[2019] UKFTT 205 (TC)

TC07053

Appeal number: TC/2018/02823

INCOME TAX – penalty under Schedule 55 to Finance Act 2009 for failure to file a tax return on time – whether to admit late appeal – special circumstances

FIRST-TIER TRIBUNAL
TAX CHAMBER

MISS A V GHAFOOR	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ANDREW SCOTT
JULIAN SIMS

Sitting in public at Taylor House, London on 7 January 2019

The Appellant did not appear

Ms Patel (officer of HMRC) for the Respondents

DECISION

Introduction

1. This appeal concerns various penalties assessed under Sch. 55 to the Finance Act 2009 ("FA09") in respect of failures by Miss A V Ghafoor to file her income tax return by the filing date for each of the tax years 2014-15, 2015-16 and 2016-17.

2. An appeal against all the penalty assessments was notified to this tribunal on 9 May 2018. The appeal included a request for appeals to be heard out of time (as well as challenging the issue of the penalties themselves). HMRC's statement of case in response to the appeal recorded the points at issue as being whether the tribunal should allow a late appeal and whether the appellant had a reasonable excuse for failing to file any of the returns by the filing date (paragraphs 8, 9 and 21 to 23 of HMRC's statement of case dated 25 July 2018).

3. As we explain below, we have found it extremely difficult to determine the precise grounds of the appeal put forward by the appellant. However, one thing that does appear clear to us is that, throughout the proceedings, the appellant has focused only on the question of her failure to file the returns on time. She has consistently elided this issue with whether or not her appeal should be admitted late.

4. In fact not all of the appeals against the penalties were made late. As was made plain in HMRC's statement of case, the appeal made against the 12 month late filing penalty notice for the tax year 2015-16 was made in time.

5. A letter dated 5 October 2018 was sent to Miss Ghafoor informing her that the application made by the appellant for permission to make a late appeal was listed for a hearing on Monday 7 January 2019.

6. On Friday 4 January 2019 a letter was received by this tribunal from the appellant. Although it was difficult to understand quite what was being said by the appellant, the letter was taken as a request to postpone the hearing. That question was determined by Judge Brooks who refused the application noting that the appellant could renew the application at the hearing. The appellant's letter of 4 January 2019 did not appear to engage with any issues relating to the lateness of the appeal and – difficult as it was to understand – focused instead on difficulties in obtaining documents that, in the appellant's view, would reveal why the penalties should be waived.

7. The appellant did not attend the hearing of 7 January 2019. As the tribunal had no email address or phone number, it was not possible to contact her to determine why.

8. We considered under rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the FTT rules") whether to proceed with the hearing in

the absence of the appellant. To do so we needed to be satisfied that she had been notified of the hearing (or that reasonable steps had been taken to notify her) and that it was in the interests of justice to proceed with the hearing in her absence. As this involved an exercise of a power under the rules, we were required to give effect to the overriding objective set out in rule 2 of the FTT rules, namely to deal with the case fairly and justly.

9. We were satisfied that the appellant had been notified of the hearing. The letter that was received on Friday 4 January 2019 contained manuscript additions to the very letter that she had been sent by this tribunal notifying her of the hearing, a full three months beforehand.

10. We also considered that it was in the interests of justice to proceed. We were satisfied that the materials provided to us in advance of the hearing would be sufficient to enable us to determine the appeal. In addition, and as we explain more fully below, we considered that the appellant had failed to produce a cogent explanation in relation to the failures to file the returns on time. What the papers provided by the appellant (including her letter of 4 January 2019) did, however, show was a consistency in advancing points that seemed to us, as we note below, improbable. We were satisfied that it was most unlikely that a more lucid explanation would be forthcoming from the appellant in person. In short, we considered that we could fairly and justly deal with the case at the hearing.

11. Having decided to proceed with the hearing, we proposed to Ms Patel (representing HMRC) that we should hear her submissions about the underlying failure to return as well as about the admission of the appeal as a late appeal (relying on the case management powers of the tribunal conferred by rule 5 of the FTT rules). Ms Patel was content to do so. We considered that this was the most appropriate course as, in the circumstances of the case, it seemed to us that many of the points that were relevant to the late appeal were the same points as were relevant to the failure to deliver the returns on time. In addition, there was one appeal in time: not dealing with that appeal would, in our view, have led to a prolonging of the litigation in circumstances where justice required expedition (with particular regard to rule 2(2)(a), (b) and (e) of the FTT rules).

12. As we mention above, the appellant was at all times focused on the assessment of the penalties. A flavour of this appears from this passage contained in her letter of 4 January 2019:

> "HMRC should recognise from the logic that the policing team will supply the arguments valid to justify the reasons why delay occurred for the late penalties in debate.
>
> The reasons being satisfactory as outlined by the applicant and within legal justification to waive the imposed penalties. [...]
>
> We ask that these conditions be recognised and that HMRC employees, working on behalf of the pending law, take the authority of the HONOURABLE MEMBERS OF THE JUDICIAL SYSTEM AND

> TRIBUNAL, and advice and that HMRC rectify the error of premature decision."

13. Accordingly, we were of the view that, as HMRC were prepared to deal with the substantive issues and as the appellant had approached the proceedings throughout with a focus on those issues, we should conduct the hearing in such a way as to enable us to determine the appeals themselves if permission to appeal late was given by us.

14. As a final introductory comment, we should record that the appeal notified by the appellant to the tribunal also referred to a claim for gift aid made in relation to the tax year 2015-16. As the appellant was not liable to pay tax for that year, HMRC calculated her tax liability for that year to recover £15 in respect of the gift she made. This would appear to have been done under section 9(3) of the Taxes Management Act 1970 ("TMA 1970"). Subsection (3A) of that section treats this as a self-assessment made by the taxpayer. It is not clear to us under what statutory authority any appeal against that self-assessment could be made. No submissions by either the appellant or HMRC have dealt with this issue. Beyond recording this state of affairs, this decision does not determine any issue in relation to the appellant's claim for gift aid.

The facts

15. We make the following findings of facts:

(1) Following a notification made to HMRC by the appellant (on form CWF1) she was on 22 September 2014 recorded in HMRC's systems as carrying on a trade. The trade was recorded as starting on 1 September 2014 and was described in HMRC's self-assessment system as a trade of telesales.

(2) As at the date of the hearing, no notification had been given to HMRC to the effect that the trade has ceased.

(3) On 6 April 2015 HMRC issued a notice to the appellant to file a tax return for the year 2014-15.

(4) On 17 February 2016 HMRC issued a penalty assessment of £100 for the late filing of the 2014-15 return.

(5) On 6 April 2016 HMRC issued a notice to the appellant to file a tax return for the year 2015-16.

(6) On 21 June 2016 the appellant was recorded in HMRC's self-assessment system as submitting another CWF1 in respect of another trade. We do not make any finding as to the nature of that trade or when it started.

(7) On 12 August 2016, having earlier sent reminder letters, HMRC issued a penalty assessment of £900 for daily penalties for the late filing of the 2014-15 return (£10 a day for 90 days) and a six-month late filing penalty of £300 for the late filing of the 2014-15 return.

(8) On 7 February 2017 HMRC issued a penalty assessment of £100 for the late filing of the 2015-16 return.

(9) On 21 February 2017 HMRC issued a 12 month late filing penalty assessment of £300 for the late filing of the 2014-15 return.

(10) On 6 April 2017 HMRC issued a notice to the appellant to file a tax return for the year 2016-17.

(11) On 11 August 2017, having earlier sent reminder letters, HMRC issued a penalty assessment of £900 for daily penalties for the late filing of the 2015-16 return (£10 a day for 90 days) and a six-month late filing penalty of £300 for the late filing of the 2015-16 return.

(12) On 22 September 2017 a letter of appeal from the appellant was received by HMRC. The letter was expressed as an appeal against the £100 late payment penalty for the tax year 2015-16 and the six-month penalties for the same year.

(13) On 24 November 2017 HMRC received an extract from a tax return for the tax year 2015-16 from the appellant with a covering letter. She was advised that she needed to complete SA100 as well.

(14) On 3 January 2018 the appellant completed a self-assessment tax return for the tax year 2015-16.

(15) On 30 January 2018 HMRC issued a 12 month late filing penalty assessment of £300 for the late filing of the 2015-16 return.

(16) On 13 February 2018 HMRC issued a penalty assessment of £100 for the late filing of the 2016-17 return.

(17) The appellant wrote to HMRC on 24 February 2018 appealing against the £100 initial penalty for the late filing of the return for the tax year 2015-16 and against the £900 daily penalty and the six-month penalty for that year.

(18) HMRC attempted on 12 April 2018 to telephone the appellant to explain the appeal process but the number given by her was not in use.

(19) The appellant notified an appeal to the tribunal on 4 May 2018. The appeal was in respect of each of the tax years 2014-15, 2015-16 and 2016-17. An appeal had originally been sent to the General Regulatory Chamber. The appeal itself initially appeared to have been made (in part) on the form for appealing to this tribunal for permission to appeal to the Upper Tribunal against a decision of this tribunal. But the correct form (T240) was also sent to the tribunal at the same time.

(20) HMRC made checks of its own systems and of others in order to determine the appellant's employment status in the tax years 2014-15, 2015-16 and 2016-17. Those findings, which we accept as facts, were that the appellant was not employed at any time in any of those tax years by any police force, any of the security services or any other public authority.

(21) Following our finding of fact as to the appellant's employment with any public authority for those tax years, we find as a fact that the appellant was not involved in any investigation of any crime for which any police force or any of the security services was responsible.

(22) As at the date of the hearing the appellant had not delivered a tax return to HMRC in respect of the tax year 2014-15 or the tax year 2016-17.

(23) HMRC was not (directly) notified of the appeals made in respect of the penalties issued for the tax year 2014-15 or the tax year 2016-17. The appellant notified the appeals in respect of those tax years directly to the tribunal.

The appellant's submissions

16. In their statement of case at HMRC said this about the grounds of appeal put forward by the appellant (para. 6):

> "Appellants appeal is against the late filing penalties and whilst the reason for the late appeal is unclear there is mention of police involvement, MI6 involvement and a statement that the appellant is an employee in the police force."

17. In our view that is (and this is to HRMC's credit) a significant understatement of the true position. In order to understand why we are of this view it is helpful to refer to information contained in the appellant's form T240 (notice of appeal) that we refer to above. In the part of the form concerned with representation, the appellant had recorded, among other things, that it was a "unique case" and that the representative's name was "to be assigned as required there will be more than one dept required for your feed-back". In part 17 of the form (grounds for appeal), the following was said (and we quote it in full without correction):

> "(Background) We need to evaluate the economic crime related to cyber computer I.T., tele-communications, law and theological political foreign policy related commercial perspectives apply. We aim to limit all hostile principles aimed to cause economic default aimed at hate crime which has religious perspectives. Cyber-crime security and public I.T. issues have been affected. The security of information and delay of information and data affected to cause disruption – we are isolating all possible affects of crime and terrorism through internet. We have attached the additional notes in support. The Decision by HMRC was wrong due to the extra evidence they need to review although there is no issue rather than late appeal and appealing for more time to waive the penalties charged."

18. It is also of note that the appellant's approach in these proceedings has often been to combine hand-written comments on other letters or documents together with a lengthy, typed document of her own. Again, in commendably measured terms, the HMRC's self-assessment system recorded that they had received a letter from the appellant dated 29 August 2018 noting that the taxpayer "has written all over appeal form making it very difficult to understand exactly what her grounds are."

19. We have found it very difficult to discern from the papers what the grounds of appeal are. A certain latitude must be given to litigants in person in formulating their appeals but, as we note below, this tribunal has jurisdiction only if certain statutory preconditions are met. One of those relates to the period in which the appeal must be made. Another is that the appeal must specify the grounds (as a result of section

31A(5) of TMA 1970, which is applied by para. 21(1) of Sch. 55 to FA09). It cannot be enough to say "I appeal" and leave it at that or refer to material that cannot, on any view, have any conceivable relevance to the appeal. There is no discretion on HMRC or the tribunal to waive the requirement for grounds to be specified.

20. Nonetheless, we think that, in recognition of the very unusual nature of the case, we can adopt a generous view here. We deduce from the various documents submitted by the appellant that her appeal rested on the alleged fact that she was unable to file a tax return on time because she needed certain documents and information to which she had no access as a result of her role in covertly investigating (on behalf of the state) certain economic crime. And, because it is relevant to our decision (see [52] to [64] below), we also consider that, adopting a generous view of the appeal, it is an appeal against both the fact that the penalty is payable (see para. 20(1) of Sch.55 to FA09) and, if a penalty is payable, against its amount (see para. 20(2) of that Schedule).

The late appeals

21. The first issue that we need to consider is whether to admit any of the late appeals.

The law

22. An appeal against a penalty assessed under any paragraph of Sch.55 to FA09 may be made under para. 20 of that Schedule. Para. 21 of that Schedule provides that the appeal is to be treated in the same way as an appeal against an assessment to the tax concerned. In the case of a failure to make a return under section 8(1)(a) of TMA 1970, the result is that, among other provisions, ss. 31, 31A, 49 and 49D of TMA are applied.

23. The effect of applying ss. 31 and 31A of TMA 1970 is that a notice of an appeal must be given to HMRC within 30 days after the specified date (which, in the ordinary case, means when HMRC conclude an enquiry by issuing a "closure notice"). As mentioned above, the notice of appeal must specify the grounds of appeal (s.31A(5) of TMA 1970).

24. The effect of applying ss. 49 and 49D of TMA is that, in a case where HMRC do not agree to notice of an appeal being made to them after the expiry of the 30 day time limit, this tribunal has a discretion to give permission for notice of appeal to be notified after its expiry (see s. 49(2)(b) of TMA 1970). It is also of note that s.49D of TMA 1970 sets out the circumstances in which this tribunal is given jurisdiction to hear a case. Subsection (3) of that section provides that the tribunal is to decide the issue "if the appellant notifies the appeal to the tribunal". But the section itself applies only "if notice of appeal has been given to HMRC". Accordingly, the statutory scheme anticipates that an appeal is first notified to HMRC (which may be given after the 30 day time limit if the tribunal gives permission) and is then notified to the tribunal. In that respect, it is different from the procedure applicable to an appeal against an assessment to VAT where the appeal can be made directly to the tribunal.

25. Section 49(2)(b) of TMA 1970 contains no provision about the test by reference to which the tribunal gives permission for notice of appeal to be made late. However, the recent Upper Tribunal case of *William Martland v HMR*C [2018] UKUT 0178 (TCC) ("*Martland*") has considered what the approach of this tribunal should be to the exercise of this statutory discretion.

26. Although the Upper Tribunal noted that this question did not involve a direct application of the overriding objective of the FTT's rules contained in rule 2 or the CPR (Civil Procedure Rules) equivalent in rule 3.9 (dealing with cases fairly and justly), it went on at [19] to hold that the principle embodied in the overriding objective "is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters."

27. Having analysed the relevant case law, the Upper Tribunal held at [43] and [44] that:

> "43. [...] The clear message emerging from the cases - particularised in *Denton* and similar cases and implicitly endorsed in *BPP* - is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".
>
> 44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

28. The tribunal went on to comment that:

> “45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. [...] The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist”.
>
> 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal [...]
>
> 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay [...]. Nor should the fact that the applicant is self-represented. [...]”

Discussion

29. In respect of the tax years 2014-15 and 2016-17 there is a preliminary issue that we need to determine, namely whether this tribunal has jurisdiction to hear the appeals relating to penalties issued for those tax years. The appellant has not, in terms, notified HMRC of the appeal and, accordingly, a question arises as to whether the conditions in s.49D of TMA 1970 have been met. HMRC have proceeded on the basis that the appeal is properly before the tribunal. By itself, that is not enough: it is not for HMRC (whether by a purported exercise of its collection and management powers under s.1 of TMA 1970 or otherwise) to confer a jurisdiction on the tribunal for which the law has not provided. In the light of our decision on the lateness of the appeal, we are prepared, however, to proceed on the basis that HMRC has been notified of the appeal by the appellant in a way that satisfies the statutory conditions. The notification by the tribunal to HMRC of the appeal and the subsequent course of conduct, taken together, constitute a notification of the appeal to HMRC.

30. We now deal separately with the penalties assessed in respect of each of the relevant tax years applying the three-stage test set out in *Martland*.

31. The delay in appealing against the various penalties issued in respect of the tax year 2014-15 has been considerable. There has been a delay in excess of a year in appealing against the 12-month late filing penalty. The delay in appealing against the daily penalties and 6-month penalties is over 600 days. The delay in appealing against the initial late filing penalty is over two years. On any reckoning, all of the delays are both serious and significant.

32. On the facts as we have found them, we cannot see any reason for the delay in making the appeal. There is nothing submitted by the appellant that has any bearing on why the appeals were made late. The reasons (such as they are) that may justify a

delay in filing the tax return itself did not prevent the appellant from making an appeal against the penalty assessments for the year 2014-15 sooner than she did.

33. It is also our view that the appellant's case is an obviously weak one. In the light of our finding of facts as to her employment with any public authority, we cannot discern any reason for filing her tax return late. No reliance can be put on facts that, in our view, did not occur. But even if the facts did occur, we would consider that the appellant had an uphill task to convince us that the reasons put forward justified not delivering a return on time. That is particularly the case when the appellant did manage to file a return for the tax year 2015-16 despite the fact that the factual background that she asserted existed appeared to be the same for that year as for the other relevant tax years. And we note that, as at the date of the hearing, the appellant had still not delivered her 2014-15 return to HMRC.

34. It is important for cases such as this not to drag on. Having regard to the above matters as well as the importance of the need for the efficient conduct of litigation, the reasonable expectation of HMRC for finality in the proceedings and the importance of meeting the relevant time limit, we consider that the appellant should be refused permission to make a late appeal against all of the penalty assessments issued for the tax year 2014-15.

35. It is convenient next to consider the appeal against the initial late filing penalty of £100 assessed in respect of the tax year 2014-15 and the initial late filing penalty of £100 assessed in respect of the tax year 2016-17.

36. The appeal against the initial late filing penalty of £100 issued by HMRC on 7 February 2017 for the tax year 2014-15 was notified to HMRC on 22 September 2017. To be in time it should have been notified on 6 March 2017. That is a delay of more than six months. We consider that constitutes a serious and significant delay. We also consider that all of the above reasoning applies to the making of that appeal. Accordingly, we consider that the appellant should be refused permission to make a late appeal against the initial penalty assessment of £100 issued by HMRC on 7 February 2017 in respect of the tax year 2014-15.

37. The appeal against the initial late filing penalty of £100 issued by HMRC on 13 February 2018 for the tax year 2016-17 was notified to HMRC on 9 May 2018 (although as we note above it was in fact made directly to the tribunal). It should have been notified to HMRC on 12 March 2018. Although that is much shorter than the other delays considered so far, it is still a delay of some 58 days. We consider that also constitutes a serious and significant delay. We also consider that all of the above reasoning applies to the making of that appeal. Accordingly, we consider that the appellant should be refused permission to make a late appeal against the initial penalty assessment of £100 issued by HMRC on 7 February 2017 in respect of the tax year 2016-17.

38. That leaves the appeals against the £900 daily penalties and the six-month late filing penalty assessed on 11 August 2017 in respect of the tax year 2015-16. As we note above, the appeal against the 12 month late filing penalty assessed in respect of

the tax year 2015-16 was notified on time. The appeals against the £900 daily penalties and the 6 month late filing should have been notified to HMRC on 10 September 2017. They were notified 12 days later on 22 September 2017. As mentioned above, the appellant has (unlike for the tax years 2014-15 and 2016-17) filed her return for the tax year 2015-16.

39. We consider that, in respect of the appeals in relation to these two penalty assessments, the balancing exercise in determining whether to grant permission to appeal late tilts in favour of giving permission. We think that is so because the appeals are late by modest margins and also because an appeal in relation to a penalty for the same tax year has been notified in time. It would be convenient to resolve all issues now: that would promote the efficient conduct of litigation at a proportionate cost. The principal countervailing issue is the obvious weakness of the appellant's case. However, our decision is to give permission for the appeals to be made late. In all the circumstances we consider that to be the most just and fair approach.

Appeals relating to the tax year 2015-16

40. We now consider whether the appeals against the £900 daily penalties and the six-month late filing penalty in respect of the tax year 2015-16 (for which we have given permission to appeal late) and the appeal against the £300 12 month late filing penalty in respect of that tax year (made in time) should stand.

The law

41. A person may be required by a notice given by an officer of HMRC under section 8(1)(a) of TMA 1970 to make and deliver a self-assessment tax return. Sch. 55 to FA09 makes provision in relation to cases where a taxpayer has failed to make the return by the relevant statutory deadline (referred to in the Schedule as the "filing date").

42. Under para. 3 of Sch.55 to FA09 a penalty of £100 is payable if a person fails to make or deliver a return on or before the filing date.

43. If, after 3 months, the return has still not been delivered, the person is liable under para. 4 of that Schedule to a penalty of £10 for each day it remains outstanding for a period of up to 90 days from a date specified in a notice given by HMRC as the date from which the penalty is payable. The date specified cannot be earlier than the end of the 3 month period during which the failure has continued (para. 4(3)(a) of Sch.55). In other words, a maximum penalty of £900 is payable under para. 4 if the return is not filed within 6 months of the filing date (assuming that the date specified in the notice is the end of the first three months of non-compliance).

44. If the return is not filed within 6 months of the filing date, a penalty of £300 is payable under para.5 of Sch.55 to FA09 or, if greater, a penalty equal to 5% of the tax liability which would have been shown in the return is payable instead. And if the return is not filed within 12 months of the filing date, a penalty of £300 is payable

under para.6 of Sch.55 to FA09 or, if greater, a penalty equal to 5% of the tax liability which would have been shown in the return is payable instead.

45. Para. 23 of Sch.55 to FA09 provides that a liability to a penalty does not arise if the taxpayer satisfies the tribunal that there is a reasonable excuse for the failure to make the return.

46. The meaning of “reasonable excuse” for the purposes of Sch.55 to FA09 has been subject to a detailed review by the Upper Tribunal in *Christine Perrin v HMRC Commissioners* [2018] UKUT 0156. At [81] the Upper Tribunal set out what they considered to be a useful approach to determining the relevant issues:

> “81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.”

Discussion

47. As mentioned above, we have taken the appellant’s appeal to rest on the alleged fact that she was unable to file her tax return on time because she needed certain documents and information to which she had no access as a result of her role in covertly investigating (on behalf of the state) certain economic crime.

48. However, we have also found as a fact that she was not employed at any relevant time by any police force, any of the intelligence services or any other public authority and that, accordingly, she has played no role in any investigation of crime undertaken on behalf of the state.

49. As such, and applying the *Perrin* test set out above, the appellant falls at the second hurdle (see [81]). We do not find as proven any fact that may, at least in theory, be capable of constituting a reasonable excuse.

50. Accordingly, in the absence of any reasonable excuse for the failure to file a return on time, the penalties were all properly assessed by HMRC as payable.

51. In the light of our observations below about the capacity of the appellant to conduct the litigation, we think that it is worth our noting that it *may* be that the appellant could have raised this issue as a reasonable excuse for failing to deliver her 2015-16 tax return on time. But she did not do that, and we had no evidence before us that related to the state of affairs as it existed at the relevant filing date for that year (31 January 2017 for an electronic return). The evidence that we mention below was relevant to the period after September 2017. It would be speculation on our part to suppose that similar evidence was available in relation to earlier times.

Altering the amount of the penalty where special circumstances

52. The finding that the appellant did not have a reasonable excuse for the late filing of the return is not, however, the end of matters. We need to consider whether there are any special circumstances that justify reducing the amount of any of the penalties.

53. Para. 16 of Sch.55 to FA09 provides as follows:

> "16. (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (a) lability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty."

54. Para. 22 of Sch.55 to FA09 deals with the powers of this tribunal on an appeal and provides as follows:

> "22. (1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.

> (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
>
> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
>
> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
>
> (4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.
>
> (5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1))."

55. It will be noted that the powers of the tribunal differ depending on what the appeal is against. In particular, this tribunal may substitute its own decision if the appeal is an appeal as to the amount, and, in so doing, may rely on para.16 (special circumstances). However, the tribunal's power to rely on para. 16 to a different extent from HMRC is permissible only if the tribunal thinks that the decision is flawed when considered in the light of principles applicable to judicial review. Those principles include (among others) a principle that, in making a decision, the decision-maker must have regard to matters that are material or relevant to the decision being made.

56. Although it is provided that certain cases do not constitute "special circumstances", no further assistance is provided by the legislation in determining what counts as "special". HMRC guidance refers to the decision in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 and the decision in *Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152 for help. There is dicta in those cases to the effect that special circumstances means something "exceptional, abnormal or unusual" or "something out of the ordinary run of events".

57. It seems to us that neither of those cases provides any meaningful assistance. They concerned different legislation with a different purpose from that of Sch.55 to FA09. The expression "special circumstances" is not a term of art used by Parliament to engage case law relevant to its meaning in other (different) statutory contexts. Rather, it is an ordinary English expression that, in accordance with basic rules of statutory interpretation, must be given its ordinary meaning. We should consider the language that Parliament has chosen to use, not other synonymous expressions.

58. There was a detailed discussion by this tribunal in the case of *Bluu Solutions Ltd v HMRC* [2015] UKFTT 0095 (TC) about the time at which HMRC need to consider whether there are "special circumstances". So far as relevant to the issues in this case, our view is that it is clear that HMRC must consider the existence of "special circumstances" when the penalty is being appealed.

59. In addition to a case where “special circumstances” exist, this tribunal has also considered in other cases whether, applying the relevant Convention rights given effect in domestic law by the Human Rights Act 1998, a penalty is disproportionate.

60. We are not convinced that, in a statutory code that provides for the reduction of a penalty in special circumstances, there is room for separate, free-standing reliance on the proportionality of the amount of a penalty payable in any given circumstances. Rather, it seems to us that the proper consideration of whether circumstances are special includes a consideration of the proportionality or otherwise of the amount of the penalty. We tend to think that a case where, having regard to everything of relevance to the case of the taxpayer, the circumstances are not “special” enough to constitute a reduction in the amount of the penalty but, nonetheless, the amount of the penalty *is* “disproportionate” (a determination likely to be made by reference to the very same set of circumstances) is an empty set.

Discussion

61. Our view is that, in relation to the appeals against the penalties assessed in respect of the tax year 2015-16 (other than the initial £100 late filing penalty the appeal against which is out of time), the circumstances are special. Since September 2017 there has been correspondence with the appellant in relation to those penalties which raises serious questions as to the capacity of the appellant to deal with the underlying issues. It is true that she is sufficiently capable to file a tax return for the tax year 2015-16 and to have got a case to the doors of the tribunal. But the correspondence with the appellant is one unlikely claim after another. HMRC diligently took the claims at face value and considered, as do we, that there was no evidence to support them. As such, we think that HMRC should then have considered whether the mental capacity of the appellant had a bearing on the continuation of the proceedings. We asked Ms Patel (representing HMRC) whether any such consideration had been given: she answered in the negative. She pointed out that she could not assess the appellant’s mental capacity without meeting her. We disagree. We think that there is ample evidence at least to raise a concern as to the capacity of the appellant.

62. Accordingly, we consider that the failure by HMRC to have regard to a consideration relevant to the exercise of the power under para. 16 of Sch.55 to FA09 renders their decision flawed within the meaning of that paragraph.

63. We, therefore, consider whether we should substitute a different decision for HMRC’s. Our decision is that we should. In our view, the circumstances of the case are out of the ordinary. The most improbable of claims have been made by the appellant and disproved. She has nonetheless managed to deliver a tax return for the tax year albeit late. She has, correctly, been assessed to a £100 penalty for the late filing of the return and that penalty stands. The return itself recorded a mere £100 of taxable income from the trade. As things stand, that has not been challenged by HMRC. No returns have been made by the appellant for either the tax year 2014-15 or the tax year 2016-17. Significant penalties have been assessed for the late filing of

those returns. Despite these proceedings, there is no sign that any return for either of those tax years is forthcoming.

64. In these circumstances, it appears to us that imposing further £1,500 penalties on the appellant would be disproportionate. There is no meaningful sense in which to impose penalties of that magnitude will encourage the appellant to comply with her obligations as a taxpayer or send a message to other taxpayers. The appellant has at least delivered a return for the tax year 2015-16. Our decision is that, in the light of the above special circumstances, the £900 daily penalty for the late filing of the 2015-16 return should be reduced to nil, the £300 six-month late filing penalty for that year should be reduced to nil and the £300 12 month late filing penalty for that year should also be reduced to nil.

Decision

65. For the above reasons:

(1) we refuse permission for the appeals against the penalties issued in respect of the tax year 2014-15 to be notified late;

(2) we refuse permission for the appeal against the £100 initial filing penalty in respect of the tax year 2015-16 to be notified late but we give permission for the appeals against the other penalties in respect of that year to be notified late;

(3) we decide that the £900 daily penalty for the late filing of the 2015-16 return, the £300 six-month late filing penalty for that year and the £300 12 month late filing penalty for that year should each be reduced to nil; and

(4) we refuse permission for the appeal against the £100 initial filing penalty in respect of the tax year 2016-17 to be notified late.

66. 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.

JUDGE ANDREW SCOTT

RELEASE DATE: 25 MARCH 2019