TC07001

Appeal number: TC/2018/07477

INCOME TAX – penalties for late delivery of tax return – whether return issued for requisite purpose: no,* Goldsmith *applied - whether reasonable excuse: no – whether special circumstances: yes – HMRC failed to take into account that overrepayment should have been coded out – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL RICH — **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 12 February 2019 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 20 November 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 22 January 2019.

DECISION

1. This is an appeal by Mr Martin Rich ("the appellant") against penalties of £1,300 assessed on him for his failure to deliver an income tax return for the tax year 2015-16 by the deadline.

Facts

2. HMRC's records indicate that on 23 March 2017 they issued the appellant with a notice to file an income tax return for the tax year 2015-16. That notice required the appellant to deliver the return by 23 June 2017 ("the due date").

3. HMRC's records indicate that on 4 July 2017 they issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

4. HMRC's records indicate that on 2 January 2018 they issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

5. HMRC's records indicate that on 2 January 2018 they also issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

6. On 26 January 2018 the appellant (though his father) filed his (paper) tax return for 2015-16 and appealed to HMRC against the penalties of £1,300 using Form SA 370.

7. Because the return had been signed by the appellant's father and the employment pages had not been completed, a scanned copy of the return was sent back on 9 April 2018. In this letter HMRC informed the appellant that they had also sent back the appeal because they couldn't accept it, and they needed a completed return and another appeal form before they could consider any appeal.

8. A complete return signed by the appellant was filed in paper form on 8 May 2018 together with further appeals.

9. On 8 October 2018 HMRC rejected the appeals as they said that the appellant had shown no reasonable excuse for the failure to file on time. They informed him that he could request a review or notify his appeal to the Tribunal.

10. The reason they said he did not have a reasonable excuse was because he had been issued with a 2015-16 tax calculation on 26 September 2016 showing a tax shortfall which he didn't pay voluntarily. He was therefore issued with "a Self-Assessment tax return" (in fact it was a notice to file). The letter went on to say that based on the information the appellant had given them HMRC were unable to accept the appeal "at this time".

11. On 11 October 2018 and again on 24 October 2018 the appellant requested a review.

12. On 14 November 2018 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld

13. On 20 November 2018 the appellant notified his appeals to the Tribunal.

The law in brief

14. The law imposing these penalties is in Schedule 55 Finance Act 2009 and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraph 5 (fixed or tax geared penalty after 6 months). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed.

The appeals

15. HMRC say in the statement of case that they will not be putting a case for daily penalties, but do not say why, especially as they were issued on the same day as the 6 month penalty which they do put a case for. That being so I cancel the daily penalties with no more ado.

16. HMRC say that the appeals against the penalties were received outside the statutory 30 day time limit but they do not object to the delay and so lateness is not an issue. There are two things wrong with this statement. The 6 month penalty appeal is not late as it was made 24 days after the date of issue of the penalty assessment notice. The fact that the officer receiving it took it upon themselves not to "accept" it is neither here no there. But what the officer did not do was to reject any of the appeals as late. The appeal against the initial penalty was undoubtedly late but HMRC did not "reject" it on those grounds. They did not deal with the appeal because they said that the appellant had not sent a completed return. This has nothing to do with the matter of lateness either.

17. The second point is that it is not for HMRC to decide whether lateness is an issue, but the Tribunal. HMRC can take a view but if an appeal is late and is rejected by HMRC then it is up to the appellant to seek permission from the Tribunal to force HMRC to accept the notice of appeal. It is not necessary for me to consider lateness because the appeals were not rejected by HMRC as out of time.

Grounds of appeal & HMRC's response

18. The grounds of appeal as set out in the review request are:

(1) Since leaving school the appellant had always been employed and had never been required to self-assess as he had always paid PAYE.

(2) This was the third year he had received a penalty for failing to self-assess but on the previous 2 occasions (2013-14 and 2014-15) and after checking HMRC's online tool he appealed and the appeals were successful.

(3) Shortly after the cancellation of the penalties he got a letter in September 2017 telling him to file a return. He felt there must be a "crossover" in the system so he waited until he received a second letter, which came in December 2017. He contacted HMRC and told them he was not self-employed and that his two previous appeals had been upheld. He was told then he would get no further letters, but they came. He was then told that he would have to appeal the fines or he would get more.

(4) He had has about 15 conversations with HMRC, and despite having the appeals upheld he was still registered for self-assessment.

(5) For 2015-16 he had a P800 (which he enclosed) showing HMRC owed him £1046.29 which was refunded to him in July 2016.

(6) He had no received no further P800s showing tax unpaid. And in any event HMRC's website shows that where a person pays tax though an employer and pension provider the tax will usually be collected in instalments through a tax code, so this is what should have happened.

(7) Because of this latest self-assessment issue he again contacted HMRC to tell them that he did not self-assess. He then received a letter saying he no longer had to make a return. As his circumstances had not changed he should not have been within the self-assessment system.

19. HMRC say in response that:

(1) A notice to file was issued on 23 March 2017 because the appellant had ignored two previous voluntary payment letters asking him to pay an amount of £241 shown as an underpayment on a P800.

(2) The notice was issued to him at the address on record and was not returned undelivered so is presumed to have been served by virtue of s 7 Interpretation Act 1978.

(3) This gave the appellant 3 months to complete the return and because it was issued outside the normal cycle he was given a extra 3 days "for postage".

(4) The first penalty notice and statement should have made the appellant aware that his return was outstanding and that penalties were accruing. Any customer wishing to comply with their obligation [to do what is not stated] would have acted on receipt of the first penalty notice.

(5) On the basis of these facts no reasonable excuse had been shown for the failure to file the return.

Reasons for my decision

20. I agree with HMRC that there is no reasonable excuse for the failure to file the return, although I disagree about the date by which it should have been filed. Whatever that date, the return was not filed for many months after it. That is only a relevant point however if the appellant was served with a notice to file for a legitimate purpose, that of establishing the amount in which he was chargeable to income tax for the year.

21. In *David Goldsmith v HMRC* [2018] UKFTT 5 (TC) I decided that where the purpose of HMRC in issuing a notice to file an income tax return was the collection of a tax liability that HMRC had ascertained by a reconciliation of a person's known income with the tax deducted from that income under PAYE and had sought unsuccessfully to collect by issuing a "voluntary payment letter", the notice to file was not issued for the purposes of establishing the amount in which the appellant was chargeable and so not within the purposes mentioned in s 8(1) Taxes Management Act 1970.

22. In this case, unlike in *Goldsmith*, HMRC have produced evidence that their purpose in issuing a notice to file was indeed the collection of tax, not the establishing of liability. They exhibit a specimen copy of the Form SA 316 they say was sent to the appellant.

23. The SA 316 in question is headed "You need to complete a tax return" and then "Tax year 6 April 2015 to 5 April 2016".

24. It starts:

> "We're sending you this letter because you owe tax from your Pay As You Earn (PAYE) income ***or*** we've looked at your circumstances and need you to complete a tax return." [My emphasis]

As the SA 316 admits of only one of the two reasons being the case, it must be the first.

25. There is a faint contra-indication in the papers. The statement of case says that when the appellant was transferred to the SA system a notice to file for each of the years 2013-14, 2014-15 and 2015-16 was sent to him on 23 March 2017. It occurred to me that in those years the appellant may have met one of the usual criteria for being required to deliver a tax return. However the evidence in the bundle of what his tax position was in those years is this:

(1) In 2013-14 he had, according to the P800, income from employments of £6,852, tax suffered under PAYE of £18.20 and a "cumulative tax liability" (*sic*) of *minus* £18.33 (I assume the extra 13 pence is repayment interest).

(2) In 2014-15 he had according to the P800 income from employments of £8,568, tax suffered under PAYE of £0 and a "cumulative tax liability" (*sic*) of £0.

26. By no stretch of anyone's imagination does this reveal any of the criteria for "needing" to file a tax return. It cannot therefore be that HMRC needed to establish his tax liability. Nor did they need a return to collect tax underpaid. I can only assume, if, as I do, I discount malice as the reason for issuing two notices to file for years which were reconciled under PAYE without any underpayment, that the reason was gross incompetence. It may well be that someone in HMRC realised that, because the late filing penalties which had been issued for those two years were cancelled by HMRC. The records show "cancellation reason 5", but do not say what that is. Nor does the statement of case have attached any communications from HMRC about the earlier two years. It does refer to these years by stating that on 12 July 2017 the appellant contacted HMRC to query the two earlier years' penalties and to request a paper copy of the 2015-16 return. It then says that "As there were no PAYE underpayments for the [two years] the penalties were cancelled ..". This then is an admission that indeed the notices to file were intended to collect tax not establish liability.

27. For these reasons I cancel the penalties of £100 and £300 which HMRC do argue for.

28. It may be that it turns out that my decision in *Goldsmith* is wrong and that I am therefore wrong to cancel the penalties for that reason. I therefore consider what has been said about a special reduction.

29. The review officer, Daniel Green, considered the issue in his conclusion letter. He came to the conclusion that there were no special circumstances that would allow him to reduce the penalties. He said that he took into account that:

(1) A P800 was issued to the appellant on 27 September 2016 and because he didn't pay voluntarily he was moved into self-assessment.

(2) A further P800 issued to the appellant on 27 September 2016 using amended details from his employer. Because he didn't pay voluntarily he was moved into self-assessment. He contacted HMRC on 8 October to discuss the letter when he was informed again of the underpayment. This indicated that he was aware of the underpayment as at 8 October 2016 and the need to pay or be put into self-assessment.

(3) No underpayment has occurred during the subsequent years and as a result he was removed from the SA system.

30. The appellant was also asked if there were any other circumstances HMRC had not been told about or believed should be taken into account.

31. It seems to me that what Mr Green sets out at §29(1) and (2) amounts to special circumstances. It is surely out of the ordinary for a person to be sent two P800s on the same day, especially when the first one shows an overpayment of over £1,000 which was paid to the appellant (who has provided the proof of this) and the second shows an overrepayment of £241 because of revised figures from an employer received six months after the end of the tax year.

32. In fact Mr Green got his dates wrong. The first P800 was issued on 23 June 2016. The circumstances then are less unusual and do not to my mind amount to a special circumstance. The appellant was not misled because he phoned HMRC and was told the reason for the over-repayment and that he needed to pay back the excess voluntarily or be put into self-assessment.

33. What Mr Green did not consider however was whether it was correct to seek a voluntary payment at all. The appellant points out that HMRC's website says that normally an underpayment is collected through the tax code, and indeed regulation 14 of the Income Tax (Pay As You Earn) Regulations SI 2003/2682 says that such treatment is mandatory unless objected to. Mrs Gardiner who compiled the statement of case did consider this issue and said that because the appellant's estimated employment income for 2016-17 was £11,130 suggesting a tax liability of £24, tax of £241 could not be collected by a coding adjustment.

34. This seems to me to be nonsense. A code of 925L would have collected the tax on that year's income *and* the underpayment. Regulation 23(5) does limit any deduction under PAYE to the overriding limit, but that limit, defined in regulation 2(1), is an amount equal to 50% of the relevant payment. If the appellant was paid monthly the gross pay would be £927.50 and the tax £22.08 or 2.3% of the relevant payment, not over 50%.

35. The result of HMRC's actions then is that a person probably earning the minimum wage (and who was previously on jobseeker's allowance) who gets a demand to pay back some of an underpayment they received a few months earlier is not allowed to pay it by instalments over a year but is required to pay it all at once with interest and is liable to late filing penalties of up to £1,600 if they don't file the unnecessary return on time.

36. HMRC's consideration of the possibility of coding out which would have avoided the penalties being charged was in my view flawed because it came to an unsupportable conclusion about coding and was an error of law. I can therefore remake it and had I needed to I would have reduced the penalties to nil by way of special reduction.

37. I have not needed to consider whether certain actions by HMRC could have amounted to special circumstances, including their refusal twice to accept returns and their refusal to accept an appeal and to demand that another one be made. That type of mistake does however have the deleterious effect that collection of penalties still proceeds when it should be suspended.

Decision

38. All the penalties for 2015-16 are cancelled.

39. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 26 FEBRUARY 2019