[2015] UKFTT (TC)

TC04568

Appeal number: TC/2014/04123

INCOME TAX – self-assessment returns – £100 late filing penalty – paragraph 3 Schedule 55 FA 2009 – whether reasonable excuse for late filing – no – failure not remedied without unreasonable delay – whether special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MISS JANE EDWARDS **Appellant**

- and -

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

TRIBUNAL: JUDGE DR HEIDI POON
EILEEN SUMPTER

Sitting in public at George House, Edinburgh on 21 May 2015

Miss Jane Edwards in person, for the Appellant

Ms C Cowan, presenting officer, for the Respondents

DECISION

1. The appeal is against the fixed penalty of £100 imposed for the late filing of self-assessment returns for each of the two tax years 2010-11 and 2011-12. The statutory provision for the fixed penalty is under paragraph 3 of Schedule 55 to Finance Act 2009 ('FA 2009'), and the main issue for the Tribunal to determine is whether the appellant had a reasonable excuse for the failure in filing the returns by the due date.

The Facts

2. From the appellant's oral evidence, HMRC's Statement of Case, and other documents produced to the Tribunal, we find the following facts.

3. The appellant was an employee of HMRC for 27 years from 1983 to 2010. She worked in the capacity of a health and safety officer, and was based in Perth. The appellant had been on PAYE for all her working life with HMRC and had been a basic-rate taxpayer without the obligation of filing an annual tax return.

4. The appellant's employment with HRMC terminated in August 2010 as a result of the closure of HMRC's Perth office. The redundancy and compensation payments received by the appellant following the termination of employment fell to be accounted for in the two tax years 2010-11 and 2011-12. There was a shortfall of tax as collected through PAYE for the two years, and HMRC sought to collect the underpayment by issuing Form P800 tax calculations for the said years.

5. The actual P800 tax calculations are not made available in the document production, but we infer from a letter from HMRC to the appellant dated 8 January 2014, that the P800 calculations for the said years were issued on 8 February 2013. The P800 calculations stated the underpayment of tax at £4,421.60 for the two years.

6. As a procedure within HMRC, the Form P800 is a method of collecting a non-recurring underpayment in the absence of a self-assessment return. A Form P800 is followed by a letter known as Voluntary Payment Request, whereby arrangements to settle the underpaid tax can be made between the taxpayer and HMRC.

7. The P800 tax calculations issued to the appellant in February 2013 could have removed the necessity to serve a tax return for each of the years concerned. There were a few exchanges of communication over the tax calculations between the appellant and HMRC, but it would seem no agreement was reached regarding either the sum owed or a payment plan.

8. The next stage to resolve the matter over tax underpayment was to issue self-assessment returns. According to HMRC's computerised records, two self-assessment tax returns for 2010-11 and 2011-12 were issued to the appellant on 7 January 2014.

9. On the self-assessment return form, the filing due date for a return served outwith the normal annual issue is three months from the date of the issue of the return. For the two returns issued to the appellant, the date shown on the returns is 7 January 2014, making the official filing due date for these returns 7 April 2014.

10. In practice, however, HMRC allow a period of three months *plus one week* from the date of issue for the purpose of determining whether such a return has been filed late. We heard from HMRC that the extra week beyond the three-month period is to allow for postage, printing and delivery. HMRC's internal system therefore shows the date of issue as 7 January 2014, and the due date for these returns to be filed as 14 April 2014, which is also the date for the purpose of applying the fixed penalty.

11. Penalty notices for £100 each in respect of the returns for tax years 2010-11 and 2011-12 were issued on 15 April 2015.

12. On 24 April 2014, Miss Edwards appealed against the penalty notices on 'Form SA370 Appeal'. HMRC's decision letter in respect of the appeal dated 14 May 2014 confirmed the penalties. The appellant requested an internal review, which concluded with the review letter dated 3 July 2014, upholding the penalty assessments.

13. The appellant appealed to the Tribunal by Notice of Appeal dated 29 July 2014, accompanied by a five-page supplementary 'Details of Appeal' dated 30 July 2014. The Notice of Appeal was date-stamped as received on 1 August 2014.

14. In her evidence, Miss Edwards asserted the due date for filing should be 16 April 2014, as per the letter from HMRC dated 8 January 2014 that accompanied the returns. She helpfully produced the letter during the hearing, and the letter includes the following statement:

> 'If you do not fill in and send to us the tax returns by **16 April 2014,** we will charge you penalties and interest.' (emphasis original)

15. Miss Edwards then gave evidence about her own health problems, saying that she had been ill for some time. Between January and April 2014, she was undergoing medical treatment, culminating in a surgery performed on 14 April 2014. She was discharged from hospital on 18 April and was off work for 12 weeks for recovery.

16. Miss Edwards also mentioned that her father fell ill from July 2014. Her father lived some way away from her.

17. Ms Cowan confirmed that she had checked HMRC's system as of the day of the hearing, and that the two returns remained outstanding. She also confirmed that further penalties may be applicable for the non-filing of the returns to date, but these penalties have been suspended pending on the outcome of this appeal.

The Law

Power to require a return and impose penalties

18. The relevant law in this case concerns the power of HMRC to require a taxpayer to make a tax return, and this power is given under section 8 of Taxes Management Act 1970 ('TMA 1970'), which provides:

> '**Personal return**
> (1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> (a) to make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may be so required.'

The provisions of reasonable excuse

19. Under paragraph 23 of Schedule 55 to FA 2009, it is provided that:

> '(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if [the taxpayer] satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
>
> (2) For the purposes of sub-paragraph (1) –
> …
> (c) where [the taxpayer] had a reasonable excuse for the failure but the excuse has ceased, [the taxpayer] is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.'

20. There is no statutory definition for *reasonable excuse*. The term is to be given its normal everyday meaning as referring to an unexpected or unusual event, either unforeseeable or beyond a person's control, which prevents one from complying with an obligation. Whether or not a person has a reasonable excuse is an objective test, and 'is a matter to be considered in the light of all the circumstances of the particular case' (*Rowland v HMRC* [2006] STC (SCD) 536 at [19]).

21. In *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ('*The Clean Car Company*'), Judge Medd QC remarks:

> 'It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects

> shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.'

22. The Appellant Company in *The Clean Car Company* case was found to have a reasonable excuse in view of the circumstances faced by its managing director when making the erroneous VAT return:

> '… the strain caused by his daughter's illness and the limitation on the time he was able to devote to his business duties … and the fact that he was not in the building industry and was unfamiliar with building contracts and the special rules that are applied to those contract …'

The consideration of special circumstances

23. Paragraph 16 of Schedule 55 to FA 2009 provides that:

> 'If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.'

24. The legislation does not define 'special circumstances'. From case law, it is accepted 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).

25. Paragraph 22 of Schedule 55 to FA 2009 provides that the Tribunal may reduce or cancel the penalty due to special circumstances only if the decision taken by HMRC is 'flawed when considered in the light of the principles applicable in proceedings for judicial review'. Unless the decision by HMRC in considering special reduction is unreasonable in the public law sense, the Tribunal will not step in to interfere with such a decision.

The onus of proof

26. HMRC have the burden of proof that there is a *prima facie* case that a penalty is due, because the return was not submitted by the due date. The appellant has the burden to establish that she has a reasonable excuse for failing to submit the return on time. The standard of proof is the civil standard of the balance of probabilities.

Submissions

27. While HMRC have the onus of proof that the penalty has been correctly charged under the relevant legislation, the appellant's arguments are here related first before summarising HMRC's submissions, which addressed the various grounds of appeal put forward by the appellant.

The Appellant's case

28. In the Notice of Appeal, the appellant stated in bullet points that her appeal is against:

- the issue of Income Tax returns for 2 years, 2010-11 and 2011-12
- the application of penalties for the same two years for alleged late submission
- the notification of underpayment
- the failure to respond to correspondence
- failure to act upon information in good time
- failure to adhere to HMRC instructions

29. The appellant attached a five-page 'Details of Appeal' stating her various grounds of appeal, which are summarised as follows:

(1) That as a taxpayer, her tax affairs do not give rise to any reasons as given by HMRC's website for a tax return to be issued; consequently, the returns for the two years should have been issued in the first place.

(2) That the penalties should not be charged as she has a reasonable excuse for the returns not being filed on time, given that she was in hospital.

(3) That the underpaid tax calculations per the P800 notices are incorrect.

(4) That the underpaid tax arising from the two years should be written off under Extra Statutory Concession ESC A19. As the employer in this case, HMRC were the payer of the redundancy and compensation payments, and therefore had the information required to determine her liability for the two years since 31 August 2010, and have failed to act on the information in good time.

30. In her submissions, the appellant took great issue with the fact that the fixed penalty for the two years was applied as from 15 April per the notices of penalty received, while the deadline of filing is stated as 16 April on HMRC's letter dated 8 January 2014 that accompanied the self-assessment returns.

HMRC's case

31. In terms of tax management powers, HMRC are empowered under section 8 TMA 1970 to require a tax return to be filed in order to determine the correct liability of the taxpayer for any one year.

32. The penalties for the two returns being filed late are correctly charged under paragraph 3 of Schedule 55 to FA 2009.

33. The returns should have been submitted as soon as the reasonable excuse ceased to exist, without any further delay. While the appellant had sent a letter to HMRC on 12 April 2014 advising the dates of her surgery and stay in hospital from 14 - 18 April 2014, it has been many months now since 18 April 2014, and the returns remain outstanding.

34. The failure to respond to correspondence from the appellant is a matter for HMRC's customer service, not the Tribunal, to address.

35. In respect of ESC A19, the appellant should make a claim for the tax due to be waived under the extra-statutory concession. The claim should be made directly to HMRC, and if HMRC refuse to give the concession, the Tribunal has no jurisdiction to consider that matter.

36. In respect of 'failure to adhere to HMRC instructions', HMRC took it to mean that the appellant had requested a review as regards whether the returns should have been issued in the first place. Again, HMRC submit that they have the tax management powers under section 8 TMA 1970 and the issuance of returns is not a matter for the Tribunal to review.

37. HMRC have considered whether any special circumstances should warrant special reduction of the penalties. Given that the amount of penalty is fixed by legislation, there is no scope for such reduction.

Discussion

38. By legislation, HMRC are vested with the powers under section 8 TMA 1970 to decide when a taxpayer should be required to file a tax return. The Tribunal has no jurisdiction over HRMC's tax management powers in this respect. Similarly, other issues being raised as grounds of appeal concerning ESC A19 concession[1], or whether there was a failure by HMRC to respond to the appellant's communications, or to adhere to their own instructions, are not matters for the Tribunal to decide.

39. Once a tax return is required of a taxpayer, the obligation for the taxpayer to submit the return by the stipulated due date is underpinned by the penalty regime contained in Schedule 55 FA 2009. The penalty of £100 specific to this appeal is under paragraph 3 of the Schedule, and is imposed if the return is not received by the due date for filing.

40. The only matter the Tribunal has jurisdiction over in this case pertains to the imposition of the two fixed penalties. In this respect, the Tribunal's remit is to decide:

(1) whether the penalties are correctly applied;
(2) whether the appellant has a reasonable excuse in filing the returns late;
(3) whether special circumstances warrant a reduction of the penalties.

41. On the first issue, the law is clear. Once a tax return is required of a taxpayer, the obligation for the taxpayer to submit the return by the stipulated due date is underpinned by the penalty regime contained in Schedule 55 FA 2009. The penalty of £100 specific to this appeal is under paragraph 3 of the Schedule, and is imposed if the return is not received by the due date for filing. The £100 penalty is the first of a series of possible penalties that may result from the failure to file a return, and is applied solely with reference to the due date.

[1] See *Prince, Bunce & Coaker v HMRC* [2012] UKFTT 157 (TC), in which Judge Bishopp concluded that the First-tier Tribunal has no jurisdiction to consider discretionary concession such as ESC A19.

42. We note the appellant's criticism of the discrepancy in HMRC's communications as regards the filing due date – that the letter of 8 January 2014 should state the due date as 16 April 2014, while the penalties were imposed as of 15 April 2014 per the penalty notices, in accordance with HMRC's computer system which carries the due date as 14 April 2014.

43. We agree that the date of 16 April 2014 (printed in bold for emphasis in HMRC's letter) can give rise to a legitimate expectation on the part of the taxpayer that the due date for filing is 16 April 2014, rather than 14 April 2014. Had the appellant acted on this assumption, and filed the returns on 15 April 2014, the Tribunal would have to determine which date should be the due date for the purpose of imposing the fixed penalty. As it stands, this question is of no immediate relevance, as the appellant had not filed the returns on 15 April 2014.

44. We would note, however, that the official filing due date for returns issued outwith the annual issue is three months after the date of issue of the return. This official due date is clearly stated on the front page of the self-assessment return notice, and can be referenced against the date of issue stamped on the return notice. The extra week given in addition to the three months is by HMRC's internal practice, and does not form part of the official due date notice. A prudent taxpayer would have adhered to the earlier filing due date on the face of the tax return notice, which is 7 April 2014 in this instant case.

45. At the date of the hearing (21 May 2015), the returns for the two years remained outstanding. The fixed penalty of £100 has been correctly applied for the failure to file each return with reference to HMRC's internal due date of 14 April 2014.

46. The second issue for the Tribunal to consider is whether the appellant had a reasonable excuse for filing the returns late, and we address this issue in two stages:

(1) whether there was a reasonable excuse for the immediate failure in submitting her returns by 14 April;

(2) whether the appellant was to be treated as having continued to have the excuse because the failure had been 'remedied without unreasonable delay after the excuse ceased' as provided by paragraph 23(2)(c) Schedule 55 FA 2009.

47. In line with *The Clean Car Company* decision, for the first stage of our consideration, we accept that the appellant was unable to give her attention to the returns between 8 January and 14 April 2014 when her health problems were a preoccupying concern. She was then in hospital from 15 to 18 April 2014 for her surgery. The appellant therefore had a reasonable excuse for her immediate failure in submitting her returns by 14 April 2014.

48. In considering whether there should be an 'extension' to the reasonable excuse, the Tribunal makes the following observations from documentary evidence available regarding the appellant's efforts in dealing with the penalty notices that were issued on 15 April 2014:

(1) Lodged appeal against the penalty notices on SA370, dated 24 April 2014;

(2) After receipt of HMRC's review letter dated 15 May 2014; the appellant requested 'review of decision' on Form SA634, which was accompanied by a covering letter dated 19 May 2014;

(3) Phoned Tribunals Service on 7 July 2014 at 11.15am to request a Notice of Appeal form to be emailed (per annotation on the appellant's copy of HMRC's 'Conclusion of Review' letter dated 3 July 2014);

(4) Notice of Appeal completed, signed and dated 29 July 2014;

(5) To accompany the appeal form, a five-page word-processed document entitled 'Details of Appeal' was drafted to expand on her grounds of appeal as listed in bullet points on the Notice; this was dated 30 July 2014;

(6) Collated the Notice of Appeal, the 'Details of Appeal', and other supplementary documents for sending to the Tribunals Service; date-stamped as received on 1 August 2014.

49. It would appear that the appellant was able to act timeously with focused attention at every juncture in relation to her appeal against the penalty notices from 24 April to the end of July 2014. Insofar as the appellant was able to pursue her appeal with consistent efforts from late April to July 2014, a reasonable taxpayer '*who had a responsible attitude to [her] duties as a taxpayer*' would have been able to submit the returns during that period.

50. The Tribunal therefore concludes that the reasonable excuse ceased on 24 April 2014, when the appellant started to deal with the penalty notices.

51. We further conclude that there could be no extension of her reasonable excuse because *the failure was not remedied without unreasonable delay after the excuse ceased*. Any 'extension' of a reasonable excuse in terms of paragraph 23(2)(c) Schedule 55 FA 2009 is predicated on the failure having been rectified without undue delay. As a matter of fact, the returns remained outstanding as of the date of hearing in May 2015, over a year after the reasonable excuse ceased in April 2014. There could be no basis for the Tribunal to consider such an inordinate delay as reasonable.

52. Her father's state of health from July 2014 had not hampered her ability to deal with the appeal, and did not constitute a reasonable excuse therefore for her continual failure to submit the tax returns.

53. Finally, we consider the third issue relating to special reduction. We note from HMRC's Statement of Case that they have considered special reduction, and concluded that there is no scope for reduction as the penalty is fixed, nor are there any special circumstances for cancelling the penalties. We agree; there are no attenuating circumstances that are exceptional, abnormal or unusual, out of the ordinary run of events to warrant special reduction.

Decision

54. The appeal is accordingly dismissed. The penalty of £100 for each of the tax years 2010-11 and 2011-12 is confirmed.

55. 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.

HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 30 JULY 2015