[2017] UKFTT 0444 (TC)

TC05906

Appeal number: TC/2016/04089

CORPORATION TAX – *Penalty for failure to file corporation tax returns in the proper form within two years of the end of the accounting period – no reasonable excuse - appeal dismissed.*

FIRST-TIER TRIBUNAL
TAX CHAMBER

VANBURGH CAPITAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
LESLIE HOWARD

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 10 May 2017

Mr J Deering, director of the Appellant, appeared for the Appellant

Mrs B Sanu and Miss D Thakrar, Officers of HM Revenue and Customs, appeared for the Respondents

DECISION

Introduction

1. This decision relates to an appeal by the Appellant against an additional penalty equal to 10% of the corporation tax payable in respect of its accounting period ending 31 December 2012. The penalty has been imposed pursuant to paragraph 18 of Schedule 18 to the Finance Act 1998 ("Schedule 18").

2. The relevant part of paragraph 18 of Schedule 18 provides as follows:-

> "(1) A company which is required to deliver a company tax return for an accounting period and fails to do so –
>
> (a) within 18 months after the end of that period, or
>
> (b) if the filing date is later than that, by the filing date.
>
> is liable to a tax-related penalty under this paragraph.
>
> This is in addition to any flat-rate penalty under paragraph 17.
>
> (2) The penalty is –
>
> (a) 10% of the unpaid tax, if the return is delivered within two years after the end of the period for which the return is required, and
>
> (b) 20% of the unpaid tax, in any other case.
>
> (3) The "unpaid tax" means the amount of tax payable by the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-paragraph (1)."

3. In this case, the filing date in respect of the relevant accounting period was 31 December 2013 (one year after the end of the relevant accounting period) and therefore the penalty arising under sub-paragraph 18(1) of Schedule 18 arose as soon as the Appellant failed to file the relevant return by the date falling 18 months after the end of the relevant accounting period (30 June 2014). On that basis, the Appellant has conceded the validity of (and discharged) the penalty equal to 10% of the corporation tax payable in respect of the relevant accounting period pursuant to sub-paragraph 18(1) of Schedule 18 at the rate set out in sub-paragraph 18(2)(a) of Schedule 18. However, the Appellant alleges that it should not be liable to pay the additional 10% penalty arising at the rate set out in sub-paragraph 18(2)(b) of Schedule 18 because it had a reasonable excuse for its failure to file the return from 11 August 2014 (when it submitted its return in improper form on-line) until after 31 December 2014, when sub-paragraph 18(2)(b) of Schedule 18 was engaged.

4. Sub-section 118(2) of the Taxes Management Act 1970 (the "TMA") provides as follows in relation to reasonable excuse:

> "… where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

5. So the question which were asked to address at the hearing is whether the Appellant had a reasonable excuse within the meaning of sub-section 118(2) of the TMA for failing to file its return in proper form after 11 August 2014 and on or before 31 December 2014 – ie after it had become liable to a penalty at the rate of 10% of the unpaid tax but before the date on which the penalty rate stepped up to 20% of the unpaid tax.

Background

6. The relevant facts and applicable law in this instance are as follows:

(a) the Appellant was required to file its corporation tax return in respect of its accounting period ending 31 December 2012 by 31 December 2013;

(b) the filing was required to be made by electronic means, pursuant to the Income and Corporation Taxes (Electronic Communications) Regulations 2003;

(c) those regulations require corporation tax returns to be submitted in a particular format;

(d) the Appellant did not file its return in respect of the relevant accounting period until 11 August 2014, by which time the Appellant had become subject to two flat-rate penalties of £500 pursuant to paragraph 17 of Schedule 18 and a penalty equal to 10% of the unpaid tax pursuant to sub-paragraphs 18(1) and 18(2)(a) of Schedule 18;

(e) in August 2014, shortly before it submitted its return, the Appellant discharged both the corporation tax due in respect of the relevant accounting period and the 10% penalty described in the above paragraph. (In fact, the Appellant paid slightly more than was, in due course, ultimately determined to be due in respect of the relevant accounting period (and thus also paid slightly more than 10% of the amount ultimately determined to be due) because, in the absence of the return, the Respondents had determined the tax due in respect of the relevant accounting period to be £60,000 and this was subsequently reduced to £57,791.49 once the return was properly filed);

(f) the return filed by the Appellant on 11 August 2014 was not in the proper form. Accordingly, the Respondents wrote to the Appellant on 18 August 2014 notifying the Appellant of that fact and requiring the Appellant to submit its return in the proper form;

(g) the Appellant maintains that it did not receive the letter of 18 August 2014;

(h) the Appellant had still not filed a return in the proper form by 31 December 2014, the date falling two years after the end of the accounting

period in question. Accordingly, on 5 January 2015, and in reliance on sub-paragraph 18(2) of Schedule 18, the Respondents issued a further penalty determination in the amount of £5,999.58 which was equal to 10% of the corporation tax which, at that point, the Respondents considered to be the amount payable in respect of the accounting period;

(i) Mr Deering, on behalf of the Appellant, stated that he could not recall whether he had received this determination. Whether he did or he didn't, he said that he became aware of the Appellant's failure to file an appropriate return in respect of the relevant accounting period only just before 1 April 2016, some 15 months later, and then filed the return on that date;

(j) the return was therefore filed 822 days late; and

(k) following its receipt of the return in appropriate form on 1 April 2016, the Respondents issued an amended penalty notice reducing the aggregate tax-related penalty to £11,558.28 to take account of the difference between the tax originally estimated to be due in respect of the relevant accounting period and the tax finally determined to be due in respect of the relevant accounting period.

The arguments

7. In relation to the Appellant's ground of appeal – that is to say, reasonable excuse - Mr Deering candidly admitted at the hearing that he had not paid enough attention to the tax affairs of the Appellant. As he put it, it was more important to focus on generating revenue for the Appellant than to spend time on tax compliance. It was for that reason that he accepted that the imposition of the two flat-rate penalties and the original 10% penalty in respect of the relevant accounting period were perfectly justified. However, in the case of the penalty which was the subject of the appeal, he considered that it was unfair for two reasons. First, he pointed out that the deficiencies in the form of the return submitted on 11 August 2014 were not material in determining the tax liabilities of the Appellant. He said that, as it transpired, the return contained all of the information upon which the Respondents ultimately relied in assessing the corporation tax in respect of the relevant accounting period. More significantly, he pointed out that, as he had never received the letter of 18 August 2014 notifying the Appellant of those deficiencies, he was unaware that the filing made on 11 August 2014 had not been accepted and therefore he was unable to rectify the problem on or before 31 December 2014.

8. Mr Deering also explained at the hearing that correspondence addressed to the Appellant at its registered office – such as the letter of 18 August 2014 – was sent to the Appellant's registered office in Surrey because that was the location of the provider of corporate secretarial services to the Appellant. Mr Deering explained that the provider of those services did not record the mail received but simply forwarded the mail to Mr Deering's home address. It would do this by normal unrecorded mail

unless the relevant item of mail appeared to be particularly urgent or significant, in which case recorded delivery would be used.

9. Mrs Sanu and Miss Thakrar made the following points on behalf of the Respondents:

(a) it was incumbent upon Mr Deering, as the director of the Appellant, to be acquainted with the laws and regulations relating to the filing of corporation tax returns. The Appellant therefore had no reasonable excuse for failing to file its return in the appropriate form regardless of whether it subsequently received notification of that failure from the Respondents; and

(b) even if the Appellant's failure to receive the letter of 18 August 2014 meant that the Appellant had a reasonable excuse for its failure to file the relevant return prior to 5 January 2015, that excuse ceased when the additional penalty determination was issued on 5 January 2015 because, at that stage, the Appellant should have been aware that its filing on 11 August 2014 had been ineffective. Therefore, the failure of Appellant to file the relevant return in the appropriate form for a further 15 months after that date meant that it did not have a reasonable excuse throughout the period during which the failure continued and this meant that, based on the language used in sub-section 118(2) of the TMA, the failure did not fall to be disregarded.

Decision

10. Contrary to the submissions of both parties, we would start by saying that, based on our construction of paragraph 18 of Schedule 18 and sub-section 118(2) of the TMA we consider that the "reasonable excuse" defence is not a potentially available defence on the facts of this case because the failure which gave rise to the penalty occurred before the alleged reasonable excuse arose and the alleged reasonable excuse instead relates only to the rate at which the penalty falls to be calculated.

11. We would elaborate on the above as follows. The starting point is to note that sub-section 118(2) of the TMA is directed in each case at a failure to do something which was required to be done and that the failure in respect of which paragraph 18 of Schedule 18 provides for a penalty to be imposed is the failure to deliver the company tax return within 18 months after the end of the relevant accounting period or, if the filing date is later than that, by the filing date. It is the failure to do that which gives rise to the penalty under paragraph 18 and not the failure to file the return within two years of the end of the accounting period. The latter date is relevant only in establishing the rate at which the penalty for the failure to comply with sub-paragraph 18(1) of Schedule 18 is to be calculated. In other words, paragraph 18 should not be construed as imposing a penalty of 20% of the unpaid tax for failing to file the return within two years of the end of the relevant accounting period. Instead, it should be construed as imposing a penalty for failing to file the return within 18 months of the end of the relevant accounting period (or, if the filing date is later than that, by the

filing date) and then providing that the rate at which the penalty for that failure will be charged is 10% if the return is filed within two years of the end of the relevant accounting period or 20% in any other case.

12. In short, sub-section 118(2) of the TMA is directed only at things which are required to be done, the only thing which was required to be done by paragraph 18 of Schedule 18 was the filing of the relevant return by the deadline set out in sub-paragraph 18(1) of the schedule and the dates set out in sub-paragraph 18(2) of the schedule are merely determinative of the rate at which the penalty for that failure is to be calculated.

13. The Appellant has conceded that it has no reasonable excuse for its failure to file the return prior to the deadline set out in sub-paragraph 18(1) of the schedule. It follows that, in our view, the fact that the Appellant may or may not have had a reasonable excuse for failing to deliver its return over a period following the deadline specified in sub-paragraph 18(1) of Schedule 18 is simply not relevant.

14. However, in case our construction of the relevant provision is considered to be incorrect by a higher tribunal or court, we have considered whether, on the assumption that the reasonable excuse defence is, in principle, available in relation to the step up in the penalty rate described in sub-paragraph 18(2)(b) of Schedule 18, the Appellant should, on these facts, be regarded as having a reasonable excuse for failing to file its return in proper form on or before 31 December 2014.

15. After listening to the arguments of both sides at the hearing, we have concluded that it does not and that we agree with the submission of the Respondents described at sub-paragraph 9(a) above. In short, we consider that it is incumbent upon the director of a company to be aware of the compliance obligations of that company and to ensure that the company meets those obligations unless there is some supervening event which prevents that. No such supervening event is alleged to have occurred in this case. Instead, the tax affairs of the Appellant appear to have been conducted in a somewhat chaotic manner, as is evidenced by the fact that Mr Deering could not recall whether or not he had received the penalty determination of 5 January 2015 and by the fact that it took him until 1 April 2016 to realise that the return submitted in respect of the accounting period ending 31 December 2012 was deficient and had not been accepted by the Respondents.

16. It is all very well for Mr Deering to say that he prefers to focus on the generation of revenue in priority to ensuring tax compliance but he must then live with the consequences of those priorities. Accordingly, we find that, insofar as (contrary to our view as expressed above), a reasonable excuse defence is potentially available in this context, there was no reasonable excuse for the Appellant's failure to file a tax return in the appropriate form on or before 31 December 2014.

17. For the above reasons, we dismiss the Appellant's appeal against the additional penalty.

18. There are two additional points which we would make for the sake of completeness.

19. The first arises out of the fact that the penalty imposed by paragraph 18 of Schedule 18 is required to be calculated by reference to the "unpaid tax". The phrase "unpaid tax" is defined in sub-paragraph 18(3) of Schedule 18 as "the amount of tax payable by the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-paragraph (1)". In this case, the Appellant had paid all of the corporation tax due in respect of the relevant accounting period by 31 December 2014 when the 20% penalty rate became applicable. In line with our construction of paragraph 18 of Schedule 18 as set out in paragraphs 10 to 13 above, we consider that the reference in sub-paragraph 18(3) of Schedule 18 to "the date when the liability to the penalty arises under sub-paragraph (1)" is to the later of the two dates set out in sub-paragraphs 18(1)(a) and 18(1)(b) of Schedule 18 (as opposed to the date set out in sub-paragraph 18(2) of Schedule 18, when the penalty rate changed) and therefore that the fact that the tax was paid in full after the later of those two dates but before 31 December 2014 does not prevent the tax from being "unpaid tax" for the purposes of the additional penalty. So we consider that all of the corporation tax due in respect of the relevant accounting period amounted to "unpaid tax" for the purposes of the additional penalty notwithstanding the fact that the tax was paid prior to 31 December 2014.

20. The second point is relevant only if the views set out above to the effect that:-

(a) the "reasonable excuse" defence is not a potentially available defence on the facts of this case; and

(b) even if it is, the Appellant did not have a reasonable excuse for its failure to file the relevant return after 11 August 2014 but on or before 31 December 2014,

both prove to be incorrect.

21. In that event, it would be necessary to consider the relevance of the fact that, even if the Appellant's failure to receive the letter of 18 August 2014 was sufficient to constitute a reasonable excuse for the Appellant's failure to file the relevant return in proper form on or before 31 December 2014, that reasonable excuse ceased to exist in early January 2015, when the penalty determination in respect of the additional 10% was issued by the Respondents. So the reasonable excuse would have ceased to exist some 15 months before the Appellant took steps to file the return in proper form (on 1 April 2016).

22. On this hypothesis, the question is whether the fact that a reasonable excuse existed until a date falling after the additional 10% penalty rate began to apply but ended well before the date when the return was filed in proper form should enable the appeal to succeed. In considering this question, we would note that it is implicit in the conclusion that the reasonable excuse defence potentially applies in this context that our construction of paragraph 18 of Schedule 18 is incorrect and that paragraph 18 should be construed as requiring a company to deliver its tax return within two years of the end of the relevant accounting period or face a penalty equal to 20% of the

unpaid tax. If that were to be the correct construction of the provision, then we would question whether, on the facts of this case, there would be any "unpaid tax" (as defined in sub-paragraph 18(3) of Schedule 18) because all of the tax which was payable in respect of the relevant accounting period was paid prior to the date when the liability to the 20% penalty arose. So, on that basis, we would expect the Appellant to succeed in its appeal.

23. Moreover, even if it were not correct to construe the definition of "unpaid tax" in this manner, we would have thought that, if the reasonable excuse lasted until after the date on which the return was required to be filed in order to avoid the 20% penalty, that ought to be sufficient to enable the Appellant to succeed in its appeal even if there was a period following the end of that period when no such reasonable excuse existed. This is because, at the time when the penalty at the 20% rate crystallised, the reasonable excuse was still continuing and it is the failure to file the return by that date which, on this construction of the paragraph, is the thing that was required to be done.

24. So, if the views described in paragraph 20 were both to prove incorrect, we would have thought that the Appellant would be entitled to succeed in its appeal on either or both of the above bases.

25. There is one final comment which we would make in this context. It is that it is unfortunate that a letter of the significance of the letter of 18 August 2014 was sent by the Respondents by unrecorded mail and that, in the continuing absence of any response from the Appellant, there was no follow-up by the Respondents in some form before the watershed date of 31 December 2014. Without in any way suggesting that this relieves the Appellant from responsibility for complying with its legal obligations, it would have been simple for the Respondents either to have contacted Mr Deering by email or to send the letter of 18 August 2014 by recorded delivery and, in either case, to send a reminder well before 31 December 2014 and it is regrettable that this did not happen.

26. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 26 MAY 2017