[2018] UKFTT 109 (TC)

TC06366

Appeal number: TC/2014/04555

INCOME TAX – penalties for failing to file a partnership tax return by the due date - did the illness of the Appellant's representative, the failure of the Respondents to provide the software necessary to file on-line, the fact that the relevant information was made available to the Respondents by other means, the absence of any tax liability for the partners or the insolvency of the partnership amount to a reasonable excuse or special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS J MURPHY (NOMINATED PARTNER) OF HART CHEMICALS PARTNERSHIP

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 27 September 2018

The Appellant did not appear and was not represented

Ms Allana Wilckens, officer of HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to late filing penalties which have been imposed on the former partners of Hart Chemicals Partnership, Mrs J Murphy and Mrs J Hall, in respect of a failure to file the partnership's tax return for the tax year of assessment ending 5 April 2013 before a date falling more than six months after the due date. As the "representative partner" (as defined in paragraph 25(6) of Schedule 55 to the Finance Act 2009 ("Schedule 55")) of the partnership, the appeal has been brought by Mrs Murphy in accordance with paragraph 25(4) of Schedule 55 but is to be treated as if it were an appeal by both partners in accordance with paragraph 25(5) of Schedule 55.

2. The Appellant did not attend, and was not represented at, the hearing. I noted that a previous hearing in respect of the appeal, scheduled for 13 December 2017, had been adjourned unheard on the basis that the Appellant did not appear and was not represented and the Tribunal was not satisfied that the Appellant was on notice of the hearing. At that hearing, the Tribunal ordered that notice of this hearing be sent to the Appellant at her last known address and to any nominated representative by no later than 31 December 2017. I noted that a letter to that effect was sent to both the Appellant at her last known address and to Mr Robin Fautley, the Appellant's representative, on 18 December 2018. (Although the letter to Mr Fautley contained an error in the address in describing him as working for a firm called "Robin And Fautley Fca", I was satisfied that this error was immaterial given that the full address, including the post code, and Mr Fautley's name, were correctly set out.) So, although the letter to the Appellant appears again to have been undelivered, I was satisfied that the notice of the hearing had been given to Mr Fautley. Accordingly, I was satisfied that it was in the interest of justice to proceed with the hearing in the absence of the Appellant or her representative.

3. The relevant facts in this appeal, as stated in a letter from Mr Fautley to the Respondents of 15 August 2014 and which the Respondents did not seek to challenge at the hearing, are as follows:

> (a) Hart Chemicals Partnership ceased to exist on 31 March 2013, after incurring substantial losses in the period following October 2012;
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> (b) Prior to its cessation, all partnership tax returns had been made on paper well before the due date;
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> (c) The paper return in respect of the tax year of assessment ending 5 April 2013 was not made by the due date for paper filings of 31 October 2013. (Mr Fautley's letter does not explain the reasons for this – he merely says that there were unspecified "difficulties" in preparing the paper return by the due date for paper filings);
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> (d) On 20 December 2013, Mr Fautley wrote to the Respondents to ask whether they would be prepared to waive the formalities of submitting a return in respect of the relevant tax year of assessment because of the

losses which had been incurred by the partnership over the relevant tax year of assessment and the deficiency of capital which existed in the partnership;

(e) On 14 January 2014, the Respondents responded negatively to this request on the grounds that "we must have an opportunity to challenge the accounts and returns should we feel there is a need to do so";

(f) Mr Fautley did not receive this letter until 27 January 2014 because he had been in hospital for most of January 2014;

(g) Mr Fautley is a sole practitioner and his absence from the office at that time meant that he had only a short period, during which he was meant to be convalescing, within which to file on-line returns for his clients. He was able to do so for his individual clients (including the partners in the partnership) using the filing software made available by the Respondents but, because the filing of on-line returns by a partnership requires the use of bought-in commercial software, which Mr Fautley does not have, he was unable to make an on-line filing of the partnership's return;

(h) The accounts of the partnership were attached to the on-line returns which Mr Fautley filed in respect of the partners in the partnership. Those returns showed that neither partner was liable to pay tax; and

(i) Following some further correspondence between Mr Fautley and the Respondents, within which the Respondents continued to insist that Mr Fautley file a return on behalf of the partnership in respect of the relevant tax year, Mr Fautley eventually filed a paper return for the partnership in respect of the relevant tax year on 10 June 2014. This was more than six months after the due date for filing paper returns for the relevant tax year.

4. The delay in filing the paper return until 10 June 2014 meant that, unless the Appellant is able to succeed in this appeal, each partner became liable to a penalty of £100 for missing the filing deadline of 31 October 2013 (pursuant to paragraph 3 of Schedule 55), a further penalty of £10 per day for a maximum of 90 days for each day after 1 February 2014 that the return remained unfiled (pursuant to paragraph 4 of Schedule 55) and a further penalty of £300 for having failed to file the return by the date falling six months after the filing deadline of 31 October 2013 (pursuant to paragraph 5 of Schedule 55). Together, that amounts to £1,300 for each partner (although the notice of appeal given to the Tribunal, whilst stating that the Appellant wishes all penalties to be withdrawn, refers in section 2 to only £1,200 for each partner.)

5. The Appellant bases this appeal primarily on two relieving provisions in Schedule 55 – paragraph 23, which provides that liability under the Schedule does not arise in relation to a failure to file a return if the taxpayer satisfies the Respondents, or, on appeal, the Tribunal, that there is a "reasonable excuse" for the failure, and paragraph 16, which provides that, if the Respondents think it right because of "special circumstances", they may reduce any penalty under the Schedule, the exercise of which discretion by the Respondents is open to challenge at the Tribunal if

the decision is "flawed" in the light of the principles applicable in proceedings for judicial review (see paragraph 22 of Schedule 55).

6. As regards the first of the relieving provisions, paragraph 23 does not elaborate in detail on the meaning of the term "reasonable excuse" beyond stipulating that, in relation to any failure to file a return:

> (a) An insufficiency of funds is not a reasonable excuse unless attributable to events outside the relevant taxpayer's control;
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> (b) Where the relevant taxpayer has relied on any other person to do anything, that is not a reasonable excuse unless the relevant taxpayer took reasonable care to avoid the failure; and
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> (c) Where the relevant taxpayer has a reasonable excuse for the failure but the excuse has ceased, the relevant taxpayer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceases.

7. None of the above is particularly enlightening in the present context.

8. However, it is clear from the decided cases in this area, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234, that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

9. As regards the second of the relieving provisions, there is no guidance in the legislation on what may constitute "special circumstances" but it is clear from the terms of paragraphs 16 and 22 of Schedule 55 that the decision as to whether any particular circumstances constitute "special circumstances" is entirely a matter for the Respondents to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents' decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

10. Bearing the above analysis of the relieving provisions in mind, my views on the application of the relieving provisions to the circumstances of the partnership in this case are as follows.

11. The circumstances which are alleged to fall within the relieving provisions are as follows:

(a) There were (unspecified) difficulties in preparing the paper return by the due date of 31 October 2013;

(b) The reason why the return could not be filed on-line by the due date of 31 January 2014 was that the Appellant's representative was in hospital for much of January. This meant that, as a sole practitioner, he managed (only with some difficulty) to meet the on-line filing deadline for his individual clients – for whom the Respondents have provided filing software – but was unable to meet the on-line filing deadline for the partnership because the Respondents have not provided filing software for partnerships and he did not have the necessary bought-in commercial software to enable him to file the partnership's return on-line. If the Respondents had provided the software necessary to file partnership returns on-line, the Appellant's representative would have been able to copy, into the on-line partnership return, the information set out in the individual partners' on-line returns and thus meet the on-line filing deadline for the partnership;

(c) The partnership's accounts were attached to the returns of the individual partners that were filed on-line by the due date and those returns contained a narrative explaining that the partnership had ceased as a result of insolvency. Therefore, the Respondents had access to the relevant information by the due date for on-line filings;

(d) The partnership had clearly made substantial losses in its final year and so there was no tax payable by the partners in any event; and

(e) It is unfair to expect a partnership that has become insolvent to incur yet more expense in filing a tax return.

12. In support of the above arguments, the Appellant's representative has cited the decision in the case of *Paul & Annette Galbraith v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 225 (TC) ("*Galbraith*") That is a decision of the First-tier Tribunal and, as such, it is not binding on me although I have considered it in reaching my decision.

13. In that case, a partnership filed its paper return for the tax year of assessment ending 5 April 2011 on 31 January 2012 (the due date for filing its return on-line) and appealed successfully against the late filing penalty on the basis that the failure on the part of the Respondents to provide software for the on-line filing of partnership returns was a reasonable excuse for filing the paper return on the due date for on-line returns.

14. I must confess that I find the precise reasoning that was adopted in *Galbraith* a little hard to follow. One way of reading it, looking at the discussion at paragraphs 19 to 21 of the decision, is that the Tribunal was merely saying that, where a partnership has a reasonable excuse (unrelated to its not having the necessary software) for being unable to file its paper return until the due date for filing on-line returns, it should be able to file its paper return by the due date for filing on-line returns without penalty because of that reasonable excuse. In other words, it should not be obliged to incur the expense of buying additional software in order to meet its statutory obligation when it has a reasonable excuse that is not software-related for filing its paper return by the later date. If that is all that the Tribunal was saying, then I would agree with it. However, that is no different from saying that a paper return that is filed late because there is a reasonable excuse for the late filing (other than not having the necessary software) should not give rise to a penalty.

15. Having said that, it may be that the Tribunal in *Galbraith* was seeking to go further than I have set out above. I say this because, although, at paragraph 20 of its decision, the Tribunal gives some examples of circumstances where a partnership may have a reasonable excuse (other than its not having the necessary software) for being unable to file its paper return by the due date for filing paper returns, it is not clear that the partnership in that case had any such excuse, in fact. So, if the Tribunal was saying that a partnership should be entitled to file its paper return by the due date for filing on-line returns in all circumstances, regardless of whether or not it has a reasonable excuse (other than its not having the necessary software) for missing the deadline for filing paper returns, then I do not agree with that.

16. In my view, a partnership knows (or should know) in advance that it has two ways of meeting its statutory filing obligations – it can either choose to file a paper return by the due date for filing paper returns or choose to incur the additional expenditure required to file on-line, in which case it can file its return on the later date for filing on-line returns. If the partnership chooses not to incur the additional expenditure that will enable it to defer the filing of its return to the later date, then that is not of itself a reasonable excuse for missing the deadline for filing its return in paper form. I consider that the mere fact that a partnership has to incur additional expenditure to avail itself of the option of the later filing date whereas an individual does not is irrelevant in this regard.

17. I would add that, in the *Galbraith* case, the partnership had in fact filed its paper return by the due date for filing on-line returns, and so the facts were materially different from the facts in this case. Here, the paper return was filed well after the due date for filing both paper returns and on-line returns and so, even if the partnership had a reasonable excuse for, or there were special circumstances justifying, its missing the deadline for on-line filing, those circumstances would need to have continued until the eventual filing date of 10 June 2014 if *Galbraith* were to be of any assistance.

18. By way of summarising my conclusions above, in my view, the crucial question is whether the partnership had a reasonable excuse for its failure to meet the filing deadline for paper returns. The failure on the part of the Respondents to provide the

necessary software to make an on-line filing by the on-line filing date is not relevant to that question. And, in that regard, no excuse has been offered by the Appellant for the partnership's failure to file its paper return by the due date for filing paper returns. Mr Fautley's letter of 15 August 2014 alludes to there being unspecified "difficulties" in meeting that filing deadline but it does not explain what those difficulties were, why they were insurmountable or why they amount to a reasonable excuse. Given that the partnership had always filed its returns in paper form, that Mr Fautley was well aware (or ought to have been aware from the information provided by the Respondents) that filing a partnership return on-line required software that he did not have and that the return that was eventually submitted was a paper return, I consider that there was no reason why this return should not have been submitted by the due date for filing paper returns.

19. That being the case, the circumstances of Mr Fautley's illness in January, in the lead up to the due date for making on-line filings, and the fact that he lacked the necessary software are ultimately irrelevant because there was no excuse for the failure to file the paper return by the due date for filing paper returns – ie 31 October 2013.

20. In addition, although I have some sympathy for the Appellant in that the information that was ultimately set out in the partnership's return was available to the Respondents through the returns filed on behalf of the partners, that no tax was payable by the partners in respect of the relevant tax year and that a partnership that had become insolvent had to incur yet more expense in filing a tax return, none of those arguments amounts in my view to a reasonable excuse, objectively tested as described in paragraphs 6 and 7 above. The statutory filing obligations in respect of a partnership are clear and the mere fact that the information required by the return is available to the Respondents through other means, that no tax is payable by reference to the information required by the return and that the partnership is in financial difficulties do not mean that the partnership should have been able to disregard those obligations.

21. For similar reasons, even if it was up to me to determine the issue by myself, de novo, I do not think that any of the matters set out in paragraph 11 above amount to "special circumstances". As noted above, I am not permitted to reach my own view on that issue in any event. I am merely permitted to determine whether the view reached by the Respondents was unreasonable in the sense set out in the *Wednesbury* case. In that regard, not only do I think that the view reached by the Respondents on this question was not unreasonable in that sense; I agree with it.

22. For the reasons set out above, I consider that the partnership did not have a reasonable excuse for the delay in meeting its filing obligations in this case and that the circumstances leading to that delay did not amount to "special circumstances".

23. In addition to his reliance on the relieving provisions, Mr Fautley also alluded to the procedural issues that were at issue in the case of *Donaldson v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2511.

24. That relevance of that case in the present context is that it is necessary for me to determine:

> (a) Whether, in relation to the penalty imposed under paragraph 4 of Schedule 55, the notices given to the partnership were such that the requirement in paragraph 4(1)(c) of Schedule 55 – the obligation to specify the date from which the daily penalty was payable – was met; and
>
> (b) Whether, in relation to all three penalties – ie the ones imposed under paragraphs 3, 4 and 5 of Schedule 55 – each relevant notice complied with the requirement in paragraph 18(1)(c) of Schedule 55 – the obligation to state in the penalty notice the period in respect of which the penalty is assessed and, if it has not so complied, whether that failure is a matter of form and not substance such that it remains valid by virtue of Section 114(1) of the Taxes Management Act 1970.

25. Although the hearing bundle did not include copies of the specific penalty notices in question, it did include pro formas of those notices and it is clear from those pro formas that:

> (a) in relation to the penalty imposed under paragraph 4 of Schedule 55, the requirement in paragraph 4(1)(c) will have been met; and
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> (b) each notice will have complied with the requirements in paragraph 18(1)(c) of Schedule 55.

26. For the above reasons, I uphold the penalties that are the subject of this appeal and I dismiss the appeal.

27. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 7 MARCH 2018