[2020] UKFTT 313 (TC)

TC07795

Appeal number: TC/2020/00889

INCOME TAX – failure to file a PAYE real time information return on time – penalty for late filing – properly imposed – no reasonable excuse – no special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LEGENDS LEISURE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 28 July 2020 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 11 February 2020 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 18 May 2020 and various correspondence between the parties.

DECISION

Background

1. This is an appeal against three penalties each of £200 (the "**penalties**") imposed by the respondents (or "**HMRC**") under paragraph 6C of Schedule 55 to the Finance Act 2009 ("**Schedule 55**") for the failure to file three Pay as You Earn ("**PAYE**") real time information ("**RTI**") returns ("**RTI returns**") under regulation 67B of the Income Tax (Pay as You Earn) Regulations 2003 ("**PAYE Regulations**") on time for the monthly periods ending on 5 November 2019, 5 December 2019 and 5 January 2020 (the "**periods under appeal**").

2. The appellant is an RTI employer and was thus required to make an RTI return on or before making a relevant payment to an employee.

3. HMRC allege that the appellant failed to deliver RTI returns on or before making relevant payments to ten employees for two of the periods under appeal, and to nine employees for the other period under appeal.

4. For reasons which I give later in this decision, I find that HMRC is correct and that the appellant did fail to deliver RTI returns on or before making such payments. I do not think that the appellant has a reasonable excuse. There are no special circumstances. And so I dismiss this appeal.

Evidence and findings of fact

5. From the papers before me I find the following facts:

(1) The appellant is an RTI employer within the meaning of regulation 2A and 2B of the PAYE Regulations and as such was obliged to deliver to HMRC an RTI return in the appropriate form on or before it made a relevant payment to an employee.

(2) For the period ending on 5 November 2019, the appellant employed 11 individuals. It made relevant payments to those employees on 1 November 2019 It filed its RTI return on 7 November 2019.

(3) For the period ending on 5 December 2019 the appellant employed 12 individuals. It made relevant payments to those employees on 29 November 2019. It filed its RTI return on 12 December 2019.

(4) For the period ending on 5 January 2020 the appellant employed 12 individuals. It made relevant payments to those employees on 27 December 2019. It filed its RTI return on 8 January 2020.

(5) On 7 February 2020 HMRC sent the appellant a penalty notification for the penalties. This was based on the fact that the appellant has between 10 and 49 employees. It was notification of a penalty assessed at £600 for the three periods.

(6) HMRC's records show that the appellant has failed to deliver timely RTI returns on a large number of occasions. Their records for the period ending on 5 November 2019 suggest that there had been seven defaults in that tax year. HMRC had accepted appeals against those earlier defaults on the basis that the appellant's administrator who had responsibility for filing the RTI returns had an ill mother and this affected her to the extent that she was unable to complete and submit the returns on time.

(7) HMRC's letter to the appellant dated 27 December 2018 (the "**Education letter**") includes the following statement:

> "**Important Information**
>
> PAYE information must be reported to us on or before a payment is made to an employee or we may charge you a penalty".

(8) This statement appears on three separate occasions in the Education letter.

(9) In a letter dated 20 August 2019 to the appellant, HMRC thank the appellant for an appeal and indicated that

> "I have on this occasion cancelled the penalties, however if any more returns are submitted late the penalties won't be cancelled.
>
> An education letter was issued to you earlier in the year which tells you when the returns need to be submitted, on or before the payment dates.
>
> If you continue to submit late penalties will be issued".

(10) The appellant notified its appeal to the tribunal on 11 February 2020 without having first made an appeal to HMRC.

Procedural issue

6. As I have said above, the appellant has not made an appeal to HMRC. It should have done. Strictly speaking this means that I do not have jurisdiction to hear the appeal. However HMRC believe, as do I, that it is in the interests of justice to deal with this appeal. HMRC are prepared to accept the appellant's notification of appeal to the tribunal as a notice of appeal to them, and to accept it as a late appeal. Again, strictly speaking, this means that notification of that appeal is also late, but I have discretion under the First-tier Tribunal Rules to extend time for notification of an appeal to the tribunal. And I exercise my discretion in the appellant's favour in these circumstances.

The Law

Legislation

7. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) An RTI employer must deliver to HMRC specified information in electronic form on or before making a relevant payment to an employee (Regulation 67B).

(2) Failure to file an RTI return on time engages the penalty regime in Schedule 55 Finance Act 2009 ("Schedule 55" and references below to paragraphs are to paragraphs in that Schedule).

(3) The amount of the penalty depends on the number of employees of the RTI employer. Where an employer has at least 10 but no more than 49 employees the penalty is £200 (Regulation 67I).

(4) If HMRC think it is right because of special circumstances they must reduce the penalty (paragraph 16).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) 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).

(7) 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).

(8) If I do decide to substitute my decision for another decision that HMRC had power to make, then I can consider special circumstances to a different extent to HMRC in respect of their original decision, but only if their decision in respect of special circumstances was flawed in the judicial review sense (paragraph 22).

(9) 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)).

(10) 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)).

Case law

8. A summary of the relevant case law is set out below

Reasonable excuse

(1) 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?"

(2) 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.

(3) 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."

(4) The approach that I adopt when considering a reasonable excuse defence is that set out in the Upper Tribunal Decision in *Christine Perrin v HMRC* [2018] UKUT 156.

(5) In *Perrin*, the Upper Tribunal made the following comments:

> "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.
>
> 70. Assuming that hurdle to have been overcome by HMRC, the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable

of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.

71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in The Clean Car Co and Coales).

72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord Hoffman said in In re B (Children) [2008] UKHL 35, [2009] 1AC 11 at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

…….

82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation."

Special Circumstances

(6) The following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131, sets out the position regarding special circumstances.

"73. The FTT then said this at [101] and [102]:

"101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.

102.It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration."

Burden and standard of proof

9. The burden of establishing that the appellant is prima facie liable for the penalties which have been properly notified and assessed lies with HMRC.

10. The burden of establishing that it should not be liable for the penalties because, amongst other reasons, it has a reasonable excuse, or that there are special circumstances lies with the appellant.

11. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Service of relevant notices

12. It is incumbent on HMRC to establish that they have acted in accordance with the provisions of paragraph 18 of Schedule 55 as regards the penalties.

13. Under paragraph 18(1) of Schedule 55:

> "(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."

14. As evidence that the penalties have been assessed and notified in accordance with paragraph 18 of Schedule 55, HMRC have provided an extract from their computer records indicating that a notice of penalty assessment designated RTI 511 was issued to the appellant on 7 February 2020 for £600. They have also provided a copy of the first page of the notice of penalty assessment.

15. The information set out in that page from the copy notice satisfies the provisions of paragraph 18 of Schedule 55.

16. The appellant has not suggested in its appeal papers that it did not receive a penalty notice.

17. I therefore find that HMRC's assessment and notification of the penalties was in accordance with paragraph 18 of Schedule 55 and the appellant was properly assessed and notified of the penalties.

Appellant's grounds of appeal

18. The appellant's grounds of appeal appear to be twofold. Firstly its PAYE administrator is still "unable to cover" and for this reason it has now contracted another individual who will be responsible for their PAYE work. Secondly they regret having to replace the administrator, but notwithstanding her many years of good service, they have concluded that her mother's dementia so serious that she is no longer able to carry any duties due to the disruption to the business. They do not suggest that the calculation of the penalties is wrong, nor that it did not receive the penalty notification.

Respondents' submissions

19. The respondents submit that the RTI returns were late. They have had considerable sympathy with the appellant's situation and indeed that sympathy has been reflected in the acceptance of appeals (and so the cancellation of penalties assessed and then appealed against) for previous periods, in particular those ending 5 February 2019, 5 March 2019 and 5 April 2019. These periods post date the Education Letter, which clearly told the appellant that PAYE information should be reported to HMRC on or before a relevant payment is made to an employee or a penalty might be charged. HMRC's lenient approach came to an end as evidenced by their letter of 20 August 2019 when it was made clear to the appellant that if any returns submitted after that date were made late, penalties would not be cancelled and would be issued. That letter also refers to the Education Letter. In these circumstances the appellant has no reasonable excuse for the late filing of the RTI returns nor are there any special circumstances which would warrant a reduction in the penalties.

Reasonable excuse

20. Like HMRC I sympathise with the appellant's situation. And HMRC have adopted a commendably generous approach towards this appellant in respect of periods of default before the three periods under appeal.

21. However it is clear that HMRC's patience ran out, and this was made expressly clear to the appellant in HMRC's letter of August 2019 when they stated in unequivocal terms that if there were any further defaults, penalties will not be cancelled and would be issued. It also referred to the Education Letter which spelt out the position in words of one syllable:

> "PAYE information must be reported to us on or before a payment is made to an employee or we may charge you a penalty."

22. So even if the appellant had been under the impression that HMRC would continue with their generous approach of cancelling penalties for its serial failures to deliver on time RTI returns for the tax year 2019-20, it could have been under no illusions following receipt of the August 2019 letter that that generous approach had ceased and should it fail to deliver timely returns from then on, it would be penalised.

23. In a letter dated 7 November 2019 to HMRC, the appellant states that "the fact that our financial administrator has had huge problems due to her mother's dementia (of which you have been previously advised of) needs to be reflected in any regulatory issues."

24. This statement suggests strongly to me that the appellant has known for some time of the issues faced by its financial administrator due to the health issues facing her mother; and indeed HMRC's submissions are that it was for this reason that they had cancelled earlier penalties.

25. So the appellant had known for some time before the periods under appeal that there were issues facing its capacity to submit timely RTI returns. In my view it should have taken action to rectify this situation sometime before it actually did so. I appreciate that the appellant has taken a compassionate position towards the administrator. However knowing the issues that she faced and knowing too that HMRC were going to adopt a strict approach towards penalties for failing to file timely RTI returns with effect from August 2019, the appellant should have put in place a regime which would have ensured that those returns were so filed in time. Its failure to do so means that I find that they have no reasonable excuse for failing to file the RTI returns for the periods under appeal. A reasonable taxpayer in the position of the appellant who knew about the problems faced by the administrator and the ongoing failures to submit RTI returns which resulted therefrom, would, in the face of HMRC's letter of August 2019 and the Education Letter, have put in place alternative arrangements which would ensure that RTI returns were filed on time.

Special circumstances

26. HMRC submit that there are no special circumstances in this case and I agree with them. The failure by an employee to carry out their designated duties does not amount to special circumstances even where that failure arises from distressing personal circumstances. And that is exacerbated by the fact that the appellant knew of these failings and their causes yet, even following receipt of the August 2019 letter from HMRC, failed to ensure that alternative arrangements were made for the timely filing of RTI returns.

Decision

27. I dismiss this appeal.

Appeal rights

28. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL:

TRIBUNAL JUDGE

RELEASE DATE: 30 JULY 2020