[2018] UKFTT 0235 (TC)

TC06468

Appeal number: TC/2018/00254

PROCEDURE - application to appeal to tribunal out of time against Construction Industry Scheme (CIS) late return penalties – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Knole Homes (Bourne End) Ltd **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Taylor House, London on 22 March 2018

Mr Owen Yarnold, director of the Appellant, for the Appellant

Mrs Paula O'Reilly, HMRC presenting officer, for the Respondents

Both parties participated remotely by video by accessing HMCTS' website

DECISION

Introduction

1. Knole Homes (Bourne End) Ltd ("Knole Homes") is a property development company, which at the relevant time was a contractor for the purposes of the Construction Industry Scheme ("CIS"). CIS is a tax compliance scheme for businesses operating in the construction industry under which contractors deduct tax from payments they make to sub-contractors and are required to file regular returns with HMRC according to certain deadlines. The contractor risks becoming liable to penalties if it does not file in time and the penalty amounts increase the longer the return is left unfiled. HMRC imposed penalties amounting to £1200 for each of two late filed October 2015 and August 2015 CIS returns. There were two sets of penalties for £100, £200 and £300. Knole Homes seeks to appeal against the penalties to the tribunal but, because its appeals were notified to the tribunal outside the 30 day time limit (8 months late), it must first get the Tribunal's permission to appeal out of time.

2. This decision concerns whether the tribunal should allow Knole Homes to make its appeal to the tribunal outside the statutory 30 day time limit. The appellant was represented by Mr Owen Yarnold. He is one of the five directors of the company but explained that the day to day responsibility for the company, including filing the CIS returns fell to him. The company does not have employees and while it instructs accountants their remit was bookkeeping and preparing the accounts.

Video hearing

3. While this kind of application and penalty appeal is routinely dealt with in this tribunal, there was some wider public interest in the proceedings because of the medium through which the parties participated. The hearing was understood to be first substantive hearing in the UK where both parties, having agreed in advance to do so, attended remotely using laptops/computers at their own premises by on-line video access which was facilitated by a specially designed HMCTS website. I conducted the hearing from a court room accessible to the public. I was able to see and hear both parties on my laptop, and each of them could see and hear each other and me. The proceedings were also fed to a large video screen in the court room so members of the public, including journalists who had attended given the interest in the new mode of hearing, could see and hear what was going on. Before the hearing the technical team supporting video on-line participation had carried out test calls to check the audio and video quality of the parties' feeds was satisfactory. Despite those precautions, there were nevertheless several occasions where the audio quality from HMRC's office in Belfast deteriorated to the extent that both Mr Yarnold and I could not hear Mrs O'Reilly sufficiently well. At certain points I had to ask Mrs O'Reilly to repeat what she had said. It was also necessary to pause the hearing twice to investigate and try to resolve the technical issues. As I mentioned at the hearing I was most grateful to the parties for their patience in persevering through these difficulties and in agreeing to

continue beyond the scheduled end time so the hearing could be completed, and to the technical support team for their help through the hearing.

4. In the course of the hearing Mr Yarnold gave evidence, which HMRC had the opportunity to cross-examine, and helped me with my further questions. I found him to be an entirely frank and honest witness. The tribunal and both parties had access to a paper bundle prepared by HMRC containing correspondence between the parties, and excerpts from legislation and case-law which HMRC relied on. There was also some further computer print-out information sent in late by HMRC. I deal with this at [22] below.

5. Before I deal with the appellant's application for permission to appeal, and in order to understand what is at stake in the appeal and Mr Yarnold's and HMRC's arguments, it is helpful to briefly explain the background to the penalties that HMRC imposed.

Legislation on CIS returns and penalties

6. The Construction Industry Scheme provides for certain payments made under construction contracts by a contractor to a subcontractor to be made under deduction on account of income tax. Contractors are required to make a return to HMRC by no later than the 19th day of each month. Returns need to be filed even if no tax was liable to be deducted. If a monthly return is received after the filing date the contractor will be liable to a penalty.

7. Under paragraphs 8 to 10 of Schedule 55 Finance Act 2009, if a CIS return is not filed by the due date there is an initial fixed penalty of £100. If the return is still outstanding two months after the due date, there is a second fixed penalty of £200. After six months there is a further penalty of the greater of £300 or 5% of any liability to make payments that should have been shown on the return. (After 12 months there is a second further penalty of the greater of either £300 or 5% of the liability to make payments to a maximum of £3,000 although it should be noted that no such penalty arose on the facts of this appeal).

8. Under Paragraph 18, where the contractor is liable for a penalty, HMRC must assess and notify the penalty and state the period in respect of which the penalty is assessed in the notice. HMRC must assess the penalty according to certain time limits. Paragraph 19 requires that an assessment of a penalty must be made the later of "the last day of the period of 2 years beginning with the filing date" or, if applicable by 12 months after the end of the appeal period for the assessment or ascertainment of the tax liability. Under Paragraph 23 (the text of which is set out in an annex to this decision) liability to the penalty does not arise where the contractor can satisfy the tribunal on appeal that there is a reasonable excuse for the failure.

9. Paragraph 16 enables HMRC, if they "…think it right because of special circumstances", to reduce the penalty. Under paragraph 22, on an appeal, the tribunal may also reduce the penalty on grounds of "special circumstances" but only if HMRC's decision not to so reduce it was "flawed in the light of the principles

applicable in proceedings for judicial review". (HMRC's decision would be flawed if they failed to consider their discretion to reduce the penalty at all, or if in considering it they took into account something which was irrelevant, or failed to consider something which was relevant, or if they came to a decision they could not reasonably have reached).

Penalties and appeals for August 2015 and October 2015 CIS returns

10. The penalties potentially under appeal, should the tribunal give permission to notify the appeal late, are two sets of £100, £200 and £300 penalties in respect of late filed returns for August 2015 and October 2015. The 5 August 2015 return was due on 19 August 2015 and the 5 October 2015 return was due on 19 October 2015. Both returns were filed after those due dates on 26 May 2016. The correspondence enclosed with Mr Yarnold's notice of appeal indicates that he received a number of penalty notices (totalling £4900 and which included the £1200 worth of penalties potentially under appeal) in respect of a number of returns. He made appeals to HMRC against all of them, and all (apart from the ones for October 2015 and August 2015) were discharged by HMRC who were satisfied there was a reasonable excuse for the failure to file those particular returns on time. HMRC's records indicate the penalty notices were issued on 11 February 2017.

11. Mr Yarnold's main argument against the penalties was that HMRC were incorrect to issue the penalties all in one go with the result the company was not made aware the fines were accruing and so did not know there was a problem that needed sorting out. HMRC explained that it had tried to issue notices for the August 2015 return on 10 September 2015 (£100), 21 October 2015 (£200) and 5 March 2016 (£300), and for the October 2015 return, on 21 October 2015 (£100), 9 January 2016 (£200) and 30 April 2016 (£300). These were all marked "RLS" on HMRC's systems, which Mrs O'Reilly explained stood for "Returned Letter Service", and which indicated the post was returned undelivered to HMRC. Mr Yarnold's evidence was that the Knoles Homes had, and continued to maintain, a post-box at the address HMRC had tried, and that the address even appeared on the appellant's website. He could not understand why the post would have been returned to HMRC. Apart from it being a matter of HMRC practice, Mrs O'Reilly could not explain why they did not try writing to the registered office address of the company. HMRC say the address on their records (which was at Bourne End SL8 5YP) became "RLS" on 18 October 2014 meaning that HMRC did not hold a current address after that date. On 10 February 2017 a new address (at SW4 7BX) was noted on HMRC's CIS system and the penalty notices were issued on 11 February 2017. HMRC say they therefore issued the penalty notices as soon as they had an up to date address.

12. Knole Homes appealed to HMRC in its letter dated 15 March 2017. On 10 April 2017 HMRC refused the appeal on the basis that the reasons provided (that Mr Yarnold was not aware he had a back-log of fines) did not explain why the two returns had been submitted so late. The letter explained that if Knole Homes did not agree it could either ask for a review or send the appeal to the tribunal; the appeal had to be sent to the tribunal by 10 May 2017. In a section entitled "What will happen if you don't take any action" HMRC set out that it would be assumed the appellant

agreed with HMRC, that the appeal would be treated as settled on the basis the appellant did not have a reasonable excuse, and that the appellant would then have to pay the penalty.

13. On 10 January 2018, Mr Yarnold, on behalf of Knole Homes, filed a notice of appeal in relation to the penalties with the tribunal stating in the section provided to give reasons for a late appeal, that he had not realised there was a 30 day time limit to submit an appeal to the tribunal.

14. As well as highlighting that because HMRC sent all the penalties at once, the company had not been made aware of its failure and therefore did not have a chance to address the failure, Mr Yarnold also queried why his explanation of a reasonable excuse had not been accepted for the August and October 2015 returns when the many other earlier returns, where he had explained his ill health circumstances, had been accepted by HMRC as a reasonable excuse.

Permission to appeal out of time – legal test to be applied

15. The decision which Knole Homes seeks to appeal is contained within HMRC's letter of 10 April 2017. In that letter HMRC offered the appellant the chance to have the matter reviewed by HMRC. The latest date for notifying the appeal to the tribunal, given the appellant did not accept HMRC's offer of a review, was 10 May 2017 being 30 days after HMRC's 10 April 2017 letter (under s49H of the Taxes Management Act 1970 ("TMA 1970"). Knole Homes notified its appeal to the tribunal on 10 January 2018. The company can however notify its appeal outside of the 30 day period but only if the tribunal gives it permission (s49H TMA 1970).

16. The approach a tribunal should take in deciding whether or not to give permission was considered by the Upper Tribunal (Morgan J) in *Data Select Limited v Commrs for HMRC* [2012] UKUT 187 (TCC). As well as considering the overriding objective and all the circumstances of the case, as a general rule when a court or tribunal is asked to extend a relevant time limit, it should ask 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 will be the consequences for the parties of the extension of time? and (5) what will be the consequences for the parties of a refusal to extend time."

17. On the face of it, the consequences for an appellant in not being able to pursue its appeal if refused permission will involve a consideration of the likelihood of success or merits of its appeal. But, in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64 the Supreme Court held that the merits of the case should only be a factor to be weighed in the balance where the case is either obviously hopeless (in which case there is no point extending time) or so overwhelmingly strong that there is no realistic prospect of there being a defence to it.

Discussion on permission to notify appeal out of time

18. Taking the *Data Select* tests in turn, the purpose of the time limit in 49H TMA 1970 is to allow matters to be closed and tax due (or in this case penalties, which under the legislation are for appeals and time limits purposes treated in the same way to tax under paragraph 21 of Schedule 55) to be collected. The length of delay was eight months. The next question is whether there was a good explanation for the delay.

19. In his notice of appeal, Mr Yarnold indicated that he did not realise was 30 day limit for appealing to tribunal. At the hearing Mr Yarnold was candid in admitting that it was an oversight on his part. He had no help with his administration and he was right in the middle of undertaking a work project. HMRC suggest it was only the actions of their debt management colleagues which prompted the appellant to lodge his appeal but no evidence of that was brought up at the hearing and I make no finding of fact on the point. On Mr Yarnold's own account, while he had opened the letter he had put it to the "bottom of the pile" because he had more pressing issues to deal with. In his words he "didn't quite appreciate" the appeal had to be filed within 30 days. While I recognise that Mr Yarnold's position, as the person with sole responsibility for running the company's day to day business involved juggling a number of competing business priorities, he was nevertheless aware of the appeal deadline, even if he was not aware of the significance of not complying with it. He effectively chose to prioritise other matters. I cannot regard the lack of awareness of the significance of the deadline and his decision to prioritise other matters as giving Knoles Homes a good explanation for the delay in filing its appeal with the tribunal. I note that although HMRC's letter did not set out, that if an appeal was notified late, then the Tribunal's permission would then be required, it did clearly state the deadline and the consequences in terms of the appeal being treated as settled and final should no appeal be filed. This would at least have put the appellant on notice that there were important consequences to the deadline.

20. As regards the respective prejudice to the parties and the question of whether the strength of Knoles Homes should feature in the analysis of whether permission should be granted, I had the benefit, in the time available, of hearing evidence and argument relevant to the substantive appeal. I set my views on those issues later. But, at this point it is sufficient to note the appeal was neither so obviously hopeless or overwhelmingly strong so as to justify enquiring further into the substance and taking account of the strength or otherwise of Knoles Homes' case for the purposes on whether or not grant permission to appeal to the tribunal out of time. The prejudice to the appellant and to HMRC accordingly does not point strongly in either direction.

21. Taking account of the overriding objective to deal with cases fairly and justly and weighing the relevant factors in the balance, I cannot overlook the fact the length of delay of eight months is significant, and the lack of a good explanation for that delay. These factors, the others being neutral, point, in my judgment against the grant of permission in this case. I therefore refuse permission for the appeal to be notified to the tribunal outside the time limit. (HMRC were keen to emphasise that the tribunal should not grant permission because of the signal it would send regarding compliance with time limits. In my view this sort of consideration is already captured by the

requirement for the tribunal to have regard to the purpose of the time limit. Each case where permission to appeal out of time is sought will obviously turn on its particular facts and I should make it clear that refusal of permission in this case is not motivated by a wish to send a wider message or a concern as to the wider effect if permission were to have been granted. The decision is based on the particular facts of this case).

Views if permission to appeal out of time had been granted

22. The fact the tribunal has refused the application to notify its appeal out of time means Knoles Homes' appeal against the two sets of penalties can go no further. But, given I had the opportunity to hear the parties' arguments and evidence on the substance of the appeal, I hope it may be helpful to Mr Yarnold to know how I would have approached the matter if permission had been granted. There was first the issue of whether HMRC could rely on the computer records from the CIS system to show that the penalty notices had been issued on 11 February 2017. Although HMRC sent these print-outs in late (they should have been included with the papers which were to have been sent to the appellant 14 days before the hearing) Mr Yarnold did not take issue with the fact the notices had been sent then and relied on the issue information as part of his case. It was precisely the fact the notices had been sent all at once in early 2017 that formed the main ground of his appeal. I would therefore have been minded to grant the application to refer to the late served computer record print outs. But even if I had not, I would have accepted that the burden had been met of showing valid penalty notices had been issued on the basis of Mr Yarnold's own evidence that all the penalty notices arrived in one go in early 2017, and from the fact that he filed a number of timely appeals with HMRC on 15 March 2017 which was consistent with him receiving valid penalty notices earlier.

23. The next issue to consider would then be whether the appellant had a reasonable excuse for not filing its returns on time. As I say above, Mr Yarnold's case centred on his concern that because HMRC did not impose the penalties as and when they became liable, but issued them all at once, he was not alerted to the failures to file his returns and was not given a chance to remedy those failures. The difficulty with this line of argument is that for there to be a valid reasonable excuse it must at least explain why the failure occurred. In other words the circumstances underlying the excuse must have caused the failure. The failure referred to in the relevant legislation is the failure to file the return by the due date. On the facts of this case those dates were respectively 19 August 2015 and 19 October 2015. Mr Yarnold accepts the £100 penalties were due but takes issue with the further £200 and £300 penalties. But, any failure to impose those further penalties which, by definition arose after the respective filing dates for the returns, cannot operate to explain a failure to file which had taken place beforehand. Even if it were argued that the absence of penalties for different returns which had been filed late before those for the August 2015, (or indeed in relation to the October 2015 return, the lack of an earlier penalty for the August 2015 return) I would not have accepted that the time at which HMRC imposed the penalties amounted to a reasonable excuse for the failure. Contractors remain under an obligation to file their returns according to the due dates whether or not HMRC have imposed penalties earlier. For this reason the issues over which address HMRC used, or could have used, the circumstances around whether and if so when the address was

updated are not relevant. Even if HMRC could have, or should have, used a different address, so that the penalties were issued earlier than they were, this would not have helped Knole Homes to establish a reasonable excuse.

24. Mr Yarnold highlighted that the penalties were time-related, escalating in amount the longer the return was outstanding. While he was content to pay the £100 fine for each submission it was, he argued, not fair or right for him to pay the rest. Again, Mr Yarnold's point is about the unfairness of the penalties not being imposed in sequence and in essence that he was not alerted to his failure to file. A similar point came up in an Upper Tribunal case (whose decisions this tribunal is bound to follow). In *Revenue Commrs v Hok* [2012] UKUT (TCC) the question arose as to whether, where HMRC did not give timely reminders to the taxpayer of its liability to make returns, the tribunal had the power to set aside the penalties because of unfairness. That decision made it clear the tribunal (as distinct from courts where judicial review proceedings could be brought) could not discharge penalties for reasons of unfairness. The tribunal only had power to deal with the matters the statute said it could deal with. That means the tribunal is restricted to looking at whether the penalty was validly imposed under the legislation, if so whether there was a reasonable excuse, and whether, if HMRC's consideration of special circumstances was "flawed" in the sense described above, the penalty should be reduced for special circumstances.

25. While Mr Yarnold did not focus on his health condition as a ground of appeal, the previous correspondence that Mr Yarnold had sent in to HMRC, in relation to appeals which were not under appeal, revealed he had chronic fatigue syndrome. At the hearing he explained he had suffered from the condition for the last 10 years, that it went through phases and he had yet to get to bottom of the cause. I explored at the hearing what the state of his health was during the relevant period, namely in the run up to the due dates in August 2015 and October 2015 and through to the date the returns were actually filed in May 2016 and the activities he was carrying out in and around that period. He explained that the returns in question related to a conversion of an office into residential flats. He was project managing everything and was also on site. He was basically overwhelmed with work. The stress of the project and his health condition got to the point that he decided to use other contractors to do the work. The conversion project finished around July/August 2015 but in the ensuing period there was still a lot of follow up work / call backs which required him to be on site 6-7 hours a day and time that needed to spent looking for the next project. He could not recall what had prompted him to eventually file the returns in May 2016. HMRC did not challenge his evidence and I accept it. However, my conclusion would have been that, Mr Yarnold's ongoing health condition did not affect him to such a degree that he was unable to file, or having known he had ongoing difficulties, as HMRC pointed out, to put in place arrangements for someone else to file the August 2015 and October 2015 returns on time. I would therefore not have accepted there was a reasonable excuse for the failure to file for health reasons. As I explained at the hearing, although in the notice of appeal, Mr Yarnold queried why HMRC had accepted his appeals to them for the earlier returns on the grounds of ill-health but not the ones before the tribunal, the tribunal would be limited to looking at the matters under appeal on their own facts not their consistency with other HMRC decisions. Mr Yarnold had also mentioned he had not been aware returns needed to be filed if there

was no liability shown on the returns. This factor too would not in my view have amounted to a reasonable excuse. Mr Yarnold had undertaken responsibility to file the returns for the company and could reasonably have been expected to understand or if unsure make enquiries about his filing obligations. In fact HMRC's records indicated there was a deduction liability for the August and October 2015 returns.

26. Finally, as regards the possibility of a reduction of the penalty for special circumstances, even if HMRC's decision could be said to be flawed (e.g. because there was no timely consideration of that point) so as to enable to the tribunal to reach its own view on whether there were special circumstances, I would nevertheless not have been able to find there were special circumstances. While as a matter of fair administration, and putting aside the difficulties with the returned post, I understand it would have been HMRC's normal practice to issue the penalties sequentially rather than concurrently, the legislative framework does not go as far as requiring the penalties are issued in sequence (i.e. it did not require that the initial £100 penalty was issued before the £200 penalty was issued, or the £200 penalty before the £300 penalty). The initial time limit it sets for HMRC to issue the penalty notice is two years from the return filing date whether the penalty is for the initial £100 one, or whether the penalty arises after two months, six months, or twelve months. Given that, and also taking account that there is no obligation to issue a warning before the penalty is issued, I would not have accepted that the facts of this case would have justified a reduction on the grounds of special circumstances.

Conclusion on permission to notify appeal out of time

27. For the reasons above (at [18] to [21]) Knoles Homes' application to notify its appeal to the tribunal out of time is refused.

28. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2018

Annex

Paragraph 23 of Schedule 55 FA 2009:-

"(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 … 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."