[2017] UKFTT 095 (TC)

TC05612

Appeal number: TC/2016/04706

VALUE ADDED TAX – Late registration – penalty – Appealed allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLOR CONSTRUCTION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
CHRISTOPHER JENKINS

Sitting in public at Vintry House, Bristol on 15 November 2016

Mr Robin Carey (Chartered Accountant) for the Appellant

Mr Ben Morgan, an Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Taylor Construction Limited ("the Appellant") against a decision on review of 4 August 2016 to impose a penalty of £1,472 on account of the Appellant's failure to register for VAT by the required time.

2. We issued a summary decision in this case on 22 November 2016 allowing the Appellant's appeal in part. On 23 November 2016 the Appellant's representative, Robin Carey, requested that we give a full decision in the appeal. This is our full decision.

3. We had before us a bundle of papers prepared by the Respondents. The Appellant was represented by Mr Carey. Mr Carey did not call any witness to give evidence on the Appellant's behalf.

The Facts

4. The facts were not in dispute and are as follows:

(1) On 26 January 2015 Mr Carey completed VAT1 on line on behalf of the Appellant, applying for the Appellant to be registered for VAT. This disclosed that the Appellant had exceeded the compulsory registration threshold on 31 July 2014.

(2) The Appellant was duly registered for VAT with effect from 1 September 2014.

(3) The VAT1 included Mr Carey's contact details as the Appellant's agent. The Respondents issued the agent authorisation code to the Appellant on 3 February 2015 and Mr Carey received it via the client and submitted it on 17 February 2015.

(4) Based on the information provided, the Respondents concluded that the Appellant should have notified its liability to register no later than 30 August 2014. The Appellant was therefore nearly five months late in registering and on 9 February 2015 the Respondents wrote to the Appellant notifying the Appellant that it may have incurred a 'failure to notify' ("FTN") penalty.

(5) The Respondents enclosed with their letter a FTN Penalty Reply Slip to enable the Respondents to assess whether to charge a penalty and, if so, in what amount. The letter requested the Appellant to notify HMRC of its net tax liability for the period 1 September 2014 to 25 January 2015 within 30 days. The letter also pointed out that any penalty could be reduced "by completing the attached reply slip **in full** and providing assistance to help quantify the net tax for the penalty period" (emphasis in the original). The letter specifically noted that the Respondents would take into account compliance with the 30 day time limit when considering disclosure reductions in assessing any penalty.

(6) HMRC did not send a copy of their letter of 9 February to Mr Carey. The Appellant did not pass HMRC's letter to Mr Carey. As no evidence was given on the Appellant's behalf we do not know why the Appellant failed to do so but we were given no reason to doubt (and so find) that HMRC's letter was duly received by the Appellant in the course of post. Mr Carey eventually discovered the FTN Penalty Reply Slip amongst the Appellant's records when he visited the Appellant's premises on 7 October 2015.

(7) The final paragraph of the 9 February letter states (in bold): "**If you have an agent, please note that although you may have a form 64-8 (authorising you agent) on file, as per note 2 on the 64-8 form a copy of this letter will not be sent to your agent.**" Note 2 on Form 64-8 states in relation to VAT that, "We will continue to send correspondence to you rather than to your agent but we can deal with your agent in writing or by phone on specific matters."

(8) Without the return of the FTN Penalty Reply Slip, the Respondents issued a penalty notification on 31 March 2015. The letter asked the Appellant to read the penalty explanation schedule carefully and to let the Respondents know if there was any relevant information that they had not already taken into account. The letter asked for any relevant information to be sent by 30 April 2015. The penalty explanation schedule calculated the potential lost revenue ("PLR") as £6,712.32 and explained that the penalty range for voluntary disclosure of the failure to register within 12 months was from 0 to 30 per cent. This was reduced by 35 per cent to produce a penalty percentage of 19.5 per cent and a penalty of £1,308. A penalty assessment in that amount was issued on 28 May 2015.

(9) Neither the penalty notification nor the assessment nor the later VAT Statement of Account and payment slip were copied by the Respondents to Mr Carey nor were they passed on to him by the Appellant. Mr Carey's letter of 8 October 2015 refers in terms to both the FTN Penalty Reply Slip and the Notice of Penalty Assessment of 28 May 2015 and we therefore find that both were in fact received by the Appellant in the ordinary course of post.

(10) Following Mr Carey's discovery on 7 October 2015, he returned the FTN Penalty Reply Slip on 8 October 2015 and asked for the penalty to be reviewed. The FTN Penalty Reply Slip revealed that the PLR was £10,910; it explained that Mr Carey had told the Appellant to register following his review of the Appellant's bank statements on 19 December 2014, that the Appellant had not previously realised its obligation to do so. The Appellant stated that its focus had been on a large job. The proprietor, Lee Taylor, recorded that "It is my weakness that I do not like the paperwork part of my job and leave it to others, but they are telling me I must attend to it and I will try."

(11) On 23 October 2015 the Respondents issued a revised penalty explanation schedule. They determined the amended penalty reduction percentages (as envisaged by paragraphs 12 and 13 of Schedule 41 to the Finance Act 2008) as 10 per cent (previously 5 per cent) for telling HMRC about the failure ("telling"), 15 per cent (previously zero) for giving HMRC reasonable help in quantifying the tax unpaid by reason of it ("helping") and 30 per cent

(previously 30 per cent) for allowing HMRC access the records for the purpose of checking the unpaid tax ("giving"). This compares with maximum penalty reduction penalties for these factors of 40, 30 and 30 per cent. They therefore allowed a reduction of 55 per cent (as compared to a maximum 100 per cent) to produce a penalty percentage of 13.5 per cent and a penalty of £1,472 (on the higher PLR of £10,910). A penalty assessment in that amount was issued on 8 December 2015.

(12) On 4 February 2016 Mr Carey wrote on the Appellant's behalf to the Respondents. He contended that the penalty should be reduced to zero and that it was difficult to see the basis for a limited reduction given that registration was unprompted and represented effective compliance. This was on the basis that the Respondents had been notified within 12 months of the failure and that the Appellant had not been intentionally unhelpful but was just not competent to deal with its VAT affairs.

(13) The Respondents replied on 15 February 2016 indicating that Mr Carey's letter had not provided any new evidence that would materially affect the Appellant's case and no further reduction would be made in the penalty. Mr Carey requested an independent review of the decision on 24 February 2016. His letter made the point that he had completed the VAT registration application and that it would therefore make sense to communicate with him rather than the Appellant. He also made the point that the FTN would have been dealt with promptly had it been sent to him. He suggested that the Respondents knew that some people were incapable of dealing with paperwork, especially builders, which was why they appointed an agent to act on their behalf. He said that the Respondents should recognise this and deal with the agent or copy the agent with any paperwork.

(14) On 4 August 2016 (following an extension of the time for review) the penalty assessment was upheld on review. The reviewing officer, having outlines the facts, noted Mr Carey's complaint that the FTN Penalty Reply Slip had not be sent to him rather than (or in addition to) the Appellant. The reviewing officer noted that the Respondents did not have the necessary VAT 64-8 on file allowing it to deal directly with Mr Carey at the time the initial penalty letter was sent on 9 February 2015 but observed that in any event such letters are only sent to the taxpayer in any event. The reviewing officer drew attention to the considerable passage of time before the FTN Penalty Reply Slip was returned. He noted that HMRC's stated policy was not to charge a penalty if a person had a reasonable excuse for the failure and they remedied the failure without unreasonable delay after the excuse ends. He concluded, however, that there was no reasonable excuse in the Appellant's case and that there were no special circumstances for reducing the penalty further.

(15) The Appellant appealed to this Tribunal on 1 September 2016.

The Law

5. Under Schedule 1 to the Value Added Tax Act 1994 ("VATA") a person who makes taxable supplies but is not registered under the VATA becomes liable to be registered either:

> (1) at the end of any month if the value of the person's taxable supplies in the period of one year then ending has exceeded the specified registration threshold for the time being; or
>
> (2) at any time if there are reasonable grounds for believing that the value of the person's taxable supplies in the period of 30 days then beginning will exceed the specified registration threshold for the time being.

6. A person who becomes liable to be registered under paragraph 5(1) above must notify the Respondents of the liability within 30 days of the end of the relevant month (para 5(1), Sched 1, VATA). A person who becomes liable to be registered under paragraph 5(2) above must notify the Respondents of the liability before the end of the period by reference to which the liability arises (para 6(1), Sched 1, VATA).

7. Under paragraph 1 of Schedule 41 to the Finance Act 2008 a penalty is payable where a person fails to comply with a specified obligation. This includes an obligation to notify liability to register under paragraphs 5 or 6 of Schedule 1 VATA. The failure in the Appellant's case is designated as category 1 and may be up to 30 per cent of the potential lost revenue (para 6, Sched 41, FA 2008). The amount of any penalty may be reduced to nil where there is an unprompted disclosure of a failure to register that is made less than 12 months after the time when the VAT in question first becomes unpaid by reason of the disclosure (paras 12 and 13, Sched 41, FA 2008). The amount of any penalty may be reduced taking account of the taxpayer having told the Respondents of the failure, of his degree of co-operation in quantifying the tax unpaid and through allowing the Respondents access to records for checking the tax (paragraph 12(2), Sched 41, FA 2008). HMRC also have power to reduce any penalty if they think it right in the circumstances (para 14, Sched 41, FA 2008).

The Appellant's submissions

8. Mr Carey's principal submission on the Appellant's behalf was that none of the Respondents' communications relating to the penalty had been sent or copied to him. In particular he pointed out that had the FTN Penalty Reply Slip been sent to him it would have been returned promptly (as indeed it was once he had discovered it) and the Appellant could then have expected the Respondents to give a 100 per cent penalty reduction. Mr Carey drew our attention to paragraph 1.5 of the Taxpayers' Charter. This states that HMRC will "respect your wish to have someone else deal with us on your behalf, such as an accountant or a relative. To protect your privacy, we'll only deal with them if they have been authorised to represent you, and we'll deal with them courteously and professionally". Mr Carey submitted that it was unrealistic of the Respondents to expect a taxpayer such as the Appellant (a building company) to be able to understand or deal with a matter such as that in issue. It was therefore incumbent on HMRC in a case such as the present to communicate with the

taxpayer's notified agent. Their failure to do so was a relevant consideration in arriving at the penalty determination in the Appellant's case.

9. Mr Carey also repeated the submissions that he had made in correspondence regarding the amount of the reduction in the penalty that the Respondents had offered. He submitted that the Appellant's behaviour had been non-deliberate and the disclosure unprompted and within 12 months of tax becoming unpaid. The Appellant's notification was less than 5 months late and well within the 12 months allowed for a 100 per cent reduction. The reduction for "telling" should therefore be 40 per cent and not 10 per cent. Based on his submissions regarding the failure to communicate with him as the Appellant's representative, Mr Carey submitted that the Appellant's perceived unhelpfulness was not of his own making and was not intentional. The Appellant should therefore qualify for the maximum reduction of 30 per cent for "helping". The Respondents had already allowed a reduction of 30 per cent for access to the Appellants' records. Accordingly, Mr Carey submitted that the Appellant should qualify for a 100 per cent reduction in the penalty. In his submission the Appellant was being compliant but was nevertheless being punished.

HMRC's submissions

10. Mr Morgan for the Respondents drew our attention to the clear statement in the Respondents' letter of 9 February 2015 noting that the letter had not been sent to the Appellant's representative. He said that it was therefore incumbent on the Appellant to pass the letter (and indeed later correspondence) to Mr Carey if the Appellant was unable to deal with it itself.

11. Mr Morgan said that the initial penalty reduction percentages of 5, 0 and 30 per cent reflected the Appellant's failure to return the FTN Penalty Reply Slip. (A 30 per cent reduction was nevertheless given in respect of access to records because no access had been sought). The revised penalty reduction percentages of 10, 15 and 30 per cent reflected the information provided but continued to reflect the significant delay in returning the FTN Penalty Reply Slip. (We also note that the initially notified PLR was some 61.5 per cent of the actual PLR eventually disclosed on return of the FTN Penalty Reply Slip.)

Our Decision

12. In our view the Respondents are entitled to charge a penalty in this case. There was an admitted failure to register for VAT in time. That failure, once it has occurred, cannot be remedied as such, so that a taxpayer that complies voluntarily with his obligation to register but does so late can be certain that the Respondents will forego any penalty. A taxpayer is not being punished in those circumstances for being compliant, as Mr Carey seemed to think was the case. He has incurred a financial penalty for his initial failure, which (once it has occurred) can cannot be entirely remedied. The object of the penalty, particularly in relation to notification and registration, is to secure timely compliance not compliance at any time.

13. The failure having occurred having occurred, the scope for the financial penalty to be reduced to zero depends upon such considerations as the reasons for his failure, the seriousness of his failure (e.g. in terms of how late he is in complying), the circumstances in which he corrects his failure and the degree of co-operation with the Respondents in investigating the failure.

14. In the present case we should note that the only excuse offered for the failure was the Appellant's focus on a large job. However, we had no evidence from the Appellant on this matter and none of the information supplied in the FTN Penalty Reply Slip leads us to think that there were any special circumstances surrounding the failure that should be taken into account. That information instead suggests a failure to pay sufficient attention to paperwork and the obligations that the tax system imposes on taxpayers which must be attended to, however unwelcome they may seem. The fact that the obligation to register only emerged in December 2014 from a review of bank statements suggests that the Appellant was not keeping its accountant regularly updated with the financial information that would have allowed Mr Carey to identify the issue at an earlier stage. Plainly once the issue had emerged there was a failure by the Appellant to pass on any communications it received to Mr Carey or, having received them, to enquire of Mr Carey whether he had also received them and, if so, to ask what he was doing about them.

15. A 100 per cent reduction in the penalty that the Appellant's failure attracts would ignore the significant delay in returning the FTN Penalty Reply Slip (even assuming that its prompt return would have attracted an automatic 100 per cent reduction). We do not accept Mr Carey's contention that the Respondents were at fault in notifying the penalty solely to the Appellant and failing to copy Mr Carey as the notified agent. The Respondents' letter of 9 February 2015 clearly stated the position and a taxpayer is not absolved from any responsibility for reading an HMRC letter addressed to him on the matter of a penalty (or any other matter) just because he has appointed an agent to deal with his tax affairs. Any taxpayer in that position has the responsibility and can be expected to communicate with his agent and, if appropriate, pass on the letter promptly. It is the Appellant's failure that lies behind the initial levying of a penalty and its continued failures that have contributed to the setting of the penalty reduction percentages in this case.

16. The penalty reduction granted by the Respondents is 55 per cent, which might be thought reasonable, but 30 per cent of that was granted irrespective of any reply by the Appellant. Accordingly, we considered separately whether we should vary penalty reduction percentages in this case, notably to take more account of the "telling" and "helping" factors involved when the FTN Penalty Reply Slip was eventually returned. The maximum penalty reduction for these factors is 70 per cent and the Respondents have allowed the Appellant a 25 per cent reduction as compared to an initial 5 per cent. The only reason that Mr Morgan relied upon in defending these percentages was the delay in returning the FTN Penalty Reply Slip. We do not think that this appropriately balances the delay with the other elements of "telling" and "helping". We have therefore decided that the reduction for these factors should be increased to 35 per cent, to provide a total penalty reduction of 65 per cent and a penalty percentage of 10.5 per cent.

17. We therefore reduce the penalty to £1,145 and the Appellant's appeal is allowed to that extent.

18. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 23 JANUARY 2017