TC05790

Appeal number: TC/2013/02588

INCOME TAX – individual tax return - penalties for late filing – whether properly imposed – yes – whether reasonable excuse – no for the late filing penalty – yes for the daily penalties and 6 month penalty - appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

N L NAPOLITANO **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 19 February 2013 (with enclosures), HMRC's Statement of Case (with enclosures) prepared by the respondents on 30 January 2017 and various correspondence between the parties.

DECISION

Background

1. This is an appeal against a late filing penalty of £100 ("**late filing penalty**"), daily penalties of, in total, £900 ("**daily penalties**") and a 6 month late filing penalty of £300 ("**6 month penalty**") for late filing of the appellant's individual 2010-2011 tax return.

Evidence and findings of fact

2. From the papers I find the following facts:

(1) A notice to file a tax return for the year ending 5 April 2011 was issued to the appellant on 6 April 2011.

(2) The filing date for that return was 31 October 2011 for a non-electronic return or 31 January 2012 for an electronic return.

(3) The appellant attempted to log into his on-line account on 1 March 2012 but was unable to do so because of the use of an incorrect password.

(4) On 8 March 2012 he requested a new password which was sent to him the following day.

(5) On 3 April 2012 he was sent notification of his user ID by HMRC.

(6) Further on-line activity occurred on 10 and 11 April 2012 and 3 July 2012.

(7) On 11 April 2012 the appellant logged into his on-line self-assessment account, and completed his tax return for the year ending 5 April 2011. He submitted it. He was provided with a reference number. This submission was not successful.

(8) On 8 October 2012 he again failed to log in successfully, but following a telephone call to HMRC's helpdesk on 11 October 2012 a further password was sent.

(9) Further on-line activity then took place on 17 October 2012 and 30 October 2012 when the appellant was successful in submitting his on-line return for the period 2010-2011.

(10) HMRC issued a notice of penalty assessment for the late filing penalty on or around 14 February 2012. They issued a notice of daily penalty assessment for the daily penalties on or around 7 August 2012. These penalties were calculated at £10 per day for 90 days.

(11) HMRC issued a notice of penalty assessment for the 6 month penalty on or around 7 August 2012.

(12) The appellant appeals against these penalties. He does so out of time.

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 3 months (i.e. the daily penalties) - £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 – 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. The appellant's appeal is dated 19 February 2013. This is considerably after the 30 day time limits within which he should have appealed against the assessments for each of the late filing penalty, daily penalties and 6 month penalty. Whilst the respondents have raised the fact that this is a late appeal in correspondence, and in their statement of case, they do not appear to object to a late appeal. Indeed in the section entitled "HMRC View", no grounds for opposing the appellant's late appeal can be seen.

8. I am conscious of the criteria set out in *Data Select Ltd v Revenue & Customs Commissioners* [2012] UKUT 187. I must ask myself a number of questions including, in my view most importantly, what would be the consequences for the parties of a refusal to admit a late appeal.

9. In light of the fact that this case has been stayed behind *Donaldson*, it strikes me that little prejudice has been caused to HMRC by the late appeal since, as events have turned out, the case has been delayed by several years. I can see no prejudice either technical or financial, to HMRC of admitting this late appeal.

10. In contrast, and given that I find that the appellant's arguments on reasonable excuse have considerable merit (see below) the prejudice to the appellant in rejecting his appeal because it is late, is considerable.

11. Accordingly I am content to admit the appellant's appeal, late, and to hear it.

Penalty notices

12. Although HMRC were unable to provide direct evidence of the paragraph 4 or paragraph 18 notifications given to the appellant, and that they were in accordance with the notifications given by HMRC in the case of *Donaldson* I find that on the balance of probabilities, the appellant had received a self-assessment tax return which included the penalty information in it which had been given to *Mr Donaldson* in his case. I also find, again on the balance of probabilities, that HMRC had given the appellant notices which complied with the provisions of paragraphs 4 and 18 of Schedule 55.

Appellant's grounds of appeal

13. The appellant appears to put forward three grounds of appeal.

(1) Firstly, he believed that he had filed an on-line tax return on 11 April 2012.

(2) Secondly, he can't afford to pay the penalties.

(3) Finally, because he was made redundant in June 2011, he did not think he had earned enough to pay any tax for the period covered by the return.

Respondents submissions

14. The respondents submissions are straightforward. They consider that none of the three grounds put forward by the appellant comprises a reasonable excuse. They say that the appellant could not have successfully filed an online return on 11 April 2012 because if that submission had been successful, he would not have been able to submit it successfully, on 30 October 2012 (which is the date on which HMRC considers that the return was eventually successfully submitted).

Reasonable excuse

15. We agree with HMRC that not having the financial wherewithal to pay the penalties does not comprise a reasonable excuse. Indeed it is statutorily prevented from being a reasonable excuse. Furthermore, simply being unable to pay does not affect the validity of the primary liability to submit a tax return in the first place.

16. Similarly, the appellant's submission that he thought he had earned insufficient to necessitate the submission of a return does not in my view comprise a reasonable excuse. Indeed the appellant now seems to accept that this is a mistake on his part, and that the late filing penalty of £100 is due.

17. However, the situation is somewhat different as regards the appellant's submission that he believed that he had successfully submitted his tax return on-line, on 11 April 2012.

18. The test of whether a taxpayer has a reasonable excuse is set out at 3(18) above. I must ask whether a reasonable taxpayer in the position of the appellant would have acted as the appellant has done in the circumstances in which he found himself.

19. I have found as a fact that he logged on and "attempted" (as HMRC would no doubt put it) to complete and submit his online return on 11 April 2012. He was online for an hour and 24 minutes and, as he says in his grounds of appeal he wasn't just "twiddling my thumbs".

20. His evidence is that he received a long reference number. He was unable to provide that reference number, but I have no reason to disbelieve that he obtained one.

21. He clearly believed that he had successfully completed the submission of his tax return for 2010-2011 on 11 April 2012.

22. In my view what has happened here is as follows. According to HMRC's records, the appellant attempted to log in on 1 March 2012 but was unable to do so

because of an incorrect password. A new password was sent to him on 8 March 2012. It is not clear whether the attempted log in was stimulated by letter sent to the appellant by HMRC, which he thinks was in March 2011. But if so, it clearly indicates a readiness to engage with the tax system, and to comply with his obligations thereto.

23. Having been unable to log in initially, he then used the new user ID which had been sent to him on 3 April 2012, to log in on 10 April 2012 and then again on 11 April 2012. If he was sent the notification of that ID on the 3 April, it is unlikely to have been received by him for 2 or 3 days, so logging in on 10 April is likely to have taken place pretty shortly after he had received that user ID. Again, an indication of his willingness to engage with the tax system.

24. On 11 April 2012 he spent an hour and 24 minutes (as mentioned above) attempting to complete and submit his return on-line. On his evidence, he believes it was successfully completed and he had a reference number to show that.

25. The daily penalties started accruing 3 months after the due date of filing (i.e. at the beginning of May 2012). So if the appellant believed that he had successfully submitted his return in April, there was no reason for him to log on again. In consequence, he was not on notice that he had failed to submit his return, and could therefore do nothing to prevent the daily penalties accruing.

26. However, it must have been apparent to him that he had failed to successfully submit his return when he received the notices of liability to the daily penalties and the 6 month penalty in or around mid August 2012. But of course he had no chance to rectify the position as regards these penalties since they had already been assessed on him. Indeed it was these notices of assessment which would have indicated to him that his attempt to submit his return electronically in April 2012, had been unsuccessful.

27. A subjective belief that he had successfully submitted his return does not comply with the objective test of reasonable care. In order to satisfy that test, the appellant must establish whether doing nothing until October 2012 following his failed attempt to submit his tax return on 11 April 2012 is something which an objectively reasonable taxpayer, in his position, would have done. In my view the answer is yes. The appellant's engagement with the tax authorities set out above and in my findings of fact, suggests a person who is conscious of and intends to comply with his obligations regarding tax. I have found as a fact that having submitted his return on 11 April 2012, he was given a reference number. He was not put on notice (see below) that the return had not been successfully completed in April 2012, until he had received the penalty notices in mid-August 2012.

28. A reasonable taxpayer, in the taxpayer's situation, would have done as this taxpayer did (i.e. take no further action regarding his return until he was put on notice in August 2012 that it had been unsuccessfully filed in April 2012).

29. The fact that he did not log in again until October 2012 and it was only on 30 October 2012 that he successfully submitted his return does not affect the reasonable excuse that he has as regards the daily penalties and the 6 month penalty. His reasonable excuse for having submitted, in his view successfully, his return on the 11 April is deemed to continue until after that excuse has ceased. That would, in my view, be mid August 2012. By then it was too late to affect the daily penalties and 6 month penalty.

30. So, in my view, the appellant's reasonably held belief that he successfully submitted his return on 11 April 2012 comprises a reasonable excuse for doing nothing further (within the period covered by the daily penalties and the 6 month penalty) to correct the error that he had failed to submit his return successfully on that date.

Decision

31. It is my decision, therefore, that:

(1) The appeal against the late filing penalty of £100 is dismissed.

(2) The appeals against the daily penalties and the 6 month penalty are allowed.

Appeal rights

32. 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