[2018] UKFTT 661 (TC)

TC06809

Appeal number: TC/2018/00068

INCOME TAX – penalty for failure to pay APN amount by due date and by dates 5 and 11 months after that – whether to grant permission to appeal - whether amount of APN can be challenged if calculation flawed – whether penalty can be unilaterally varied by HMRC – whether reasonable excuse for non-payment – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN GRAHAM	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Alexandra House, Manchester on 11 September 2018

Mr Steven Glover of G & T Accountancy Services for the Appellant

Ms Michelle Poulter, Advocate Solicitor's Office and Legal Services HMRC, for the Respondents

1. This was an appeal by Mr Kevin Graham ("the appellant") against three penalties assessed on him by the respondent Commissioners ("HMRC") for his failure to pay an amount of an advance payment notice ("APN") by the due date for payment and dates after that.

Facts

2. I find the undisputed facts from the bundle of papers supplied to me.

3. On 27 November 2009 HMRC enquired into the appellant's tax return for the tax year 2008-09. The return had been filed on 29 September 2009. The enquiry related to the appellant's participation in a tax avoidance scheme promoted by NT Partners and the consequent entry in his tax return of an amount of interest of £200,000 claimed to be 'qualifying loan interest payable in the year'. As a result of the claim, the return showed a repayment due to the appellant of £26,472. This amount was the tax deducted under PAYE from his salary as a director of a company Concept Drilling Services Ltd.

4. The next item of correspondence from HMRC in the file is a letter from HMRC Counter Avoidance AP Teams dated 29 April 2015 informing the appellant that he would, in the next 1 to 6 weeks, receive an APN payable within 90 days, or possibly later if representations were made. The accompanying leaflet referred to penalties for not paying the APN amount in time.

5. On 20 May 2015 HMRC wrote again to the appellant enclosing the APN. This required him to pay £53,607.97 by 21 August 2015. A three line computation was given which added -£26,472 the amount shown as repayable on his return, to £27,135.97, the amount now calculated to be payable, to give £53,607.97.

6. In a telephone call of 18 June 2015 the appellant explained that he could not pay the amount within 30 days. He was asked to review his finances and suggest a payment plan, which might involve the sale of assets. The appellant explained that his company was in an IVA (presumably a CVA).

7. On 19 June 2015 Mr Glover, his accountant, spoke to the same individual in HMRC and informed her that the appellant did not receive the dividends shown on the return and that the appellant needed to amend the return. This was said to be impossible due to the penalty enquiry but Mr Glover was to be put in touch with a caseworker to discuss how the appellant could pull away from the scheme.

8. Mr Glover followed this up with a letter on the same day. He explained more about the dividends saying that they were told by NT Advisers and his then accountant that to make the scheme successful they had to show income in excess of £200,000 on the return. He suggested that the return should be restated to remove both the dividends and the loan interest. That would leave £0 payable by both the appellant and HMRC.

9. Further negotiations on this continued into September.

10. On 3 November 2015 HMRC write to the appellant about the representations made in respect of the APN in Mr Glover's letter of 19 June 2015.

11. On 27 April 2016 HMRC sent their response to the representations. They could not make any amendment to the amount in the absence of "documentary evidence". The revised payment date for the APN amount was 2 June 2016.

12. On 3 May 2016 the appellant phoned HMRC to discuss the provision of bank statements. He was told that the APN was now due to be paid and the note of the call said that the appellant seemed quite distressed and said he could not afford to pay it.

13. On 4 July 2016 the appellant again phoned about a penalty notice and was told that he could appeal it.

14. The penalty notice also carried the date of 4 July 2016 and imposed a penalty of 5% of £53,607.97, making £2,680.40.

15. On 12 July the appellant appealed. Apart from denying the penalty should have been applied he said that the APN amount was wrong. He gave further information about the CVA.

16. On 26 August 2016 HMRC responded to the appeal. But they said the appellant had no reasonable excuse, because he had shown nothing that was unexpected or unusual that had caused the inability to pay. On the same day two amended penalty notices were issued, though they seem to be identical.

17. On 16 January 2017 a "5 month" penalty notice was issued in the sum of £1,357, and on 25 May 2017 an "11 month" penalty was issued in the same amount.

18. On 28 July 2017 the appellant and HMRC entered into a contract settlement under which the amount of tax payable was agreed to be £9,410.15. This did not include penalties, but did include £1,327.95 tax arising in 2009-10.

19. On 18 October 2017 HMRC informed the appellant that they would not now be pursuing the APN amount, but advised him that he may still be liable to late penalties.

20. On 8 November 2017 the appellant, through Mr Glover, appealed against the late payment penalties.

21. On 21 November 2017 HMRC rejected the appeal as they said it was out of time.

22. On 29 November 2017 the appellant notified his appeal to the Tribunal and in the notice included a statement that he was in time to appeal.

The issues

23. HMRC said that there was a preliminary issue about the lateness of the appeals. They argued that leave should not be given.

24. But if leave was given, they said the issues in the penalty appeal were:

    (1) Were the penalties correctly issued?

    (2) Is there a reasonable excuse for late payment?

    (3) Was HMRC's decision that there were no special circumstances flawed?

25. Mr Glover did not disagree.

Late appeal permission application

26. In my view the appellant had appealed against the first penalty of £2,680.40 and had done so within 6 days. Permission for this penalty to be considered was not needed as it was not late.

27. As to the other two penalties I asked HMRC if they would, were I to find against them on the first, withdraw or remit the later two. They would not commit to doing that on the grounds that I might find that there was a reasonable excuse at the initial penalty date, but that might have ended before the 5 or 11 month points.

28. In view of this, and in view of the confusion in the appellant's mind apparent from the papers which I considered was contributed to in large part by his having to deal with three parts of HMRC, Counter Avoidance about the scheme, the AP team about the APN, and Debt Management about payment, and given that it was likely that any reasonable excuse for the first failure would have continued, based on what I knew of the case, I considered it was in the interests of justice to given permission for the later appeals to be treated as under appeal and before the Tribunal.

The penalties – law

29. The law relating to these penalties is found in s 226 Finance Act ("FA") 2014 which charges a penalty of 5% of the unpaid APN amount at each of the date the APN is due to be paid, 5 months thereafter and 11 months after that.

30. Section 226(7) FA 2014 provides that paragraphs 9 to 18 Schedule 56 FA 2009 (procedural provisions for penalties for failure to make in time payments of eg income tax) apply with any necessary modifications.

31. Section 220(2)(b) FA 2014 provides that in a case where an enquiry is still open the APN must specify the payment (if any) required to be made under s 223. That is defined, not in s 223 (which merely says P (ie the appellant here) must make a payment of the amount stated in the notice in accordance with s 220(2)(b)), but in s 220(3) as:

> "(3) … an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax ...
>
> (4) "The understated tax" means the additional amount that would be due and payable in respect of tax if—
>
> ...
>
> (b) in the case of a notice given by virtue of section 219(4)(b) (cases where the DOTAS requirements are met), such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;
>
> …
>
> (5) "The denied advantage"—
>
> (b) in the case of a notice given by virtue of section 219(4)(b), means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise, …"

32. An appeal may be made against liability to penalties and the amount of them. If a person has a reasonable excuse for not paying on time they are not liable to the penalty; if they have requested a time to pay agreement before the due date for payment and that agreement is accepted, the penalty is suspended; and if there are special circumstances the penalty may be reduced (including to nil).

The penalties – discussion.

33. The grounds of appeal are:

(1) The APN amount was calculated on the basis of incorrect figures. They should be based on the final settlement figures.

(2) The appellant and his accountant had been working openly with HMRC and agreed a settlement in much lower figures. He should not be penalised for this.

34. HMRC say in their skeleton:

(1) In accordance with *Nijjar v HMRC* [2017] UKFTT 175 (TC) (Judge Richards) ("*Nijjar*") the tribunal cannot go behind Conditions A to C in s 219 FA 2014.

(2) HMRC say that the document is clearly labelled as an APN and satisfied the requirements of s 220 FA 2014.

(3) The APN was valid and was due to be paid on 2 June 2016.

(4) HMRC say the appellant at no point said that payment would cause him hardship.

(5) The appellant says he relied on others (eg NT Advisers) but that is not a reasonable excuse.

(6) The negotiations were immaterial.

35. In relation to (4) it seemed to me from the papers that the appellant had been complaining of his inability to pay and had given HMRC details of the reasons, namely the crash of his company. He gave me further oral evidence on this issue.

36. A penalty assessment is valid if as here the appellant was notified of the assessment (and he has not raised any issue on that) and the notice states the period in respect of which the penalty was assessed. Unlike the position for income tax there is no tax year or other period involved here apart from the tax year 2008-09 which was the year for which the return was made. In my view where there is a one-off event such as the issue of an APN, the "period" is the day for payment, in this case 2 June 2016, and that date is specified.

37. *Nijjar* does indeed say what HMRC contend. In *Vasudeva v HMRC* [2018] UKFTT 370 TC) Judge Mosedale disagreed with the decision in *Nijjar* and held that the validity of an APN, ie whether Conditions A to C had been met, could be in issue in this Tribunal. In my view *Vasudeva* is to be preferred as it establishes a logical and coherent approach which is in conformity with the views of the majority in the Court of Appeal in *R (oao PML Accounting Ltd) v HMRC* [2018] EWCA Civ 2231.

38. But there is nothing in the appeal which seek to put Conditions A to C in dispute. And neither *Nijjar* nor *Vasudeva* dealt explicitly with the question here, whether the amount of the penalty can be appealed against, not on the basis that the provisions of s 226 FA 2014 have been incorrectly applied (which is clearly appealable) but whether the amount of the APN by reference to which the which the penalty has been correctly calculated in terms of s 226 can be challenged on the basis that the officer of Revenue and Customs who determined the APN should have come up with a different (and lower) amount.

39. In my view it would be consistent with Vasudeva to say that the amount can be challenged. But I disagree with the appellant who says that the amount of the APN should be the amount of tax due as a result of settling the HMRC investigation by way of contract settlement long after the issue of the APN. The only challenge can be that HMRC have, at the time they calculated the APN, either not estimated the amount to the best of their information or belief or there is an obvious mistake in the calculation.

40. Factsheet CC/FS24 which accompanied the initial warning letter of 29 April 2015 says of the amount:

> "We'll calculate the amount to the best of our information and belief. If we don't have all the information we need to establish the amount, then the amount shown in the accelerated payment notice may not be the same as the amount when your compliance check is complete …
>
> If the amount in the accelerated payment notice is more than the amount we find to be due once your compliance check is complete … we'll normally repay any amount that you've overpaid. We'll also pay you any interest that is due to you in respect of the amount overpaid."

41. In this case HMRC had the appellant's return with a lengthy white space explanation of the scheme used. They would clearly know that the only entry in the return that related to the scheme (because the white space entry said so) was the claim for £200,000 interest.

42. It follows that to find the APN amount it was simply necessary to remove the deduction for loan interest. That would give, according to the tax calculations in the file, tax of £27,135.97 due. But the APN amount was £53,607.97. The APN "calculation" shows that in addition to the £27,135.97 tax payable on the revised calculation, there was added an amount of £26,472 as if the appellant owed that money. £26,472 is the amount that the return shows as repayable, and is equal to the PAYE deducted in the year. The only feasible explanation for the officer producing this APN calculation is that they did not check to see if the amount repayable has actually been repaid. From all the information in the papers there is not a single trace that it was repaid, and although the notice of enquiry did not say so, I cannot believe that an enquiry opened so soon and on the basis of a lengthy white space entry and a wholly extraordinary claim for relief manufactured by NT Advisers, that it would have been. The settlement agreement is entirely inconsistent with there having been a repayment.

43. The amount was not then calculated to the best of the information and belief of the officer (if there was an actual officer – no name is given).

44. The consequence of this is not that I can strike down or vary the APN: I cannot. But in my view I can amend the amount used to calculate the penalty, to be 5% of £27,135.97 which is £1,356.79.

45. That amount, rounded up to the nearest pound is also the amount which HMRC amended the first penalty assessment to, and in which they charged the second and third penalties. That cannot be coincidence, and it isn't. But what is HMRC's explanation?

46. In their letter of 26 August 2016 HMRC said that Debt Management had "located" a credit of £26,468 and had arranged for this to be "moved" to the Self assessment statement leaving a balance of £27,139.97[1]. They referred to the need to issue an amended penalty notice in the sum of £1,357 (ie 5% of £27,139.97).

47. The credit of £26,468 can only be a reference to the amount of repayment due to the appellant arising from his 2008-09 return. But this not tax which the appellant had overpaid in the past so could be set against the APN amount and treated as a part payment of it. It is on the SA Statement because it had not been repaid. Had it been repaid it would not be on the statement. Thus HMRC are implicitly recognising that the APN amount was not to the best of the officer's information and belief.

48. But by what authority can they amend the penalty assessment? In a case of an income tax amount under the APN rules, Schedule 56 requires that income tax rules on assessments and appeals apply. There is no such thing in income tax as a unilateral amendment or vacation of an assessment by HMRC. That is prohibited by s 30A(4) Taxes Management Act 1970 ("TMA"). It can only be done by the Tribunal under s 50 TMA or by a s 54 TMA agreement (whether actual or deemed following a review, which was incorrectly offered in the letter accompanying the amendment but was not required by the appellant).

49. Thus the appeal is against the amount of £2,680.40, the only valid figure for the penalty assessment. All other things being equal I would vary it to show £1,357 for the reasons given at §§36 to 40. HMRC have only assessed £1,357 in the second and third assessments so no variation is required.

50. But this still subject to the question whether the appellant had a reasonable excuse.

51. I should say here that I reject the appellant's arguments that the APN amount and so the penalty amount should be based on the figure agreed ultimately with HMRC. The officer calculating the amount had to do it to the best of their information and belief at the time. They had no information about the matters that Mr Glover showed to HMRC in the negotiations of the settlement.

52. The excuse that emerged at the hearing, although it had been foreshadowed in conversations that the appellant had had with HMRC, was that he could not afford to pay the APN. Lack of funds is not an excuse unless the reason for it was outside his control. The appellant's company entered into a CVA and as a result he had had very little in the way of earnings for some years before 2016. The only family asset was his house in his wife's name and it had a mortgage of £60,000 to £70,000. He didn't go to a bank to seek to raise the money to pay the APN.

[1] The APN calculation shows £27,125.97. I do not know where the extra £4 came from.

53. I am satisfied that the CVA and crash of his company caused his inability to pay the APN and was outside his control. I therefore consider he had a reasonable excuse for not paying it. I therefore cancel the penalties.

54. Had I needed to consider special circumstances I may well have come to the view that the circumstances described in §7 justified a reduction to a penalty based on the finally agreed 2008-09 amount in the settlement.

Observations

55. When the amendments to the appellant's return were agreed and a contractual settlement agreement come to in lieu of a closure notice, the appellant was told that payment of the APN would not be pursued. But it was not cancelled or remitted so could theoretically be revived. There is it seems nothing in FA 2014 or TMA that enables an unpaid APN to be scrubbed from the books. A paid APN can be used as a payment on account of the "understated tax" – s 223(3) FA 2014, and a payment of the understated tax is treated as a payment of that same amount of the APN. But that is the limit of its use. HMRC say an excessive APN amount paid can be repaid with interest but I cannot see where that is provided for either.

56. But it is not just APNs – a careful scrutiny of s 59A TMA suggests the same fate for a stranded unpaid payment on account.

Decision

57. Under paragraph 15(1) Schedule 56 Finance Act 2009 as applied by s 226(7) FA 2014 I cancel each of the three penalties assessed for failure to pay the APN in time.

58. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

59.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 09 NOVEMBER 2018