[2016] UKFTT 0242 (TC)

TC05018

Appeal number: TC/2015/06949

PAYE – late appeal – admitted - failure to make Returns – closure of the business – reasonable excuse – no – penalties confirmed - Appeal refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN WAIN for D FRANKLIN and JOHN WAIN t/a THE MALT SHOVEL HOTEL — **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

DECISION

1. The Tribunal determined this appeal on 29 January 2016 without a hearing under the provisions of Rule 26 (default paper cases) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") having first read the Notice of Appeal dated 25 November 2015 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 December 2015 and the appellant's Reply dated 11 January 2016.

2. This is an appeal against penalties totalling £1,200 imposed under Section 98A (2)(a) and (3) Taxes Management Act ("TMA") 1970 for the late filing of the employer's annual return for the tax year 2010-11.

Preliminary matter

3. This appeal includes an application to appeal out of time. In terms of the legislation, any appeal must be made within 30 days. The penalty notices were issued on 16 February 2012 and 28 May 2012. The appeal was received in 2015. HMRC considered the late appeal under Section 49 TMA 1970 and refused to admit it late out of time. However, the Tribunal has discretion and HMRC do not oppose Mr Wain's application to the Tribunal to appeal out of time. I had due regard to the Rules and in particular Rule 2. In the circumstances I decided that it is in the interests of justice to grant permission in terms of Section 49(2) TMA 1970 and I therefore proceeded to consider the appeal.

Background facts

4. Mr Wain was trading in two separate businesses. He was in partnership with D Franklin t/a as the Malt Shovel Hotel but he was also trading as a sole trader under a different PAYE reference. The sole trader PAYE reference does not disclose a trading name in HMRC's records but HMRC accept that it is for the business known as "Reams Restaurant". In this appeal I am concerned only with Malt Shovel Hotel but Mr Wain refers repeatedly to Reams Restaurant so in the interests of clarity I set out the facts, as known, in regard to both businesses.

5. The appellant, trading as the Malt Shovel Hotel, had been required to file employer annual returns since at least the 2007/08 tax year. From 2009/10 onwards these had to be filed on-line using an approved method of electronic communication. As far as 2010/11 was concerned the filing date for the return was 19 May 2011 and no return has ever been lodged.

6. HMRC had sent a P35 PN reminder electronically to the appellant on 6 August 2010 to which there was no response presumably because by then the appellant was no longer trading and it seems that the appellant had made no arrangements to maintain electronic contact with HMRC.

7. On 16 February 2012, HMRC sent the appellant a late filing penalty notice for £800 for the period 20 May 2011 to 19 January 2012. That carried the reference 567 PEN P E 1190 12 SZ59991. That £800 penalty is part of the subject matter of these appeals.

8. On 26 September 2011, in respect of Reams Restaurant, HMRC had issued a penalty in the sum of £400 to Mr Wain for the period 20 May 2011 to 19 September 2011 and on 30 January 2012 a further penalty was issued in the sum of £400 covering the period 20 September 2011 to 19 January 2012. The reference for these two penalties was 567 PEN P E 474 12 TA21137. The total was £800.

9. On 19 March 2012, Mr Wain wrote to HMRC referring to a telephone conversation and utilising only the latter reference which is for Reams Restaurant. At that point there were penalties outstanding for both businesses, each totalling £800. That letter enclosed copies of two letters found in his archives, one for each business, and both dated 16 June 2010 stating that "the company" had ceased trading on

31 May 2010. In each case he confirmed that he had made the return for 2009/10, and he would be making the final payments for the periods April-May 2010. In the case of Reams Restaurant he also requested repayment of an over-payment in 2009/10 amounting to £1,108.57. He intimated his change of address. He requested a review of **the** decision not all of the decisions.

10. HMRC states that it agrees that both businesses were closed early in the 2011-12 year. That is an understandable error since the appellant wrote to HMRC in regard to this appeal on 5 May 2015 stating that he had closed those two businesses in May 2011. On the balance of probability we find that both businesses closed on 31 May 2010.

11. An appeal was received on 30 March 2012 in respect of Reams Restaurant and since HMRC's records disclosed that there were no employees listed for the 2010/11 year HMRC decided that a P35 return was not required. Accordingly, the appeal against the penalties totalling £800 for Reams Restaurant was upheld on 20 April 2012 and those penalties cancelled. Mr Wain was notified.

12. On 28 May 2012, HMRC sent the appellant a second late filing notice penalty for £400 for the period 20 January 2012 to 19 May 2012. There was no response until the debt was pursued in 2015.

Discussion

13. HMRC concede that they did receive the letters dated 16 June 2010 notifying the closure of both businesses and the change of address. Mr Wain concedes that the correspondence in regard to Reams Restaurant reached him at his new address. He states that nothing was sent to him at the new address for the Malt Shovel Hotel. Since he did receive correspondence for Reams Restaurant I find that at a bare minimum that should have made him at least check on the position for the appellant.

14. HMRC state that a reminder was sent electronically on 6 August 2010. Presumably that reminder may not have been received by Mr Wain as he no longer had the business. For the reasons set out below, in any event, the issue or not of the reminder is not relevant.

15. Mr Wain is adamant that it was only when a debt collection agency pursued him in 2015 (by which time he had moved address again) that he became aware that there was a problem with the appellant and he acted immediately. Unfortunately, however, he did not act when he received the final penalty in May 2012, taking the total penalties to £1,200. It is not clear why Mr Wain states in his letter of 5 May 2015 that his appeal against the "£1,200 fine" was successful. The successful appeal was for Reams Restaurant and was for £800. The acknowledged receipt of the cancelled penalties of £800 in April 2012 followed by a further penalty notice for £400 should have alerted him to a problem.

16. What happened in 2012? It is the case that because the letter of 19 March 2012 did not include the reference for the Malt Shovel Hotel there was not explicitly an

appeal for that business. Had Mr Wain received a penalty for the Malt Shovel Hotel? In March 2012, the penalty for each of the businesses would have been £800.

17. Mr Wain argues that the cause of his problems with HMRC are that his letters of 16 June 2010 "had not been read" but certainly the letter relating to Reams Restaurant must have been read because undoubtedly he got those penalty notices.

18. In his Notice of Appeal Mr Wain stated that "… on being penalised in 2012 for failing to end (sic) year 2010-11 I successfully appealed. I assumed, obviously wrongly, that this would cover both accounts."

19. I find on the balance of probability that the penalty notices were probably received. The fact that the two separate enclosures sent with that letter related to the two different businesses would suggest that it was Mr Wain's intention that he was appealing in respect of both businesses. Indeed, that letter states that "the payments" had been made and that is, of course, one for each business. If he had not received the penalty notice for the Malt Shovel Hotel there would have been no reason to enclose both letters and refer to the payments for both. Indeed, if by any chance he had not received a penalty for the Malt Shovel Hotel, that should have alerted him to the possibility that he would receive one and it would be expected that that should have been raised with HMRC.

20. Mr Wain now argues that Reams Restaurant did have employees and that seems likely since he made a payment for 2010-11. He argues that the businesses were similar and that both "companies" should be treated in the same way.

21. However, if the decision by HMRC to cancel the penalties for Reams Restaurant was made in error, that is not a matter for this Tribunal and the fact that they did cancel the penalties does not, and cannot, impact on this decision. I am dealing only with the taxpayer which is D Franklin and J Wain trading as the Malt Shovel Hotel. If HMRC have made an error and upheld the other appeal on factually incorrect grounds that is to Mr Wain's advantage but it cannot and does not affect these proceedings.

22. The fact is that the appellant had filed electronically in the past and no return has been submitted for 2010-11. The only circumstance in which the penalty would not be upheld would be if there was a reasonable excuse for the failure to file the return by 19 May 2011. No explanation for that failure has been offered other than that he states in his letter of 11 January 2016 that his letters had explicitly asked HMRC on 16 June 2010 "is there anything more I need to do?" and that he spoke by telephone to HMRC on at least three occasions and was told that there was nothing outstanding. In fact, he did not ask in writing if there was anything else that he should do. He simply stated "Should you require any further information, please write to me at the above address…".

23. At the point at which he may have been in dialogue with HMRC in June 2010, the returns were not yet due to be lodged. It is not for HMRC to chase statutory returns. The fact that HMRC did not reply to his letters of 16 June 2010 does not absolve him of his obligation to file returns. HMRC had no obligation to remind him so the fact that the reminder was issued electronically is not relevant.

24. Further, the letter of 19 March 2012 makes it explicit that in at least one telephone conversation HMRC had made him aware that a penalty was extant and the return was still not lodged.

25. Shortly put, the issue for this Tribunal is quite simply whether or not Mr Wain had a *reasonable excuse* for failing to file a year end return for the appellant.

26. Although Section 118(2) TMA 1970 provides for relief from penalties if there is a *reasonable excuse*, there is no statutory definition of *reasonable excuse*. I agree with Judge Brannan in *Coales v R & C Commrs*[1], when looking at similar wording in the context of a default surcharge, where he said at paragraph 26 that it is "…an objective test applied to the individual facts and circumstances of the appellant in question" and at paragraph 28 he adopted the summary of Judge Medd QC in *The Clean Car Co Ltd v C & E Commrs*[2] which reads:

> "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?"

27. Mr Wain should have filed a return, and timeously. In his letter of 16 June 2010 for the appellant he confirmed that he had "recently submitted the year end …to complete 2009-10". He was clearly aware of the need to file a return. Quite why he did not do so is a mystery. I do not accept his argument that the fact that he was not experienced in company closures or that he acted in ignorance amount to a *reasonable excuse*. The return was required whether the business closed or carried on.

28. I do not think that the appellant has acted as "…a prudent employer exercising reasonable foresight and due diligence having proper regard for his responsibilities under the Tax Acts" in the words of Judge Tildesley in *Schola UK Ltd v Revenue and Customs*[3].

29. No other excuse has been offered.

30. It is noted that Mr Wain argues that the penalty is unfair. The Tribunal cannot consider whether the penalty is fair or not. It is imposed in accordance with the legislation passed by Parliament. The Upper Tribunal has made it explicit in both *HMRC v Total Technology (Engineering) Ltd*[4] and *HMRC v Hok*[5] that whether or not the penalty regime might be perceived as being harsh or unfair, the Tribunal has absolutely no jurisdiction to vary or adjust the level of penalty.

31. Accordingly, since the return has never been filed and no *reasonable excuse* has been established, the appeal is dismissed and the penalty confirmed.

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[1] [2012]UKFTT 477

[2] [1991]VATTR 234

[3] [2011]UKFTT 130

[4] [2012]UKUT 418(TCC)

[5] [2012]UKUT 363 (TCC)

32. The Tribunal has no jurisdiction in regard to any possible outstanding overpayment in 2009/10.

33. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 6 APRIL 2016