[2018] UKFTT 429 (TC)

TC06621

Appeal number: TC/2018/02527

CORPORATION TAX – penalties for the late filing of company tax returns – reliance placed on the Appellant's former accountants – whether or not a reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEN ASSOCIATES (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 17 July 2018

Mr S Ayoade of Samuelsons & Company Limited for the Appellant

Ms L Morgan and Mr D Hopkins, Officers of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against three penalties, each of £1,000, for a failure by the Appellant to file its company tax returns in respect of its accounting periods ending 31 July 2013, 31 July 2015 and 31 July 2016 respectively.

The relevant law

2. Under paragraph 3 of Schedule 18 to the Finance Act 1998 ("Schedule 18"), an officer of the Respondents may by notice require a company to deliver a tax return in respect of each of the company's accounting periods by the relevant filing date. Under paragraph 14 of Schedule 14, the filing date is the last day of the last to end of various periods. In the case of each accounting period which is the subject of this appeal, the day in question was the last day of the period of twelve months from the end of the relevant accounting period. Under paragraph 17 of Schedule 18, a company which fails to deliver a company tax return in respect of an accounting period is liable to a flat rate penalty.

3. Paragraph 17(2) of Schedule 18 provides that:

"The penalty is—

(a) £100, if the return is delivered within three months after the filing date, and

(b) £200, in any other case."

4. Paragraph 17(3) of Schedule 18 then goes on to provide as follows:

"The amounts are increased to £500 and £1000 for a third successive failure, that is, where—

(a) the company is within the charge to corporation tax for three consecutive accounting periods (and at no time between the beginning of the first of those periods and the end of the last is it outside the charge to corporation tax),

(b) a company tax return is required for each of those accounting periods,

(c) the company was liable to a penalty under this paragraph in respect of each of the first two of those periods, and

(d) the company is again liable to a penalty under this paragraph in respect of the third period".

5. Section 118(2) of the Taxes Management Act 1970 (the "TMA 1970") provides as follows:

"For the purposes of this act, the person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

6. Section 117(2) of the Finance Act 1998 provides as follows:

"Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act."

7. As a result, the terms of Section 118 of the TMA 1970 (which apply to failures under that Act) apply also to a failure to file a company tax return pursuant to Schedule 18.

Discussion

8. It is well accepted that, in penalty cases such as this one, it is for the Respondents to establish that the failure which has given rise to the relevant penalties has occurred and that notice of the relevant penalties has been given to the Appellant and then, once they have done so, it is for the taxpayer to establish that it has a reasonable excuse for its failure.

Did the failures occur

9. Turning then to the question of whether the Respondents have discharged the burden of establishing that the failures which have given rise to the penalties have arisen, the Respondents have provided me with evidence, in the form of their computer records relating to the Appellant, that:

(a) As regards the accounting period ending 31 July 2011, notice to file the return was issued on 19 August 2012 and no return had been filed by the filing date of 24 November 2012;

(b) As regards the accounting period ending 31 July 2012, notice to file the return was issued on 17 March 2013 and no return had been filed by the filing date of 31 July 2013;

(c) As regards the accounting period ending 31 July 2013, notice to file the return was issued on 18 August 2013 and no return had been filed by the filing date of 31 July 2014;

(d) As regards the accounting period ending 31 July 2015, notice to file the return was issued on 23 August 2015 and no return had been filed by the filing date of 31 July 2016;

(e) As regards the accounting period ending 31 July 2016, notice to file the return was issued on 21 August 2016 and no return had been filed by the filing date of 31 July 2017; and

(f) Each of the relevant notices to file returns was sent to the Appellant's registered office at Flat 1, 77 Sudbourne Road, Brixton, London SW2 5AF.

10. The Appellant does not challenge any of that evidence.

11. However, there is a significant omission in the records with which I have been provided in that the Respondents have not provided me with their records in respect of

the company's accounting period ending 31 July 2014. That accounting period is not itself a subject of these proceedings but whether or not the Appellant has become liable to a penalty for the late filing of its company tax return in respect of that accounting period is highly relevant to the amount of the penalties which are alleged to be due in respect of two of the accounting periods which are the subject of this appeal, given the terms of paragraph 17(3) of Schedule 18, set out above.

12. The reason for this omission is that, when the Respondents attended the hearing, they provided their records only in respect of the accounting periods which are the subject of this appeal. I made the point at the hearing that, in order for me to be able to conclude that the level of penalty in respect of each accounting period was properly £1,000 and not £200, I needed to be sure that the terms of paragraph 17(3) of Schedule 18 were satisfied in relation to each relevant accounting period. So the Respondents undertook to provide me after the hearing with evidence of the defaults in relation to other accounting periods that would justify that conclusion.

13. Unfortunately, the evidence which the Respondents provided following the hearing did not include any record in respect of the Appellant's accounting period ending 31 July 2014. This was probably because Mr Hopkins erroneously assumed, in providing that evidence, that the appeal related to the accounting periods ending 31 July 2014, 31 July 2015 and 31 July 2016 – his covering letter to the First-tier Tribunal said as much - and therefore that I already had the record in respect of that accounting period.

14. The result is that I do not have a copy of the Respondents' records relating to the Appellant in respect of the accounting period ending 31 July 2014.

15. If the company did not become liable to a penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 31 July 2014, then the penalties in respect of the accounting periods ending 31 July 2015 and 31 July 2016 should have been £200 and not £1,000 because the fact that the Appellant had not become liable to a penalty in respect of the accounting period ending 31 July 2014 would have meant that paragraph 17(3)(c) of Schedule 18 would not have been satisfied in relation to each of the two later accounting periods and therefore, in terms of the application of paragraph 17 of Schedule 18, the clock would have been reset.

16. There is no evidence in the papers that I have seen that the Respondents have actually imposed a penalty of any amount in relation to the Appellant's failure to file a return in respect of the accounting period ending 31 July 2014. However, the question for me to determine is not so much whether any such penalty has in fact been imposed but rather whether the Appellant has become "liable" for any such penalty. In other words, I need to ascertain whether the Appellant did not in fact file its return in respect of that accounting period by 31 July 2015 and, if not, whether the Appellant had a reasonable excuse for that failure.

17. Just pausing there, it is unfortunate that the Respondents both failed to provide, for the hearing, the evidence on which they were necessarily relying in order to establish the quantum of the penalties which are the subject of this appeal and then

failed to provide the requisite evidence in the period of grace for which I allowed at the hearing in order for them to produce that evidence. The consequence is that it is not very clear whether the Appellant did in fact become liable to a late filing penalty in respect of its accounting period ending 31 July 2014.

18. In asking myself that question, I need to determine, first, whether the Appellant did in fact file the relevant return by the filing date and, secondly, if it did not, whether the Appellant had a liability to a penalty in respect of that failure because it did not have a reasonable excuse for that failure.

19. The first of those questions is the easier of the two. I have reached the conclusion that, on the balance of probabilities, the Appellant probably did not file its return in respect of the accounting period ending 31 July 2014 by the due date of 31 July 2015. I say this for four reasons. First, the hearing bundle contained a letter from the Respondents to the Appellant dated 5 February 2018 in which it is recorded that the return in respect of that accounting period was filed on 8 December 2017. Secondly, the hearing bundle contained a letter from Mr Ayoade to the Respondents dated 6 December 2017 in which it is recorded that the relevant return was filed on 8 December 2017. (Given the discrepancy in dates, I assume that the letter from Mr Ayoade must have been sent on a later date than the one recorded on the letter). Thirdly, I would suspect that, if the Appellant defaulted in its filing obligations in respect of each of its other accounting periods from and including the accounting period ending 31 July 2011 to and including the accounting period ending 31 July 2016, then it is highly likely that it would have defaulted in its filing obligation in respect of the accounting period ending 31 July 2014 as well. Finally, the Respondents' computer system, which shows the penalty in each case, is automated, and it is likely that, if the system is showing a penalty for £1,000 in respect of the two accounting periods immediately following the accounting period ending 31 July 2014, then it is likely that the Appellant did not file its return in respect of the accounting period ending 31 July 2014 on or before the filing date for that accounting period.

20. That then leads to the slightly more difficult question of whether a liability attached to the Appellant in respect of that failure.

21. There is some evidence in the documents presented to me at the hearing that, for whatever reason, the Respondents have not sought to collect a late filing penalty from the Appellant in respect of either that accounting period or the accounting period ending 31 July 2012 - see the terms of the correspondence which passed between the parties prior to the hearing in the form of Mr Ayoade's letter of 6 December 2017, the Respondents' reply of 5 February 2018 and Mr Ayoade's further letter of 2 March 2018. For example, the table in Mr Ayoade's letter of 6 December 2017 makes no mention of late filing penalties in respect of those two accounting periods. It also seems a little unlikely that the Appellant would have paid a £1,000 penalty in respect of those accounting periods without making an appeal.

22. However, the mere fact that the Respondents may not have sought to collect a late filing penalty in respect of those two accounting periods does not mean that the Appellant was not "liable" to a penalty in respect of those two accounting periods. In

the light of my conclusion above that, on the balance of probabilities, the Appellant probably did default in its filing obligations in respect of those two accounting periods, it would have been so liable unless it had a reasonable excuse for its failure. As there is no evidence that the Appellant had any excuse for its failure in respect of those accounting periods other than the one that it is advancing for the purposes of these proceedings, and given the conclusion that I set out below in relation to whether or not that amounts to a reasonable excuse, I am inclined to conclude that the Appellant did have a liability to a penalty in respect of both of those accounting periods, even if, for some reason, the Respondents have not sought actually to impose the relevant penalties.

23. So, whilst noting the deficiencies in the case presented by the Respondents, I have concluded that, on the balance of probabilities, the Appellant probably did default in its filing obligations in respect of each accounting period from and including the accounting period ending 31 July 2011 to and including the accounting period ending 31 July 2016 and therefore that, in the absence of a reasonable excuse in respect of any of those accounting periods, the Appellant is liable to pay a penalty of £1,000 in respect of each accounting period which is the subject of this appeal.

Penalty notices

24. The document bundle for the hearing also did not contain either a copy of any of the penalty notices which the Respondents claim to have sent to the Appellant or a pro forma of any of those notices. In addition, the document bundle did not contain any evidence to support the Respondents' claim that reminders in relation to the relevant penalties were sent to the Appellant. However, as the Respondents' computer records relating to the Appellant do set out, in relation to each accounting period, the date on which the relevant penalty notice was issued and the Appellant did not allege that no penalty notices or reminders were received at the Appellant's registered office, I am content to proceed on the basis that the Appellant was notified of the penalties and also received subsequent reminders that the penalties were due.

Reasonable excuse

25. As for whether or not the Appellant has a reasonable excuse for its defaults, Ms Priscilla Adelano, the director of the Appellant, explained that, as she knew nothing about the tax legislation, she had relied entirely on the Appellant's previous accountants to make the required tax filings and generally to manage the tax affairs of the Appellant. This meant that she had approved the contents of the relevant returns and handed them to the accountants, in each case before the filing date in question. It also meant that she had passed on to the Appellant's previous accountants all communications that she had received from the Respondents in relation to the Appellant's tax affairs, including all penalty notifications and reminders. In relation to the latter, she said that, when she had made subsequent enquiries of the accountants as to the position in relation to those communications, she had been told by them that everything was in order. It was only when the previous accountants ceased practising and Mr Ayoade took over the Appellant's affairs that she had become aware that the relevant returns had not been filed and she had then taken steps to remedy the

position. In short, Ms Adelano's position was that placing reliance on the Appellant's professional advisers was a reasonable excuse.

26. It is clear from the decided cases in relation to what constitutes a reasonable excuse, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ("*Clean Car*"), that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

27. The question which I need to determine is whether the actions of Ms Adelano in relying entirely on her accountants to file the Appellant's tax returns on time, without making detailed substantive enquiries of the accountants when communications continued to be sent to the Appellant, satisfied the objective standard mentioned above.

28. In that context, although it is not part of the reasonable excuse language in Section 118 of the TMA 1970, there are other reasonable excuse provisions, such as the one in paragraph 23 of Schedule 55 to the Finance Act 2009, which provide that "where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure". Although that language is not included in Section 118 of the TMA 1970, I believe that the language correctly describes the objective standard that should be applied in a case such as this one. In other words, it is not sufficient simply to rely on a third party to ensure compliance with one's tax obligations. One must also take reasonable steps to check on the activities of the third party and not simply accept the third party's unsubstantiated assurances that all is well without asking for some evidence to that effect.

29. There are various cases where the First-tier Tribunal has held that reliance on an adviser is a reasonable excuse – see *Rowland v Revenue and Customs Commissioners* [2006] STC (SPC) 536, *Browne v Revenue and Customs Commissioners* [2010] UKFTT 496 (TC), *Rich v Revenue and Customs Commissioners* [2011] UKFTT 533 (TC) and *Barrett v Revenue and Customs Commissioners* [2015] UKFTT 329 (TC) - and also various cases where the First-tier Tribunal has held that that is not the case - see *Richfield Fashion Co Ltd v Revenue and Customs Commissioners* [2011] UKFTT 80 (TC), *Ireton v Revenue and Customs Commissioners* [2011] UKFTT 639 TC, *Stewarton Polo Club Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 668 (TC) and *Westbeach Apparel UK Limited v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 561 (TC). It is clear from those decisions that the answer in each case very much depends on its own particular facts.

30. In this case, we are not talking about a complicated piece of tax advice which necessarily required Ms Adelano to rely on a tax specialist but rather on the relatively

simple act of completing and filing a tax return. So the fact that Ms Adelano is a lay person and not a tax expert is not particularly persuasive in leading to the conclusion that her reliance on the Appellant's accountants without taking any steps herself to determine that the tax returns had been filed was reasonable. Ms Adelano knew that the Appellant had to file a return in respect of each accounting period because, as she said herself and as is recorded in the notice of appeal, she had approved the contents of the relevant returns and handed them to the accountants. That being the case, I do not think that simply handing over to the Appellant's accountants all subsequent communications that she received from the Respondents without reading them and then accepting assurances from the accountants that all was fine when the notifications continued to arrive at the Appellant's registered office meets the objective standard required in order to amount to a reasonable excuse. In my view, it was incumbent on Ms Adelano, as the director of the Appellant, to be more pro-active in her approach to the question of whether the Appellant's tax returns had been filed and to satisfy herself that that was the case as opposed to simply accepting the assurances of the accountants.

Conclusion

31. For that reason, I have concluded that the Appellant does not have a reasonable excuse for its failure to file the relevant returns and, accordingly, that this appeal should be dismissed.

32. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2018