[2017] UKFTT 0321 (TC)

TC05799

Appeal number: TC/2016/06110

TYPE OF TAX – CIS – lateness penalties – reasonable excuse. Proportionality in individual cases – must be considered.

FIRST-TIER TRIBUNAL
TAX CHAMBER

VISAO LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q.C.
MS JANE SHILLAKER

Sitting in public at Fox Court, London on 10 April 2017.

Mr. I. Gray, director, the Appellant

Miss S. Shakeel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 7 November 2016 the appellant, Visao Limited, lodged an appeal with this Tribunal in respect of penalties imposed upon it under schedule 55 Finance Act 2009 in respect of failures to file Construction Industry Scheme returns in due time. The penalties imposed totalled £10,400 and cover each month February 2015 – July 2016 for which CIS returns should have been filed.

2. The appellant accepts that the necessary filings did not take place.

3. Initially it seemed to us that Mr Gray, acting on behalf of the appellant, sought to advance the appeal on the basis that the total of the penalties was too great and that this Tribunal should mitigate them. We explained to Mr Gray that this Tribunal has a limited function and has not been trusted by Parliament to determine whether the statutorily imposed penalties are or are not reasonable upon the facts of each and every individual case which, of necessity, will be different. We explained that we can only look at whether the penalties have been correctly assessed in accordance with the relevant legislation and, if the appellant raises this as an issue, whether the appellant has a reasonable excuse for non-compliance in respect of all or any of the default periods.

4. HMRC contend that the decision of the Upper Tribunal in HMRC v Bosher [2013] UKUT 0579 (TCC) closes off any argument to the effect that the penalty scheme applicable to the late filing of CIS returns is not proportionate. It is right to say that the Upper Tribunal dealt only with whether the scheme as a whole was or was not proportionate; plainly it could not deal with whether, upon the facts and circumstances applicable in any individual case, the imposition of such a penalty would or would not be proportionate. However, it is clear from reading the Decision that its starting point was that there was a presumption of proportionality because the scheme laid down by Parliament singularly fails to relate the amount of any penalty to the size of the company or organisation against which a penalty is imposed and fails to have any regard to its financial resources (whether large or small).

5. Mr Gray turned his submissions to the issue of whether the appellant company had a reasonable excuse for all or any of the defaults. He explained that the appellant company was engaged in purchasing, renovating and then selling real property and that he was in charge of the day-to-day running of the business. He said that the business had employed a Finance Manager, but that the person who held that position left his/her job in February 2015 and was not replaced by an employee with similar status or similar aptitudes until 4 August 2016. It will be noted that this coincides with the period during which defaults took place.

6. Mr Gray explained that he was aware of the £100 penalties that could be imposed and he stated that he was aware that the company had received letters from HMRC concerning the need for the CIS returns to be filed. He explained that he had been unable to deal with those returns because he was focused upon the survival of

the business which, he said, had been substantially damaged by the financial downturn and the downturn in real property prices in 2008/2009.

7. The "reasonable excuse" relied upon was that it was reasonable to wait until another Finance Manager was in post before the statutorily required filings took place. Taken to its logical extent that would mean that any company that chose to leave vacant the position of the person normally responsible for filing such returns would, of itself, give that company a reasonable excuse for failing to comply with its statutory filing obligations. In other words, that company would then be able to choose when to comply.

8. CIS return documents are not amongst the most complex that taxpayers or businesses have to complete. Mr Gray did not suggest that it was not within his competence to attend to the necessary work.

9. In our judgement it cannot possibly amount to a reasonable excuse for a business to say that it realised that these statutory returns needed to be made, but that it could and should be excused in respect of its non-compliance because it chose to wait around 16 months to replace the employee who would usually be expected to file the necessary returns.

10. Mr Gray also referred us to the various authorities which HMRC sought to rely upon, to advance the appeal on the basis that the overall level of penalties was/is disproportionate.

11. We are satisfied that that is an argument which remains open to the appellant notwithstanding the Upper Tribunal decision in Bosher, to which we have referred above. We take our guidance from **Customs and Excise Commissioners v Newbury [2003] EWHC 702 (Admin), [2003] 1 WLR 2131** where the Divisional Court of the Queen's Bench Division had to consider whether the forfeiture of goods would be lawful if the forfeiture offended the principle of proportionality. That was a case where a motor car had been seized when it was found that it was carrying dutiable goods (tobacco products) in commercial quantities. Condemnation proceedings took place before the Magistrates Court at which the tobacco products were condemned as forfeit. Upon appeal by the motor car owner to the Crown Court, that Court held that it had a residual discretion not to order condemnation of anything liable to forfeiture if such forfeiture would be disproportionate.

12. The Commissioners appealed that decision of the Crown Court by way of case stated to the High Court. The Divisional Court (Lady Justice Hale and Mr. Justice Moses) held, dismissing the appeal, that the forfeiture of the car was an unjustified interference with the car owner's property rights and that its seizure and condemnation engaged that owner's right to the peaceful enjoyment of her possessions. The facts were that Mr. Newbury had borrowed his wife's car to undertake a trip to France (with three other people) and the vehicle owner, Mrs Newbury, was not one of the people who had attempted to evade excise duty.

13. The Divisional Court held that seizure and condemnation of the motor car would be incompatible with Mrs Newbury's right to the peaceful enjoyment of her possessions pursuant to article 1 of the First Protocol to the European Convention on Human Rights (A1P1) unless it was a proportionate response in the factual circumstances applicable in that case. The Divisional Court also held that a Court (and so also a Tribunal) seized of the issue of whether property is liable to confiscation by the state was under a duty to consider whether such liability would be in breach of the owner's Convention rights.

14. After referring to the arguments advanced on behalf of the Commissioners, Lady Justice Hale, giving the judgement of the Court, said at [12] :

"12. That argument is deeply unconvincing. The right conferred by article 8 is not simply a right not to pay United Kingdom duty on the goods. It must encompass a right to import those goods without paying that duty. When a load of goods is brought into the country in circumstances where customs officers have reasonable suspicions which they wish to investigate, temporary seizure may well be justified. But the court is then charged with determining the facts with a view to deciding whether the goods are in fact liable to forfeiture. Once the court is satisfied as to which goods a person was himself bringing in for his own use then there is no liability to duty and no need at all for his goods to be forfeit in order to enforce any liability to duty upon those goods. The argument, however, is that it may be necessary to do so in order to enforce the liability to duty of other goods found in the same vehicle. At this point the Community law concept of proportionality becomes relevant. In Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547, 5596, para 67, it was recognised that as penalties were not harmonised within the Community it remained open to member states to choose the penalties which seem appropriate to them.

"They must, however, exercise that power in accordance with Community law and its general principles, and consequently with the principle of proportionality … The administrative measures or penalties must not go beyond what is strictly necessary for the objectives pursued and 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 …"

15. The Learned Judge then explained why it was "deeply unconvincing," in paragraphs 21, 22 and 23 of the judgement, where she said :

"21. We can understand why the commissioners might want to keep this issue under their control, subject to a specialist tribunal. But courts are used to finding facts and applying their judgment to the consequences of the facts found. There are many other contexts in which courts at all levels have to make the sort of judgments required here. If section 7(1)(b) of the 1998 Act is to have any meaning, how can a court which is seized of the issue of whether property is liable to confiscation by the state not have a duty to consider whether such liability would be in breach of the owner's Convention rights? If it would be, the court cannot condemn the property: it would itself be acting in breach of Convention rights. It is not compelled by CEMA to do so because the concept of liability to forfeiture is capable of incorporating more recently enacted Convention rights.

22. The argument that the condemnation and restoration procedures, taken as a whole, are sufficient to provide "full jurisdiction" for the purpose of article 6 of the Convention does not meet the point that seizure and condemnation are themselves acts of interference with the peaceful enjoyment of property and therefore acts incompatible with Convention rights if forfeiture is disproportionate. It is not sufficient to wait until an owner seeks a review and then exercises his right to appeal. The right to peaceful enjoyment is engaged from the moment of seizure and continues thereafter. The initial act of seizure may not be disproportionate because the commissioners are entitled to investigate. But the interference should cease once an opportunity is available properly to consider whether it complies with Convention rights. The court should not be asked or expected to make an order which is not only in breach of those rights in itself but also legitimates continuing breach by the commissioners unless and until the review process takes place.

23. However, section 7 of the 1998 Act does not give the court any wider powers than it already has: see section 8(1) . Here, the court's powers are "all or nothing". So the court can only refuse to condemn if to forfeit at all would be disproportionate. In this case, where only one passenger was making the sort of non-commercial but not necessarily permitted import contemplated by *Lindsay v Customs and Excise Comrs [2002] 1 WLR 1766* , and neither the car owner nor the car driver knew about it, the Crown Court was clearly entitled to find that any forfeiture was disproportionate. Intermediate cases where forfeiture would not be disproportionate if terms were imposed may have to be left to the more sensitive powers of the commissioners and the tribunal".

16. We also remind ourselves that in Pusinskas v Border Force [2017] UKFTT 172 (TC) this Tribunal found at [25] that a restoration decision (as well as a forfeiture or condemnation decision) would be flawed and not lawfully arrived at absent a full and proper consideration of the principle of proportionality by the person taking the relevant decision:

> "25. We have read the decision of the Reviewing Officer in detail. It is striking that it makes no reference whatsoever to the principle of proportionality, nor is there any consideration whatsoever of whether, on the facts which the Reviewing Officer considered to be relevant and established, it was disproportionate to refuse restoration either at all or conditionally. In our judgement that is a fundamental flaw in the Review Decision. We should add that this is not a simple enquiry into whether or not the word "proportionate" or "proportionality" appears in any given Review Decision. The essence of the enquiry is to determine, after reading the Review Decision in its entirety, whether the mind of the Reviewing Officer turned to the issue of proportionality, howsoever that might be expressed. We cannot, on any fair and proper reading of this Review Decision, find anything that suggests that the Reviewing Officer turned her mind to the issue of proportionality. That, of itself, renders this Review Decision flawed so that we must direct that it ceases to have effect".

17. However, there is a difference when the Tribunal has to deal with a statutorily laid down scheme rather than the (often discretionary) exercise of a power given by

Parliament to specified state officials. It seems to us that the starting point must be that the scheme is to be regarded as proportionate given that Parliament must be assumed to have been aware of the requirement that legislative provisions enacted by it should comply with the requirements of both E. U. and domestic law, each of which emphasise the principles of proportionality and legal certainty as central to the rule of law.

18. The issue of proportionality in this appeal must be looked at not from the perspective of the overall total of the penalty because that has arisen by reason of conscious continued default. In our judgement, it must be considered in the light of each individual penalty.

19. Mr Gray did not adduce any evidence concerning the appellant's financial situation or argue that the appellant's Balance Sheet would demonstrate such a modest capital or asset base as to lead to the conclusion that any of the individual penalties were disproportionate when judged against that capital or asset base.

20. As Mr Gray acknowledged before us, he was aware that penalties were accruing and that he knew that the appellant was in default of its CIS filing obligations. It also came across to us that Mr Gray was later surprised to find that the amount of those penalties had accumulated to a sum of £10,400. That, we are satisfied, arose simply because of his failure to cause the company to make the necessary filings when he knew that same were not being undertaken notwithstanding that penalties were accruing. Statutorily imposed filing obligations cannot be explained away and/or excused on the basis that the appellant got around to fulfilling them some 16 months later once a suitable employee had been engaged.

21. Accordingly, this appeal must be dismissed.

22. 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.

GERAINT JONES Q.C.
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2017