[2019] UKFTT 223 (TC)

TC07070

Appeal number: TC/2018/07923

INCOME TAX – failure to file a PAYE real time information return on time – penalty for late filing – properly imposed – no reasonable excuse – no special circumstances – penalty proportionate – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RED LION TRADING PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 27 March 2019 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 December 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 21 January 2019 and various correspondence between the parties.

DECISION

Background

1. This is an appeal against a penalty of £200 (the "**penalty**") imposed by the respondents (or "**HMRC**") under paragraph 6C of Schedule 55 to the Finance Act 2009 ("**Schedule 55**") for the failure to file a Pay as You Earn ("**PAYE**") real time information ("**RTI**") return ("**RTI return**") under regulation 67B of the Income Tax (Pay as You Earn) Regulations 2003 ("**PAYE Regulations**") on time for the period 6 August 2018 to 5 September 2018 (the "**period under appeal**").

2. The appellant is an RTI employer and was thus required to make an RTI return on or before making a relevant payment to an employee.

3. HMRC allege that the appellant failed to deliver an RTI return on or before making relevant payments to two employees for the period under appeal.

4. For reasons which I give later in this decision, I find that HMRC is correct and that the appellant did fail to deliver a return on or before making such payments. I do not think that the appellant has reasonable excuse. There are no special circumstances and that the penalty is proportionate. And so I dismiss this appeal.

Evidence and findings of fact

5. From the papers before me I find the following facts:

(1) The appellant is an RTI employer within the meaning of regulation 2A and 2B of the PAYE Regulations and as such was obliged to deliver to HMRC an RTI return in the appropriate form on or before it made a relevant payment to an employee.

(2) On 26 August 2016 the appellant made relevant payments to two employees.

(3) The RTI return was submitted on 7 September 2018.

(4) Payment of the PAYE tax and national insurance contributions was also made to HMRC on 7 September 2018.

(5) On 16 November 2018 HMRC sent the appellant a penalty notification of the penalty. This was based on the fact that the appellant has between 10 and 49 employees. It was notification of a penalty for £400 for each of two periods. A penalty of £200 for the period under appeal and a second penalty of £200 for the period 6 September 2018 to 5 October 2018. The penalty for this later period is not part of this appeal.

(6) The appellant has previously been assessed to penalties for late delivery of RTI returns for the periods 6 February 2018 to 5 March 2018 and 6 March 2018 to 5 April 2018. In each case the appellant appealed against the assessments on the basis that they had paid the tax. HMRC accepted those appeals and cancelled those appeals and cancelled those penalties.

(7) HMRC's letter to the appellant dated 28 June 2018 (the "**Education letter**") includes the following statement:

> "**Important Information**
>
> PAYE information must be reported to us on or before a payment is made to an employee or we may charge you a penalty".

(8) This statement appears on three separate occasions in the Education letter.

(9) The appellant appealed the penalty to HMRC on 22 November 2018. HMRC rejected the appeal and notified the appellant of that rejection in their letter of 4 December 2018.

(10) The appellant notified its appeal to the tribunal on 6 December 2018.

The Law

Legislation

6. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) An RTI employer must deliver to HMRC specified information in electronic form on or before making a relevant payment to an employee (Regulation 67B).

(2) Failure to file an RTI return on time engages the penalty regime in Schedule 55 Finance Act 2009 ("Schedule 55" and references below to paragraphs are to paragraphs in that Schedule).

(3) The amount of the penalty depends on the number of employees of the RTI employer. Where an employer has at least 10 but no more than 49 employees the penalty is £200 (Regulation 67I).

(4) If HMRC think it is right because of special circumstances they must reduce the penalty (paragraph 16).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

(8) If I do decide to substitute my decision for another decision that HMRC had power to make, then I can consider special circumstances to a different extent to HMRC in respect of their original decision, but only if their decision in respect of special circumstances was flawed in the judicial review sense (paragraph 22).

(9) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(10) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Case law

7. A summary of the relevant case law is set out below

Reasonable excuse

(1) The test I adopt in determining whether the appellant has a reasonable excuse is that set out in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "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?"

(2) Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

(3) Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the

taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

(4) The approach that I adopt when considering a reasonable excuse defence is that set out in the Upper Tribunal Decision in *Christine Perrin v HMRC* [2018] UKUT 156.

(5) In *Perrin*, the Upper Tribunal made the following comments:

> "69. Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant.
>
> 70. Assuming that hurdle to have been overcome by HMRC, the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in The Clean Car Co and Coales).
>
> 72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it, and one of those tools is the inherent probability (or otherwise) that the belief which is being asserted was in fact held; as Lord

Hoffman said in In re B (Children) [2008] UKHL 35, [2009] 1AC 11 at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse.

…….

82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation."

Special Circumstances

(6) There have been a number of cases on special circumstances from which I derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

(a) While “special circumstances” are not defined, the courts accept that for circumstances to be special they must be “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).

(b) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(c) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(d) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(e) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(f) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(g) I can allow the taxpayer's appeal if I find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill) (*John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal."

(h) In deciding whether HMRC's decision was unreasonable, I should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(i) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome - whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(j) Having undertaken that assessment:

> (i) If the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.
>
> (ii) If the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

(7) In relation to the doctrine of proportionality and its application to the issues in this case, I have reviewed the following cases:

(a) Paraskevas Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(b) International Transport Roth GmbH v Secretary of State for the

Home Dept [2003] QB 728 ("*Roth*")

(c) James v UK (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(d) Wilson v SoS for Trade and Industry [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(e) R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent) [2015] UKSC 41 ("*Lumsden"*)

(8) A summary of the principles relating to proportionality is set out below:

(a) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(b) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23].

(c) In the context of its application to penalties, the principle of proportionality is that:

(i) penalties may not go beyond what is strictly necessary for the objective pursued; and

(ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(d) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(e) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

Burden and standard of proof

8. The burden of establishing that the appellant is prima facie liable for the penalty which has been properly notified and assessed lies with HMRC.

9. The burden of establishing that it should not be liable for the penalty because, amongst other reasons, it has a reasonable excuse, or that the penalty is disproportionate, lies with the appellant.

10. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Service of relevant notices

11. It is incumbent on HMRC to establish that they have acted in accordance with the provisions of paragraph 18 of Schedule 55 as regards the penalty.

12. Under paragraph 18(1) of Schedule 55:

> "(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must –
>
> (a) assess the penalty;
>
> (b) notify P, and;
>
> (c) state in the Notice the period in respect of which the penalty is assessed."

13. As evidence that the penalty has been assessed and notified in accordance with paragraph 18 of Schedule 55, HMRC have provided an extract from their computer records indicating that a notice of penalty assessment designated RTI 511 was issued on 16 November 2018 for £400. They also provide a pro forma notice of penalty assessment, in this case for quarter ended 5 which includes a schedule of how a penalty is calculated. As I say this is a pro forma and is not a copy of the actual assessment or notice given to this appellant since HMRC has not kept a copy.

14. If the actual penalty notice given to the appellant in respect of the penalty included, accurately, the information set out in the pro forma, then it would satisfy the provisions of paragraph 18 of Schedule 55.

15. The appellant has not suggested that it did not receive a penalty notice either in its appeal to HMRC or in its appeal to the tribunal. The grounds of appeal are simply that HMRC have refused the appeal despite the appellant having paid the amount in full on 7 September 2018.

16. There has been correspondence between the appellant and HMRC in relation to this matter and in none of that correspondence has the appellant raised any complaint or observation about the penalty assessment and notification.

17. I therefore find that, on the balance of probabilities, it is more likely than not that HMRC's assessment and notification of the penalty was in accordance with paragraph 18 of Schedule 55 and the appellant was properly assessed and notified of the penalty.

Appellant's grounds of appeal

18. The appellant appears to put forward only one ground of appeal which is, as mentioned above, that it had paid the amount in full on 7 September 2018. That is set out in the grounds of appeal. In his letter to HMCTS of 21 February 2019, Ritchie Grearson, as representative of the appellant, makes a similar submission. In it he says about HMRC's position "They seemed to include screenshots of alleged non-payments which dated back into the past. The appeal here is only for one payment which they allege not to have received on time, despite us paying on time."

Respondents' submissions

19. The respondents submit that the RTI return was late. The fact that the appellant paid the PAYE and national insurance contributions on 7 September 2018 does not matter. The penalty has been imposed because of the late filing of the return, rather than late payment of the PAYE and national insurance contributions.

20. The appellant has no reasonable excuse and indeed has not submitted that it has one other than the fact that it has paid the tax and national insurance on 7 September 2018. There are no special circumstances which would merit a reduction of the penalty and that decision is not flawed.

Reasonable excuse

21. The appellant has no reasonable excuse for failing to submit an RTI return on time for the period under appeal. It clearly knew that it was required to make an RTI return on or before making a relevant payment to an employee. It had failed to submit timely returns for two previous periods and had been assessed and notified of those penalties. They had been cancelled by HMRC, but the appellant was clearly on notice of its filing requirements.

22. The Education letter spelt out the position in words of one syllable:

> "PAYE information must be reported to us on or before a payment is made to an employee or we may charge you a penalty."

23. So why did the appellant fail to report the relevant payments which it made to employees on 26 August 2018, on or before that date? I do not know. The appellant has provided no explanation for its failure to do so other than the fact that it paid the tax on 7 September 2018.

24. This is not an excuse, let alone a reasonable one, for failing to deliver an RTI return on time. A reasonable taxpayer in the appellant's position having been previously assessed to penalties for failing to submit RTI returns on time and who had been given the Education letter would have submitted an RTI return on or before making the relevant payments to employees on 26 August 2018.

Special circumstances

25. In their statement of case, HMRC suggest that they have taken into account special circumstances. They say that they have considered Red Lion Trading Partnership "state [sic] payment was made on time and submit there are no special circumstances….".

26. However, I cannot see any evidence that they have done so. Certainly the review letter of 4 December 2018, which deals with reasonable excuse, does not deal with special circumstances. Even if they had, they have certainly not given any reasons as to their decision that there are no special circumstances which apply to the appellant's decision.

27. That means, in accordance with the principles set out at [7(6)(j)] above, I must consider whether there are special circumstances which apply to this taxpayer. I do not believe there are. As is mentioned at [7(6)(a)] to comprise special circumstances, they must be exceptional, abnormal or unusual or there must be something out of the ordinary run of events as regards the taxpayer's situation. None of the appellants circumstances fall into either category.

Proportionality

28. Although not argued by the appellant, it is my view that the penalty is proportionate. In light of the principles set out at [7(8)] above, and in view of the justification for the imposition of penalty (namely that it is essential for the proper function of the RTI regime that an RTI employer provides timely and accurate information in relation to payments it makes to its employees). I consider that penalty does not go beyond what is strictly necessary for the objective pursued. The penalty is far from being not merely harsh, but plainly unfair.

Decision

29. I dismiss this appeal.

Appeal rights

30. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 4 APRIL 2019