TC05478

Appeal number: TC/2016/04262

CORPORATION TAX – failure to file returns on time – whether reasonable excuse: no – whether penalty amounts correct -- yes for first two, penalties confirmed – no for next two as conditions for increased penalties do not apply when failures to file simultaneous – penalties reduced.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FLAME INTRODUCTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 4 November 2016 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 8 August 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 7 September 2016.

This is an appeal against four penalties determined by an officer of the Respondents ("HMRC") for the late filing of corporation tax ("CT") returns.

Facts

From the papers I find the following facts.

1. Flame Introductions Ltd ("the appellant") was incorporated on 21 September 2010.

2. On 20 September 2015 HMRC sent the appellant notices to file a corporation tax return for each of the four periods ending 20 September 2011 (period 1), 30 September 2011, 2012 and 2013 (periods 2, 3 and 4). The filing date in each case was (said to be) 25 December 2015 (the law gives a person three months).

3. The returns for period 3 were filed online on 22 January 2016.

4. The returns for periods 1, 2 and 4 were filed online on 1 February 2016.

5. On 13 January 2016 (before filing) HMRC issued a penalty assessment on the appellant of £100 for each of periods 1 and 2.

6. On 13 January 2016 (before filing) HMRC issued a penalty assessment on the appellant of £500 for each of periods 3 and 4.

Law

7. The law relating to penalties for late filing is found in paragraph 17 Schedule 18 Finance Act ("FA") 1998:

> "(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.
>
> …
>
> (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."

8. Apart from the provisions of paragraph 19 Schedule 18 FA 1998 (no penalty under paragraph 17 if return not delivered later than Companies House filing date) there is no "reasonable excuse" provision in Schedule 18 FA 1998 itself. But s 118(2) Taxes Management Act 1970 ("TMA") applies, despite it being expressed as a provision applying only to "this Act", ie TMA. This is because of s 117(2) FA 1998 requiring Schedule 18 to be construed as if contained in TMA.

9. Section 118(2) TMA says:

> "For the purposes of this Act, a 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."

10. The penalty provisions of Part 10 TMA apply to CT penalties – s 117 FA 1998.

Submissions

11. The appellant appealed, by its agents Shenkers Accountants, on the grounds that:

(1) The situation arose due to errors made by HMRC when the company first started to trade and were caused by the change of name during that time.

(2) The company has made losses and funds are very scarce.

(3) During the autumn of 2015 the client was unavailable due to the pressure of work and being away from the office due to other commitments, she was away over Christmas and then the accountants were overwhelmed by work on self-assessment returns.

12. HMRC submit that there was no reasonable excuse for the admitted failure, and that the amounts of the penalty determinations were correct.

Discussion

Reasonable excuse

13. For the purposes of section 118(2) TMA and other similar provisions in the Taxes Acts and in indirect tax legislation it has been held many times by this Tribunal that whether there is a reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case, and that the best expression of the test to be adopted is in *Clean Car Company Limited v Commissioners of Customs and Excise* [1991] VATTR 234 where Judge Medd said:

> "the test of whether 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 [taxpayer] 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 in at the relevant time, a reasonable thing to do?"

14. A reasonable excuse is one that must exist at the time of the failure, in this case on (HMRC say) 25 December 2015. I cannot see how HMRC errors at the time when the company first starting trading (in 2010) can be of any relevance (see §13(1)).

15. The fact that the company made losses (see §13(2)) is irrelevant and cannot amount to a reasonable excuse. Scarcity of funds may be a reasonable excuse under s 118(2) TMA, but there is no explanation here of why the scarcity of funds caused the default or what its extent was or the reason for it.

16. As to the excuse in §13(3) I assume that in September 2015 the accounts of the company for all periods were available. There were three months available to the appellant to give the accountants whatever they needed to file the CT returns and there is insufficient evidence to show why pressure of work or absence from the office meant that there no occasions at all on which the returns could be discussed with the accountants. But since the deadline was 25 December 2015, any excuse which related to periods after that cannot be taken into account.

17. I therefore find that there was no reasonable excuse for the failure to file the returns by the filing date.

The amount of the penalties

18. I would normally in a penalty case now consider whether the penalties have been correctly imposed, the burden being on HMRC to show that they have been. I am hampered though by the absence from the papers of any copy of the determinations made under s 100 TMA. But the appellant and their accountants have proceeded on the basis that everything about the penalty determinations was in order and so I accept that they were validly imposed.

19. On an appeal to the Tribunal against a penalty determination made under s 100 TMA, my power is set out in s 100B(2)(a):

> "On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but--
>
> (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may--
>
> (i) if it appears ... that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears ... to be correct, confirm the determination, or
>
> (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount,
>
> …"

20. Under sub-paragraph (2) of paragraph 17 Schedule 18 FA 1998, the penalty for a failure to file on or before the filing date is £100. Paragraph 17(3) increases the penalty to £500 for a "third successive failure". In relation to periods 3 and 4 the case is within paragraphs (a), (b) and (c) of that sub-paragraph. Paragraph (d) requires that in relation to the third consecutive period the company is "again" liable to a penalty.

21. Clearly that provision was drafted on the assumption that a notice to file would be issued a period at a time and the returns would be filed a period at a time. The use

of the word "again" and the present tense "is" in paragraph (d) reinforces this as it contemplates that there have already been two failures before another one happens. And paragraphs (a) to (d) are a definition of the term in the chapeau, a "third *successive* failure".

22. But in this case the company became liable for a penalty at the same time for all four periods. It is impossible then to say that it is *again* liable for a penalty. The penalties for periods 3 and 4 should therefore be £100.

23. It seems to me that this result is in accordance with the policy of the paragraph. The substantially increased penalty is clearly aimed at the serial defaulter: a "three strikes and you're out" approach. In this case there was only one strike. Whether that was due to the HMRC errors alleged by the accountants is neither here nor there, but it is a fact that the company was not required annually to file a return.

Decision

24. In accordance with s 100B(2)(a)(ii) I confirm the amount of the determination for the periods ending 20 September 2011 and 30 September 2011 at £100.

25. In accordance with s 100B(2)(a)(iii) I reduce the amount of the determination for the periods ending 30 September 2012 and 30 September 2013 to £100.

26. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 8 NOVEMBER 2016