INCOME TAX – penalties for late filing – insufficient evidence that a notice to file was given by an officer of the Board- application of the provisions of section 12D TMA does not provide an effective remedy for HMRC - reasonable excuse – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07236

Appeal number: TC/2018/07358

BETWEEN

MS CARMEN ZURL **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Plymouth on 18 June 2019

The Appellant in person

Miss Lawrie Outten, officer of HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against three late filing penalties, each of £100 (the "**penalties**") for the failure, by the appellant, to submit tax returns on time for the tax years 2014/2015, 2015/2016 and 2016/2017.

2. I have concluded, for reasons given below, that:

(1) No valid notices to serve given by an officer of the Board in respect of these three years. But if I am wrong;

(2) the situation, if "cured" by section 12D TMA does not assist HMRC. But if I am wrong;

(3) the appellant has a reasonable excuse for the late filing of the returns.

SUMMARY OF THE LAW

3. The law imposing £100 late filing penalties is in schedule 55 Finance Act 2009.

4. Paragraph 1(1) of schedule 55 states that:

> "a penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date".

5. The Table referred to is in paragraph 1(5). It specifies an income tax return as being a return under section 8(1 (a) Taxes Management Act 1970 ("**TMA**").

6. Under section 8(1):

> "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice.....".

7. If a taxpayer has not been given a notice to file but still files a tax return, then section 12D TMA may apply. If it does, it deems a notice to have been given to a taxpayer on the day the taxpayer delivers the return to HMRC

8. HMRC must assess and notify a taxpayer of a £100 penalty and tell the taxpayer of the period for which the penalty is being assessed.

9. If the imposition of the penalties is procedurally correct, both the respondents and this Tribunal have power to cancel them, if they think that the appellant has a reasonable excuse; or reduce them if either HMRC consider that there are special circumstances, or that the

Tribunal believes that HMRC's decision not to reduce the penalties because there are no special circumstances is flawed.

10. The test of reasonable excuse is set out below. An insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control.

11. Where a taxpayer relies on another person to do something, that cannot be a reasonable excuse unless the taxpayer took reasonable care to avoid the failure which caused the penalties to be assessed.

12. Special circumstances do not include the ability to pay.

13. The test I adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

14. Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

15. Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

THE FACTS

16. I was given a bundle of documents and the appellant gave evidence on her own behalf. She obviously found the experience of presenting her case a traumatic one, yet she gave her evidence clearly and I find her to be an honest and credible witness. From this evidence I find the following relevant facts.

(1) The appellant had a modest amount of UK source income from real property and investments. These were managed by a firm of chartered financial planners called Seabrook Clark ("**SC**"). Matthew Clark ("**MC**") was her adviser there.

(2) The appellant was obliged under section 7 TMA to notify HMRC of this income.

(3) On 25 January 2018 the appellant asked MC whether he could help her to deal with this income and declare it to HMRC. Initially MC indicated that he wasn't sure whether he could help but he told the appellant that he would research into it. And having undertaken that research, he then told the appellant he could help her, and explained to

her the deadlines for filing tax returns in a number of emails in January and February 2018. In particular, in an email dated 1 February 2018, MC told the appellant then if she needed to file a UK tax return for 2016/2017, then this should be done asap as the deadline was "yesterday" for online filing to avoid interest and penalties.

(4) MC also told the appellant that she needed to acquire a unique tax reference number so that SC could be set up as her tax agent. On 8 February 2018 the appellant went online and completed an online form entitled "registering for self-assessment and getting a tax return". She believes that she successfully submitted this to HMRC. Having submitted that return she felt that she had contributed significantly towards her obligations to the tax system.

(5) On the same date HMRC issued the appellant with notices to file for each of the three tax years in question, with the filing date of 15 May 2018. The appellant did not make SC aware of this deadline until she gave those notices to file to MC at a meeting on 29 March 2018.

(6) On 9 February 2018 the appellant sent SC her unique tax reference number. Between early February 2018 and her meeting with MC on 29 March 2018 the appellant was collecting information that she understood MC required to enable him to complete the tax returns that needed to be submitted for the three years in question. This information included receipts for outgoings for the real property that she owned for each of the three years.

(7) At that meeting, MSc explained to the appellant that MC required a notice of authority in the to deal with HMRC. This is a form 64-8. The appellant wished to sign that form at that meeting. But given that it was towards the end of the day and it was clear, to the appellant, MC wanted to get away, she accepted his suggestion that he would send the 64-8 to her in the post. The appellant had had bad experiences about forms being sent to her in the post, but agreed to proceed in this way.

(8) According to a time line compiled by MC, he sent form 64-8 to the appellant on 5 April 2018 but did not receive the signed form back from her until 20 April 2018. The appellant's evidence is that MC knew that during this period she was not going to be physically present at the address to which the 64-8 had been sent.

(9) On 24 April 2018 MC sent form 64-8 to HMRC. HMRC records show that SC were not registered as tax agent for the appellant until 18 May 2018 i.e. three days after the deadline for submission of the three tax returns requested by HMRC.

(10) Following email exchanges between SC and the appellant, the returns were filed, electronically, for each of the three tax years, by SC, on 13 June 2018.

(11) On or around 22 May 2018 HMRC issued penalty assessments for the penalties which SC, on the appellant's behalf, appealed to HMRC on 23 July 2018. Following a request for a review of the decision to assess the appellant to penalties, and, as far as the appellant was concerned, an unsuccessful review, the appellant appealed against the penalties to this tribunal in November 2018.

BURDEN OF PROOF

17. HMRC must prove, on the balance of probabilities, that valid notices to file and valid penalty assessments have been given to the appellant for each of the three tax years. If they can establish both of these, then the appellant must prove, again on the balance of probabilities, that she has a reasonable excuse or that there are special circumstances which might exonerate her from liability to the penalties.

DISCUSSION

Notice to file issue

18. HMRC's evidence that valid notices to file under section 8 TMA were given to the appellant comprises; the fact that the appellant accepts that she received notices to file dated 8 February 2018; a computer printout for each of the three years entitled "Return Summary" on which is recorded that a notice to file was issued on 8 February 2018 with, for each of the three years, a return due date for a paper return of 15 May 2018; and copies of pro-forma notices in the form of letters, each dated 6 April (for each relevant year). These letters have no signature blocks and are unsigned.

19. Regrettably for HMRC I do not consider that this is sufficient evidence to discharge their obligation to prove that it is more likely than not that a valid notice to file was served on the appellant for each of the three years. The return summary, combined with the acceptance by the appellant that she received notices to file does prove that such documents were sent to the appellant on the dates recorded in that return summary. And I am prepared to accept HMRC's submission that although the dates on the pro forma letters included in the bundle were 6 April for each of the three years, the copies that would have been sent to the appellant would have been dated 8 February 2018.

20. However, what these documents do not show is that an officer of the Board gave the notices to the appellant. I am aware that HMRC consider that it is not necessary for an officer of the Board to give the notices; it is sufficient that HMRC as an organisation gives the notices. This point is currently under appeal to the Upper Tribunal. But it is my view that to be valid, a notice to file under section 8 TMA must be given by an officer of the Board and there is absolutely no evidence before me to suggest that that has happened in this case.

21. I have then considered (although this was not suggested, let alone argued by HMRC at the hearing) whether the provisions of section 12D TMA which was introduced by section 87 Finance Act 2019 (which, having received Royal Assent on 12 February 2019, deems section 12D to always have been in force) "cures" this defect in the notice to file.

22. Given that this point was not argued before me (I am involved in another case where I am awaiting HMRC's detailed submissions on the application of this new section) the view that I am giving now is one that I give with some hesitation.

23. I am not wholly convinced that section 12D was intended to operate so as to cure defective notices to file. It is arguable that its purpose was to treat wholly voluntary returns (i.e. those where HMRC had never attempted to give a taxpayer a notice to file) as if they had been given pursuant to a valid notice to file. And so section 12D would not apply in the case of this appellant where a defective notice has been given. But if I am wrong on that, and it

applies even to circumstances where HMRC have given a defective notice, I do not think that it assists HMRC by dint of the deeming provision in section 12D(2)(a).

24. This treats a relevant notice (i.e. a notice under section 8 TMA) as having been given to the appellant on the day the relevant return was delivered to HMRC.

25. So, in the context of this appeal, the section 8 notice to file is deemed to have been given on the day that electronic returns were given to HMRC on 13 June 2018.

26. In other words although ostensibly HMRC issued notices to file on 8 February 2018, the effect of this deeming provision is to defer that date to the date on which the return was actually received.

27. Given that there is then a three month period within which the appellant should have filed her returns, then she must (self-evidently) have done so within that period. She has submitted the returns on the same date that she was issued the notice to file. And so no penalties under schedule 55 can arise. There is no late filing.

Penalty assessments

28. As regards the penalty assessments, HMRC have reduced the following evidence that these were given to the appellant; a computer printout entitled "view/cancel penalties" for each of the years indicating that a late filing penalty had been issued to the appellant on 22 May 2018; a pro forma notice of penalty assessment for a £100 penalty; and the fact that the appellant accepts that she received, and indeed appealed against, these penalty notices. Slightly oddly, in their appeal dated 23 July 2018, SC refer to the penalty notices as having been dated 12 June 2018. This point was not addressed by HMRC at the hearing but it is of no consequence. I find that if HMRC had served valid notices to file on the appellant for each of the three years, then valid penalty notices for each of the three years were given to the appellant. If they did not, then another consequence of the application of section 12D TMA is that it seems to me highly unlikely that the penalty period will have been correctly set out in any penalty notice. The penalty period in the notice would need to start on the due filing date as specified in section 12D, something which was unknown to HMRC when they issued the penalty notification.

REASONABLE EXCUSE

29. The main focus of the evidence and submissions at the hearing was whether the appellant had a reasonable excuse for the late filing. She should have filed returns by 15 May 2018 but only did so on 13 June 2018. The appellant's submissions on this, briefly stated, were:

(1) She put her tax affairs in the hands of SC who had accepted that they were able to assist. She has been badly let down by them. She expected them to deal with all matters relating to the filing of her returns and dealing with HMRC which she had asked them to do. They accepted that responsibility and she simply assumed that they were doing all that was necessary.

(2) She had completed a self-assessment registration form, online, on 8 February 2018 which must have benefited her.

(3) She is unfamiliar with the UK tax system.

30. HMRC's submissions are that:

(1) SC were not accountants nor properly qualified to assist the appellant in filing her tax returns and the appellant knew this.

(2) She caused considerable delays in the process between February2018 and May 2018 in failing to sign and return form 64-8 on a timely basis; she took some six weeks to get her information together for SC (between 8 February 2018 and 29 March 2018); she failed to tell MC of the filing deadline of 15 May 2018 until her meeting with him on 29 March 2018.

(3) She is responsible for her tax affairs and although reliance on another can be a reasonable excuse, it can only be so if she took reasonable care to avoid SC's failure to file on time; and she did not take such reasonable care.

(4) She could have gone on to HMRC's website and considered their guide to self-assessment which would have told her all she needed to know about the self-assessment system.

31. It is clear that reliance on another can comprise a reasonable excuse. In this case the appellant relied on SC to submit her tax returns by the due date of 15 May 2018. She was unfamiliar with the UK tax system. That ignorance may not be an excuse and, as HMRC say, she could have cured that ignorance by finding out much more about the tax system by accessing the wealth of online information that HMRC have published.

32. And it is equally true that responsibility for ensuring that her tax returns were filed on time rested with the appellant.

33. But because she felt uncertain about the UK tax system, she (in my view perfectly understandably and indeed commendably) sought the assistance of SC. Whilst they are not accountants and were initially reticent about whether they could help, having undertaken research, they subsequently told the appellant they could help her. HMRC make the point that SC accepted that they were not expert in overseas tax. But the assistance sought by the appellant related not to technical advice concerning her residence status, but rather to the practical issue of filing returns on time. She and SC both accepted that tax returns had to be submitted in respect of her UK source income and indeed pursuant to the notices to file.

34. In my view, the fact that the appellant sought help from SC demonstrates that she took a responsible attitude towards the UK tax system. She took that responsibility seriously. Having sought help from someone who accepted that they were competent to provide it (and the emails from SC demonstrate that they understood the appellants filing obligations and indeed subsequently completed, properly, her tax returns for the years in question) it is entirely reasonable for her to expect that what needed to be done to file her returns on time would have been so done by SC.

35. It seems to me that she has been let down by SC. HMRC make the point that to some extent she was the author of her own misfortune by taking over long to complete and return form 64-8. But, as the appellant pointed out, she did not understand the importance of this document and if it was as important as it now seems it was, she could rightfully have expected SC to have prepared the form and given it to her to sign in February 2018 when they were first instructed, rather than waiting for the meeting in March. She wanted to sign that document at

that meeting but was not permitted to do so by MC. I accept that had she appreciated its importance, she should have insisted on signing it there and then, but I accept her evidence that she did not appreciate its importance.

36. Similarly, I am content with her explanation as to why there was a delay of six or seven weeks between receiving the notices to file on 8 February 2018 and the meeting with MC on 29 March 2018. She had three years worth of receipts and information to collect. I appreciate that SC did not know of the notices to file and thus the filing deadline of 15 May 2018 until the meeting on 29 March 2018. However, that would still have given SC ample opportunity to compile the returns pending receipt of the signed form 64-8. They failed, it seems, to do so. That they were competent to do so is evidenced by the fact that they subsequently did so in June 2018. They submitted her returns then, correctly, but late.

37. HMRC accepted, in their submissions that MC had adequate understanding and knowledge of the UK tax system, particularly self-assessment, and provided the appellant with adequate and correct advice. I agree. The issue is that that they then failed to do what they should have done; namely file the returns on time. HMRC suggest that the delays in processing her files should have been foreseeable by the appellant. I disagree, having asked SC to help, she relied on them to ensure that any time limits were met. It was not up to her to constantly badger SC. Having bought a dog there was no need to bark herself.

38. The objectively reasonable taxpayer in the appellant's position would, in my mind, have done exactly what the appellant did. By putting her tax affairs in the hands of SC who accepted responsibility for submitting her returns correctly and on time, and appeared to be wholly competent to discharge that responsibility, the appellant demonstrated a commendably responsible attitude towards the UK tax system. She was conscious of and intended to comply with our obligations towards the UK tax system.

39. Reliance on SC can only be a reasonable excuse if the appellant took reasonable care to avoid the failure by SC to file her returns on time. I think that she did take reasonable care. As I have said above, there was no need in my mind for the appellant to double check what SC was doing. She had no reason to doubt their competence. She was entitled to rely on them to get things right. I do not think, that, for example, there was any need for her to become intimately acquainted with the self-assessment regime when she had employed someone ostensibly competent to discharge her responsibility towards it.

40. And so I find that the appellant does have a reasonable excuse for failing to file her returns for these three tax years, on time.

DECISION

41. As I have said at the start of this decision, I have found that HMRC have not given a valid notice to file under section 8 TMA to the appellant and section 12D TMA does not cure that. And so I could have stopped there and allowed this appeal.

42. But I have considered reasonable excuse on the basis that HMRC might (perfectly properly) appeal my decision on those two points.

43. I would hope, however, that having found that the appellant has a reasonable excuse, HMRC will not take this matter any further.

44. I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 26 June 2019