[2019] UKFTT 0238 (TC)

TC07084

INCOME TAX - late filing penalties - individual return - whether reasonable excuse -no-appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03339

BETWEEN

JAMES DAVID WILLS **Appellant**

-and-

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

TRIBUNAL: JUDGE JENNIFER TRIGGER

The Tribunal determined the appeal on 10 October 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 21 May 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 July 2018 and the Appellant's Reply dated 30 August 2018.

DECISION

INTRODUCTION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55 ") for a failure to submit an annual return for the tax year 2014-15 on time.

2. The penalties that have been charged are:

(a) a £100.00 late filing penalty under paragraph 3 of Schedule 55 imposed on 17 February 2016

(b) late filing daily penalties totalling £900.00 under paragraph 4 of Schedule 55 imposed on 12 August 2016

(c) a £300.00 six month late filing penalty under paragraph 5 of Schedule 55 imposed on 12 August 2016

(d) the penalties totalled £1,300.00

3. Summary judgment was given by the Tribunal. The Decision was released on 30 October 2018 and the appellant made a request for a full statement of reasons on 04 December 2018, which was after the expiry of the 28 day period in which to request full written reasons from the Tribunal for the its Decision dated 10 October 2018.

4. The appellant thereafter applied out of time for Full Facts and Findings from the Tribunal. The grounds of his application are set out in an email dated 04 December 2018 to Her Majesty's Courts & Tribunals Service, ("HMCTS"). The appellant states that he and his wife "had to move house more than once in the past several weeks and our last 2 addresses have had no internet connection whatsoever". As a result of these facts the appellant had received the Decision outside the 28 day time limit and therefore was prevented from making a request within the 28 day period. Furthermore, the appellant had sent a letter to HMCTS a couple of weeks prior to the letter referred above to advise a change of address in Melbourne. This notice of change of address had not been received by HMCTS.

5. On 20 December 2018 HMCTS notified HMRC of the appellant's application. HMRC confirmed that it had no objection if the time limit were extended.

6. Accordingly, the Tribunal confirms that the time limit be extended in which to apply for full written reasons.

Appellant's case

7. The appellant had finished work in 2015 as he and his wife had decided to return to Australia to live for family reasons. The appellant left his final tax return for the tax year 2014-15 with his accountant, Mr Jack Goldsby-West, to calculate any tax owed and to file the return. The appellant believed that he had no tax to pay. He instructed his accountant to file the return and he left the UK in the belief that his accountant would submit his tax return. The appellant accepts that he was solely responsible for filing any tax return. However, he contends that as the filing of his return was to be done by a professional, he was entitled to assume that he would receive a professional service but he did not do so.

8. Whilst in Australia the appellant received emails from HMRC to the effect that his tax return had not been filed and that penalties had accrued and were continuing to do so. The appellant contacted his accountant by email and was assured by him that the tax return "was in hand". On 09/09/16 the appellant sent his accountant an email in which he states "I have just had yet another letter from the wonderful tax department… telling me that my tax return for the year ended April 5th 2015 is now so overdue that I have incurred £600.00 penalties" Following this the appellant received an email, dated 09/12/16, from his accountant confirming that the return had been filed and that the accountant had appealed the penalties imposed. The appellant asserts that he was unaware that the 2014-15 return had been submitted a year late. He was aware only that the return had been filed and that there was no tax to pay. He maintains that there was nothing else that he could have done "on the other side of the world". The appellant suggests also that as his accountant was receiving treatment for cancer this may account for the late filing of the return. However, the appellant was unaware of the nature, extent or duration of the illness and treatment nor whether the accountant was absent from work as a result.

HMRC's case

9. HMRC submitted that the following were the issues to be decided:

(1) Whether the individual tax return was correctly issued;

(2) Whether the return was received late;

(3) Whether the penalties were correctly charged;

(4) Whether the appellant had a reasonable excuse in effect throughout the default period.

10. The appellant had submitted self-assessment returns for the tax years 2012-13 and 2013-14 and was therefore deemed to be familiar with his responsibility to file the 2014-15 return on time once notice to file had been issued to him. A notice to file a return for 2014-15 was issued to the appellant on 06 April 2015 and he had not denied receiving it.

11. When the notice to file was issued to the appellant, on 06 April 2015, that notice contained a warning that a penalty would be charged if the return was not filed by the due date and that more penalties would be incurred if the return was three months, six months or 12 months late. That notice clearly outlined the due filing dates for both paper return and electronic return.

12. The filing dates for the appellant's individual tax return were 31 October 2015 for a paper return and 31 January 2016 for an electronic return. The appellant's paper return was received on 31 January 2017.

13. The penalties were issued in accordance with Schedule 55 paragraphs 3, 4 and 5.

14. HMRC's decision was that the appellant had failed to demonstrate that he had a reasonable excuse in relation to his failure to make a return on time under paragraph 23 Schedule 55.

15. HMRC contend that the daily penalties notice issued on 12 August 2016 complied with the decision of the Court of Appeal in the case of *Donaldson v Commissioners of HMRC* in that although the notice did not specify the three month period for which the penalty had been charged, or at least the date when the penalties started, that omission did not affect the validity of the notice of assessment as the period could be worked out without difficulty. Accordingly the appellant was not misled or confused by the omission.

16. Although the appellant was at all times material living in Australia whilst his accountant was in the UK the evidence shows that throughout the greater part of 2016 HMRC were notifying the appellant both that the return had not been received and that penalties had accrued and were accruing. This evidence is not disputed by the appellant.

17. On or around 31 May 2016 the appellant was advised by HMRC to file an electronic return as soon as possible in order to avoid further penalties. Again on or around 05 July 2016 HMRC issued a 60 day daily penalties reminder to the appellant. following correspondence from the appellant, on 23 August 2016 HMRC advised that no return for the tax year 2014-15had been received by HMRC and at the same time HMRC issued a blank paper return for the year 2014-15.

18. Although the appellant had been told by his accountant that the return had been submitted and an appeal against the penalties lodged, as late 12 September 2016, that was not the case.

19. HMRC accept that the appellant may have been failed by his accountant. However HMRC assert that the appellant did not provide any evidence of any direct instructions he may have made to his accountant to file the 2014-15 return on time.

20. HMRC contend that the appellant was sent sufficient notification that his 2014-15 return was late, and that he was given clear warnings of the penalties charged should the return remain outstanding. HMRC maintain that by 17 February 2016 the appellant would have been aware that his accountant had failed to file the return.

21. There were no special circumstances that may have reduced the penalties imposed.

The law

22. Section 8 Taxes Management Act 1970;

Schedule 55 Finance Act 2009 paragraphs 3, 4, 5, 16, 20, 22 and 23.

Schedule 55 paragraph 23 provides so far as is relevant:

"(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if the person satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)-

(a)…

(b) where the person relies on another person to do anything, that is not a reasonable excuse unless he/she took reasonable care to avoid the failure, and

(c) where the person had a reasonable excuse for the failure but the excuse has ceased, he/she is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

Perrin v HMRC [2018] UKUT 156 (TCC) in which the Upper Tribunal held "that to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account.

…Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – eg. "…I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self -assessment returns but was told by a friend one year in a pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

The approach to be taken by the FTT in a reasonable excuse case is described in *Perrin* as follows:

"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, decide 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."

Findings of fact

23. The Tribunal found that:

(1) the individual self-assessment return for tax year 2014-15was correctly issued by HMRC;

(2) the return was received late by HMRC;

(3) the penalties were correctly charged in accordance with the law; and

(4) there was no reasonable excuse.

Reason for the decision

24. It was not disputed that the self-assessment was filed late and the Tribunal consider that HMRC established that the penalties were properly issued and properly calculated. The question is therefore whether the appellant has a reasonable excuse for the failure to file the return on time.

25. There is no statutory definition of "reasonable excuse". However, in accordance with the case of *Perrin* the Tribunal must establish what facts the appellant asserts. It is the appellant's case that he put the filing of his 2014-15 return in the hands of his accountant because he was going to live in Australia; he believed that his accountant was competent and trustworthy and that he would file the return by the due date; and further he was unaware that the return had not been filed until all the penalties had accrued.

26. The appellant failed to prove all of those facts. That he left the UK and went to Australia is not in dispute, although the date that the appellant left the UK is not disclosed. The appellant has provided no evidence of the instructions that he gave to his accountant. By letter dated 02 August 2016 the appellant provided the name and address of his accountant to HMRC. On 23/08/2016 HMRC records show:

"Ltr to T/P adv no rtn recd, also adv no agent on record. Adv T/P of gov. uk address for 64-8. 14-15 duplicate rtn issd to T/P."

This record undermines the appellant's evidence that there was an authorised agent instructed to file the 2014-15 return.

27. Furthermore, the appellant had successfully filed self-assessment tax returns for the tax years 2012-13 and 2013-14 and would, therefore be aware of the filing deadlines and the penalty regime and aware, also, of his responsibility as a taxpayer to act responsibly to make sure he met the deadlines.

28. HMRC records show that by 04/02/2016 HMRC had a record of the appellant's address in Australia. Accordingly, when the return had not been filed by the filing date HMRC issued a notice of penalty assessment to the appellant, on or around 17 February 2016, in the sum of £100.00. The appellant confirms that he received the notice and paid the penalty. It follows that the appellant was aware that from at least 17 February 2016 that the 2014-15 return was outstanding and not, as he asserts, at the time when all the penalties had accrued.

29. On 08/05/2016; 09/05/2016; 02/06/2016; 31/07/2016; 09/09/2016; 10/09/2016; 12/09/2016 and 13/09 2016, there is evidence that the appellant had sought clarification from his accountant to the effect that his self-assessment tax return for 2014-15 tax year had been filed. No explanation is given for the long delay, by the appellant, before he contacts his accountant, following receipt of the notice of penalty assessment sent by HMRC 17 February 2016. Furthermore, the appellant was given a paper return to file by HMRC but he did not file that document in a timely manner and again provides no explanation for his delay.

30. In addition, the appellant made no attempt to obtain the relevant information from his accountant, or obtain alternative assistance in filing the return.

31. A reasonably prudent taxpayer in all the circumstances asserted by the appellant would have been alerted to the continuing failure to file the return and would have taken steps to ensure the return was filed as soon as possible after 17 February 2016. Any reasonable excuse that the appellant may have had for the failure to submit the return before 17 February 2016 cannot in the circumstances and viewed objectively extend the reasonable excuse to a period of 12 months from at least 17 February 2016.

32. Accordingly, the appellant fails to prove that he had a reasonable excuse for the failure throughout the period of default, the appellant further fails to show that he put right the default without unreasonable delay.

33. In relation to the question of a special reduction the Tribunal can only substitute its decision if it concludes that the decision made by HMRC was flawed when considered in the light of the principles applicable in proceedings for judicial review. The Tribunal having carefully considered all the evidence cannot so conclude.

34. A taxpayer, like the appellant, becomes liable to penalties of this kind for no other reason than his continuing failure to file a return; no proof of qualitative misconduct is required. The

£100.00 penalty, the daily penalties and the six month penalty were simply a means of securing the production of timely returns.

35. Accordingly, the appeal is dismissed and the appellant remains liable for the penalties totalling £1,300.00.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

JENNIFER ANN TRIGGER
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2019