TC05787

Appeal number: TC/2013/04738

INCOME TAX – individual tax return - penalties for late filing – whether properly imposed – yes – whether reasonable excuse – no – whether special circumstances – no -appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAJID MUKHLES **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 10 April 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 5 July 2013 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 3 February 2017 and various correspondence between the parties.

DECISION

Background

1. This is an appeal against the following penalties, visited on the appellant under Schedule 55 Finance Act 2009 for the late filing of an individual tax return for the tax year 2010-2011.

(1) A late filing penalty of £100 ("**late filing penalty**")

(2) A daily penalty of £900 ("**daily penalty**")

(3) A 6 month late filing penalty of £300 ("**6 month penalty**");

(4) A 12 month late filing penalty of £300 ("**12 month penalty**").

Evidence and findings of fact

2. From the papers before me I find the following facts:

(1) A paper tax return for the year ending 5 April 2011 was sent to the appellant at flat 19 Langford Court, 22 Abbey Road, St John's Wood, London NW8 4DN ("**Flat 19**") on 6 April 2011.

(2) The filing date for this paper return was 31 October 2011, or for an electronic return, was 31 January 2012.

(3) The appellants electronic return for the year 2010-2011 was received on 22 April 2013 and was processed on that date.

(4) As a result of the late filing of this return, HMRC issued and sent notices in respect of the late filing penalty, the daily penalty, and the 6 month penalty, to Flat 19 on or around (respectively) 14 February 2012, 7 August 2012 and 7 August 2012.

(5) A notice of penalty assessment for the 12 month penalty was issued and sent to the appellant on or around 19 February 2013. By that time the address that HMRC had on its file for the appellant was 34 Vermon Ct, NW2 2PE ("**34 Vermon Ct**").

(6) On 18 February 2013, the appellant had a telephone conversation with HMRC. During that conversation the appellant stated "I received a self-assessment late tax return. What for, I haven't received any notice to file a tax return, I'm employed by.... Nassim Limited".

(7) In response to being told by the advisor that the appellant would need to complete 2009-2010 and 2010-2011 tax returns, the appellant responded "yes, but what about the penalties".

(8) The advisor responded "well when we get them in we will review that, what I will do is for the 11/12 year I will get that penalty cleared", and then, "9/10 and 10/11 they will be looked at once we get the penal(sic), once we get the returns in".

The Law

Legislation

3. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970, a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by HMRC to submit a tax return, must submit that return by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 (and references below to paragraphs are to paragraphs in that Schedule).

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) – 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(d) failure to file for 12 months (i.e. the 12 month penalty) – 5% of payment due or £300 (which is the greater) (paragraph 6).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to us under paragraph 20, we can either give effect to the same percentage reduction as HMRC have given for special circumstances. We

can only change that reduction if we think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Case law

(12) A summary of the relevant case law is set out below

Notification of penalty

(13) As can be seen from 3(4) above, in order to visit a daily £10 penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

(14) These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*").

(15) The Court of Appeal decided that:

> (a) The high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.
>
> (b) A notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three month's late and specified the date from which the penalties were payable. This was in compliance with the statute.
>
> (c) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the Taxes Management Act 1970 which the Court of Appeal held applied to the notice. And so they concluded that the failure to specify the period for which the daily penalties had been assessed did not invalidate the notice.

Reasonable excuse

(16) The test we adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissions* [1991] VATTR 234, in which Judge Medd QC said:

> "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?"

(17) Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

(18) Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

(19) HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

> "So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".
>
> "In HMRC's review it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

Special Circumstances

(20) There have been a number of cases on special circumstances from which we derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

> (a) While “special circumstances” are not defined, the courts accept that for circumstances to be special they must be “exceptional, abnormal or

unusual" (*Crabtree v Hinchcliffe* [1971], 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979], 1 All ER 152).

(b) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(c) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(d) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(e) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(f) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(g) We can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill in John Dee) *John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941.

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(h) In deciding whether HMRC's decision was unreasonable, we should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(i) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(j) Having undertaken that assessment:

> (i) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.
>
> (ii) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

(21) In relation to the doctrine of proportionality and its application to the issues in this case, we have considered the following cases:

(a) Paraskevas Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(b) International Transport Roth GmbH v Secretary of State for the Home Dept [2003] QB 728 ("*Roth*")

(c) James v UK (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(d) Wilson v SoS for Trade and Industry [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(e) R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent) [2015] UKSC 41 ("*Lumsden"*)

(22) A summary of the principles relating to proportionality are set out below:

(a) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (Lumsden at [33])

(b) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (Lumsden at [23].

(c) In the context of its application to penalties, the principle of proportionality is that:

(i) penalties may not go beyond what is strictly necessary for the objective pursued; and

(ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (Louloudakis at [67]).

(d) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (Wilson at [62]).

(e) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (Roth at [26]).

Burden and standard of proof

4. The burden of establishing that the appellant is prima facie liable for penalties which have been properly notified and assessed lies with HMRC.

5. The burden of establishing that he should not be liable for such penalties because, amongst other reasons, he has a reasonable excuse, or that the penalties are disproportionate, lies with the appellant.

6. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Late appeal

7. In the correspondence there is some suggestion that the appellants appeal has been made late. No such suggestion has been made in the statement of case which unsurprisingly, contains no grounds on which I should deny permission to the appellant to make a late appeal . It is my view that neither party has been prejudiced if indeed this appeal has been made and notified out of time, and the prejudice to the appellant of not hearing it outweighs any prejudice to the respondents for its lateness. Indeed, *Donaldson* has made a bit of a mockery of timely hearings for Schedule 55 appeals. I am, therefore, prepared to deal with the appeal.

Service of notices

8. This is important for two reasons. Firstly, because one of the appellants grounds of appeal is that he has not received the paper assessments and therefore did not realise he had to file a tax return.

9. Secondly, because the paperwork which has been sent by HMRC includes the notification of the penalties which is a pre-requisite to the appellants liability. Unless HMRC can establish that the appropriate notifications of the penalties were given under Schedule 55, the appellant must succeed in his appeal.

10. HMRC state that the paperwork has always been sent to the address that it has on record. Up until 7 January 2013, that address was Flat 19. Between 7 January 2013 and 9 July 2013, that address is 34 Vermon Ct.

11. The appellant states that he received no notifications regarding the tax return and, by implication, no notification of the penalties.

12. HMRC pleads the Interpretation Act, Section 7, and that as the returns (and presumably the notices of penalty liability), were sent to the address held on record, and were not returned to HMRC as undelivered, they are deemed served.

13. That is not, strictly speaking, the correct statutory position.

14. Under Section 7, service is only deemed "unless the contrary is proved".

15. So if the appellant can prove that he was not served with these notices, the deeming of service is displaced.

16. I have not found this an easy position to resolve. But I find, on balance, that HMRC's position is the correct one. I say this on the basis of the transcript of the

telephone conversation which the appellant had with an agent of HMRC on 18 February 2013. As set out at 2(7) above, in response to HMRC's advisors observation that "we will need you to complete the 2009/2010 and 2010/2011 tax returns", the appellant replied "yes, but what about the penalties" (emphasis added).

17. By the 18 February 2013, HMRC's recorded address for the appellant was 34 Vermon Ct.

18. In their statement of case HMRC say that the notice of penalty assessment for the 12 month penalty was issued on or around 19 February 2013. 19 February 2013 is the date set out in the computer record supplied with the statement of case.

19. So the telephone conversation on 18 February 2013 took place around the same time as HMRC issued the 12 month penalty notice.

20. But, I think it is almost inconceivable that the telephone conversation on 18 February 2013 was stimulated by the receipt, by the appellant, of the 12 month penalty notice. Not only was this probably issued the day after that call (i.e. on the 19 February), but once issued, it would have spent some time in the post, so it would be unlikely to have been received by the appellant until, say, 22/23 February 2013 at the earliest.

21. In these circumstances, when the appellant spoke to HMRC's advisor on 18 February his position seems to be that he had received none of the paperwork relevant to the late filing penalty, the daily penalty or the 6 month penalty, (nor indeed the original tax return), all of which were sent to Flat 19.

22. But if that was the case, why did the appellant refer to "the penalties" during his telephone conversation on the 18 February 2013?

23. In my mind, the use of the word "the" means that he was talking about penalties about which he knew, rather than about any general penalties which might be visited on him as a result of having failed to complete and submit tax returns for previous years. It suggests to me that he was concerned about specific penalties. For this to be the case, he must have known about them. He did not know about the 12 month penalty, because notice of that did not reach him until after that telephone conversation. The only penalties to which he could have been referring, therefore, were the late filing penalty, the daily penalty or the 6 month penalty. To have known about these, he would have had to have received the paperwork in respect of them, and that paperwork was sent to Flat 19.

24. I therefore find, as a fact, that the appellant has not displaced the presumption of deemed service, and that the paper return, and the penalty notices have all been properly served on him.

Appellants submissions

25. The appellant makes 3 submissions.

(1) Firstly, he and his accountants were assured by HMRC that the penalties which are the subject matter of this appeal, would be annulled;

(2) Secondly, that he was not aware of the self-assessment tax return filing;

(3) And finally, he did not receive any notifications to advise him to file a tax return.

Respondents submissions

26. The respondents submit that:

(1) they have not told the appellant that the penalties would be annulled;

(2) the paper return and penalty notices were properly served on the appellant at the address which HMRC held on record;

(3) failure to send a paper return does not negate a taxpayer's obligation to submit a return;

(4) nor does it comprise special circumstances.

Reasonable excuse

27. The test of whether a taxpayer has a reasonable excuse is set out above. I do not consider that there is anything in what I have read that comprises a reasonable excuse for the taxpayer to have failed to submit the tax return on time. It is incumbent on the taxpayer to be aware of his obligations to the tax system, and to complete a return on time. A taxpayer is statutorily obliged to notify chargeability. It is a maxim of English law that ignorance or a mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it. This is on the basis that a taxpayer should be thoroughly acquainted with the law, and such knowledge is required to be accurate.

28. Furthermore, in light of my finding that the paper self-assessment return and the penalty liability notices were deemed served on the appellant, there can be no reasonable excuse based on non-receipt.

Special circumstances

29. HMRC indicate that they have taken into account special circumstances but a simple statement to that effect does not, in my view, render the decision lawful. I have seen nothing (apart from that bold statement) setting out what HMRC have taken into account when coming to their decision that special circumstances do not apply, and in light of this, and of any reasons of that decision, it is my view that HMRC's decision regarding special circumstances is flawed. See [3(20)(f)] above.

30. That means, in accordance with the principles set out at [3(20)(j)] above, I must consider whether there are special circumstances which apply to this taxpayer. I do not believe there are. As is mentioned at [3(20)(a)] to comprise special circumstances, they must be exceptional, abnormal or unusual or there must be something out of the ordinary run of events as regards the taxpayer's situation. None of the appellants circumstances fall into either category.

Proportionality

31. Although not argued by the appellant, it is my view that the penalties are proportionate. In light of the principles set out at [3(22)] above, and in view of the justification for the imposition of penalties (namely that it is essential for the proper function of a self-assessed tax regime that the taxpayer provides timely and accurate information). I consider that penalties for late filing do not go beyond what is strictly necessary for the objective pursued. The penalties are far from being not merely harsh, but plainly unfair.

Promise to annul penalties

32. On the facts before me there is no evidence of an agreement to annul these penalties. I reject this ground of appeal.

Decision

33. In light of the above, I dismiss this appeal.

Appeal rights

34. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 18 APRIL 2017