[2018] UKFTT 186 (TC)

TC06427

Appeal number: TC/2017/06717

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed - no - no primary evidence adduced by HMRC concerning the issue and notification of a notice to file or the penalty notices - permission given for the appellant to give late notice of his appeal to HMRC - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW HINCHLIFFE **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 23 March 2018 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 20 August 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 19 October 2017.

DECISION

Background

1. This is an appeal against the following penalties, visited on the appellant under Schedule 55 Finance Act 2009 for the late filing of an individual tax return for the tax year 2013/2014.

(1) A late filing penalty of £100 ("**late filing penalty**")

(2) A daily penalty of £470 ("**daily penalty**")

Evidence and findings of fact

2. This is a straightforward appeal which is notable for the startling paucity of primary evidence provided by the respondents (or "**HMRC**").

3. In their Statement of Case HMRC accept that one of the points at issue is "is the penalty valid?"; and they then go on to accept that it is up to them to show that the penalty was valid (the standard of proof being the balance of probabilities).

4. And they provide a comprehensive Statement of Case. But there are no documents exhibited to that Statement of Case. So having accepted that they have the obligation to establish that a valid penalty has been assessed and visited on the appellant, they provide no evidence that this has been done.

5. Indeed the only documents that are before me, and on which I am being asked to decide this appeal are; the Statement of Case dated 19 October 2017; the Notice of Appeal dated 20 August 2017 to which are annexed an unsigned copy of a letter dated 7 June 2017 from HMRC asking the appellant to pay £495.47 and the first page of a copy of a letter dated 24 July 2017 from HMRC to the appellant telling the appellant that his appeal was late and explaining that HMRC can only accept a late appeal if the appellant has reasonable excuse; and a form dated 9 October 2017 authorising Nicolson and Company accountancy as the authorised representative of the appellant.

6. My (considerable) experience of these cases is that HMRC would normally exhibit to the Statement of Case, copies of relevant notices (namely notices to file and penalty notices such as the SA 326) which, although not taxpayer specific, when combined with copies of HMRC's computer records, seek to establish that the relevant notices in the appropriate form which contain the appropriate statutory information, have been served on the appellant on the dates identified in the computer records.

7. But in this case, no such exhibits have been provided by HMRC. I simply have their Statement of Case.

8. So in this decision it is somewhat difficult to make any findings of fact.

9. The relevant legal principles applicable to HMRC's acceptance of their need to establish that the penalty is valid are as follows:

Evidence

(1) A tribunal makes findings of fact based on admissible evidence, and not based upon unsubstantiated assertions made in the Statement of Case.

(2) The burden of proof in a penalty case rests upon the respondents who must prove each and every factual matter said to justify the imposition of the penalty, to the civil standard of proof.

(3) Documents are admissible as evidence. Such documents might contain hearsay evidence and, if so, it is up to the tribunal to decide what weight to place upon them.

(4) Whatever form admissible evidence takes, adequate evidence is a necessity not a luxury.

(5) If HMRC want to charge an appellant daily penalties, they must prove that the requirements of paragraph 4(1)(c) of Schedule 55 Finance Act 2009 are met, not merely invite the Tribunal to speculate that they may be satisfied.

Notices to file

(6) Paragraph 1(1) of Schedule 55 Finance Act 2009 states that:

> "a penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date".

(7) The Table referred to is in paragraph 1(5). It specifies an income tax return as being a return under Section 8(1)(a) of the Taxes Management Act 1970 ("TMA 1970").

(8) Under Section 8(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.....".

(9) So in order to engage Finance Act 2009 Schedule 55 HMRC must have served a notice to file upon the appellant. That notice to file must have been served for the correct purpose and must identify the information which HMRFC require to be given go them in the return which the taxpayer must serve in response to that notice.

10. If HMRC cannot establish that they have served a notice to file on the appellant, then Schedule 55 of the Finance Act 2009 is not engaged.

Notification of penalty

11. In order to visit a daily £10 penalty on a taxpayer under paragraph 4 of Schedule 55 of Finance Act 2009. HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

12. The provisions of paragraph 4 of Schedule 55 of Finance Act 2009 are as follows:

> (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.

13. These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*").

14. The Court of Appeal decided that:

> (1) 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.
>
> (2) 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.
>
> (3) 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 TMA 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.

15. If HMRC cannot establish that they have served proper notice under paragraph 4 (and notice to file is one piece of evidence as is the SA 326 notice), then the daily penalties cannot be visited on the appellant.

Discussion

16. As will be quickly apparent from the foregoing, HMRC have got nowhere near satisfying their evidential burden that firstly a valid notice to file has been served on the appellant pursuant to Section 8 TMA 1970, nor that valid notification has been given to the appellant under paragraph 4 of Schedule 55 Finance Act 2009. The unsubstantiated assertions to that effect in the Statement of Case are not evidence. No evidence has been adduced by HMRC to establish service of notices to file or service of penalty notices.

17. In these circumstances I need not go on to consider reasonable excuse, special circumstances or proportionality. HMRC have failed to prove what they need to and I should thus allow the appeal.

Late appeal

18. However, HMRC in their Statement of Case, again without producing any primary evidence say that the appellant's appeal is some 744 days late, and they object to that late appeal.

19. Although the appellant has been given an opportunity to comment on this, he has failed to do so.

Late appeal principles

20. I have read *Hattons (Southport) Limited v Revenue and Customs Commissioners* [2016] UKFTT 0710 ("*Hattons*"), *Romasave (Property Services) Limited v Revenue and Customs Commissioners* [2016] SD1 ("*Romasave*"), *Denton v TH White Limited (and related appeals)* [2014] EWCA Civ 906 ("*Denton*"), *Data Select Limited v Revenue and Customs Commissioners* [2012] STC 2195 ("*Data Select*"), *BPP Holdings v Revenue and Customs Commissioners* [2016] EWCA Civ 121 ("*BPP*") from which I derive the following principles which are relevant to the issue of whether I should grant permission for this appeal to be made out of time.

21. The exercise of a discretion to allow a late appeal is a matter of material import since it gives the tribunal a jurisdiction it would not otherwise have. (*Romasave*)

22. Time limits imposed by law should generally be respected. (*Romasave*)

23. Permission to appeal out of time should only be granted exceptionally meaning that it should be the exception rather than the rule and not granted routinely. (*Romsave*)

24. A tribunal's orders, rules and practice directions are to be complied with in like manner to a courts (*BPP*)

25. The approach which should be adopted when considering whether a late appeal could be made to a tribunal involves a tribunal asking itself the following questions (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what would be the consequences for the parties of

an extension of time? and (5) what would be the consequences for the parties of a refusal to extend time? (*Data Select*)

26. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice, direction or court order". If the breach is neither serious nor significant the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case so as to enable the court to deal justly with the application. (*Denton*)

27. The approach set out in *Denton* is no different in principle to that set out in *Data Select*. The seriousness and significance of the relevant failure has always been a factor of relevant in the tribunal's determination and is reflected in the reference in *Data Select* to the purpose of the time limit and the length of the delay before relief is sought. (*Hattons*)

28. Even if there is a serious breach and no good reason for it the application for relief from sanctions will not automatically fail. But in those circumstances when considering all the circumstances at stage three of the test set out in *Denton*, particular weight must be given to the matters specifically referred to in the relevant tribunal rules (*Hattons*)

29. The appropriate procedure for a tribunal is to make a decision by reference to the three stage approach laid down in *Denton* taking account as one of the relevant circumstances the consequences for either party of a decision to allow or not to allow an extension of time as provided for in the guidance given in *Data Select*. (*Hattons*)

Discussion

30. I have decided to give permission to the appellant to make his appeal after the relevant time limit as I am entitled to do under Section 49(2)(b) TMA 1970. My reasons for so doing are:

> (1) Whilst HMRC have asserted that the appeal had been made some 744 days late they have adduced no primary evidence that that is indeed the case. I accept that the appellant, who has been given an opportunity by HM Courts and Tribunals Service to comment on the Statement of Case, has not contradicted this assertion and so, for the purposes of this decision I have accepted that the appeal is very late indeed.
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> (2) This is clearly a serious delay. In *Romasave* it was said that in the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.
>
> (3) I also accept that the purpose of the time limit for making an appeal is to ensure that the appeal process is instigated promptly and thus to ensure insofar as is possible that litigation is settled promptly. Finalising litigation is an important aspect of the administration of justice.

(4) But whilst the delay might be serious, its significance is diminished considerably by the fact that this is a *Donaldson* case. By that I mean it is a case which is affected by the principles set out by the Court of Appeal in *Donaldson*. This appeal relates to the failure to submit a tax return for the year 2013/2014. HMRC's Statement of Case suggests that the late filing penalty notice for the late filing penalty was issued on the 18 February 2015 and the notice for the daily penalties was issued on 16 June 2015.

(5) I have no doubt that even if the appellant had appealed those penalty notices in time, and then notified his appeal to the tribunal, that appeal would have been stayed pending the outcome of *Donaldson* and it would only have been once *Donaldson* had been decided that this appeal would have proceeded (as in the case of many thousands of appeals which have been dealt with by the First-tier Tribunal over the last six to twelve months).

(6) So in fact nothing has been lost by the appellant's failure to appeal in time. It would have made very little difference to the timing of the hearing of the appeal. The principle of ensuring finality litigation has not been compromised to any, or any material, extent.

(7) The appellant has given no explanation as to why he has made such a late appeal. A fact that weighs against him.

(8) But when I now come to consider surrounding circumstances, I find that the balance of prejudice weighs heavily in his favour. In view of the decision I have come to in the first part of this decision, namely that HMRC have come nowhere near establishing that either a valid notice to file and a valid penalty notice has been properly visited on the appellant, the appellant will be materially prejudiced if I was to deny him permission to appeal out of time. There is no similar prejudice to HMRC. They have had ample opportunity to prepare their case. They have provided a comprehensive (7 page) Statement of Case. What they have not done, however, is provide adequate evidence to support their position. Whilst they will be prejudiced in that by granting permission to appeal late, I will therefore go on to allow the appeal, they have not been prejudiced in the sense that by allowing a late penalty, they have somehow been hampered in either providing evidence or preparing their case adequately.

31. I have reached the conclusion that in the circumstances of this case it is in the interests of justice and consistent with the overriding objective of the tribunal rules (to enable me to deal with cases fairly and justly) to allow the appellant to give late notification of his appeal to HMRC.

Conclusion

32. For the foregoing reasons, I

(1) give permission to the appellant to give notice of appeal to HMRC out of time as I am permitted to do under section 49(2)(b) TMA; and

(2) allow the appeal.

Appeal rights

33. 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: 5 APRIL 2018