[2017] UKFTT 568 (TC)

TC06012

Appeal number: TC/2016/07155

INCOME TAX – accelerated payment notice – penalty – application to amend grounds of appeal – application refused – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOLDENSTATE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 18 May 2017

Mr Devshi Chothani of DBF Associates Ltd appeared for the Appellant

Mr Christopher Shea of HM Revenue & Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

Background

1. This is an appeal against a penalty of £3,235.29 for failure to pay an accelerated payment notice issued on 31 March 2015 ("the APN").

2. The APN stated that it covered the period 1 September 2007 to 31 August 2008. It was said to relate to the Appellant's participation in a tax avoidance scheme called "Liberty 2 (Syndicate)" and it was expressed to be made pursuant to section 219(4)(b) Finance Act 2014 ("FA 2014"). The sum due pursuant to the APN was £64,705.84 and payment was said to be due on or before 2 July 2015.

3. Following receipt of the APN the Appellant made written representations to HMRC on 29 June 2015 as he was permitted to do by the legislation. HMRC issued their determination to confirm the amount specified in the APN on 2 December 2015. The due date for payment was therefore 30 days from the date that the Appellant was notified of that determination. It is common ground that subject to the matters referred to below, the due date for payment was 5 January 2016. It is also common ground that payment of the sum stated in the APN was made in full on 10 March 2016.

4. I set out below details of the statutory framework, the basis on which the APN was issued, and the penalty regime. Briefly, FA 2014 makes provision for a penalty of 5% of the sum specified as due in an APN if it is not paid by the due date. Liability to a penalty will not arise where the taxpayer has a reasonable excuse for failing to pay the sum by the due date.

5. A penalty assessment was issued on 1 February 2016 in the sum of £3,235.29. The Appellant appealed against the penalty to HMRC by letter dated 27 April 2016. He asserted a reasonable excuse for late payment of the APN. Essentially the Appellant's case was that he was travelling abroad at the time payment fell due and he had difficulties making the payment. As soon as he returned to the UK he paid the full amount of the APN.

6. The appeal was rejected by HMRC in a letter dated 28 June 2016 and the Appellant asked for a review of that decision. The penalty was upheld in a review decision dated 26 October 2016.

7. The Appellant then notified his appeal to the Tribunal in a notice of appeal dated 29 November 2016. The grounds of appeal were repeated, namely the fact that the Appellant was abroad at the due date and had difficulties making payment until his return to the UK.

8. At the outset of the hearing Mr Chothani who appeared on behalf of the Appellant indicated that the Appellant was no longer pursuing his appeal on the basis of reasonable excuse. He handed up a skeleton argument which challenged the validity of the APN. I treated that as an application to amend the grounds of appeal and I shall consider that application once I have set out the statutory framework in more detail.

Statutory Framework

9. The circumstances in which an APN may be issued are set out in section 219 FA 2014 which provides as follows:

> " **219 Circumstances in which an accelerated payment notice may be given**
>
> (1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.
>
> (2) Condition A is that—
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax….
>
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").
>
> (4) Condition C is that one or more of the following requirements are met—
>
> …
>
> (b) the chosen arrangements are DOTAS arrangements;
>
> …
>
> (5) "DOTAS arrangements" means—
>
> (a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,
>
> (b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or …"

10. Section 220 FA 2014 sets out certain requirements for an APN given pursuant to section 219(2)(a). In particular the APN must specify the payment required to be made as an accelerated payment within the period set out in section 223.

11. Section 222 FA 2014 entitles the recipient of an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C in section 219 are not satisfied, or objecting to the amount specified in the APN. Any representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made. The payment period is extended where representations are being considered by HMRC.

12. Section 226 FA 2014 imposes a penalty for failure to comply with an APN and provides as follows:

> " **226 Penalty for failure to pay accelerated payment**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).
>
> (2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.

(3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

…

(5) "The penalty day" means the day immediately following the end of the payment period.

…

(7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax."

13. There is no statutory right of appeal against HMRC's decision to issue an APN. There is a right of appeal to this Tribunal against a penalty that is imposed as a result of failure to make an accelerated payment by the due date.

14. Section 226(7) FA 2014 applies certain provisions of Schedule 56 Finance Act 2009 ("Schedule 56") to penalties charged under that section. Paragraph 13 Schedule 56 confers a right of appeal to this Tribunal. The scope of the right of appeal is set out in paragraph 13 as follows:

" **13 Appeal**

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P."

15. Paragraph 16 Schedule 56 sets out a defence of "reasonable excuse" as follows:

" **16 Reasonable excuse**

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment 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."

16. Schedule 56 also includes provisions which entitle HMRC to reduce a penalty by reason of "special circumstances" and a limited right of appeal against their

decision on special circumstances although the present appeal is not concerned with those provisions.

17. Paragraph 15 Schedule 56 sets out the scope of the Tribunal's jurisdiction on an appeal against a penalty as follows:

> " **15**(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make."

Application to Amend

18. As mentioned above, Mr Chothani stated at the outset of the hearing that the Appellant was not pursuing the appeal on the ground of reasonable excuse. The sole ground of appeal the Appellant wished to pursue was that the enquiry by HMRC into the Appellant's company tax return for the year-ended 31 August 2008 was out of time. Hence there was no open enquiry and Condition A in section 219(2)(a) which requires that a tax enquiry is in progress into the Appellant's return was not satisfied.

19. I indicated that it would be necessary for the Appellant to obtain permission to amend its grounds of appeal. Mr Shea who appeared on behalf of the Respondents objected to the application on the following grounds:

> (1) The Appellant should not be granted permission to amend its grounds of appeal to assert a wholly new ground of appeal so late in the day.
>
> (2) No evidence had been adduced to support the factual basis on which the new ground of appeal was being put forward.
>
> (3) There was no merit in the new ground of appeal in any event because the Tribunal does not have jurisdiction to consider the validity of the APN.

20. It is certainly late in the day for the Appellant to entirely change the basis on which it wishes to pursue the appeal. The principles to be applied in determining such applications may be derived from similar applications in the civil courts. Those principles were summarised by Carr J in *Quah v Goldman Sachs International [2015] EWHC 759 (Comm)* at [37] and [38]:

> " 37. … the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities …
>
> 38. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

21. As to the last point, it is clear that a similar approach applies to compliance with the Rules of this Tribunal – see *BPP Holdings Limited v Revenue & Customs Commissioners [2016] EWCA Civ 121*.

22. In the light of the principles described by Carr J, I am satisfied that the Appellant should not be permitted to amend its grounds of appeal.

23. The Appellant's case is that the APN concerns a tax avoidance scheme which the Appellant participated in during its accounting period ending 31 August 2008. The Appellant disclosed use of the scheme under DOTAS in its self assessment return for

that accounting period. The return was due to be submitted to HMRC on or before 31 May 2009. The Appellant's case is that it was submitted on 26 March 2009.

24. Paragraph 24(1) Schedule 18 Finance Act 1998 provides that any enquiry into the Appellant's return must be opened within 12 months of the date the return was submitted, that is by 26 March 2010. The enquiry was purportedly opened by letter dated 31 March 2011. The Appellant's case is therefore that the APN could not properly be given to the Appellant because Condition A in section 219 was not satisfied – there was no valid tax enquiry in progress into a return or claim made by the Appellant.

25. For present purposes I shall put the jurisdiction point in Mr Shea's third ground of objection to one side. If the Appellant is permitted to amend its grounds of appeal then it will be necessary to have a further hearing of the appeal. It will be necessary for the Appellant to adduce evidence to establish its contention that the enquiry was commenced out of time. In particular that the corporation tax self assessment was filed on 26 March 2009. HMRC may also wish to adduce evidence as to the date on which the corporation tax self assessment was filed and whether any amended return was filed which would extend the period in which an enquiry could be opened. It will be necessary to hear further submissions from both parties as to the validity of the APN. The need for a further hearing date is equivalent to vacating a hearing date following a late application to amend.

26. Mr Chothani told me that in March 2016 when the Appellant paid the sum required by the APN he was not aware that there was an argument that the APN was invalid. He remained unaware of the argument until January 2017 when he received a call from a specialist tax adviser connected to the original promoter of the avoidance scheme. They told Mr Chothani that they had seen quite a few cases where the notices were invalid because the enquiry was commenced out of time.

27. The Appellant agreed to engage the services of the specialist adviser and was asked to provide copies of the original notices sent by HMRC to commence the enquiry. On 27 March 2017 Mr Chothani wrote to HMRC asking for a copy of the enquiry notice. HMRC then replied sending a copy of the notice on 27 April 2017. At that stage Mr Chothani was away. He forwarded a copy of the notice to the specialist adviser at the beginning of May 2017. Late in the week prior to the hearing the specialist adviser asked Mr Chothani to check the date on which the return was filed. Mr Chothani provided that information in the week of the hearing and the specialist adviser then advised him that the enquiry was commenced out of time and therefore the APN was invalid. At that stage Mr Chothani produced his skeleton argument which he made available on the day of the hearing.

28. I am satisfied that there was no good reason for the Appellant to leave it so late in the day to apply to amend its grounds of appeal. It has been open to the Appellant to challenge the date on which the enquiry was opened since 31 March 2011. The Appellant or its advisers might reasonably have been expected to consider whether the enquiry was validly opened in April 2011 when they received notice of the enquiry, in March 2015 when the APN was sent to the Appellant identifying that Condition A

was satisfied, in June 2015 when the Appellant submitted its written representations in relation to the APN and in December 2016 when the notice of appeal against the penalty was lodged.

29. On the basis of the evidence presently before me I do not know what merit there is in the Appellant's argument that the enquiry was opened out of time. I have been provided with no evidence as to the date on which the company tax return was filed. Mr Chothani told me that he was not aware whether any amended return was submitted. The Appellant has not shown the strength of its case that the enquiry was not validly commenced.

30. I must balance any injustice to the Appellant of refusing the amendment against any injustice to the Respondents and Tribunal users in general of permitting the amendment. I am not satisfied that there would be injustice to the Appellant. It has not established the merits of its case that the enquiry was out of time. It has relied merely on assertion. On the other hand there is clear injustice to the Respondents and other Tribunal users in the waste of costs and Tribunal resources arising from an adjournment. There is no good reason for the lateness of the application. Having regard to the overriding objective of dealing with cases fairly and justly I consider that the application to amend should be refused.

31. In any event, and by way of aside I am not satisfied that the Tribunal has any jurisdiction on the present appeal to determine the validity of the APN. A number of decisions of this Tribunal indicate that the Tribunal has no jurisdiction to consider the validity of an APN – see *O'Donnell v Commissioners for HM Revenue & Customs [2016] UKFTT 743 (TC)* at [26], [37] and [41] and *Nijjar v Commissioners for HM Revenue & Customs [2017] UKFTT 175 (TC)* at [28] and [29]. I gratefully adopt what was said by Judge Jonathan Richards in the latter case:

> " 28. The starting point for the Tribunal in determining whether a penalty is payable, or the amount of any penalty, must be s226 of Finance Act 2014 which imposes the penalty. That section makes no mention of Conditions A to C. The trigger for the imposition of the penalty is the failure to pay the amount specified in the APN. There is nothing in the express wording of s226 that suggests that the Tribunal must, or may, consider Conditions A to C.
>
> 29. Nor do I consider that it is implicit that Parliament intended the Tribunal to consider Conditions A to C. Those conditions go to whether the APN was validly issued in accordance with s219. The statutory scheme in Finance Act 2014 envisages that a taxpayer who considers that Conditions A to C are not met should make representations under s222 of Finance Act 2014 and, if not satisfied with HMRC's response to those representations, take judicial review proceedings. The statutory scheme does not give taxpayers who consider that APNs have been wrongly issued (for example on the grounds that Conditions A to C are not satisfied) any rights of appeal to the Tribunal. That cannot be an oversight given the central role that the Tribunal plays in the adjudication of other tax-related disputes of which Parliament would have been well aware when enacting Finance Act 2014. In those circumstances, Parliament cannot have intended that taxpayers should be able, in penalty proceedings, to litigate the very issues relating to the validity of the APN on which the Tribunal has been denied jurisdiction."

32. I note what Judge Richards also said at [25(2)] of his decision in Nijjar where he referred to the burden of proof on HMRC, including proof of the following facts:

> " … (2) That the APN was issued pursuant to s219(2)(a) of Finance Act 2014 (while an enquiry was in progress) as that is a precondition to a penalty falling due under s226 of Finance Act 2014. Mr Nijjar accepted that this was the case (see [4(1)] above)."

33. It does not seem to me that Judge Richards was saying in that paragraph that there was a burden on HMRC in a penalty appeal before the Tribunal to satisfy the Tribunal that Condition A was satisfied. Rather, HMRC must satisfy the Tribunal that the APN was given by virtue of section 219(2)(a). That is established not by evidence that Condition A is satisfied, but by reference in the APN itself that it was given by virtue of section 219(2)(a). In other words, it is not necessary for HMRC to establish that Condition A was satisfied but they must establish that the APN was intended to be given pursuant to section 219(2)(a).

34. Support for the proposition that the Tribunal has no jurisdiction to consider the validity of an APN in a penalty appeal may be derived from the decision of the Administrative Court in *PML Accounting Limited v Commissioners for HM Revenue & Customs [2017] EWHC 733 (Admin)*. That case concerned penalties arising from non-compliance with an information notice. It was held that the Tribunal had no jurisdiction to consider the validity of the information notice.

35. For the reasons given above, taking into account all the circumstances I consider that it would be unfair and unjust if the Appellant were to be allowed at this late stage to amend its grounds of appeal.

Conclusion

36. The Appellant did not seek to rely on any ground of appeal other than the ground which it sought permission to raise at the hearing. Having refused permission to amend the grounds of appeal I must therefore dismiss the appeal.

37. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 18 JULY 2017