



TC01970

Appeal number: TC/2011/04342

Paragraph 18 to Schedule 18 of the Finance Act 1998- Whether reasonable excuse for late return - No

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STERLING DEVELOPMENTS (LONDON) LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE ALISON MCKENNA
 ANTHONY HUGHES**

Sitting in public at Bedford Square on 27 February 2012

John Pittalis of K J Pittalis LLP Chartered Accountants for the Appellant

Nadine Newham of HMRC for the Respondents

DECISION

- 5 1. This appeal concerns a tax geared penalty raised in accordance with paragraph 18 of schedule 18 to the Finance Act 1998 in respect of the late filing of the Company Tax return for Sterling Developments (London) Limited for the accounting period ended 30 April 2008.
- 10 2. The Appellant appeals against the penalty pursuant to s 100 of the Taxes Management Act 1970, and asks the Tribunal to find that he had a reasonable excuse for the late filing of the return and on that basis to set aside the penalty.
- 15 3. By the time of the hearing, there had been a concession by the Respondents as to the extent of the period of lateness, which had the effect of reducing the amount under appeal from an original penalty of £80,240 down to one of £40,120. The Respondent asked the Tribunal formally to vary the penalty to this amount (as the concession post-dated the Decision Review) and to confirm that that amount was payable by the Appellant.

The Facts

- 20 4. It was agreed by the parties for the purposes of this appeal that the Company Tax Return for the accounting period ended 30 April 2008 was due on 30 April 2009 but was received by the Respondents on 30 April 2010.
5. It was also agreed that, for a period of within two years' default, paragraph 18(2)(a) of schedule 18 to the Finance Act 1998 permits the imposition of a penalty of 10 % of the unpaid tax for the period of default, in addition to flat-rate penalties.
- 25 6. The parties agreed that the question for the Tribunal was whether the Appellant's reason for the late filing was one which amounted to a reasonable excuse throughout the period of default pursuant to s 118(2) of the Taxes Management Act 1970.

The Evidence and Arguments

- 30 7. The Tribunal heard oral evidence from Mr Colin Foux, a director of Sterling Developments (London) Ltd. He told the Tribunal that the property development business had suffered as a result of the recession and that the company's loan facility with Allied Irish Bank had been withdrawn at short notice. He had needed to arrange re-financing through Royal Bank of Scotland which had cost him £100,000 in revaluation fees. The re-financing was only
35 completed in October 2010.
8. Mr Foux considered that HMRC were unsympathetic to the plight of businesses suffering as a result of the recession. He pointed to the fact that HMRC had issued a bankruptcy petition against the company in 2011. He explained that he

had borrowed money from his family to pay the tax due, but had no more capacity to borrow. He said he had never heard of late filing penalties and had thought that the result of his delaying filing the return would be only that he would pay interest on the tax due. He said he had not been advised about the flat rate penalties imposed prior to the tax geared penalties now under appeal. Mr Foux stated that he had intended to pay his tax, as he had always done in the past, but the extreme financial pressures he was facing in 2009 led to him making a tactical decision not to file the company's tax return because he thought that the crystallisation of a £450,000 tax debt (as it would have appeared at that time, subsequently reduced to some £289,000) would have jeopardised his re-financing negotiations.

9. Mr Foux explained to the Tribunal that, whilst it might have been naïve, he had thought it better to delay filing the tax return so that his subsequent losses could be taken into account to reduce the tax debt than to file it on time and be unable to pay the tax due. He considered that he had done the "right thing" to save his company in the circumstances and that he was now being penalised for it.

10. In answer to questions from Ms Newham and from the Tribunal, Mr Foux accepted that he could have filed the return and asked HMRC for time to pay. He said that he had negotiated with HMRC for time to pay in the past but not with such large sums at stake. His evidence was that his main concern was to secure the re-financing and save the company. He had thought that the re-financing would have been jeopardised by the submission of the tax return and so delayed filing, ignorant of the penalty that would be incurred as a result. He said he had discussed matters with this accountant but had not been advised about penalties and that it had been his own decision not to file the return.

11. Mr Pittalis submitted that the Appellant had acted reasonably when judged by the standards of a reasonable businessman in those circumstances at the relevant time. He referred us to the decision in *The Clean Car Co Ltd v C & E Commissioners* [1991] VATTR 239 (concerning a VAT default surcharge) in support of this argument. Mr Pittalis also referred us to the decision of a differently constituted panel of the First-tier Tribunal in *N A Dudley Electrical Contractors Limited v HMRC* [2011] UKFTT 260 (TC) but we did not find this case helpful as it concerned very different circumstances in which there was no proof of a return having been sent to the Appellant by HMRC. Although neither party referred us to the case directly, we understood Mr Pittalis' submission to be based on the Court of Appeal's approach in *C & E Commissioners v Steptoe* [1992] STC 757, namely that whilst a lack of funds available to pay the tax was not a reasonable excuse in itself, the underlying reasons for the lack of funds could constitute such an excuse. Once again, this was in a VAT case and concerned late payment rather than late filing. Although we were not referred to this case either, we note the Tribunal's decision in *T E Davey Photo Services Ltd v C & E Commissioners* [1997] STC 889 in which the Appellant's case was that if he had borrowed funds to meet his liabilities to Her Majesty's Customs and Excise (as it then was) it would have compromised his company's future viability. This scenario seems closest to the Appellant's case, notwithstanding

that it concerns VAT rather than Corporation Tax and concerned late payment rather than a late return, and yet the Tribunal in that case found that this did not constitute a reasonable excuse for late payment and the High Court subsequently declined to interfere with its approach.

- 5 12. Mr Pittalis also submitted that the attitude and approach of HMRC after the late
return was filed was indicative of how it would have acted if the Appellant had
filed the return and asked for time to pay. He submitted that HMRC would
have been unsympathetic to the company's plight and asked the Tribunal to find
10 on the balance of probabilities that HMRC would have taken punitive action
against the Appellant, as it had done in 2011 when the return had been filed but
the tax had remained unpaid for a period, and that the expectation of this on the
part of the Appellant meant that his actions had been reasonable in the
circumstances.
- 15 13. Ms Newham on behalf of HMRC argued that it was the company directors'
responsibility to ensure that the company tax return was filed on time and that,
even if a loss in subsequent years was expected to reduce the tax ultimately
payable and even if it were anticipated that time to pay would have to be asked
for, Mr Foux was under a legal obligation to file the return when it was due.
20 She submitted that it was a decision made by Mr Foux to file the company's
return late, and that this did not constitute a reasonable excuse in law, even if
one took into account his circumstances at the time.

The Tribunal's Conclusions

- 25 14. The Tribunal is sympathetic to the position of the company and to the pressures
it faced at the relevant time. However, it does not seem to us that a consciously-
made, tactical decision to delay the filing of the company's tax return can be
viewed as a reasonable excuse for late filing in all the circumstances. Whilst Mr
Faux was faced with difficult circumstances outside of his control in the shape
of an urgent and unexpected need to secure re-financing, we do not find that
30 these circumstances themselves served to prevent him from filing the return.
Although the circumstances might have provided the company with a
reasonable excuse for not being able to pay the tax after the return had been
filed, we do not find that they constituted a reasonable excuse for not filing the
return on time. We are also unable to accept that subsequent actions by HMRC
35 in relation to debt management, even if the Appellant had the fear or
expectation of those actions at the relevant time, is capable of constituting a
reasonable excuse for not complying with a legal obligation.
- 40 15. For the reasons set out at paragraph 3 above, we therefore allow the appeal in
part so as to vary the penalty payable to 10 % of the outstanding liability at the
point of two years' default, namely £40, 120.00. We confirm that this penalty is
payable by the company.

16. 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.

10

TRIBUNAL JUDGE

15

RELEASE DATE: 18 April 2012