TC06411

Appeal number: TC/2017/04729

INCOME TAX – self-assessment returns – late filing penalties – paragraphs 3 to 5 of Schedule 55 FA 2009 – whether mistakes gave rise to a reasonable excuse – whether notice for daily penalties served – whether reasonable excuse for continual delay in filing – whether special reduction – appeal allowed in part – penalties reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLAIRE PALMER **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

The Tribunal determined the appeal on 12 March 2018 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 6 June 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 25 July 2017.

DECISION

Introduction

1. The appeal is against penalties imposed under paragraphs 3 to 5 of Schedule 55 to Finance Act 2009 ("FA 2009") in relation to the late filing of the self-assessment return for the year ended 5 April 2015.

2. The penalties under appeal total £1,200 and consist of:

   (1) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55;

   (2) The fixed six-month penalty of £300 under paragraph 5 of Schedule 55.

3. The appellant has accepted and settled the fixed penalty of £100 for the initial late filing of the return, and this element is not a matter under appeal.

Findings of fact

4. From 6 April 2014, the appellant started to receive rental property income, which brought her into the self-assessment regime. The time limit for notifying chargeability is six months after the end of the tax year in which the tax liability arises. HMRC should have been notified by 5 October 2015. The notification on form SA1 was received late in January 2016.

5. On 10 February 2016, a Notice to file a return for 2014-15 was issued to the appellant. On 18 February 2016, a paper return for 2014-15 was also issued.

6. As the return was issued outside the normal filing cycle for the year, the due date for filing the 2014-15 return was three months and a week after the date of issue. The filing due date was therefore 25 May 2016, for a paper or an electronic return.

7. HMRC's SA notes show the following penalty notices were issued to the appellant by the automated system:

   (1) On or around 31 May 2016, a notice for the fixed penalty of £100;

   (2) On 27 September 2016, the 30-day daily penalty reminder;

   (3) On 25 October 2016, the 60-day penalty reminder.

8. In December 2016, the appellant received a demand for late filing tax penalties of £1,200.

9. On 7 December 2016, the appellant's 2014-15 return was filed electronically, over six months after its due date of 25 May 2016.

The Appellant's Case

10. On the Notice of Appeal, the appellant states her grounds as follows:

(1) All information was provided to my agent and my tax return was finalised on 25 July 2016. Unfortunately, he somehow made an inexplicable human error and forgot to hit the send button on his tax software.

(2) This error did not come to light until a tax demand for late filing penalties was received in December 2016.

(3) The decided case of *Barrett v HMRC* (UKFTT 329) should be relied upon to demonstrate that I had a reasonable excuse in that as far as I was aware my tax return had been filed on 25 July 2016, and I had met all my obligations to file.

(4) The recent case of *T Richter* (TC05816) casts doubt on the legitimacy of the HMRC procedure for past £300 penalty notices.

HMRC's case

11. The penalty reminders were sent to the address held on the record at the time, which was the same correspondence address held since 28 January 2016. HMRC's Returned Mail Service with the Royal Mail did not show any mail being returned as undelivered from that address.

12. If Mrs Palmer believed her return had been successfully filed on 25 July 2016, the first penalty reminder issued on 27 September 2016 would have alerted her to the fact that her 2014-15 self-assessment return had not been received.

13. The First-tier Tribunal decisions do not set precedents and each case must be considered on its own merits.

14. This appeal does not show that something unforeseen prevented filing the 2014-15 return by the due date that was outside the control of Mrs Palmer to merit special reduction.

Discussion

15. The first issue for the Tribunal to decide is whether the appellant had a reasonable excuse for the late submission of the return.

16. If I can find no reasonable excuse, I will consider if there are any special circumstances in this case to merit special reduction.

Whether mistaken belief gave rise to a reasonable excuse

17. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse is "a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

18. Mrs Palmer's first ground of appeal is that she believed that the return filing was successfully completed on 25 July 2016. Her belief was mistaken, since the agent made an inexplicable mistake of failing to press the "send" button to submit the

return. Whether it was Mrs Palmer's mistaken belief, or the agent's human error, the essential ground of appeal is that there had been a genuine mistake.

19. In *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC)) where there was a *bona fide* mistake made, Judge Hellier states at [12] that while the mistake "was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable excuse."

20. Similarly, in *Coales v HMRC* [2012] UKFTT 477 (TC), Judge Brannan states at [32]: "The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse."

21. An honest and mistaken belief cannot, of itself, amount to a reasonable excuse. The reasonableness of a belief has to be subject to the same objective test for reasonable excuse as set out by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239:

> "… can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. … 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?"

22. The taxpayer in *Clean Car* was a VAT trader, but the same principle applies to all taxpayers, whether traders or not. It is accepted that Mrs Palmer had held a mistaken belief that her return was submitted on 25 July 2016. However, the legislation does not provide for a mistake to become a reasonable excuse. It remains for me to find whether there were circumstances for there to be a reasonable excuse associated with the late filing.

23. This takes me to the second ground of Mrs Palmer's appeal, which was to say that the error only came to light when she received a tax demand for late filing penalties in December 2016.

24. There has been no dispute as regards the delivery of correspondence to Mrs Palmer's address. I cannot accept that it was the action of a reasonable taxpayer to take notice only when the tax demand for £1,200 arrived in December 2016. In actual fact, there had been earlier reminders of the accruing daily penalties, in September and October 2016. These notices would have given Mrs Palmer a clear indication that the return she believed to have been submitted had not been received by HMRC.

25. A responsible taxpayer would have enquired into the status of the return submission, with the agent or with HMRC. To take no action in respect of these penalty reminders cannot be held as a reasonable thing to do by a responsible taxpayer, conscious of and intending to comply with her obligations regarding tax.

26. The first ground of appeal, namely, that Mrs Palmer had done all that she could have done on 25 July 2016, is dismissed. The second ground of appeal is likewise dismissed, as there is a *prime facie* case that other penalty notices prior to the payment demand of December 2016 were issued to enable Mrs Palmer to realise earlier that the return filing supposed to have happened might not have happened as she believed.

Whether reliance of a third party gave rise to a reasonable excuse

27. The third ground of appeal is essentially to argue that following *Barrett v HMRC* [2015] UKFTT 329 (TC), the Tribunal should find that Mrs Palmer, having appointed an agent to deal with her tax affairs, has met her obligations in terms of return filing for 2014-15.

28. The merits of each case depend on its own facts, as Judge Berner was careful to point out in *Barrett* at [155]:

> "Tribunals should, in particular, be cautious in making generalised statements concerning perceived categorises of case, and equally circumspect about judging what is reasonable as a matter of the legal test by reference to perceived policy. ... In the case of s 118(2) TMA, with which this case is concerned, and which contains no reference to reliance on third parties, it is not in my view possible or permissible to discern any underlying purpose or policy with regard to such reliance from the statutory language."

29. Two facts in *Barret* are to be distinguished from those in Mrs Palmer's case. First, *Barret* concerned the filing of CIS returns, which renders section 118(2) TMA applicable. Section 118(2) TMA states as follows:

> "... 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."

30. The context for Judge Berner's observations was in respect of the notification of an obligation to make CIS returns. It is to be read in conjunction with [160] where Judge Berner concluded:

> "... I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself."

31. In *Barret*, Judge Berner was considering whether the taxpayer had a reasonable excuse for failing to notify his obligations to file CIS returns in *Barret*. This is akin to the matter of Mrs Palmer notifying HMRC of her chargeability on the commencement of a new source of income. It is not arguable that the matter to which Judge Berner allowed in part in *Barrett* was the same as the matter in front of me to enable *Barrett* to be applied.

32. Furthermore, I should note that Mrs Palmer's notification of her chargeability (the matter analogous to that in *Barrett*) was made late. The lateness of that notification could have been subject to a penalty, but HMRC have not imposed a penalty in that respect, probably due to an absence of a tax liability for 2014-15, and is not a matter in front of me.

33. Secondly, Judge Berner was observing that the statutory provision under section 118(2) TMA does not make any reference to reliance on third parties. Judge Berner's comment is to be understood in the context of other statutory provisions that specifically exclude the reliance of a third party from being a reasonable excuse, such as those applicable in the present appeal.

34. The relevant provisions under paragraph 23 of Schedule 55 apply here. Paragraph 23(1) of Schedule 55 provides that liability to a penalty under any paragraph of the Schedule does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC or (on appeal) the Tribunal that there is a reasonable excuse for the failure. The statute specifically excludes "an insufficiency of funds" as a reasonable excuse, and in respect of reliance of a third party, the provision under sub-paragraph 23(2)(b) should be applied in conjunction with sub-paragraph 23(2)(c):

> "23(2)(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
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> 23(2)(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."

35. The penalties were imposed under Schedule 55 to FA 2009. The relevant provisions for me to consider are those under paragraph 23 of Schedule 55, not section 118(2) TMA as in *Barrett*. Not only is the case of *Barrett* not applicable, but in view of the statutory exclusion under paragraph 23(2)(b), it limits any reliance of a third party, such as the agent, to being a reasonable excuse unless the taxpayer had taken reasonable care to avoid the failure. For the same reasons that the first and second grounds of appeal are dismissed, I cannot find that Mrs Palmer had taken reasonable care to avoid the failure.

36. Furthermore, the daily penalty reminders preceding the penalty demand of £1,200 in December 2016 should have prompted Mrs Palmer to take action to remedy the failure earlier than she eventually did. As already considered, no action was taken on the receipt of the penalty reminder in September 2016. Had Mrs Palmer acted promptly on the September 2016 reminder, she could have limited the penalty to £300 or £400, depending on the time lapse between the notice arriving and the action taken.

37. In the light of sub-paragraph 23(2)(c), I cannot find that Mrs Palmer had a reasonable excuse for the continual delay in filing the return, since the failure was not remedied without unreasonable delay.

38. As the mistake originated with the agent, it is open to Mrs Palmer to take action against her agent in respect of that mistake, in contract or in tort. The legislation does not provide shelter for such mistakes. The statutory exclusion of reliance of a third party being a reasonable excuse is for good reasons, and Parliament's intention for incorporating this kind of statutory exclusion was evidenced by the minister's statement in relation to VAT as recorded in *Hansard*: "If all one had to do to have a reasonable excuse was to find an accountant who would delay everything, there would be easy pickings to be made."[1]

Whether HMRC have discharged the burden under paragraph 4(1)(c) of Schedule 55

39. The daily penalties are imposed under paragraph 4 of Schedule 55, and a taxpayer is liable to a penalty under paragraph 4 "*if (and only if)*" HMRC "give notice to P [the taxpayer] specifying the date from which the penalty is payable".

40. The *Donaldson* case, to a large extent, is about whether this onus has been met by HMRC in imposing the daily penalties, since the provisions under paragraph 4 are emphatic as to the conditions to be met before the daily penalties can be imposed.

41. More recent decisions from the First-tier Tribunal have concluded that where the burden is not met, the penalty notices is invalidated, see for example *Mohammed Samuel Islam t/a Zainub Takeway v HMRC* [2017] UKFTT 0337 and *Thomas Richter v HMRC* [2017] UKFTT 0339.

42. The fourth ground of appeal citing the case of *Richter* is effectively about whether the onus has been discharged by HMRC to impose the daily penalties. Each case turns on its own facts, and it remains to be established whether HMRC have met the burden of proof in giving notice to Mrs Palmer to enable them to discharge the "if (and only if)" criterion for the daily penalties to be imposable.

43. The burden of proof for giving Mrs Palmer notice of the daily penalties lies with HMRC. Under s 7 of the Interpretation Act 1978, it is provided 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."

44. What is required to be proved is that the document has been: (a) properly addressed, (b) prepaid and (c) posted. If the sender can prove all these elements, then the deeming provision under the first part of section 7 can be relied upon for service of the said document to be deemed to have been effected.

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[1] *Hansard* 21 May 1985 (HC Official report SC B (Finance Bill) 21 May 1985, col 173. The statutory exclusion referred to in the comment was legislated under section 33 (2)(b) of Finance Act 1985, and s 33(2)(b) is, to all intents and purposes, the predecessor of section 71(1)(b) of VATA 1994 which applies to the current case.

45. The daily penalty reminder letters were issued to Mrs Palmer's correspondence address. HMRC have no record of any mail returned as undelivered to that address. To that extent, the onus under paragraph 4(1)(c) placed on HMRC has been met in the present case for the effective service of the daily penalty notices to be deemed.

46. The six-month penalty of £300 was imposed under paragraph 5 of Schedule 55 which provides:

> "P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date."

47. The condition for imposing a 6-month penalty is only referential to whether the return is still outstanding six months after the due date. There is no similar provision under paragraph 5 as regards the onus of "giving notice" before the six-month penalty can be validly imposed. There is no dispute that the return was still outstanding six months after the filing due date on 25 May 2016.

Whether special circumstances

48. On the second issue, whether there were special circumstances that merit a reduction of the penalties, HMRC's view is that there was nothing special or exceptional outside the control of Mrs Palmer to merit special reduction.

49. Case law authorities have defined "special" as "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). Special circumstances must also apply to the particular individual, and not be general circumstances that apply to many taxpayers by virtue of the penalty legislation (*David Collis* [2011] UKFT 588 (TC) at [40]).

50. The Tribunal's jurisdiction as regards special reduction comes under paragraph 22 of Schedule 55, with sub-paragraphs (3) and (4) stating the following:

> "(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16 –
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> (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
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> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
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> (4) In sub-paragraph (3)(b) 'flawed' means flawed when considered in the light of the principles applicable in proceedings of judicial review."

51. In considering whether Mrs Palmer had special circumstances, I have regard to the following facts:

(1) It would appear that the appellant was new to self-assessment, and that the year 2014-15 was the first time she had to file an SA return, as I note that

HMRC had to set up an SA record for her when she notified them of her liability to register for self-assessment in January 2016.

(2) She was therefore a "first-time filer' when it came to the 2014-15 return.

(3) She took the necessary steps of engaging an accountant to file her return and was led to believe that the return filing was effected on 25 July 2016.

(4) She had thought that she had no further obligations in respect of the 2014-15 return based on her erroneous belief.

(5) She would *not* have realised the return was still outstanding from 25 July 2016 to 27 September 2016.

(6) While the date of the penalty reminder was dated 27 September 2016, it could have taken up to 4 or 5 working days to arrive, which meant that the appellant might have come to realise her erroneous belief in early October 2016.

(7) An experienced taxpayer would have taken immediate action to remedy the failure, knowing what significance the September 2016 penalty reminder carried. Given that the appellant was relatively new to self-assessment, she might have to make enquiry on receiving the penalty reminder as to its meaning before taking action to remedy the failure. In any event, by the end of October 2016, the failure should have been remedied, especially in view of the fact that the 2014-15 return had already been completed for submission in July 2016.

52. Pursuant to the provisions under paragraph 22 of Schedule 55, the Tribunal substitutes its decision for that of HMRC by giving special reduction at 70%.

Decision

53. For the reasons set out above, special reduction at 70% is given by reducing the overall penalties payable to £360.

54. The appeal is accordingly allowed in part.

55. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2018