[2020] UKFTT 00165 (TC)

TC07651

Appeal number: TC/2019/04405

INCOME TAX – individual tax return – failure to file income tax return by due date – penalty under paragraph 3 Schedule 55 FA 2009 – Whether reasonable excuse established – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

MARIO DANAJ **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA

The Tribunal determined the appeal on 6 December 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 (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

INTRODUCTION

1. This was an appeal by Mr Mario Danaj ("the Appellant") against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for his failure to submit an annual self-assessment return by the due date.

FACTS

2. A notice to file for the tax year ending 5 April 2017 was issued to the Appellant on 6 April 2017. The filing date for this return was 31 October 2017 for a paper return or 31 January 2018 for an online return.

3. The Appellant's tax return was received on 30 August 2018. As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment on or around 13 February 2018, for the £100 late filing penalty (SA326D), in accordance with paragraph 3 of Schedule 55. The SA326D serves as a warning of the daily penalties (see paragraph 4 (1)(c) of Schedule 55.

4. As the return had still not been received six months after the penalty date, HMRC issued a notice of penalty assessment on or around 31 July 2018, in the amount of £900, for the daily penalties, pursuant to paragraph 4 of Schedule 55. A further notice of penalty assessment was issued on 10 August 2018 in the amount of £300, for the six-month penalty.

5. On 30 August 2018, the Appellant appealed against the penalties. On 11 October 2018, the Appellant accepted the offer of a review of HMRC's decision. The Appellant then notified his appeal to the Tribunal on 25 June 2019.

6. HMRC have indicated in their Statement of Case that they do not object to the late appeal.

7. I make further findings of fact below (see § 21 below).

THE LAW

8. Under section 8 of the Taxes Management Act 1970 (hereinafter referred to as "TMA 1970"), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by HMRC to submit a tax return, must submit that return by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed online). Where a notice to file a return is given to a

taxpayer after the 31 October immediately following the year of assessment, the filing date is three months after the date of that notice.

9. The law imposing the penalties charged in this appeal is in Schedule 55, and in particular, paragraphs 3, 4 and 5. The penalty may only be cancelled, assuming it is procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed.

10. Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 ("Schedule 55").

[Any references to paragraphs are to paragraphs in Schedule 55].

11. Penalties are calculated on the following basis:

> (a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).
>
> (b) Failure to file for three months (i.e. the daily penalty) - £10 per day for a maximum 90 days (paragraph 4).
>
> (c) failure to file for six months (i.e. the six-month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

12. If a person (P) fails to file an income tax return by the "penalty date" (the day after the "filing date" i.e. the date by which a return is required to be made or delivered to HMRC), para 3 of the Schedule provides that he is liable to a penalty of £100.

13. Para 4 provides:

> "(1) P is liable to a penalty under this paragraph if (and only if)–
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable."

14. Paragraph 5 provides that P is liable to a penalty under that paragraph if (and only if) his failure continues after the end of the period of 6 months beginning with the penalty date. The penalty under this paragraph is the greater of (a) 5% of any liability to tax which would have been shown in the return in question and (b) £300.

15. Paragraph 18 of Schedule 55 provides that:

"(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed".

16. Therefore, if HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer.

17. Paragraph 23, of Schedule 55, provides that:

"(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P 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) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

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

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

18. A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20). On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22). If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

GROUNDS OF APPEAL AND HMRC'S RESPONSE

19. The Appellant's grounds for appealing against the penalties can be summarised as follows:

(1) He sent a paper tax return on time by post. It is not his fault if Royal Mail did not deliver it.

20. HMRC's case can be summarised as follows:

(1) There is no record of a paper return being submitted and the Appellant has not provided any proof of posting.

(2) Once a tax return is received, it is not possible to cancel it.

(3) A notice to file creates a legal obligation to file a tax return.

(4) The Appellant's 2015-16 tax return remains outstanding to date. The 2016-17 tax return was submitted seven months late.

(5) The appeal is concerned with the responsibility on the Appellant to ensure that his tax return was filed by the legislative date.

(6) HMRC records show the Appellant's tax return was received on 30 August 2018. It should have been delivered by 31 January 2018.

(7) The notice to file clearly details the filing dates and the consequences of failing to meet them.

(8) The notice to file was issued to the last address provided by the Appellant and there is no evidence that it was returned undelivered.

(9) Records show that the Appellant was self-employed within the self-assessment regime from 2015 and he is not therefore new to the procedure.

(10) The penalties charged are not disproportionate.

DISCUSSION

21. Neither party has requested an oral hearing in this appeal. I considered the contents of the appeal bundle, together with the issues raised in the appeal. I concluded reach a fair and just decision on the papers, having regard to the terms of the Procedure Rules. Having considered all of the documentary evidence, I make the following further findings of fact:

22. The Appellant should have taken two distinct steps in order to get the appeal before the Tribunal:

(1) Firstly, he should have appealed to HMRC under section 31A TMA 1970. There is a deadline in s31A (30 days after the penalty notice was issued) for the appeal to be made to HMRC and both HMRC and the Tribunal have power under section 49 (2) TMA 1970 to extend that deadline.

(2) Secondly, after appealing to HMRC, the Appellant needs to notify the appeal to the Tribunal. If the Appellant has either offered, or requested, an HMRC review, there is a deadline for doing so. However, if no review has been offered or requested, there is no deadline. The relevant deadlines (applicable to situations where reviews have been offered or requested) are set out in s49G and s49H TMA 1970.

23. The Appellant's appeal to the Tribunal was made outside of the statutory deadline. HMRC have said that they have no objection to the Appellant's appeal being made late. I therefore consider that HMRC have now given consent under section 49 (2) (a).

24. This is an appeal by the Appellant against the imposition of a late filing penalty. The penalty was imposed in respect of the late filing of a self-assessment tax return.

25. The issues under appeal are firstly, whether HMRC was correct to issue the penalty in accordance with legislation, and secondly, whether or not the Appellant has established a reasonable excuse for the defaults which have occurred. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse. The factual prerequisite is therefore that HMRC has the initial burden of proof. See also *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) in the context of a discovery assessment.

26. In *Perrin v R & C Commrs* [2018] BTC 513, at [69], the Upper Tribunal held the following:

> "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."

27. The standard of proof is the civil standard; that of a balance of probabilities.

28. Two questions arise, in determining this appeal: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period? The above matters are to be considered in light of all the circumstances of the case. No penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute.

29. As stated at § 2 above, a notice to file for the tax year ending 5 April 2017 was issued to the Appellant on 6 April 2017. The filing date for this return was 31 October 2017 for a paper return or 31 January 2018 for an online return. The taxpayer summary shows that the address that HMRC had at the material time. The Appellant has not suggested that the address, which was effective from 30 October 2015, was not his address.

30. The Appellant failed to file the return by 31 January 2018. It is clear that a person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable within 12 months. The notices were sent to the address that HMRC had on file for the Appellant and there is no suggestion that they were returned undelivered. There is no suggestion on the evidence before me that there were any difficulties with the postal service at around the time of those deliveries.

31. The Interpretation Act 1978, at section 7 (which relates to service by post), provides that:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

32. The notices are therefore deemed to have been delivered, unless the contrary is proved. There is no suggestion that the address was changed prior to the notice to file or the notices of penalty assessment being issued.

33. The Appellant's tax return was received on 30 August 2018. A notice to file creates a legal obligation to file a tax return and the requirement to both file a return and pay any tax due by the legislative due date is one that cannot be circumvented or overcome, even if a nil liability return is to be filed. There is no evidence before me to support a finding that the Appellant asked for the notice to file to be withdrawn.

34. A notice of penalty assessment must state the period in respect of which a taxpayer had been assessed, as required by paragraph 18(1)(c). However, Section 114(1) of TMA 1970 provides:

> "An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

35. Section 114(1) is expressed in wide terms. It captures a *notice "affected by reason of a mistake, defect or omission therein"* (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is *"in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts".* In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at [51], Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection.

36. The Appellant does not argue that there were any defects in the penalty notices, or in the procedure that HMRC followed when issuing them. In any event, such arguments were considered, and rejected, by the Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761. I am bound by that decision and I am satisfied that the penalty notices were sent to the postal address linked to the Appellant's account at the

relevant time. Subject to considerations of *"reasonable excuse"* and *"special circumstances"* set out below, the penalties imposed are due and have been calculated correctly.

37. A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)). However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

38. There is no statutory definition of reasonable excuse. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all the circumstances of the particular case: *Rowland v R & C Commrs* (2006) Sp C 548, at [18]. 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 ("Clean Car"), in which Judge Medd QC said this:

> "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?"

39. 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.

40. As stated, whether or not a person had a reasonable excuse is an objective test and 'is a matter to be considered in the light of all the circumstances of the particular case. The actions of the taxpayer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. 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.

41. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. The word "reasonable" imports the concept of objectivity, whilst the words "the taxpayer" recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. Therefore, the excuse must be objectively reasonable and the test must be applied to the facts of the individual case. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as

having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

42. I find that the Appellant has failed to substantiate his contention that he submitted a paper tax return in a timely manner and that Royal Mail did not deliver it. The Appellant has not submitted any proof of postage in support of his argument and he further has not suggested that he took the matter up with the Royal Mail, if any actions on their part resulted in the loss of important tax documentation. I further find that if the Appellant did indeed send his tax return in a timely manner by post, then it is reasonable to expect him to have evidence in the form of either a recorded/special delivery slip, or indeed proof of postage, which does not require any additional payment over and above the cost of a postage stamp.

43. I find that the Appellant's letter dated 16 October 2018 to HMRC, where he states: *"I would like to let you know that my Tax Return for 16/17 was done by mistake…..please cancel 16-17 tax return"* does not support his claim to have sent a tax return any earlier than 30 August 2018 (which was seven months late). I find that if the Appellant had sent a timely return before 31 January 2018 and thought that he had filed the return in error, then it is reasonable to expect him to have notified HMRC of the error prior to October 2018.

44. Following the initial failure to file, the first filing penalty notice was sent to the Appellant on 13 February 2018. I conclude that the notice should have prompted further action on the part of the Appellant, which would have avoided the second set of penalties

45. The Appellant commenced self-employment on 28 October 2015. His self-assessment registration was received on 8 November 2015. I therefore find that the Appellant has been in the self-assessment regime for a considerable period of time. I further find that whilst the Appellant may have honestly believed that he could simply say that he had filed a tax return by mistake, having registered for self-assessment and having failed to request withdrawal of the notice to file, in my judgment it was not objectively reasonable to have failed to consider the ramifications of such registration. In those circumstances, the initial belief is not objectively reasonable. The Appellant is not absolved from the responsibility of ensuring that his tax obligations are met. I am not told of any efforts by the Appellant to inform himself of the requirements of self-assessment. In my judgment that is insufficient

46. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate.

47. There have been a number of cases on special circumstances, from which I derive the following principles: see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 95 and the cases cited therein:

(1) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152).

(2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

48. The special circumstances must apply to the individual and not be general circumstances that apply to many taxpayers: see *David Collis* [2011] UKFTT 588 (TC), at [40].

49. Furthermore, where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55, FA 2009 provide the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. The Tribunal may rely on paragraph 16 (Special Reduction) but only if HMRC's decision was *'flawed'* when considered in the light of the principles applicable in proceedings for judicial review'. That is a high test. I do not consider that HMRC's decision in this case is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon the Appellant.

50. HMRC have considered the Appellant's grounds of appeal found that his circumstances do not amount to special circumstances which would merit a reduction of the penalties. Accordingly, HMRC's decision not to reduce the penalties was not flawed. Even if I did have the power to make my own decision in respect of special reduction, the only special circumstance which the Appellant relies on is that there may have been a problem with the postal service. I have explained above why I do not consider that these explanations amount to a reasonable excuse.

51. I have borne in mind the recent comments of the Tribunal in *Hesketh* [2018] TC 06266 about whether ignorance of an obligation to file could excuse late filing. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The onus is upon an appellant to ensure that he or she properly understands their obligations under the law. I conclude that the Appellant does not have a reasonable excuse for the late filing of his tax return.

52. I have also considered the case of *Hok* [2012] UKUT 363 (TCC). There, the Upper Tribunal held that this Tribunal did not have power to discharge penalties on the ground that their imposition was unfair. In *Rotberg v Revenue and Customs Commissioner* [2014] UKFTT 657 (TC), it was accepted that the tribunal's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. In that appeal, conduct of HMRC had given rise to a legitimate expectation as to the availability of tax relief, which in turn went to the amount of tax lawfully due. The Tribunal held in that case, at [109], that the First-tier Tribunal has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Tribunal found, at [116], that the jurisdiction of the Tribunal in cases of that nature was limited to considering the application of the tax provisions themselves.

53. In *Edwards v R &C Commrs* [2019] BTC 516, 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.

54. 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.

55. In reaching these findings, I have applied the test set out in *Clean Car*.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

JUDGE NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 25 MARCH 2020