[2018] UKFTT 260 (TC)

TC06491

Appeal number: TC/2017/03118

PROCEDURE – Hearing in absence of appellant – Satisfied appellant notified of hearing - Whether in interests of justice to proceed – Reference to incorrect authority and reliance on wrong test in HMRC's skeleton argument – Hearing postponed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID ROBERT ADRIAN JONES — **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Eastgate House, Newport Road, Cardiff CF24 on 23 April 2018

The Appellant did not appear and was not represented

Janic Nathoo of HM Revenue and Customs for the Respondents

© CROWN COPYRIGHT 2018

DECISION

1. The purpose of this decision is to explain my reasons for the directions, which have been issued to the parties separately from, but at the same time as, this decision.

2. Mr David Robert Adrian Jones appeals against a VAT default surcharge imposed by HM Revenue and Customs ("HMRC"), under s 59 of the Value Added Tax Act 1994 ("VATA"), in the sum of £577.16 for the late payment of VAT due in his 03/12 VAT accounting period. He also appeals against a "late filing" penalty, imposed under schedule 55 to the Finance Act 2009 ("Schedule 55"), in respect of his 2011-12 self-assessment tax return in the sum of £1.26.

3. As Mr Jones had not appealed within the statutory time limits (of 30 days from the imposition of the surcharge and penalties), this hearing was listed to enable the Tribunal to consider whether permission should be given for the appeals to be admitted, notwithstanding they were late, to be immediately followed be a hearing of the appeals if admitted. HMRC did not object to the late admission of the appeals and, having considered, as I must, the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 do deal with cases "fairly and justly", I agree that they should be admitted and have directed accordingly.

4. A further issue arises as, although HMRC were represented by Mr Janic Nathoo, a HMRC litigator, Mr Jones did not appear and was not represented. An email dated 23 March 2018 explained that he would not be able attend as he was "not good" after a family bereavement and was also in poor health.

5. While I am satisfied that Mr Jones, who has referred to it in correspondence, had been notified of the date of the hearing (which was originally listed for 21 February 2018 and postponed following an unopposed application by Mr Jones) it can only proceed in his absence under Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 if I am also satisfied that it is in the interests of justice for it to do so.

6. On 14 February 2018 Mr Nathoo provided the Tribunal and I assume Mr Jones, although it is not clear whether this is the case, with HMRC's skeleton argument. This sets out the background to the appeals, the relevant law and HMRC's submissions on its application to the facts of the case. With regard to the Schedule 55 late filing penalties, it explains that because Mr Jones has not filed his self-assessment tax return for 2011-12 he was liable to penalties under Schedule 55 which except for £1.26 which remains outstanding have been paid in full by Mr Jones. I am pleased to note that HMRC do not intend to pursue recovery of the £1.26.

7. The skeleton argument also explains that because VAT of £7,053.77, which was subsequently reduced to £3,847.77 on the correction of an error, shown as being payable on his 03/12 VAT return was not received by 30 April 2012, Mr Jones was liable to a default surcharge at 15% of that amount, £577.16.

8. Although I consider that HMRC's submissions in relation to the late filing penalties should, but do not, refer to the evidence upon which they rely to establish that Mr Jones was required to file a return, that it was filed late and penalties correctly charged, I am most concerned at HMRC's submissions on the default surcharge. Not only do these refer to an incorrect authority but also rely on the wrong test to be applied in a case, such as the present, where late payment of VAT appears to have been caused by an insufficiency of funds.

9. The submissions in the skeleton argument after referring to the relevant statutory provisions, including s 71 of the Value Added Tax Act 1994 ("VATA") which specifically precludes an insufficiency of finds from being a reasonable excuse for the late payment of VAT, continue:

> "53. The Respondents draw the Tribunals attention to the quote within the case of *Salevon* by Nolan LJ as to whether insufficient funds is a reasonable excuse for late payment of VAT:
>
> > "... the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of "reasonable excuse" must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to it to invoke s 19(6)(b). In other words he will be hard put to it to persuade the commissioners or the tribunal that he had a reasonable excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian."
>
> The Respondents also refer to the comments of Scott LJ:
>
> > "Insufficiency of funds cannot per se constitute a reasonable excuse. The reason for the insufficiency may do so but the reason must, in my judgment, amount to something more than that the business of the taxpayer has been carried on unprofitably or that conditions of trade produce cash flow problems."

10. Although Nolan J (as he then was) did make the observations to which the skeleton argument refers in the High Court in *Customs and Excise Commissioners v Salevon Ltd* [1989] STC 907 at 911, the comments of Scott LJ were not made in that case, as it seems from the skeleton argument, but in his dissenting judgment in the

Court of Appeal *Customs and Excise Commissioners v Steptoe* [1992] STC 757 at 765.

11. As this Tribunal has emphasised on many occasions, this is the wrong test for determining whether an appellant had a reasonable excuse for late payment of VAT because of an insufficiency of funds. This was made clear by the decision of the Upper Tribunal (Judge Greg Sinfield and Judge John Clark) released on 30 September 2016 in *ETB (2014) Limited v HMRC* [2016] UKUT 424 (TCC) ("*ETB*") which, through ignorance or error, is not mentioned in the skeleton argument.

12. In *ETB*, under the sub-heading "Test for reasonable excuse where late payment caused by insufficiency of funds" the Upper Tribunal said:

> "11. The leading case on the meaning of reasonable excuse in the context of an insufficiency of funds is the decision of the Court of Appeal in *Customs and Excise v Steptoe* [1992] STC 757 ('*Steptoe'*). In that case, the Court of Appeal held unanimously that although insufficiency of funds can never of itself constitute a reasonable excuse, the cause of that insufficiency – the underlying cause of the taxpayer's default – might do so. There was some disagreement, however, about what constitutes a reasonable excuse.
>
> 12. Lord Donaldson MR first set out the unanimous view of the Court on the construction of what is now section 71(1) VATA94 as follows at 769-770:
>
>> "There is agreement between [Nolan and Scott LJJ] that section 33(2)(a) of the Finance Act 1985 is not to be construed in the way in which the Commissioners of Customs and Excise (the commissioners) would wish to construe it, namely, that an insufficiency of funds can in no circumstances amount to a reasonable excuse for failing to dispatch the tax due, however short the duration of that failure and whatever the reason for the insufficiency of funds. In practice this would mean that the taxpayer had always to demonstrate that he could have paid the tax, but failed to do so for some reason constituting a reasonable excuse. Not only is this an improbable construction, but it really cannot survive in the context of section 33(2)(b) [now section 71(1)(b) VATA94]. There the words 'neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse' show clearly that although reliance on another person is not of itself capable of constituting a reasonable excuse, the commissioners and the tribunal are expected to look behind that reliance and to ask themselves whether in such a case the underlying cause was dilatoriness or inaccuracy on the part of that person or whether, for example, he was run over by a bus. If the same approach is applied to section 33(2)(a) [now section 71(1)(a) VATA94], as clearly it should be, the legislative intention is that

> insufficiency of funds can never of itself constitute a reasonable excuse, but that the cause of that insufficiency, ie the underlying cause of the default, might do so."

13. Lord Donaldson then turned to the question of what constitutes a reasonable excuse in cases where the default occurred because of an insufficiency of funds. Lord Donaldson described the different views of the Court and the prevailing majority view as follows:

> "The difficulty which then arises is that Parliament has not specified what underlying causes of an insufficiency of funds which lead to a default are to be regarded as reasonable or as not being reasonable. Prima facie the legislative intention is the same as in the context of section 33(2)(b). This is that, save in so far as Parliament has given guidance, it is initially for the commissioners to decide whether the underlying cause constitutes a reasonable excuse and for the tribunal to decide this on an appeal. That said, there must be limits to what could be regarded as a reasonable cause. Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Comrs v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds.
>
> Scott LJ on the other hand is of the opinion that the underlying cause of the insufficiency of funds must be an 'unforeseeable or inescapable event'. I have come to the conclusion that this is too narrow in that (a) it gives insufficient weight to the concept of reasonableness and (b) it treats foreseeability as relevant in its own right, whereas I think that 'foreseeability' or as I would say 'reasonable foreseeability' is only relevant in the context of whether the cash flow problem was 'inescapable' or, as I would say, 'reasonably avoidable'. It is more difficult to escape from the unforeseeable than from the foreseeable.
>
> It follows that if I have correctly interpreted the two judgments, I am in agreement with Nolan LJ rather than Scott LJ."

14. As an aside, we note that in July 2016 HMRC issued an updated version of factsheet CC/FS12 on penalties for VAT and excise wrongdoings. In that document, HMRC express the view that a "reasonable excuse is normally an unexpected or unusual event that's either unforeseeable or beyond your control". There are strong echoes there of Scott LJ's dissenting judgment in *Steptoe* and it certainly does not reflect the views of the majority in that case. The wording in

> CC/FS12 is unfortunate as it could lead a taxpayer or HMRC officer or even a tribunal into error when assessing whether particular circumstances constitute a reasonable excuse. The new VAT Default Surcharge Officer's Guide published online on 26 August 2016 avoids this error by not trying to define what is or is not a reasonable excuse. The Guide refers HMRC officers to the Compliance Handbook which contains further guidance on reasonable excuse in the context of late payment of tax due to a shortage of funds. The Handbook states, at CH555800, that a person may have a reasonable excuse for failing to pay on time when the failure resulted from a shortage of funds which:
>
>> "… occurred despite the person exercising reasonable foresight and due diligence, having given proper regard to their tax due date obligations."
>
> It seems to us that the statement in the Compliance Handbook at CH555800 is much better than the one found in factsheet CC/FS12 and more closely reflects the views of Lord Donaldson MR and Nolan LJ in *Steptoe*.
>
> 15. In summary, the question to be asked when considering whether someone has a reasonable excuse for failing to pay an amount of tax on time because of a cash flow problem is whether the insufficiency of funds was reasonably avoidable. A cash flow problem would usually be regarded as reasonably avoidable if the person, having a proper regard for the fact that the tax was due on a particular date, could have avoided the insufficiency of funds by the exercise of reasonable foresight and due diligence. If the cash flow problem was reasonably avoidable then the mere fact that the taxpayer could not afford to pay the VAT at the proper time would not, without more, be a reasonable excuse. On the other hand, if such foresight, diligence and regard would not have avoided the insufficiency of funds then the taxpayer will usually be regarded as having a reasonable excuse for the VAT having been paid late until it would be reasonable to expect the taxpayer to have found alternative funding or taken other action to counteract the insufficiency."

13. In my judgment, as the skeleton argument was the only document setting out HMRC's case in advance of the hearing, because of the failure to refer to *Steptoe* or *EDT* in the skeleton argument and in seeking to rely on the wrong test, Mr Jones, who is not professionally represented, could not have been aware of the case he had to meet. In such circumstances, as it would not be in the interests of justice to have heard the appeal without allowing him the opportunity to consider these issues even if he was present, I cannot see how it could be in the interests of justice to proceed with the hearing in his absence.

14. I therefore postponed the hearing and have issued directions for the further progress of the appeal.

15. Given that this further delay has arisen as of a failure by HMRC (and had Mr Jones been present I would have given serious consideration to awarding him any costs incurred for attending the hearing) I would hope that the parties would be able to resolve the issues between them without further recourse to the Tribunal.

16. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 24 APRIL 2018