[2019] UKFTT 535 (TC)

TC07329

CORPORATION TAX – penalties for failure to file company tax returns - Schedule 18 Finance Act 1998 – taxpayer relied on agent to file returns – unaware returns had not been filed - whether reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00761

BETWEEN

MAKING PRODUCTIONS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 9 August 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 5 February 2019 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 19 March 2019 and the Appellant's Reply dated 29 May 2019.

DECISION

INTRODUCTION

1. Making Productions Limited ("MPL") is appealing against penalties totalling £1,400 that HMRC have imposed under Schedule 18 Finance Act 1998 ("Schedule 18") for a failure to submit company tax returns on time for the accounting periods ended 31 May 2015, 31 May 2016 and 31 May 2017.

2. MPL's agent, Norman Thomas, appealed against the penalties to HMRC on 16 October 2018.

3. MPL's grounds for appealing against the penalties can be summarised as follows:

(1) MPL argues that there was a "reasonable excuse" for any failure to submit the returns on time, in that MPL relied on its previous tax agent, Darren Hutchinson of Hutchinson Moss Limited, and this covers the whole period of non-submission of returns. MPL's registered office was the address of the tax agent, and all warnings and late payment notifications had been sent to that address and were not seen by MPL. The tax agent had been telling Mr Murphy, the director of MPL, that he had filed all the accounts and returns. Mr Murphy could not have known that the returns were not submitted to HMRC unless HMRC had contacted him personally. The new tax agent (Norman Thomas) stated that it was understood that his predecessor had had a heart attack and has since changed vocation to the catering trade. Mr Murphy (and thus MPL) did not become aware of the penalties until he received the letters from HMRC after changing the registered office of MPL to his own address.

(2) MPL argues that the amount of the penalty should have been reduced. MPL is loss-making and it is wrong that HMRC blame the company for the agent's failures and impose such a large penalty.

4. MPL's appeal to HMRC under s31A TMA 1970 was made outside the statutory deadline in respect of the penalties for the accounting periods ended 31 May 2015 and 31 May 2016, as the appeal against all of the penalties was made on 16 October 2018. It is not evident from the papers whether or not HMRC initially refused consent to the late appeals under s49(2)(a) of TMA 1970. HMRC's Statement of Case notes that HMRC sent MPL a decision letter on 9 November 2018 rejecting their appeal and offering a review but a copy of that decision letter is not available from HMRC's records. Mr Thomas did then request a review on 3 December 2018, and received a review conclusion letter. HMRC have now prepared a full Statement of Case which deals with the substantive appeal (and does not suggest that the Tribunal should refuse to deal with the appeal because it was made late to HMRC). I therefore consider that HMRC have now given consent under s49(2)(a).

5. MPL's appeal was notified to the Tribunal late (as HMRC issued their review conclusion letter on 4 January 2019 and the appeal was notified to the Tribunal on 5 February 2019). However, since the delay is only a few days and HMRC have not objected to the late notification, I give permission under s49G(3) TMA 1970 for the appeal to be notified late.

RELEVANT LEGISLATION

6. Under paragraph 3 of Schedule 18, an officer of HMRC may by notice require a company to deliver a tax return in respect of each of the company's accounting periods by the relevant filing date. Under paragraph 14, the filing date is the last day of the last to end of various periods. In the case of each accounting period which is the subject of this appeal, that was the last day of the period of twelve months from the end of the relevant accounting period. Under

paragraph 17, a company which fails to deliver a company tax return in respect of an accounting period is liable to a flat-rate penalty.

7. Paragraph 17 provides:

> **"17 Failure to deliver return: flat-rate penalty**
>
> (1) A company which is required to deliver a company tax return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.
>
> It may also be liable to a tax-related penalty under paragraph 18.
>
> (2) The penalty is—
>
> (a) £100, if the return is delivered within three months after the filing date, and
>
> (b) £200, in any other case.
>
> (3) The amounts are increased to £500 and £1000 for a third successive failure, that is, where—
>
> (a) the company is within the charge to corporation tax for three consecutive accounting periods (and at no time between the beginning of the first of those periods and the end of the last is it outside the charge to corporation tax),
>
> (b) a company tax return is required for each of those accounting periods,
>
> (c) the company was liable to a penalty under this paragraph in respect of each of the first two of those periods, and
>
> (d) the company is again liable to a penalty under this paragraph in respect of the third period.
>
> (4) The first or second period mentioned in sub-paragraph (3) may be a period ending before the self-assessment appointed day, in relation to which—
>
> (a) the reference in paragraph (b) to a company tax return shall be construed as a reference to a return under section 11 of the M3Taxes Management Act 1970 , and
>
> (b) the references in paragraphs (c) and (d) to a penalty under this paragraph shall be construed as a reference to a penalty under section 94 of that Act."

8. Section 118(2) Taxes Management Act 1970 ("TMA 1970") provides:

> "For the purposes of this act, the person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased…"

9. Section 117(2) Finance Act 1998 provides:

> "Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act."

10. As a result, the provisions of s118 TMA 1970 (which apply to failures under that Act) apply also to a failure to file a company tax return pursuant to Schedule 18.

FINDINGS OF FACT

11. The evidence produced by HMRC in relation to the issuance of notices to file returns, and the issue of penalty notices comprises extracts of their computer records together with a pro forma penalty notice. Before considering this evidence, I had regard to the recent decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

> "49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.
>
> 50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
>
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
>
> "14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.
>
> 15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.
>
> 16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."
>
> 52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be "anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.
>
> 53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:
>
> "…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."

> 54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

12. HMRC's records state that notices to file were issued as follows:

(1) for the accounting period ended 31 May 2015, issued on 21 June 2015 and sent to 74 Brabourne Rise, Beckenham, Kent BR3 6SH;

(2) for the accounting period ended 31 May 2016, issued on 19 June 2016 and sent to 27 Grove House, Waverley Grove, London N3 3PU; and

(3) for the accounting period ended 31 May 2017, issued on 18 June 2017 and sent to 27 Grove House, Waverley Grove, London N3 3PU.

13. MPL does not dispute that such notices to file were issued to these addresses (each being the company's registered office at the relevant time), and I find that they were so issued.

14. The company tax returns for the accounting periods ended 31 May 2015, 31 May 2016 and 31 May 2017 were due to be delivered by 31 May 2016, 31 May 2017 and 31 May 2018 respectively. They were all delivered online by MPL's agent on 17 October 2018.

15. HMRC's records state that penalty notices were issued as follows:

(1) a £200 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 31 May 2015, issued on 16 September 2016 (the first £100 of which had been imposed by a notice issued on 16 June 2016);

(2) a £200 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 31 May 2016, issued on 18 September 2017 (the first £100 of which had been imposed by a notice issued on 16 June 2017);

(3) a £1,000 flat-rate late filing penalty under paragraph 17 of Schedule 18 in respect of the accounting period ending 31 May 2017, issued on 18 September 2018 (the first £500 of which had been imposed by a notice issued on 18 June 2018).

16. MPL does not dispute that such penalty notices were issued to the company's registered office at each relevant time and I find that they were so issued.

17. Mr Thomas submits that MPL relied on his predecessor tax agent, Mr Hutchinson, to file the company tax returns and was not aware that this had not been done as all notices from HMRC were sent to Mr Hutchinson (as the company maintained its registered office at the agent's address). Mr Murphy had confirmed that MPL's accounts had been filed at Companies House and had no reason to expect that the tax returns had not been similarly filed with HMRC.

18. HMRC do not dispute the fact of this reliance and I therefore find that MPL was relying on Mr Hutchinson to file company tax returns on time for the accounting periods in issue.

DISCUSSION

19. HMRC bear the onus of proving the facts and matters said to justify the imposition of penalties, albeit to the civil standard of proof namely balance of probabilities. Once they have done so, it is then for the taxpayer to establish that it had a reasonable excuse for its failure(s).

20. This principle was recently restated by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TC) (albeit in the context of self-assessment returns rather than company tax returns) where it said at [69]:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result

> of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

21. I have concluded that the company tax returns for the accounting periods ended 31 May 2015, 31 May 2016 and 31 May 2017 were submitted on 17 October 2018. They should have been submitted by 31 May 2016, 31 May 2017 and 31 May 2018 respectively. Subject to consideration of "reasonable excuse", the penalties imposed are due and have been calculated correctly.

22. Section 118(2) TMA 1970 provides that where a taxpayer had a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

23. In *The Clean Car Co Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "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?…
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

24. That this is the correct test has recently been confirmed by the Upper Tribunal in *Perrin*. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse (albeit that this was in the context of the reasonable excuse provisions in paragraph 23 of Schedule 55 ("Schedule 55") Finance Act 2009):

> (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. In doing so, the Tribunal 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 Tribunal, 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 Tribunal 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.

25. The question in the present case is whether Mr Murphy's (and thus MPL's) reliance on MPL's agent, Mr Hutchinson, constitutes a reasonable excuse. Although it is not part of the reasonable excuse language in s118 TMA 1970, there are other reasonable excuse provisions, such as the one in paragraph 23 of Schedule 55, which provide that "where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure". I consider that this language correctly describes the objective standard that should be applied in a case such as this one. In other words, it is not sufficient simply to rely on a third party to ensure compliance with one's tax obligations. The taxpayer must also take reasonable steps to check on the activities of the third party.

26. HMRC's position is that:

(1) a company must ensure that it has in place the necessary systems and processes to ensure its filing obligation is met. Successful submission of a return remains the responsibility of the company and its directors at all times;

(2) MPL chose to appoint a tax agent and to have its registered office address as that of the agent at all times that the notices to file and penalty notices were issued. A company can choose where the registered office address is (as long as it is in the UK) and HMRC will then use that address for notices; and

(3) reliance on another person cannot be considered as grounds to support a reasonable excuse, unless the taxpayer took reasonable care to avoid the failure. Mr Murphy did not make a conscious effort to ensure that the company's tax affairs were up to date. It cannot be assumed that as the accounts were submitted to Companies House on time that the tax returns would also be submitted within the required deadlines.

27. It is clearly objectively reasonable for MPL to appoint a tax agent to deal with its tax affairs. The question is then whether, having appointed an agent, and not having actually seen any notices from HMRC which might indicate that there is a problem, it is objectively reasonable for MPL not to take any action to check compliance with its tax obligations (eg ensuring it has a copy of company tax returns as submitted to HMRC, or requiring screenshots of the webpage confirming successful submission). I am not satisfied that this is objectively reasonable. MPL had, by deciding to use the agent's address as its registered office, set up a system which means that certain post (including from Companies House and HMRC) will only be seen by directors of MPL if they take positive steps to do so. This approach creates a risk that inaction by the agent will not be drawn to the attention of MPL unless and until the directors initiate checks themselves; in such circumstances, the director of MPL should have been more alert to the possibility of either deliberate or careless non-compliance by the agent, and cannot abdicate responsibility for compliance by doing no more than appointing an agent, paying invoices and checking that the accounts are filed at Companies House.

28. MPL also argue that it is wrong to impose such a large penalty on a company that is loss-making (and, by implication, has no tax liability). I have taken this to be a challenge to the fairness or proportionality of the penalty regime in Schedule 18.

29. In *Edwards*, the Upper Tribunal considered whether the fact that significant penalties had been levied for the late filing of returns where no tax was due was a relevant circumstance that

HMRC should have taken into account when considering whether there were "special circumstances" which justified a reduction in the penalties. The Upper Tribunal concluded that the penalty regime set out in Schedule 55 establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. Accordingly, the Upper Tribunal determined that the mere fact that a taxpayer has no tax to pay does not render a penalty imposed under Schedule 55 for failure to file a return on time disproportionate and, as a consequence, is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

30. Schedule 18 does not, unlike Schedule 55, contain a provision which entitles HMRC (or this Tribunal if HMRC's decision is found to be flawed) to reduce the amount of a penalty where there are special circumstances. Any challenge based on proportionality can therefore only be based on the right to peaceful enjoyment of possessions contained in Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1").

31. However, I have considered the penalty regime in Schedule 18 and conclude that, as with the regime in Schedule 55, it establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear. It follows that I have concluded that the mere fact that MPL had no tax liability for the relevant accounting periods does not justify a reduction in the penalty on the grounds of proportionality.

CONCLUSION

32. For the reasons given above, MPL's appeal is dismissed and the penalties are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 14 AUGUST 2019