[2018] UKFTT 467 (TC)

TC06645

Appeal number: TC/2018/02201

NATIONAL INSURANCE CONTRIBUTIONS – penalty for failing to file form P11D(b) on time – whether Appellant's belief that it had filed the form on time in the circumstances of its particular case amounts to a reasonable excuse – yes –- appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MUNRO SAWMILLS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

The Tribunal determined the appeal on 10 July 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 7 March 2018 (with attachments), the Respondents' statement of case (with enclosures) acknowledged by the Tribunal on 8 May 2018 and the Appellant's reply (with attachments) dated 16 May 2018

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DECISION

Background

1. This is an appeal against a penalty of £400 which has been imposed under Regulation 81(2)(a) of the Social Security Regulations 2001 (SI 2001/1004) (the "Regulations") in respect of the tax year of assessment ending 5 April 2017.

The facts

2. The circumstances which have led to the present appeal, and the respective allegations of the parties, may briefly be described as follows:

(a) the Appellant was obliged to file, on or before 6 July 2017, a form P11D(b) in respect of the tax year of assessment ending 5 April 2017;

(b) the Appellant alleges that, prior to the telephone call referred to in paragraph 2(j) below, it believed that it had submitted the relevant form on the Respondents' website on 28 April 2017;

(c) in any event, the Appellant paid the national insurance contributions that were shown as being payable by the form on 28 April 2017 and the payment in question was recorded as being received by the Respondents on 5 May 2017;

(d) the Respondents allege that the form in question was not received on 28 April 2017, as the Appellant claims to have believed. In support of their position, the Respondents say that successful submission is always followed by a computer-generated message showing that submission has been successful and that the Appellant would not have received such a message in the present case. They contrast this to submissions by the Appellant of the same form in respect of earlier tax years of assessment, where the Appellant would have received that message. The Respondents have attached, at folios 46 to 50 of the attachments to their statement of case, copies of their records in relation to the Appellant which show that such a message was generated in respect of the Appellant's submission of P11D(b) forms in respect of each of the tax years of assessment ending 5 April 2013, 5 April 2014, 5 April 2015 and 5 April 2016;

(e) the Appellant accepts that it did not receive any computer-generated message acknowledging receipt by the Respondents in the present case but alleges that the same was true in respect of the submission of its P11D(b) return in respect of the tax year of assessment ending 5 April 2016 which was treated by the Respondents as having been submitted on time and that therefore it did not consider that the absence of an acknowledgement was of any significance;

(f) the Respondents allege that, because they had not yet received the form by June 2017, they sent to the Appellant in that month a reminder in the form set out at folios 1 and 2 of the attachments to the Respondents'

statement of case, reminding the Appellant that the form had not yet been received and was due to be filed on or before 6 July 2017. The Respondents further allege that they sent to the Appellant, in August 2017, a further communication in the form set out at folios 3 and 4 of the attachments to the Respondents' statement of case informing the Appellant that it had failed to file the form on time and should either do so as soon as possible or inform the Respondents that no such form was required to be filed;

(g) the Appellant denies that the communication that was sent to it in June 2017 was in the form set out at folios 1 and 2 of the attachments to the Respondents' statement of case. In support of its position, it has attached to its reply to the Respondents' statement of case a copy of the communication that it says it actually received from the Respondents in June 2017;

(h) there is a slight, but significant, difference between the pro forma set out at folios 1 and 2 of the attachments to the Respondents' statement of case and the communication attached to the Appellant's reply to the Respondents' statement of case, in that the former expressly states that the Respondents have not yet received the relevant form whereas the latter is simply a reminder to file the relevant form. I will return to this difference later on in this decision;

(i) the Appellant also denies that it received the further communication in the form set out at folios 3 and 4 of the attachments to the Respondents' statement of case either in August 2017 (when the Respondents allege that they sent it) or at any other time;

(j) instead, the Appellant alleges that the first it knew about the failure to submit the form was in November 2017 when one of its representatives telephoned the Respondents to discuss another matter;

(k) on 13 November 2017, the Respondents sent to the Appellant the late filing penalty notice which is the subject of this decision and, on 24 November 2017, the Appellant filed with the Respondents a hard copy of the relevant form;

(l) on 20 November 2017, the Appellant notified the Respondents that it wished to appeal against the penalty;

(m) the Respondents rejected the Appellant's appeal on 21 December 2017 and, following a request by the Appellant for a review of that decision on 3 January 2018, that rejection was upheld in a review conclusion letter of 22 February 2018; and

(n) the Appellant notified this Tribunal of its appeal on 7 March 2018.

The law

3. There is no dispute between the parties as to the relevant law. The Appellant accepts that it is liable to the penalty under Regulation 81(2) of the Regulations unless

it has a reasonable excuse for its failure to file the relevant form on time as outlined in Regulation 81(9) of the Regulations.

4. Regulation 81(9) of the Regulations provides as follows:

"For the purposes of this regulation a person shall be deemed not to have failed to have done anything required to be done within a limited time if he—

(a) did it within such further time as the Board allowed; or

(b) had a reasonable excuse for the failure and if that excuse ceased, did it without unreasonable delay after that excuse ceased."

Findings of fact

5. It is a little unfortunate that this case, which features a number of areas of dispute between the parties as to the relevant facts, has been allocated as a paper case. It might have been helpful for me to have had the benefit of witness evidence, in order to help me reach a conclusion on which party's version of events is to be believed. As it is, I have only the submissions of the parties, and the documentary evidence attached to those submissions, to go on.

6. Subject to that limitation, I have reached the following conclusions in relation to the facts in this case:

(a) I find as a fact that, although it genuinely believed that it had submitted the relevant form on 28 April 2017, the Appellant did not do so. I base this conclusion on the fact that the Appellant did not receive a computer-generated acknowledgment of the alleged submission;

(b) I find as a fact that, notwithstanding the Appellant's allegation that it did not receive a computer-generated acknowledgement of the submission of its form P11D(b) in respect of the tax year of assessment falling immediately prior to the year of assessment ending 5 April 2017, it must have done so, both in respect of that submission and in respect of the submissions of form P11D(b) which it had made in respect of the tax years of assessment ending 5 April 2013, 5 April 2014 and 5 April 2015, because the Respondents have provided evidence to that effect in the form of folios 46 to 50 of the attachments to the Respondents' statement of case;

(c) I find as a fact that the only communication which the Respondents sent to the Appellant in respect of this matter in June 2017 was the letter of 17 June 2017 which was attached to the Appellant's reply to the Respondents' statement of case and that the Respondents did not send to the Appellant a letter in the form attached at folios 1 and 2 of the attachments to their statement of case. I reach this conclusion because the Respondents do not refer to there being two letters in June 2017 on this subject and the Appellant has produced a copy of the letter that it actually received;

(d) although it is not a straightforward matter, I find as a fact that the Appellant did not receive from the Respondents in August 2017 the letter in the form attached at folios 3 and 4 of the attachments to the Respondents' statement of case. In reaching this conclusion, I have taken into account the Respondents' allegation that the terms of Section 7 of the Interpretation Act 1978 mean that the Appellant must be deemed to have received the relevant letter. Section 7 of the Interpretation Act 1978 provides as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

There are a number of reasons why, in the present instance, I think that the above provision is not determinative of the fact that, in August 2017, the Appellant received from the Respondents a letter in the form of the letter attached at folios 3 and 4 of the attachments to the Respondents' statement of case.

The first is that the provision applies only to documents that are authorised or required by an Act to be served by post. It isn't clear to me that a further reminder letter in the form of the letter set out at folios 3 and 4 of the attachments to the Respondents' statement of case is a letter that is authorised or required by an Act to be sent by post. Certainly, the Respondents have not produced any evidence of the Act pursuant to which the further reminder letter was sent or the provision in that Act which authorised or required the further reminder letter to be sent by post.

The second is that the Respondents have not attached to their statement of case a copy of the actual letter that they claim to have sent to the Appellant. Instead, they have merely attached a pro forma of that letter. In the light of what I consider to be an erroneous claim as to the form of the letter which the Respondents' allege to have sent in June 2017 – see paragraph 6(c) above - I am sceptical that, even if the Respondents did send a communication of some sort to the Appellant in August 2017 in relation to this matter, the form of that communication was as set out at folios 3 and 4 of the attachments to the Respondents' statement of case. The communication could quite easily have been a letter saying something altogether different.

Finally, despite the error made by the Appellant in relation to its submission of the form P11D(b) in April 2017, the impression which I have gained of the Appellant from the papers before me is that the representatives of the Appellant are generally diligent, conscientious and efficient in dealing with the Appellant's tax affairs and therefore, if they claim not to have received a letter from the Respondents in August in the form set out at folios 3 and 4 of the attachments to the Respondents' statement of case, or indeed in any other form in relation the subject which at issue in the present case, then I am inclined to believe them;

(e) I find as a fact that the Respondents received payment of the national insurance contributions in question in the amount of £1114.35 on 5 May 2017 and took no action in relation to that payment until the form P11D(b) was received from the Appellant on 24 November 2017, when they allocated the payment against the amount shown in the form on 1 December 2017;

(f) I find as a fact that there was no indication on the Respondents' website of the outstanding penalty at any time – because the Respondents say in their statement of case that outstanding penalties are never disclosed on the website since employers are not allowed to appeal against the penalties online – but that the Appellant had a genuine expectation that any outstanding penalty which was owed by the Appellant in respect of a failure to file the relevant form would have appeared on the Respondents' website; and

(g) it follows from the above findings that I accept that the Appellant did not become aware of its failure to file the form in question with the Respondents until November 2017.

Discussion

7. Turning then to the reasonable excuse provision set out above, the Appellant is relying on the fact that, until the telephone call with the Respondents referred to at paragraph 2(j) above, the Appellant genuinely believed that it had filed the relevant return and had good grounds for believing that.

8. 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.

9. However, as noted in the decision of Judge Hellier in *Garnmoss Limited trading as Parham Builders v The Commissioners of Customs and Excise* [2012] UKFTT 315 (TC) ("*Garnmoss*") the mere fact that a mistake has been made in good faith and is not blameworthy does not, in and of itself, make that mistake a reasonable excuse. The legislation provides for relief in the case of reasonable excuses and not all mistakes satisfy the test outlined in paragraph 8 above.

10. I must confess that I find it very difficult to decide whether the present circumstances amount to a reasonable excuse or merely a mistake which has been made in good faith and isn't blameworthy. On the one hand, the Appellant was clearly at fault in reaching the conclusion that it had submitted the relevant form given that it did not receive the computer-generated acknowledgement to that effect which it had received in respect of its submissions of the same form in respect of the prior tax

years of assessment. So, if the Appellant had then received the two communications which the Respondents allege it to have received in June and August 2017, and had not made any payment of the tax in question, I would have said that its initial mistake, coupled with its failure to take heed of clear warnings from the Respondents, would mean that it did not have a reasonable excuse.

11. However, those are not the facts which I have found to be the case. Instead, I have found that:

(a) the June communication from the Respondents, instead of stating clearly that the Appellant had not yet filed the relevant form – and thereby placing the Appellant on notice that something was amiss – merely stated that there was an obligation to file the form by 6 July 2017;

(b) the Respondents received the relevant tax on 5 May 2017 and then did nothing about the monies they had received until 1 December 2017, after the relevant return had been submitted. The Respondents did not write to the Appellant to ask why the monies had been paid or to find a relevant tax liability of the Appellant against which to allocate the monies; and

(c) until it was notified to the contrary in November 2017, the Appellant genuinely believed that, if it had had a liability to a penalty over the period following 6 July 2017, that liability would have appeared on the Respondents' website.

12. I think that the difference in form between the communication that the Respondents claim to have sent to the Appellant in June 2017 and the communication that the Respondents actually sent to the Appellant in June 2017, although slight, is of some significance in this context. This is because the Appellant could reasonably assume from the language used in the communication that it actually received that the communication was just a pro forma reminder that was being sent to all employers, regardless of whether or not they had already submitted their forms P11D(b). So it was in my view perfectly natural and reasonable that, on the basis of its belief that it had submitted the relevant form, the Appellant did not regard the communication as being of any particular import and simply disregarded it.

13. I also believe that, although the Respondents may not have been in dereliction of their statutory duties in failing to contact the Appellant about the payment which the Respondents received on 5 May 2017, that failure is highly relevant in the context of whether or not the Appellant had a reasonable excuse. If the Respondents had contacted the Appellant at any point between 5 May 2017 and the telephone call in November 2017 which alerted the Appellant to its failure to file the relevant form, to enquire about the reasons for the payment and the tax liability to which it related, the Appellant would have taken steps to remedy the position, and, if that contact had occurred before 6 July 2017, this case would not now be before me.

14. Finally, although I understand the reason why the Respondents do not post the existence of penalties on their website, I do not think it unreasonable of the Appellant

to believe that, if it had a liability for a penalty after 6 July 2017, that liability would have appeared on the Respondents' website.

15. Taking all of the above into account, although the Appellant may consider itself to be a trifle fortunate in this instance, I have decided that it did have a reasonable excuse for its failure to file the form P11D(b) before 6 July 2017 and that the circumstances which constituted that reasonable excuse continued until the telephone call in November 2017 when the Appellant was made aware of that failure. As the form P11D(b) was filed on 24 November 2017, which was shortly after the relevant conversation, I therefore hold that the penalty of £400 should be cancelled.

16. Conclusion

17. For the reasons set out above, I allow the Appellant's appeal.

18. 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: 19 July 2018