TC04620

Appeal number:TC/2015/02113

INCOME TAX – penalties for non payment of tax – schedule 56 Finance Act 2009 – due date for payment – reasonable excuse – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR FARHAD KAIVANI **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS BEVERLEY TANNER

Sitting in public in Manchester on 7 July 2015

The Appellant appeared in person

Mrs Helen Roberts of HM Revenue & Customs for the Respondents

DECISION

Background and Findings of Fact

1. The appellant, Dr Kaivani appeals against penalties of £303 and £441 imposed for late payment of tax for tax years 2010-11 and 2011-12 respectively ("the Penalties"). Further penalties have been imposed for late filing of returns but those penalties are not the subject of this appeal. HMRC's review decision in relation to the late filing penalties is awaiting the decision of the Court of Appeal in the case of *Donaldson v HMRC [2014] UKUT 0536 (TCC)*.

2. We make the following findings of fact as to the circumstances in which the Penalties were incurred.

3. The appellant was employed as a doctor by Aintree University Hospital Trust until August 2008. Thereafter he was employed by St Helens & Knowsley Hospital Trust but returned to Aintree Hospital in December 2008. Between April 2009 and June 2009 he was employed by East Kent Hospitals University Trust. In July 2009 he returned to train as a consultant at the Mersey Deanery and was on a payroll administered by the Royal Liverpool University Trust. During the course of that training he worked at various hospitals but remained on the same payroll. Whilst the appellant had more than one employer in 2008-09 and 2009-10 he did not have more than one employment at any one time.

4. In June 2012 HMRC sent a P800 Tax Calculation to the appellant for tax years 2008-09, 09-10, 10-11 and 11-12. These showed total tax due of £10,380. The reason tax was due was that the PAYE codes being operated by his employers in the various tax years included for part of the time the BR code. This meant that some of the appellant's income which ought to have been taxed at the higher rate of 40% was only taxed at the basic rate.

5. The appellant immediately informed HMRC that he considered the unpaid tax had arisen as a result of errors by his employers. HMRC did not accept that was the case and by letter dated 6 August 2012 they explained why they were not satisfied that there had been any employer error. The significance of employer error is that in certain circumstances HMRC may not seek to collect tax due from an employee. Based on the evidence before us we cannot identify the underlying cause of the underpayment beyond finding that it arose because of the use of the BR code. The appellant has since accepted that there was an underpayment and, as set out below, has paid the tax.

6. In order to collect the unpaid tax, HMRC sent a letter to the appellant dated 30 November 2012 requiring him to make self-assessment returns for the four tax years in question. The returns were required to be made by 7 March 2013. The appellant had 3 months to complete the tax returns. We understand that HMRC treat a notice requiring returns to be made as having been given to a taxpayer 7 days after the date of issue to allow for delivery by Royal Mail. 7 March 2013 was a date 3 months and 7 days after the date of the notice.

7. The letter indicated that self assessment returns were being sent to the appellant to be filled in. The letter also stated that the appellant was required to pay the tax due by 7 March 2013, and that if he failed to do so then a late payment penalty would be charged.

8. The appellant told us he could not recall whether he received the letter dated 30 November 2012. He said that he did not receive the self assessment returns.

9. On 9 July 2013 HMRC sent a reminder letter. On receiving that letter the appellant made an appointment with the Liverpool Riverside tax office and went to see them on 18 July 2013. He explained his view that the unpaid tax had arisen as a result of errors by his employers. It appears from the notes of this meeting that the appellant told the tax office that he had not received the letter dated 30 November 2012 or the self assessment returns.

10. We are satisfied that the appellant is an honest witness. He was not aware of any particular difficulty with deliveries of post to his home address which was the address used by HMRC. On balance we are satisfied that for some reason he did not receive the letter dated 12 November 2012 or the tax returns sent separately.

11. On 25 September 2013 HMRC wrote to the appellant enclosing duplicate copies of the tax return forms requiring the tax returns to be filled in for all four tax years and the tax paid by 1 January 2014. HMRC acknowledged that the appellant had not previously received the returns. The letter was in the same form and included the same requirements as the previous letter dated 30 November 2012, save that the date for compliance was 1 January 2014.

12. A further letter was sent by HMRC on 26 September 2013 rejecting the appellant's claim that the unpaid tax was the result of employer error and confirming that the appellant was responsible for the unpaid tax.

13. The appellant telephoned HMRC on 27 September 2013 asking for a further explanation as to why HMRC considered there was no employer error. This was acknowledged as a complaint by letter dated 27 September 2013 and the appellant was told he could expect a response by 25 October 2013.

14. On 16 October 2013 HMRC wrote to the appellant by way of a response to his complaint. The letter set out why the writer did not consider that the unpaid tax was the result of employer error. We are satisfied that the appellant did not receive this letter and on 12 November 2013 he telephoned HMRC chasing the response he had been expecting. The result of that telephone conversation is not clear and the appellant could not recall it, other than the fact he had made a manuscript note that he had called. It seems likely that the appellant did not get through to HMRC because their telephone records do not have any entry for calls after 27 September 2013.

15. On 6 March 2014 the appellant wrote to HMRC stating that he had received no response following his complaint. By letter dated 4 April 2014 HMRC acknowledged that the appellant had not received their letter dated 16 October 2013 and provided a

copy. It was noted that the self assessment returns were still outstanding and should be submitted.

16. The appellant filed the outstanding tax returns on 20 April 2014. By this stage the appellant had an accountant acting and the accountant lodged the returns. On 31 July 2014 HMRC sent tax calculations to the appellant for 2010-11 and 2011-12 showing tax due of £2,027 and £2,947 respectively.

17. The appellant paid the tax due for 2010-11 and 2011-12 on 23 October 2014.

Calculation of the Penalties

18. Section 8 Taxes Management Act 1970 ("TMA 1970") provides for HMRC to give notice to a taxpayer requiring a self assessment tax return. The return must be delivered to HMRC within 3 months from the date of the notice. Section 9 TMA 1970 requires the return to include a self assessment of the amount of income tax falling due, save where the return is delivered to HMRC on or before 31 October in the year following the year of assessment. That was not the case here, so the appellant was required to calculate the amount of tax payable by him for each tax year.

19. Section 59B TMA 1970 provides that in the present circumstances the tax is payable 3 months after the date on which notice requiring a return was given. Section 59(B)(3) and (4) read as follows:

"*(3) In a case where the person –*

> *(a) gave the notice required by section 7 of this Act within 6 months from the end of the year of assessment, but*
>
> *(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,*

the difference [ie the tax] shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment."

20. The reference to a notice required by s 7 TMA 1970 is to the notice by an individual that he is chargeable to tax for any year of assessment. However a taxpayer is not required to give a notice under s 7 if in the year of assessment his total income is from a source where all payments have been taken into account in making deductions under PAYE regulations. It appears that HMRC have treated the appellant as being having given a notice under s 7, which is to his advantage as the date for payment of the tax would otherwise be 31 January in the years following the years of assessment.

21. The Penalties were calculated pursuant to Schedule 56 Finance Act 2009 which provides for a penalty of 5% of the tax payable where it remains unpaid on the date 30 days after the due date for payment ("the penalty date"). Further 5% penalties arise for tax unpaid 5 months after the penalty date and 11 months after the penalty date.

22. HMRC contend that the tax for 2010-11 and 2011-12 was due to be paid by 7 March 2013. The penalty date would therefore be 6 April 2013. The Penalties were imposed on 18 August 2014 being 5% of the tax outstanding as at the penalty date for each tax year, 5% of the tax outstanding 5 months after the penalty date and 5% of the tax outstanding 11 months after the penalty date.

23. For 2010-11 the tax unpaid was £2,027 giving rise to three 5% penalties of £101. For 2011-12 the tax unpaid was £2,947 giving rise to three 5% penalties of £147.

24. Paragraph 16 Schedule 56 provides that a penalty does not arise if the taxpayer has a reasonable excuse for failing to make the payment as follows:

> " *(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.*
>
> *(2) For the purposes of sub-paragraph (1)—*
>
> *(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,*
>
> *(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and*
>
> *(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.*"

25. The meaning of reasonable excuse in this context is well established. It derives from the decision of HH Judge Medd QC in *The Clean Car Co Ltd v Customs and Excise Comrs* [1991] VATTR 234 where he stated in the context of VAT penalties:

> " *It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?*"

26. HMRC considered that there was no reasonable excuse for the appellant not to make payment by the penalty date.

Reasons

27. Our jurisdiction on this appeal is to consider whether the Penalties were payable, and if so whether the amount has been properly calculated. We can summarise the issues which we consider arise for determination as follows:

(1) What was the due date for payment of the tax?

(2) Was there a reasonable excuse for non payment by that date, and if so when did the reasonable excuse cease?

(3) What date was the tax paid?

(4) Have the Penalties been calculated correctly?

28. The due date for payment depends on when the notice requiring the returns was given to the appellant. HMRC's case is that the notice under section 8 was given by 7 December 2012 and pursuant to s 59B(3) the tax was payable on 7 March 2013.

29. We have found that the letter dated 30 November 2012 was not received by the appellant. Section 115(2) TMA 1970 provides that a notice is validly served if it is delivered to a person "*at his usual or last known place of residence, or his place of business*" and may be given by post. Further, section 7 Interpretation Act 1978 provides:

> "*Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.*"

30. We have found that the notice was not received by Dr Kaivani and therefore the notice was not given to Dr Kaivani for the purposes of section 59B.

31. Even if we had been satisfied that the appellant had received the notice, HMRC sent a further notice purporting to be a notice under s 8 TMA 1970 on 25 September 2013. It seems to us that in giving the later notice HMRC must be treated as having withdrawn the earlier notice. It would not be right certainly in penalty proceedings for HMRC to rely on the earlier notice in those circumstances. Otherwise there would be real confusion as to the date the appellant was required to deliver his return and the date on which he was required to pay the tax. An alternative way of looking at the position would be to say that the appellant had a reasonable excuse for non payment of the tax by 7 March 2013. Whichever approach is taken, in the circumstances of this appeal we do not consider that HMRC can rely on the earlier notice.

32. We are satisfied that the due date for payment of the tax was 1 January 2014.

33. We must then consider whether there was a reasonable excuse for the appellant not having paid the tax by the due date.

34. We acknowledge that the appellant wanted a further explanation as to why his employers were not to blame for the underpayments of tax. In the period from the end of September 2013 to the beginning of March 2014 he had been expecting to receive a further explanation. He telephoned on 12 November 2013 chasing the explanation he had been told he would receive. We have found that he did not manage to get through to HMRC in that telephone call.

35. By 1 January 2014, especially in the light of previous difficulties with receipt of post, we consider that the appellant ought to have established contact with HMRC to find out what the position was. He was aware that the returns and the tax were due on 1 January 2014. There was no reliable evidence of any attempt to contact HMRC after 12 November 2013 or if there were such attempts what the result was and how matters were left.

36. In the circumstances therefore we do not consider that the appellant had any reasonable excuse for not paying the tax which fell due on 1 January 2014.

37. It was not until 20 April 2014 that the appellant delivered the tax returns to HMRC. Even then they did not include a self assessment of the tax owing as required by s 9. He left it to HMRC to calculate the tax which they did on 31 July 2014. There is then a period until 23 October 2014 during which the tax remained unpaid.

38. We do not consider that there was any reasonable excuse for non payment in the period after 1 January 2014.

39. On that basis the penalty date was 31 January 2014. The correct penalties should therefore be a 5% penalty for tax not paid by that date and a 5% penalty for tax not paid by 30 June 2014. The tax was paid before the 11 month penalty became payable.

40. The amount of the Penalties should therefore be £202 for 2010-11 and £294 for 2011-12.

41. Finally, we should say that Schedule 56 also entitles HMRC to reduce a penalty in the case of "special circumstances". HMRC did not consider that there were any special circumstances and we are not satisfied that they were unreasonable in doing so.

Conclusion

42. For the reasons given above we reduce the Penalties from £303 and £441 to £202 and £294 respectively.

43. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 SEPTEMBER 2015