[2017] UKFTT 409 (TC)

TC05873

Appeal number: TC/2012/10642

INCOME TAX – penalties for late filing

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK PALMER EDGECUMBE **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

The Tribunal determined the appeal on 2 May 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 21 November 2012 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 24 January 2017.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit his 2010/2011 self-assessment return on time.

2. The penalties that have been charged can be summarised as follows:

(1) Penalty of £100 imposed on 14 February 2012.

(2) Daily penalties of £10 per day amounting to £770 imposed on 17 July 2012.

In fact the notice of appeal refers only to the £770 daily penalties but HMRC have treated the appeal as also being against the £100 penalty, and I will do so too.

3. The appellant's grounds for appealing against the penalties can be summarised as follows:

(1) The imposition of the penalties was unfair because HMRC (allegedly) failed to give warning of the new late filing penalties;

(2) The appellant changed address in October 2010 and was unable to receive the notice to file and any reminders sent to him;

(3) The appellant was based abroad in tax year 11/12 and found it difficult to communicate with either his adviser or HMRC;

(4) The penalty is out of proportion to the tax owing as in fact the appellant was owed a refund of tax: the appellant is being penalised for making a late claim to a refund.

(5) The appellant intends to file on time in future years.

(6) The appellant will have difficulty paying the penalties.

History of appeal

4. The appellant's agent filed an appeal which was notified to the Tribunal on 21 November 2012. In February 2013 the appeal was stayed behind another appeal in this Tribunal (*Morgan and Donaldson)* which raised questions on whether there were technical defects with the imposition of daily penalties. That stay lasted for several years, as this Tribunal's decision was appealed to the Upper Tribunal, and then to the Court of Appeal. In July 2016 the Court of Appeal released its decision (*Donaldson* [2016] EWCA Civ 761) dismissing Mr Donaldson's appeal against the daily penalties.

5. It became clear that the Court of Appeal's decision was final when the Supreme Court refused Mr Donaldson permission for leave to appeal on 21 December 2016.

Thereafter, HMRC have been asked to provide statements of case on the many appeals stayed behind *Donaldson* in order that they could be resolved.

6. That history explains why this appeal, which was lodged in 2012, has only come on to be determined in early 2017.

7. HMRC filed their statement of case on 24 January 2017. On 30 January 2017 the Tribunal reminded the appellant of his right of reply to the statement of case but nothing was received. On 13 March 2017, in view of the lack of communication from the appellant, the Tribunal requested the appellant to notify it whether he intended to proceed with the appeal and to confirm the appointment of his agent. He did so on 27 March 2017 and the Tribunal then proceeded to determine the appeal.

8. The appeal is determined on the papers as it was categorised as a paper case and the appellant has made no request for it to be determined at a hearing.

The facts

9. The effect of the appellant's failure to submit a Reply to HMRC's statement of case is that I take it that the appellant does not dispute the factual matters alleged in that statement of case.

10. HMRC's case is that a notice to file for year ended 5 April 2011 was issued to the appellant on 8 April 2011 as evidenced by a computer printout, and, as the appellant has not disputed this, I take it as proved. That notice notified the appellant of his liability to file a return, the statutory due dates for which were 31 October 2011 (if paper) or 31 January 2012 (if electronic).

11. The appellant's case, apparent from the notice of appeal, was that he did not in fact receive the notice to file because he moved house in October 2010. HMRC pointed out in the review letter of 22 October 2012 that the appellant nevertheless filed his 09/10 return in February 2011 showing the same address as he had held for previous years, being the address to which the 10/11 notice to file was sent in April 2011. The appellant has not disputed this: all that the notice of appeal said was to agree that it had taken 'a long time' for the appellant to notify HMRC of his change of address.

12. HMRC's case is that the appellant's tax return was filed electronically on 16 July 2012 and this has not been disputed by the appellant.

13. HMRC's case in addition is that the notice to file was accompanied by a flyer which stated that daily penalties would be imposed together with other penalties for late filing. Their case is that this flyer was sent to all recipients of a notice to file and therefore was sent to the appellant. I was given a copy of this flyer and I note it refers not only to daily penalties but also to the fact that a penalty would be charged even if there was no tax to pay. As the appellant has not disputed HMRC's assertions on this, I find that the appellant was sent this flyer.

Were the penalties properly imposed?

14. HMRC is obliged to send notifications to a taxpayer's 'usual or last known place of residence, or his place of business or employment' (s 115(2)(a) Taxes Management Act 1970). The appellant has accepted that the notice to file and flyer were sent to the last known address of the appellant's held by HMRC, although in practice the appellant may not have received them because he had moved in October 2010. I find that the notice was duly served.

15. Schedule 55 to the Finance Act 2009 sets out the penalties at issue in this appeal. The relevant text of those provisions is set out in the appendix to this decision.

The £100 penalty

16. In summary, paragraphs 1(1) and (3) have the effect that a fixed £100 penalty can be imposed if the tax return has not been filed on or before the filing date. The appellant's tax return was not filed by the filing date of 31 January 2012 and so the penalty was due.

17. I also find that the penalty was properly imposed by notice: it was HMRC's case that the penalty notice was served on or around 14 February 2012 and the appellant does not dispute this. I find that the £100 penalty was properly imposed.

The daily penalties

18. In summary, daily penalties can be imposed at £10 a day if certain conditions are met. Those conditions are (paragraph 4(1)) that (a) the tax return is still outstanding on 1 May 2012 (ie 3 months beginning with the day after the filing date); (b) HMRC have decided that the penalty is due; and (c) HMRC have given the appellant notice of the date from which the penalty is payable.

19. There can be no dispute about whether condition 4(1)(a) was fulfilled as it is clear from my above findings of fact that the appellant's tax return was outstanding until 16 July 2012.

20. But whether HMRC had fulfilled the other conditions was the issue in the *Donaldson* appeal. There was no appeal from the Court of Appeal's decision on this matter and therefore that decision is binding on this Tribunal.

21. The Court of Appeal held at [18] that HMRC's policy decision to charge all taxpayers more than 3 months' late with their tax returns daily penalties was sufficient for paragraph 4(1)(b). So I find that condition was fulfilled in this case too.

22. The Court of Appeal held at [21] that the warning given to the taxpayer in that case that he would be charged daily penalties if more than three months late, such as the flyer referred to in paragraph §13 above, was sufficient to amount to due notice under paragraph 4(1)(c). So I find that condition was fulfilled in this case too.

23. Lastly, the Court of Appeal accepted that the notice assessing the penalties in the *Donaldson* case was defective as it failed to specify the period over which the daily penalties were charged, but held at §29 that that defect was cured by s 114 of the Taxes Management Act 1970 which provided that mistakes in assessments which were not misleading would not affect the validity of the assessment. The Court of Appeal considered that the period assessed could be easily calculated. In short, the taxpayer in *Donaldson* lost the appeal as the imposition of the daily penalties was held to be valid.

24. I do not have a copy of the notice of assessment of the daily penalties in this case. Even if it suffered from the same defect as in the *Donaldson* appeal, it is clear that I must find that s 114 of the Taxes Management Act 1970 cures that defect. It should have been obvious that the 77 days for which the £10 penalty was charged was the period of 1 May 2012 to 16 July 2012 (a period of exactly 77 days). Nevertheless, as the return was filed on 16 July, daily penalties should only have been imposed for 76 days so to the extent of £10 the appeal must be allowed.

Conclusion

25. I therefore find that the penalties were properly imposed (save to the extent of £10). I move on to consider the appellant's grounds of appeal.

Reasonable excuse

26. Paragraph 23 of Schedule 55 provides that liability to the penalties does not arise if the appellant is able to satisfy the Tribunal that he has a reasonable excuse for his failure to make a return.

27. While Schedule 55 does not define a reasonable excuse it is understood to be something which causes the failure to file and which could have caused a conscientious taxpayer, aware of his obligations to HMRC and intending to fulfil them, to fail to file the return. The appellant put forward five grounds of appeal (see §4) and so I consider whether any of these amount to a reasonable excuse. The burden of proof is on the appellant to prove the reasonable excuse.

Lack of warning?

28. The appellant claims that there was no warning, in particular of the fact that the penalties would apply to those filing nil returns, but gives no further details. I have found that the flyer sent with the notice to file warned about daily penalties and the fact that penalties would be due even if no tax was owing. In practice, I accept that although the notice to file was duly served, the appellant may not have seen it. But that was due to his own failure to notify HMRC of his change of address. So, to the extent he did not receive a warning, that was due to his failure to act as a conscientious taxpayer and keep HMRC informed of his address. It could not be a reasonable excuse.

29. In any event, I reject his case as a matter of law. Ignorance of the law does not amount to a reasonable excuse as to be a reasonable excuse the appellant must have acted as a conscientious taxpayer aware of his obligations to file online: moreover, not only should a conscientious taxpayer be aware of the law, it is not excuse to fail to comply with it simply because one did not expect to be penalised for non-compliance.

Change of address

30. I have already dealt with this above: a conscientious taxpayer would keep HMRC up to date with his address and his failure to do so cannot amount to a reasonable excuse.

Located abroad

31. It was not explained why being abroad made it difficult for the appellant to give instructions to his adviser and file his tax return. It is hinted that it may have been because he left the relevant paperwork in the UK. Whatever the actual reason, I have not been given a reason which amounts to a reasonable excuse. A conscientious taxpayer, mindful of his obligation to return his tax liability, would have made arrangements before he left the UK to ensure that he could give his agents proper instructions and to file his tax return in good time.

Other grounds of appeal?

32. The remaining grounds of appeal relate to the size of the penalties, future intentions and past good compliance record, and difficulty in paying penalties: the size of the penalties cannot be a reasonable excuse for failing to file online as clearly they did not *cause* the late filing. Similarly, having good intentions as to future compliance and/or an exemplary past record cannot be a reasonable excuse for the penalised failings. I will consider them separately below.

Special circumstances

33. Another statutory defence is one of 'special circumstances' (see paragraph 16 of Schedule 55). There are only limited circumstances in which this Tribunal can consider such a defence, and I do not think that they apply here.

34. Nevertheless, even if I could consider the grounds put forward by the appellant as 'special circumstances' it is clear that I must reject them. Firstly, the three grounds which I have considered as potential reasonable excuses, must be rejected as special circumstances and for the same reasons.

35. So far as the sixth ground of appeal is concerned, the alleged lack of ability to pay the penalties, paragraph 16(2)(a) of Schedule 55 makes it clear that this cannot amount to a special circumstance allowing the Tribunal to reduce the penalty.

36. So far as the fifth ground of appeal, future good intentions, is concerned, I do not accept that this is a special circumstance. Taxpayers ought to intend to make their

tax returns on time: there is nothing special about intending to do so. The same is true of having an exemplary compliance record up to the penalised failure to comply. It is not a special circumstance.

37. So far as the fourth ground of appeal is concerned, proportionality of the penalties, it is clear that Parliament intended that penalties would be payable for late tax returns irrespective of the tax liability shown on the return, because the previous provision that restricted the penalty to the unpaid tax was repealed. The fact that the penalty exceeds the unpaid tax is not therefore a 'special circumstance' as it is clearly contemplated by the legislation.

Proportionality

Penalties out of proportion?

38. Nevertheless, I consider the question of proportionality of the penalty in a case where a refund of tax was owing. While there is no statutory defence relating to proportionality, there is a doctrine that penalties can be struck down where they are 'not merely harsh, but plainly unfair' as per the Court of Appeal in the case of *International Transport Roth GmbH* [2002] EWCA civ 158.

39. However, I do not consider penalties for failing to lodge a nil tax return are, by themselves, harsh and certainly not plainly unfair. HMRC need to be told whether or not the taxpayer has a tax liability in order to do their job of collecting the right amount of tax. In particular, HMRC can't challenge the taxpayer's self-assessment unless and until it is filed. A penalty of £100 which encourages timely filing of all returns is therefore not by itself even harsh and certainly not plainly unfair.

40. In so far as the complaint is that the amount of the daily penalty was 'plainly unfair', again I am unable to agree. The daily penalties are merely £10 per day: the appellant was warned about them in advance (or would have been warned if he had kept HMRC up to date with his address).

41. I dismiss this ground of appeal.

Decision

42. For the reasons given above, I find that the daily penalties of £760 and penalty of £100 were properly imposed for failure to file the appellant's 2010/11 until 16 July 2012. I find that the penalties did not lack proportionality, the appellant had no reasonable excuse for his late filing, and there were no special circumstances. The appeal against the two penalties is dismissed save as to the £10 overcharged as explained in §24.

Application for permission to appeal

43. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 5 MAY 2017

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 4—
>
> (1) P is liable to a penalty under this paragraph if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 5—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

4. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

> 23—
>
> (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P 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)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

5. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

16—

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

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

6. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.