[2018] UKFTT 428 (TC)

TC06620

Appeal number: TC/2014/03405

INCOME TAX – Application for an adjournment – refused – Proceeding in the absence of the Appellant - Penalties for failure to make self-assessment returns – Whether a reasonable excuse? – No: insufficient evidence advanced by Appellant – Whether HMRC's failure to consider special circumstances renders decisions to penalise flawed in the light of the principles applicable to judicial review? - No, John Dee v CCE applied - HMRC's decisions would inevitably have been the same - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR SAMUEL SMYTH **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS SONIA GABLE

Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on Tuesday 17 July 2018

No appearance by or on behalf of the Appellant

Mrs O'Reilly, an Officer of HMRC, appeared for the Respondents

DECISION

The Application for an Adjournment

1. At about noon on the day before the hearing, the Applicant's representatives applied by email to the Tribunal for an adjournment. That application was placed by the Tribunal's administration before the panel at about 10 o'clock on the morning of the hearing, by email.

2. The application requested "*that this case is postponed for a short duration as this case has been confused by our client with a PAYE liability which is still subject to appeal. Our Client would be obliged if you could grant him a little time to complete the preparation for his case for hearing at this tribunal."*

3. The application was opposed by HMRC.

4. We decided to refuse the application to adjourn.

5. This is an appeal about late payment penalties imposed on the Appellant for the late filing of self-assessment tax returns in two successive years: 2011/12 and 2012/13.

6. The Notice of Appeal was filed on 18 June 2014 – that is to say, over four years ago (albeit, for at least some of this period, the Appeal was stayed behind Donaldson v HMRC). The appeal was originally allocated to the default paper track, but in April 2017 the Appellant (as was his right) requested an oral hearing and the appeal was re-allocated to the basic track. The appeal was eventually listed for hearing before the Tribunal on 26 March 2018. On that occasion, the Appellant did not appear and was not represented. When contacted by the Tribunal, he stated that he had got the date wrong. The Tribunal (Judge Fairpo and Mrs Gable) took the overriding objective into consideration and concluded that, in the interests of justice, the hearing should be postponed. The hearing on 17 July 2018 was notified to the parties on 10 April 2018.

7. The Notice of hearing was sent together with the 'Guidance for Tribunal users on the Postponement of Hearings' That makes clear that any request for a postponement made more than 14 days after the hearing has been notified to the parties is unlikely to be granted 'unless the reasons are compelling'.

8. The reasons here are far from compelling.

9. The Appellant had known that there was to be a hearing on 17 July 2018 for almost three months. That is to say, since March he has had a further three whole months to complete his preparation for this hearing. The extent of this preparation is entirely unclear given that the Appellant is professionally represented.

10. We do not know of any other concurrent appeal, and no information as to the same was placed before us. The Appellant had already had four years to prepare his appeal. The application to adjourn was simply far too late. There was no indication of the length of adjournment which the Appellant wanted (other than it should be 'short') but, in all likelihood, given the Tribunal's resources, an adjournment would not result

in a further listing for several months. The appeal was ready for hearing. There was no indication as to what further preparation was required by the appellant, bearing in mind that appeals on the basic track are relatively informal, and on the 'turn up and talk' model.

Proceeding in the absence of the Appellant

11. The next decision which we had to make was whether to proceed with the appeal hearing in the absence of the Appellant. We decided that we would. He had received notice of the hearing in good time. It was in the interests of justice to proceed: Rule 33 of the Tribunal's Rules. The reasons for that are essentially the same as the reasons for not adjourning. The appeal was ready to be heard and it had gone on for a very long time already. Rule 2 says that we should aim to deal with cases proportionately, and avoiding delay, so as far as compatible with proper consideration of the issues. Here, the appeal was one which, but for the Appellant's wish, would have been dealt with by a single judge, on the papers. Nothing had been put before us suggestive that this appeal could not be justly and fairly decided on the basis of the documents.

The Appeal

12. In this appeal, the Appellant appeals against penalties that HMRC has imposed on him under Schedule 55 of the Finance Act 2009 ('Schedule 55') for a failure to submit annual self-assessment returns for two successive years - 2011/12, and 2012/13 - on time.

13. The Appellant's Notice of Appeal refers to the sum of £1,400. That is arithmetically wrong. The amount of the penalties is in fact £2,700, made up as follows:

(1) For 2011/12:
   (a) £100 late filing penalty
   (b) £900 daily penalties
   (c) 6 month late filing penalty
   (d) 12 month late filing penalty

(2) For 2012/13:
   (a) £100 late filing penalty
   (b) £900 daily penalties
   (c) 6 month late filing penalty

14. The 12 month penalty imposed in relation to 2011/12 is not a deliberate withholding penalty, and does not involve any such allegations against the taxpayer. It is imposed under Schedule 55 Paragraph 6(5).

15. The latest filing date for 2011/12 was 31 January 2013. The latest filing date for 2012/13 was 31 January 2014.

16. The returns for both years were filed on the Internet on 8 October 2014.

17. Those returns for both 2011/12 and 2012/13 were therefore late. The return for 2011/12 was more than 12 months late. The return for 2012/13 was more than 6 months late.

18. The penalty legislation is set out in the Appendix, and was also contained in the Authorities Bundle prepared for the hearing.

19. The thrust of the Appeal, in summary, is that the Appellant had entrusted one Glen Boyd, described as a tax consultant, to deal with his tax affairs. He had paid Glen Boyd a large sum of money – said to be either £12,500 or £20,000 - only to later discover that Mr Boyd did not prepare accounts, file tax returns, or forward payment to HMRC.

Penalty Appeals

20. Because these are appeals against penalties, it is important to remind ourselves that an initial burden lies on HMRC to establish that events have occurred as a result of which any particular penalty is, on the face of it, due. Facts, unless admitted, have to be proved. In order to prove something, evidence is required. Assertions in Statements of Case or at the hearing by Presenting Officers are not evidence. Unless sufficient evidence is provided to prove the relevant facts relating to a particular penalty on the balance of probabilities, then that penalty must be cancelled without any question of 'reasonable excuse' (or 'special circumstances') becoming relevant: see the decision of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC) at Para [69].

21. HMRC's Return Summary shows that a Notice to File was sent to Mr Smyth on 6 April 2012 for the year 2011/12 and a full return (i.e., a full, blank, tax return) was sent to Mr Smyth on 6 April 2013. There is no challenge to the fact that Mr Smyth was in the self-assessment regime, or as to the receipt of Notices to File / Full Returns. We find that HMRC's records were correct. We are satisfied that section 8 of the *Taxes Management Act 1970* has been complied with.

22. Hence, we are satisfied that the £100 late filing penalties, the six month penalties, and the 12 month penalty were all lawfully imposed, subject to any question of reasonable excuse or special circumstances, in relation to which the appellant bears the burden.

The daily penalties

23. When it comes to the daily penalties the situation is different. We have to be satisfied, as a matter of law, that HMRC has served a notice of the kind referred to in Schedule 55 Paragraph 4(1)(c). Whilst this is not a point raised by the Appellant in support of his appeal, HMRC still bears the burden: see *Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC)

24. We are satisfied that HMRC gave appropriate notice for the purposes of Paragraph 4(1)(c) in relation to the daily penalties for each of the two years.

25. We disregard the template documents for the year ending 2010/11 which are not of assistance in ascertaining what notice was given in relation to subsequent years. We cannot proceed on the basis that the notices in subsequent years 'would have been the same'.

26. In relation to 2011/12, we have been shown the template payment reminder letters at page 53 of the bundle: Form SA309E. It explicitly relates to the tax year 2011/12. It is the version from August 2012, and therefore was in circulation at the relevant time, and is not some later version. It sets out the date of 31 January for the return, which can only mean 31 January 2013. It goes on to say "*the longer you delay the more you will pay. If your tax return is more than three months late you will get daily penalties of £10 per day and could pay up to £1,600 – even if you don't owe any tax".* We consider that sufficient notice for the purposes of section 4(1)(c).

27. In relation to 2012/13, we have been shown an SA100 full return for that year, which, on the face of it, gives the latest date for filing, and says that '*If your return is more than three months late, you will be charged daily penalties of £10 a day'*. We have also been shown (at page 26 of the bundle) the actual notice of penalty assessment sent to Mr Smyth (and not a template or generic document) SA326D which says "*Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns'*. We consider that sufficient notice for the purposes of section 4(1)(c).

28. As such, appropriate notice of daily penalties was given for each of these years, and the daily penalties were lawfully imposed, subject to any question of reasonable excuse or special circumstances.

29. For the sake of completeness, we have noted HMRC's position in other appeals which we have encountered to be that it does not retain originals of the documents which it has sent to the taxpayer. However, in this appeal the Self-Assessment Notes record HMRC, in June 2015, retrieving microfiche copies from 'Aspire' (we do not know otherwise who, or what, this is) and in February 2016 retrieving papers from 'Woodston' (we do not know what this is), taking copies and returning 'originals'. These entries are suggestive (to say no more) that HMRC – at least in relation to this appellant – had useful documents somwhere in storage.

Reasonable Excuse

30. There is no definition of "reasonable excuse" in the statute, but its meaning is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners* [1991] VATTR 234, HHJ Medd OBE QC stated (in the analogous context of VAT penalties):

> " It has been said before in cases arising from default surcharges that 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?"

31. We apply that test here.

32. We do not consider that the Appellant meets it.

33. We do not accept that he had a reasonable excuse for any of the late filings.

34. Schedule 55 Paragraph 23(2)(b) says that where a taxpayer relied on any other person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

35. On 12 April 2017, the Tribunal – when listing this appeal, at the Appellant's request – for an oral hearing, gave the following direction:

> *"If you intend to rely at the hearing upon any documents (e.g. letters, bank statements, accounts, receipts, invoices, contracts or other documents) that you have not previously sent to the Respondents, please send copies of them to the Tribunal and the Respondents so that they are received at least 14 days before the hearing…."*

36. As far as we are aware, neither party sought to set aside or vary that direction. As far as we are aware, everything which the Appellant has put before the Tribunal and HMRC is before us. As far as we are aware, the Appellant has not sought – whether in accordance with that direction, or out of time – to put any further information, documents or material before the Tribunal or HMRC.

37. The evidence which the Appellant puts forward is so vague and lacking in detail that it does not satisfy us, even on the balance of probabilities, in showing either (i) that the Appellant actually, as a matter of fact, did rely on Derek McDowell / Pennybridge Accounting and/or Glen Boyd to do anything; or (ii) if he did, and if there were failures by Derek McDowell / Pennybridge Accounting and/or Glen Boyd, that the Appellant took reasonable care to avoid such failure or failures.

38. As such, the Appellant's evidence fails to discharge the burden placed on him. We can expand on this:

(1) It is far from clear what the Appellant's relationship with Derek McDowell/Pennybridge Accounting was. There is no documentary evidence;

(2) It is far from clear what the Appellant's relationship with Glen Boyd was. There is no documentary evidence;

(3) There is no evidence of the Appellant paying anyone – whether Derek McDowell, Pennybridge Accounting, or Glen Boyd – anything (let alone £12,500 or £20,000);

(4) The grounds of appeal say, rather strangely, '*It has since been discovered that Glen Boyd did not prepare accounts, file tax returns, or forward payment to HMRC and is now the subject of a police investigation. We can provide further details if necessary'*;

(5) It was plainly obvious that 'further details' were necessary. Many of those 'details' would have been available to the Appellant in mid 2014. It is unclear why no 'further details' were provided by the taxpayer then, or at any time in the subsequent four years;

(6) There is no police evidence. There is no crime number. It is not sufficient for the Appellant, as he has done, to give the Tribunal and HMRC the mobile phone number of a policeman, and expect either the Tribunal or HMRC to seize the initiative by acting as a detective in following up what criminal investigation, if any, there has been. That is not HMRC's task, and it is not our task.

39. But, and even if any of this amounted to a reasonable excuse for late filing, Mr Smyth's eventual filings were not made without 'unreasonable delay' after the excuse ceased: see Schedule 55 Paragraph 23(2)(c).

40. This is because he was aware of the late filings by 11 March 2014 (at the latest), which was when he wrote to HMRC: the letter at page 14 of the bundle. But the filings were not until 8 October 2014 – almost 7 months later. The delay of 7 months is unreasonable, especially when Mr Smyth was advised by HMRC, in May 2014, that he could submit tax returns using estimated figures. We note that the Notice of Appeal, dated 18 June 2014, said that 'We are currently in the process of filing 2011/12 and 2012/13 self assessment tax return forms, and hope to have these completed within the next two weeks'. In fact, those were not completed in two weeks, but took a further three months.

Special circumstances

41. HMRC did not explicitly consider special circumstances. But we do not consider that this renders its decision in relation to the penalties flawed in a public law sense.

42. The decision of the Tribunal (Judge Popplewell) in *Quested t/a Eyelevel Design Consultants* [2017] UKFTT 460 (TC) contains (at Paragraph [20]) a useful summary of the principles applicable to special circumstances.

43. Guided by and applying those principles, even if we were to find that HMRC had failed to consider whether Mr Smyth's circumstances were special (in the accepted sense of exceptional, abnormal or unusual), and that failure rendered the penalties "flawed in the light of the principles applicable in proceedings for judicial review", that is not the end of the argument.

44. We consider that HMRC, looking at the self-same information and material as was put before us, would still inevitably have come to the same decision as it did. That is to say, we consider that HMRC would inevitably have refused a special reduction and would have upheld the penalties, and that that decision would have been a

reasonable one to reach in a public law sense: see *John Dee Limited v Commissioners of Customs and Excise [1995] STC 941* (Court of Appeal).

45. Therefore, we also dismiss the appeal insofar as it is advanced in relation to special circumstances.

Conclusion

46. For the above reasons, the appeal is dismissed and the penalties are upheld.

Application for permission to appeal

47. This document contains full findings of fact and reasons for the decision.

48. The appellant has the right to apply to the Tribunal to set this decision, or any part of it, aside and to remake it, pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 28 days after this decision is sent to the appellant.

49. Any party has the right to apply for permission to appeal against this decision 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 CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2018

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 4—
>
> (1) P is liable to a penalty under this paragraph if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 5—
>
> (1) 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.
>
> (2) The penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

> 6—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.
>
> (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 100%,

(b) for the withholding of category 2 information, 150%, and

(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 70%,

(b) for the withholding of category 2 information, 105%, and

(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

23—

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

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(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.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(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.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.