedule 7 (statement of market value of fixed assets where substantially different from balance sheet amount);

(ba) paragraph 5A of Schedule 7 (disclosure relating to the use of financial instruments);



- (c) paragraph 6 of Schedule 7 (miscellaneous disclosures); or
  - (d) paragraph 11 of Schedule 7 (employee involvement).
- (5) Notwithstanding anything in section 242(1), the directors of the company need not deliver to the registrar any of the following, namely—
- (a) a copy of the company's profit and loss account for the year;
  - (b) a copy of the directors' report for the year; and
  - (c) if they prepare Companies Act individual accounts and they deliver a copy of a balance sheet drawn up as at the last day of the year which complies with the requirements of Schedule 8A, a copy of the company's balance sheet drawn up as at that day.
- (6) Neither a copy of the company's accounts for the year delivered to the registrar under section 242(1), nor a copy of a balance sheet delivered to the registrar under subsection (5)(c), need give the information required by—
- (a) paragraph 4 of Schedule 5 (financial years of subsidiary undertakings);
  - (b) paragraph 6 of Schedule 5 (shares of company held by subsidiary undertakings);
  - (c) Part I of Schedule 6 (directors' and chairman's emoluments, pensions and compensation for loss of office); or
  - (d) section 390A(3) (amount of auditors' remuneration).
- (7) The provisions of section 233 as to the signing of the copy of the balance sheet delivered to the registrar apply to a copy of a balance sheet delivered under subsection (5)(c).
- (8) Subject to subsection (9), each of the following, namely—
- (a) accounts prepared in accordance with subsection (2) or (3),
  - (b) a report prepared in accordance with subsection (4), and
  - (c) a copy of accounts delivered to the registrar in accordance with subsection (5) or (6),

shall contain a statement in a prominent position on the balance sheet, in the report or, as the case may be, on the copy of the balance sheet, above the signature required by section 233, 234A or subsection (7), that they are prepared in accordance with the special provisions of this Part relating to small companies.

(9) Subsection (8) does not apply where the directors of the company have taken advantage of the exemption from audit conferred by section 249AA (dormant companies).

## ***Companies Act 2006 provisions***

### **394 Duty to prepare individual accounts**

The directors of every company must prepare accounts for the company for each of its financial years.

Those accounts are referred to as the company's "individual accounts".

### **396 Companies Act individual accounts**

- (1) Companies Act individual accounts must comprise—
  - (a) a balance sheet as at the last day of the financial year, and
  - (b) a profit and loss account.

### **415 Duty to prepare directors' report**

- (1) The directors of a company must prepare a directors' report for each financial year of the company.

### **416 Contents of directors' report: general**

- (1) The directors' report for a financial year must state—
  - (a) the names of the persons who, at any time during the financial year, were directors of the company, and
  - (b) the principal activities of the company in the course of the year.
- (2) In relation to a group directors' report subsection (1)(b) has effect as if the reference to the company was to the undertakings included in the consolidation.
- (3) Except in the case of a company [entitled to the small companies exemption], the report must state the amount (if any) that the directors recommend should be paid by way of dividend.
- (4) The Secretary of State may make provision by regulations as to other matters that must be disclosed in a directors' report.

Without prejudice to the generality of this power, the regulations may make any such provision as was formerly made by Schedule 7 to the Companies Act 1985.

### **415A Directors' report: small companies exemption**

- (1) A company is entitled to small companies exemption in relation to the directors' report for a financial year if—
  - (a) it is entitled to prepare accounts for the year in accordance with the small companies regime, or

(b) it would be so entitled but for being or having been a member of an ineligible group.

(2) The exemption is relevant to—

section 416(3) (contents of report: statement of amount recommended by way of dividend),

section 417 (contents of report: business review), and

sections 444 to 446 (filing obligations of different descriptions of company).

#### **417 Contents of directors' report: business review**

(1) Unless the company is entitled to the small companies exemption], the directors' report must contain a business review.

#### **444 Filing obligations of companies subject to small companies regime**

(1) The directors of a company subject to the small companies regime—

(a) must deliver to the registrar for each financial year a copy of a balance sheet drawn up as at the last day of that year, and

(b) may also deliver to the registrar—

(i) a copy of the company's profit and loss account for that year, and

(ii) a copy of the directors' report for that year.

(2) The directors must also deliver to the registrar a copy of the auditor's report on the accounts (and any directors' report) that it delivers.

This does not apply if the company is exempt from audit and the directors have taken advantage of that exemption.

(3) The copies of accounts and reports delivered to the registrar must be copies of the company's annual accounts and reports, except that where the company prepares Companies Act accounts—

(a) the directors may deliver to the registrar a copy of a balance sheet drawn up in accordance with regulations made by the Secretary of State, and

(b) there may be omitted from the copy profit and loss account delivered to the registrar such items as may be specified by the regulations.

These are referred to in this Part as “abbreviated accounts”.

#### **444A Filing obligations of companies entitled to small companies exemption in relation to directors' report**

- (1) The directors of a company that is entitled to small companies exemption in relation to the directors' report for a financial year—
  - (a) must deliver to the registrar a copy of the company's annual accounts for that year, and
  - (b) may also deliver to the registrar a copy of the directors' report.