TC07124

[2019] UKFTT 285 (TC)

INCOME TAX – penalties for late filing of returns and late payments – application to notify late appeals to the Respondents – no reason given for the delay in notifying the appeals – permission refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02230; TC/2018/02231

BETWEEN

KAULWANT KAUR BASSI (THE "FIRST APPELLANT")

KULDIP SINGH BASSI (THE "SECOND APPELLANT") **Appellants**

-and-

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

TRIBUNAL: JUDGE TONY BEARE
MRS JANET WILKINS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 24 April 2019

Mr D R Vijh, of Vijh & Co, for the Appellant

Ms L Long, Officer of Her Majesty's Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to an application by the Appellants for permission to notify the Respondents of late appeals against a number of penalties for the late filing of self-assessment tax returns and partnership returns and the late payment of taxes in respect of the tax year of assessment (each, a "tax year") ending 5 April 2006 through to the tax year ending 5 April 2012 (both inclusive).

2. The penalties in question were set out in tables appearing at pages 171 to 173 of the documents bundle produced for the hearing (the "DB"), in the case of the First Appellant, and pages 168 to 170 of the DB, in the case of the Second Appellant. Together, those penalties amount to £5,505.16, in the case of the First Appellant and £8,341.20, in the case of the Second Appellant.

BACKGROUND

3. The background to this decision is that the tax affairs of the Appellants in respect of the tax years ending 5 April 2006 and 5 April 2007 were the subject of an investigation which commenced in 2006 and ended in 2013. During the period of the investigation, the Appellants did not file any tax returns. They were accordingly sent numerous penalty notices for the late submission of the returns and for the late payment of taxes.

4. The earliest document in the DB which relates to the matters which are the subject of the appeals is a letter dated 7 March 2017 from Mr Vijh (the Appellants' accountant) to the Respondents at page 72 of the DB. In that letter, Mr Vijh referred to the "large amount of debt related to the late submissions of self-assessment return" and asked the Respondents to advise him on "the ways to deal with the late submission of returns".

5. Mr Neil Frazer, an Officer of the Respondents, replied to that letter on 28 March 2017 by saying that "I am not entirely clear what help you are requesting. Can you please clarify this point and provide further detail regarding the investigation and why this prevented submission of your client's tax returns, at least with estimated amounts?" (See pages 73 and 74 of the DB.)

6. A file note prepared by Mr Frazer of a telephone call which was made to him by Mr Vijh of 3 May 2017 (at page 75 of the DB) records that Mr Vijh asked Mr Frazer to "take into consideration evidence from other similar circumstances" in considering the late filing penalties.

7. What Mr Vijh meant by this was made clear by his letter of 13 June 2017 to Mr Frazer (at pages 76 and 77 of the DB) in which Mr Vijh referred to the case of one of his other clients who had been relieved of its obligation to pay penalties in similar circumstances.

8. On 11 July 2017, Mr Frazer wrote to Mr Vijh (see pages 78 and 79 of the DB). In that letter, Mr Frazer agreed to reduce to nil the late payment penalties for the tax year ending 5 April 2011 in the case of the Second Appellant. In his letter, Mr Frazer noted that Mr Vijh had "been in touch elsewhere in HMRC regarding reallocation of payments against charges on your client's statement. To prevent complicating matters I shall now not get involved in this aspect further".

9. Despite the fact that the letter of 11 July 2017 from Mr Frazer made it plain that Mr Frazer was agreeing to reduce to nil only the penalties relating to late payment for the tax year ending 5 April 2011 in the case of the Second Appellant, Mr Vijh wrote to the Respondents on 19 July 2017 to express his gratitude for the Respondents' agreement to reduce "the various penalties charged for the late submission of returns to 'nil'...Please amend the penalties to 'nil' for all the years under consideration and let us know in due course" (see page 80 of the DB).

10. On 15 August 2017, Mr Frazer wrote once again to Mr Vijh (see pages 81 and 82 of the DB). In that letter, Mr Frazer made it clear that the penalties for the tax years other than the one mentioned in his earlier letter were "outside the years of my enquiry" and that he had "no involvement with those". He informed Mr Vijh that, if Mr Vijh wished to make an appeal against those penalties, he needed to write to another address within the Respondents.

11. On 20 September 2017, Mr Vijh wrote to that address (see page 83 of the DB). In that letter, he referred to his dealings with Mr Frazer and asked the Respondents to cancel "all the penalties and interest charged on the late penalties for years 2005/2006 - 2008/2009". That letter of 20 September 2017 is the only document in the DB which can be construed as a notification to the Respondents of appeals against any of the penalties to which this decision relates. The letter did not include any request on the part of the Appellants to be allowed to be make late appeals to the Respondents.

12. On 25 October 2017, the Respondents wrote to the Appellants to inform them that the appeals made on their behalf in Mr Vijh's letter of 20 September 2017 were late and that the Respondents would not accept the appeals unless the Appellants had a reasonable excuse for not appealing within the time limit in each case (see pages 84 to 87 of the DB).

13. On 30 October 2017, Mr Vijh wrote to the Respondents to say that he and his clients did not agree with the Respondents' decision (see page 88 of the DB). His basis for saying that was that he did not see any difference between, on the one hand, the returns for the tax year ending 5 April 2006 through to the tax year ending 5 April 2009 and, on the other hand, the return for the tax year ending 5 April 2011, where the penalties had been cancelled. Mr Vijh said that he would to appeal to the First-tier Tribunal if the Respondents did not reconsider their position.

14. On 30 April 2018, Mr Vijh notified the First-tier Tribunal of the appeals to which this decision relates. The notices of appeal to the First-tier Tribunal did not specify directly which penalties were intended to be the subject of the appeals to which the notices referred. Mention was made in the grounds of appeal to the tax years ending 5 April 2007, 5 April 2008, 5 April 2009 and 5 April 2010, suggesting that the notices of appeal to the First-tier Tribunal related to those tax years. However:

(1) those tax years were slightly different from the tax years mentioned in Mr Vijh's letter of 20 September 2017 – that letter, which (as mentioned in paragraph 11 above) is the only document in the DB that can be construed as a notification of appeals to the Respondents, mentions the tax year ending 5 April 2006 and does not mention the tax year ending 5 April 2010; and

(2) the figures set out in the notices suggested that Mr Vijh intended the notices of appeal to the First-tier Tribunal to cover all of the outstanding penalties described in paragraphs 1 and 2 above, and not just the penalties referred to in his letter to the Respondents of 20 September 2017 or the penalties relating to the tax years set out in the grounds of appeal.

At the hearing, Mr Vijh confirmed that the appeals were intended to cover all of the outstanding penalties described in paragraphs 1 and 2 above. Each notice of appeal to the First-tier Tribunal also contained an application for the relevant Appellant to be allowed to make a late notification of her or his appeal to the Respondents.

15. The above summarises all of the documents which appear in the DB in relation to the subject matter of this decision and which are not dated after the date on which the notices of appeal were given to the First-tier Tribunal.

16. However, in addition to those documents, Mr Vijh informed the First-tier Tribunal by way of a letter of 9 October 2018 and by way of oral submission at the hearing that he had originally notified the appeals to an Officer of the Respondents (a Mrs D Hughes) in 2012 and that Mrs Hughes had told him at that time that the appeals were already out of time. Mr Vijh said that, as a result of a change of premises which had occurred following that exchange, he no longer had the correspondence with Mrs Hughes. He also admitted that he had no explanation for his failure to take any further action in relation to the appeals between being rebuffed by Mrs Hughes in 2012 and the letter of 7 March 2017 mentioned in paragraph 4 above.

17. It is apparent from the above description that:

(1) the tax affairs of the Appellants in relation to the various tax years are in some disarray; and

(2) it is not at all clear from the correspondence that we have seen that the Appellants have, even now, notified the Respondents in writing of their wish to appeal against all of the penalties described in paragraphs 1 and 2 above. We have been provided with none of the correspondence which Mr Vijh claims to have exchanged with Mrs Hughes in 2012 and the letter containing the appeal on 20 September 2017 which we have seen refers only to certain of the tax years and not others.

DISCUSSION

Time limit for giving notice of appeal

18. The position here is governed by Section 49 of the Taxes Management Act 1970 (the "TMA 1970"). Under that section, if no notice of appeal is given to the Respondents within the requisite time limit, notice of appeal may still be given after that period as long as the Respondents agree or the First-tier Tribunal gives permission.

19. In this case, Section 31A of the TMA 1970 – which applies to the appeals because they fall to be treated in the same way as an appeal against an assessment to the tax to which the penalty relates (see Section 100B of the TMA 1970, paragraph 21 of Schedule 55 to the Finance Act 2009 (the "FA 2009") and paragraph 14 of Schedule 56 to the FA 2009) - required notice of the appeals against the relevant penalties to have been given to the Respondents in writing within thirty days of the date on which the relevant penalties were issued.

How late are the notices of appeal in this case?

20. Based on the documentation in the DB which we have seen and which is summarised in paragraph 1 to 14 above, and overlooking for the moment the fact that the letter from Mr Vijh of 20 September 2017 suggests that the Appellant has notified the Respondents of appeals only in relation to the penalties issued in respect of the tax years ending 5 April 2006 to 5 April 2009, the appeals in this case were notified to the Respondents between three and a half years and ten and a half years after the latest date by which they were required to be notified.

21. As noted in paragraph 16 above, the Appellants have alleged that they notified the Respondents of their wish to appeal against the penalties at some point in 2012. However, they have produced no evidence to that effect. Moreover:

(1) some of the penalties did not arise until after 2012 and therefore could not possibly have been notified to the Respondents in 2012; and

(2) based on the terms of Mr Vijh's letter of 20 September 2017, it seems highly unlikely that any appeals which were notified in 2012 related to penalties issued in respect of tax years ending after 5 April 2009.

22. It follows that, even if we were to accept that, on the balance of probabilities, some notification by the Appellants of their wish to appeal was actually made in 2012 (which we are disinclined to do, given the absence of any evidence to that effect):

(1) that notification would still have been late, and late by a period of between several months and more than six years; and

(2) that notification could not have related to the penalties which were issued after 2012, and therefore the only notice of appeal in relation to those penalties would be the one made on 20 September 2017 (assuming that we were to overlook the fact that Mr Vijh's letter of 20 September 2017 did not refer to any penalty in respect of a tax year after the tax year ending 5 April 2009), which means that the notification to the Respondents of the Appellants' wish to appeal against those penalties would be between three and a half years' and four and a half years' late.

23. We would add that, even if we were to accept that some notification by the Appellants of their wish to appeal against certain of the penalties was actually made in 2012, Mr Vijh admitted at the hearing that:

(1) the Respondents informed him at that time that the appeals were already too late; and

(2) he had no explanation for the delay by the Appellants in taking further action between 2012 and 2017.

Making a late appeal

24. Sections 49(3) to 49(6) of the TMA 1970 require the Respondents to agree to late notice of an appeal as long as:

(1) the appellant in question makes a request in writing to the Respondents to allow the late notice of appeal (Section 49(4) of the TMA 1970); and

(2) the Respondents are satisfied that the appellant in question has a reasonable excuse for not giving the notice before the relevant time limit and gave the notice without unreasonable delay after the reasonable excuse ceased (Section 49(5) of the TMA 1970).

25. As noted in paragraphs 11 and 14 above, the Appellants have made a written request to be allowed to make a late appeal to the Respondents. However, that written request is set out in the notices of appeal to the First-tier Tribunal, and not in any communication between the Appellants and the Respondents. Thus, it seems to us that the Appellants have failed to satisfy the condition in Section 49(4) of the TMA 1970.

26. Be that as it may, we consider that, in any event, the Appellants have not provided a reasonable excuse for delays of the length described above. In our view, neither:

(1) the fact that the Respondents may have been prepared to waive penalties arising in similar circumstances in relation to one of Mr Vijh's other clients; nor

(2) the fact that, in 2017, the Respondents were prepared to waive the penalties for late payment imposed on the Second Appellant in relation to the tax year ending 5 April 2011,

amounts to a reasonable excuse for the failure by the Appellants to notify the Respondents of their wish to appeal against the outstanding penalties within the thirty-day time limit in each case. The Appellants have accordingly failed to satisfy the condition in Section 49(5) of the TMA 1970.

27. It follows that, regardless of whether or not the Appellants can be said to have satisfied the condition set out in paragraph 24(1) above, the Appellants have not satisfied the condition

set out in paragraph 24(2) above and therefore the Respondents are not required to agree to the late notice by Section 49(3) of the TMA 1970.

28. In addition, the extent of the delay in this case is such that the Respondents have not agreed to the late notice.

Should we give permission for late notice be given?

29. For the same reason, the Respondents have urged us not to give permission for late notice of the appeals to be given.

30. In considering whether to exercise our discretion to give permission for late notice of the appeals to be given to the Respondents, we have taken into account the principles which have been established by various decisions of the higher courts– those decisions' being the decisions of the Upper Tribunal in *Data Select Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] STC 2195 ("*Data Select*"), *BPP Holdings Limited and others v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 121 ("*BPP*") and *Romasave (Property Services) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 254 (TCC) ("*Romasave*").

31. For completeness, we should note that, whereas the subject-matter of this decision is whether or not we should give permission to the Appellant to give late notice of the appeals to the Respondents, the decisions mentioned in paragraph 30 above are primarily relevant to the question of when permission should be given in a slightly different circumstance – namely, permission to be given for late notice of appeals to the First-Tier Tribunal. In other words, those cases relate to the operation of the rules governing the conduct of litigation before the First-tier Tribunal. Both *Data Select* and *Romasave* related to whether or not to extend the time period for notifying a VAT appeal to the First-tier Tribunal and *BPP* related to the non-compliance by the Respondents with procedural rules. Thus, those cases would be directly in point if this decision concerned the exercise of our power to allow late notice of the appeals to be given to the First-tier Tribunal. They are not directly in point in relation to the question which is before us in the present case – namely, whether to give permission for late notice of the appeals to be given to the Respondents.

32. Having said that, we believe that the principles which are set out in those cases can reasonably be applied by parity of reasoning in a similar manner in determining whether or not to give permission for late notice of the appeals to be given to the Respondents.

33. In addition to adhering to the principles set out in those cases in exercising our discretion as to whether or not to give such permission, we are also required to exercise that discretion in accordance with Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). That rule requires us to deal with cases fairly and justly in accordance with the overriding objective of the Tribunal Rules.

34. The decisions mentioned in paragraph 30 above establish that, in considering whether we should give permission for late notice of the appeals to be given to the Respondents, we need to take into account:

(1) the purpose of the time limit;

(2) the length of the delay;

(3) the explanation for the delay;

(4) the consequences for the parties if we give permission; and

(5) the consequences for the parties if we refuse to give permission.

35. We would answer each of the above questions as follows:

(1) the purpose of the time limit for notifying the Respondents of an appeal against a penalty is to provide certainty and finality to the process of issuing and challenging penalties;

(2) in *Romasave*, the Upper Tribunal observed that, in the context of an appeal right which must be exercised within thirty days from the date of the document notifying the decision, a delay of more than three months could not be described as anything but serious and significant. The delay in this case goes well beyond that period;

(3) in addition, no reasonable explanation has been provided by the Appellant for the delay;

(4) the consequence for the Appellants if we do not give permission for the late notice is that the Appellants will be unable to proceed with the appeals. They will therefore suffer a detriment; and

(5) on the other hand, the consequence for the Respondents if we do give such permission is that the Respondents will be required to defend appeals which, in the circumstances, they have (with very good reason) for a long time considered to be closed.

36. Taking all of the above into account, we do not think that we can reasonably give permission for late notice of the appeals to be given by the Appellant to the Respondents in relation to the penalties which are in issue in this case. This is because, applying the principles set out in the cases mentioned in paragraph 30 above to the facts in this case, and our obligation under Rule 2 of the Tribunal Rules to deal with cases fairly and justly, the extent of the Appellant's failure to engage with the Respondents for such a prolonged period means that it would be neither fair nor just for us to give permission for the late notices in this case. In short, the Respondents are entitled to assume that penalties which have not been the subject of notices of appeal for such a long period are not at this point going to be the subject of a hearing.

37. For the reasons set out above, we do not give permission for late notice of the appeals to be given to the Respondents in relation to any of the relevant penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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 Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 01 MAY 2019