



[2020] UKFTT 0039 (TC)

TC07545

Income tax - Schedule 36 notice – penalty for non compliance – failure to produce bank statements - reasonable excuse? - yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04664

BETWEEN

PERVEZ AKHTAR

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ZACHARY CITRON

Sitting in public at Taylor House on 7 January 2020

The Appellant did not appear and was not represented

Mr J Gyasi, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against a penalty for failure to produce certain bank statements as required by a notice under paragraph 1 Schedule 36 Finance Act 2008. (All references in this decision are to paragraphs of that Schedule).

BACKGROUND TO THE APPEAL

2. A penalty notice was issued to the appellant on 6 February 2019 charging a £300 penalty by reason of HMRC not having received everything asked for in an information notice (the “IN”) under paragraph 1 sent by them to the appellant on 18 December 2018. The IN had been approved by the Tribunal under paragraph 3.

3. The penalty was raised under paragraph 39 on grounds that the appellant had failed to comply with the IN.

4. On 12 February 2019 AKA, the appellant’s accountants, wrote to HMRC appealing against the penalty.

5. On 15 May 2019 AKA requested statutory review of the penalty decision by HMRC. This concluded by letter from HMRC of 28 June 2019 saying that the penalty should be upheld.

6. The appellant sent a notice of appeal to the Tribunal on 8 July 2019.

THE HEARING

7. The appellant did not attend the hearing. I was satisfied that he had received due notice of the hearing and also that it was in the interests of justice to proceed in his absence: no reason was provided for his non-appearance and there was nothing to suggest that he would attend a future hearing if this one were adjourned.

EVIDENCE

8. I received the Tribunal bundle in advance of the hearing; at the hearing I was given HMRC’s bound paginated “document bundle”.

FINDINGS OF FACT

9. The IN required documents and information (as set out in a schedule running to a page and a half in length) to be produced or provided by 22 January 2019. Amongst the documents listed in the schedule were bank statements from Santander Bank and National Westminster Bank for the period from the opening of the account (or, if later, six years prior the date of the IN i.e. from 18 December 2012) to 18 December 2019.

10. On 15 January 2019 AKA wrote to HMRC stating that the bank statements had been requested from both Santander and Nat West but, as he had to rely on the banks as third parties to provide these, the appellant could not guarantee they would arrive before 22 January. This point was repeated in a letter from AKA to HMRC of 18 January.

11. On 23 January 2019, HMRC wrote to AKA pointing out areas of non-compliance with the IN and agreeing to extend the deadline to noon on 4 February 2019.

12. On 29 January 2019, AKA wrote to HMRC again saying again that they had to rely on third parties (the banks) for the statements but would send them as soon as they received them.

13. On 31 January 2019 AKA wrote to HMRC enclosing the following bank statements:

- (1) for the Santander account for the period 1 January 2013 to 22 January 2019

(2) for the Nat West account for the period 4 December 2012 to 20 January 2017, when the account was closed.

14. The only documents (or information) required by the IN which were not sent by 4 February 2019 were statements for the Santander bank account for the 13 days from 18 December 2012 to 31 December 2012.

15. On 15 May 2019 AKA wrote to HMRC enclosing these outstanding documents.

RELEVANT LAW

16. An information notice only requires a person to produce a document if it is in the person's possession or power – paragraph 18.

17. A failure by a person to do anything required to be done within a limited period of time does not give rise to a liability to a penalty under paragraph 39 (or 40) if the person did it within such further time, if any, as an office of Revenue and Customs may have allowed – paragraph 44.

18. The relevant parts of paragraph 45 (reasonable excuse) provide as follows:

(1) Liability to a penalty under paragraph 39 ... does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure ...

(2) For the purposes of this paragraph—

(a) ...

(b) where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and

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

19. In *The Clean Car Co Ltd v C&E Comrs* [\[1991\] 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.”

29. That this is the correct test has been confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81], the UT also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

(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 reasonable 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.

SUBMISSIONS OF APPELLANT

20. AKA asserted in their written representation of 15 October 2019 that the appellant requested bank statements for the correct period (18 December 2012 to 18 December 2018) from Santander; Santander’s failure to provide statements for 13 days of that period (18-31 December 2012) was a simple mistake on their part.

SUBMISSIONS OF HMRC

21. The missing Santander statements for the 13-day period in December 2012 meant that the IN had not been fully complied with by the deadline.

22. As regards the defence of reasonable excuse linked to the actions of Santander, HMRC asserted that there was an absence of evidence that the appellant took reasonable care to avoid the failure to comply with the IN. This is because the appellant has not provided HMRC any evidence surrounding his interactions with Santander. In correspondence (letter from HMRC to AKA of 26 March 2019), HMRC said they had asked for detailed reasons as to why compliance would not be possible by the deadline but in AKA's response nothing was said about when the documents had been requested, why there was a delay and what steps were being taken to rectify the position. This was reiterated by HMRC in their letter to AKA of 2 May 2019: they say that consideration would have been given to extending the deadline, if the appellant had given HMRC the date on which he requested the bank statements and evidence of efforts made to obtain them.

DECISION

23. I find that the appellant did not have possession of bank statements from Santander for the "missing" 13 days in 2012, as at the deadline as extended by HMRC (4 February 2019) – but he did have power over those documents at that time, as he was able to require Santander to deliver them to him.

24. I find that the appellant failed to comply with the IN because he did not provide those "missing" bank statements from Santander by 4 February 2019.

25. Turning now to whether the appellant had a reasonable excuse for this failure – I find that the facts on which he wishes to rely are that he contacted both Santander and Nat West at the same time and gave them the correct dates for the requested statements. It was only due to an error on Santander's part that they did come back, by the deadline, with statements for the last 13 days in 2012.

26. Although I did not have direct evidence of the appellant's communications with Santander, I am satisfied that on the balance of probabilities the facts that comprise his excuse are proven. I infer from the following (agreed) facts – namely, that

- (1) one of the banks, Nat West, came back to the appellant, before the deadline, with bank statements for a period of several years that included the last 13 days of 2012; and
- (2) the other bank, Santander, also came back in time, with six years of bank statements, but omitting statements for the last 13 days of 2012,

that the appellant did, as he claims, ask both banks for statements for the correct periods of time, in sufficient time to comply with the deadline in the IN; Santander misunderstood the request to the extent that they omitted statements for the last 13 days in 2012, which the appellant had requested.

27. I find that the appellant took the actions a reasonable business person wishing to comply with the IN would have taken – he contacted the banks in question in sufficient time, requesting the bank statements for the correct periods of time; that, by so doing, he took reasonable care to avoid failure to comply with the IN; and that his actions, in so doing, were objectively reasonable for someone in the appellant's circumstances.

28. I find that the appellant's excuse had not ceased by the time of the deadline in the IN, 4 February 2019 (a Monday) – the appellant had only received the bank statements from Santander towards the end of the previous week (I infer this from the fact that AKA had written

to HMRC on (Tuesday) 29 January stating that none of the bank statements had yet been received) – there was insufficient time, between receiving the Santander banks statements on Wednesday 30 or Thursday 31 January, to go back to Santander for the statements for the missing 13 days and deliver those to HMRC on Monday 4 February.

29. I am therefore satisfied that there was a reasonable excuse for the appellant’s failure to comply with the IN.

30. The appeal is allowed and the penalty is cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

31. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

Release date: 22 January 2020