[2019] UKFTT 575 (TC)

TC07369

CORPORATION TAX – penalties for late filing of company tax returns for three accounting periods – insufficient evidence that HMRC had given proper notice to file the returns under paragraph 3 of Schedule 18 Finance Act 1998 – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00790

BETWEEN

TILLZANE SCAFFOLDING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Cardiff on 28 August 2019

Mr Phil Davies of Spot-On Accountancy for the Appellant

Mr Joel Price, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the imposition on the appellant (or the "**company**") of penalties (the "**penalties**") assessed under Schedule 18 to the Finance Act 1998 ("**schedule 18**"), for failing to file tax returns on time for three accounting periods (the "**periods under appeal**"). The periods and penalties are as follows:

   (1) A flat rate penalty of £200 for the accounting period ending 28 July 2016;

   (2) A tax related penalty of £1705.36 for the accounting period ending 28 July 2016;

   (3) A flat rate penalty of £200 for the accounting period ending 31 July 2016; and

   (4) A flat rate penalty of £500 for the accounting period ending 31 July 2017.

2. The appellant's appeal was brought only in respect of the first three of these penalties, but HMRC are content that the appeal may be extended to include the £500 penalty, and I direct that the appeal is so extended.

3. For reasons given later in this decision, I have decided that:

   (1) HMRC have failed to establish that valid notices requiring the company to file a company tax return for the periods under appeal was served on or given to it.

   (2) If the provisions of paragraph 20A of schedule 18 apply, then the notice to require the company to deliver the company tax returns to HMRC was only given to it on 22 August 2018, and so the returns, having been given to HMRC on that date, were not made late.

SUMMARY OF THE LAW

4. Under paragraph 17 of schedule 18, a company which is "required" to deliver a company tax return and fails to do so by the filing date is liable to a fixed rate penalty of (basically) £100 if the return is less than three months late or £200 if later.

5. A tax related penalty under paragraph 18 of that schedule can also be visited on a company which is required to deliver a company tax return for an accounting period and fails to do so. That penalty is 10% of the unpaid tax if the return is delivered within two years after the end of the period for which the return is required and 20% of the unpaid tax in any other case.

6. A company is required to deliver a company tax return if an officer of Revenue and Customs has, by notice, required the company to so deliver a return (paragraph 3 of schedule 18).

7. Under paragraph 14 (1) of schedule 18, the filing date for a company tax return is the last day of a number of alternative periods which is the last to end. For the purposes of this appeal, these periods are 12 months from the end of the period for which the return is made, or 12 months from the end of a shorter than 12 month accounting period.

8. In order to visit a penalty under paragraphs 17 or 18 for failure to deliver a timely return,

the penalty must be determined pursuant to the provisions of section 100 Taxes Management Act 1970 ("**TMA**"). This requires an officer of the Board authorised by the Board to make the determination.

9. If the imposition of the penalties is procedurally correct, both the respondents and this Tribunal have power to cancel them, if they think that the appellant has a reasonable excuse. This is in section 115 TMA which provides that if the excuse ceases, the taxpayer still has that excuse if it does what it is required to do within a reasonable time of the excuse ceasing.

10. The test I adopt in determining whether the appellant has a reasonable excuse is that set out 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."

THE FACTS

11. I was provided with a bundle of documents. Mr Dean Corrick ("**Mr Corrick**") and Mr Phil Davies ("**Mr Davies**") gave oral evidence on behalf of the appellant. They both gave their evidence clearly and frankly and I find them to be honest and credible witnesses. I accept their evidence. From this evidence I find the following:

(1) Mr Corrick has worked in scaffolding for the past 18 years. During that time he has been both employed and self-employed. About four years ago it became apparent that one of his significant "employers" wanted him to incorporate his business to ensure that he could be treated, by that employer, as an independent contractor and not as an employee, with all the additional costs that goes with that status.

(2) Whilst self-employed, Mr Corrick had looked after his tax affairs himself but in or around July 2014, as those tax affairs became more complicated as a result of him getting more business, he engaged Mr Davies to help him with his tax returns. This involves the preparation of income and expenditure accounts for the purposes of Mr Corrick's self-assessment tax return. So it was inevitable that Mr Davies was involved in incorporating the company on 29 July 2015 and for then dealing with the tax and accounting affairs of that company. Mr Davies and his firm Spot-On Accountancy was instructed by Mr Corrick, on behalf of the appellant, to deal with all the tax and accounting affairs of the company. Mr Corrick's skill is in scaffolding. He is not well versed in financial affairs. Accordingly whenever he received any communications from HMRC he would have a quick look at it but then pass it across to Mr Davies expecting Mr Davies, as per his general instructions, to deal with it. Mr Corrick did not scrutinise documents that he received from HMRC in any detail.

(3) Neither Mr Corrick nor Mr Davies has any detailed or specific recollection of receiving notices to file company tax returns for the periods under appeal. Their evidence was that they might have done or they might not have done. They simply cannot remember whether they did or didn't receive those notices.

(4) Mr Corrick does, however, remember receiving a penalty notice, or at least

documents relating to a penalty, in October 2018. It was this that caused him to write to HMRC in that month, that letter being received by HMRC on 12 October 2018 and being treated by HMRC as a notice of appeal against the penalties.

(5) The company was struck off the register of companies on 26 September 2017 as a result of failure, by the company, to file appropriate returns. Whilst Mr Davies was aware of this at or around that time, Mr Corrick was not. The first time that anything untoward concerning the company and its financial affairs came to his attention was shortly after 6 April 2018. What put him on notice that something was amiss was the fact that one of his major customers started deducting tax at 30% from the company's invoices rather than 20%. He contacted the customer to find out why this was and was told that there was no longer an appropriate tax reference number for the company. Mr Corrick then contacted Mr Davies to find out what was going on and it was then that Mr Davies told him that the company had been struck off. It was agreed that Mr Davies would sort things out as quickly as possible.

(6) Mr Davies managed to restore the company on 6 August 2018 and attempted to file corporation tax returns for the periods under appeal on 7 August 2018. He was unable to do so, but returns for those three periods were filed with HMRC on 22 August 2018.

(7) HMRC claim in their statement of case and through the submission made by Mr Price at the hearing that notices to file corporation tax returns were given to the company by means of service at the company's registered office. The evidence of this is the same for each of the three periods under appeal. It comprises an extract from HMRC's computer. At the top is "cotax", and below that an operator ID. To the left there is the notation "COT212C". There is then the "DISPLAY SPECIFIED NOTICE PERIOD 28/03/2019". That date is common to the three print outs, and I presume, therefore, it is the date on which they were printed out rather than any date which is relevant to the period to which the notice relates. There are then details of the company and its address at Port Talbot and a line which reads "The above details are those applicable at the date the Notice was issued". There are then some dates under the heading "Specified Period Details". The print out which I am asked to find is evidence that a notice to file for the accounting period ended 28 July 2016 was served on the appellant then has an entry "End Date" of 28/07/2016 and an entry "Issue Date" of 21/08/2016. For the period ending 31/07/2016, that date is the End Date identified in the print out, and the Issue Date is 21/08/16. For the accounting period ending 31/07/2017, that date is identified as the End Date, and the Issue Date is identified as 20/08/2017. And this is all the positive evidence that HMRC have submitted proves service of valid notices to file for the periods under appeal.

BURDEN AND STANDARD OF PROOF

12. The burden of proving that an officer of HMRC has given a valid notice requiring the company to deliver a company tax return rests with HMRC. HMRC accept this. The burden, too, of proving that a valid notice of determination of the penalties has been made under section 100 TMA and that that determination has been served on the appellant, lies, too, with HMRC. In each case the standard of proof is the balance of probabilities. If HMRC can establish both of the foregoing, the burden then shifts to the appellant to show, again on the balance of probabilities, that it has a reasonable excuse for failing to file its company tax return on time.

DISCUSSION

Notice of requirement to deliver a return

13. I must make a finding of fact as to whether a valid notice to file a return has been given by HMRC. It is a prerequisite to the imposition of penalties under paragraphs 17 and 18 of schedule 18.

14. In this case HMRC are relying on the three computer printouts mentioned above coupled with the fact that neither Mr Corrick nor Mr Davies are able to say, categorically, that they did not receive any notices to file.

15. In *Platt v HMRC* [2019] UKFTT 0303 (TC) a case concerning penalties for failing to file an individual tax return on time Judge Geraint Jones QC said as follows:

> "[2] As this appeal is in respect of penalties, the jurisprudence of the European Court of Human Rights in Jussila v Finland [2006] ECHR 996 makes it clear that article 6 of the European Convention on Human Rights (right to a fair trial) applies to the instant appellate process.
>
> [3] The right to a fair trial plainly requires that the hearing is before an independent Court of Tribunal which acts procedurally fairly which, in the context of this appeal, includes the following:
>
> > (1) Noting that because this appeal involves penalties, the respondents bear the onus of proving the several facts and matters said to justify the imposition of penalties.
> >
> > (2) The Tribunal making its findings of fact based upon admissible evidence; not based upon unsubstantiated assertions made by the respondents in their Paper Hearing Submission.
>
> [4] Thus the present situation is that in the absence of an admission by the appellant of a fact which the respondents must prove to justify the imposition of a penalty, it is for HMRC to prove that factual prerequisite. That is so regardless of whether HMRC is on notice that the appellant expressly asserts that she did not receive a Notice to File because a litigant in person cannot be expected to know that (proof of) service of a Notice to File is a prerequisite to the respondents being able successfully to resist the appeal…
>
> [7] Whatever form the admissible evidence takes, adequate evidence is a necessity; not a luxury…
>
> [10] HMRC has chosen not to adduce any witness evidence.
>
> [11] In respect of serving a Notice to File [to] HMRC for the fiscal year ended 5 April 2017, HMRC has simply produced a document, presumably printed from some computer held record, headed "Return Summary" which bears the appellant's name, tax reference number and national insurance number. There is then a column which contains the words "Return Issued Date" alongside which appears "06/04/17". HMRC contends that I can be satisfied that a Notice to File was sent to the appellant's correct address because it would have been sent to the address for the appellant which the respondents hold on file by way of another computer record headed "Individual Designatory Details".

[12] In my judgment the "Return Summary" falls well short of being sufficient evidence to prove, even to the civil standard, that a Notice to File was actually sent to the appellant. That is because:

(1) Where the document shows a "Return Issue Date" of "6/04/16" I can be reasonably certain that that is a fiction, because those with experience in this Tribunal well know that, absent special circumstances, that is the date which appears alongside every person's Return Summary alongside the words "Return Issued Date". It is equally well known that the reality is that HMRC sends out Notices to File on a staggered basis because, logistically, it simply could not hand over to the Royal Mail the huge volume of letters which it would need to send if every relevant taxpayer was sent a Notice to File on the same day of each year. Nonetheless, that would have to be the factual situation for that record to be a true and reliable record. The record is therefore inherently improbable and unreliable. It may well be that HMRC sends out some Notices to File on 6 April in each year, but there is, literally, no reliable evidence to show that that happened in the case of this appellant on 6 April 2017 or indeed on any other date. Accordingly, the Return Summary probably contains false information and it would require cogent evidence from HMRC for me to find as a fact that a Notice to File was sent to this appellant on 6 April 2017.

(2) Even if HMRC could show that a Notice to File was intended to be sent to this appellant on 6 April 2017, there is no evidence to show that any such Notices to File were actually sent. That is because even if the date shown in the Return Summary, whether inserted by a person or a computer, is accurate, it falls far short of evidencing and proving actual dispatch of any particular document.

(3) I acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage pre-paid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material. There is no such evidence in this case.

[13] Accordingly in circumstances where HMRC has failed to prove a prerequisite to issuing the penalties in dispute in this appeal, the appeal must be allowed in full in respect of the fiscal years ended 5 April 2017.

16. Furthermore, in *Griffiths v HMRC* [2019] UKFTT 424, Judge Austen said the following when coming to his decision in that case:

"32. Like Judge Jones in Platt at [12], I derive little or no assistance from the document marked "Return Summary" included in my bundle. In particular, I have no confidence that the stated "Return Issued Date" of 6 April 2017 for the Notice to File is accurate. In fact, for the reasons given by Judge Jones, it seems more likely than not that this date is a "fiction", rendering the printout "inherently improbable and unreliable" and I find accordingly. I am unable to tell from the Return Summary alone whether or not a Notice

to File was issued to the appellant and, if it was, on what date it was sent. The evidence offered, such as it is, is not sufficiently detailed and cogent to discharge the evidential burden on HMRC. There is no other evidence before me, including evidence of HMRC's internal systems and processes, which could assist in resolving these questions in HMRC's favour.

33. The Return Summary is not apt to support the required inference that on the balance of probabilities a valid Notice to File was sent to the appellant. In my view, I could only properly draw that inference from evidence of HMRC's systems and processes – but that evidence is not before me. The inference of fact is therefore two steps removed from the evidence actually presented, ie I would have to infer from the Return Summary that: (1) HMRC's systems and processes would probably have meant that a Notice to File was validly prepared; and, from that inference, (2) that those systems and processes meant that such a notice was probably sent to the appellant. The first of those inferences alone would not suffice and it is a stretch too far to draw an inference from an inference in my view. I should have reached this decision on either the test as set out in Qureshi and approved in Edwards or the modified version proposed by Mr Gordon in Taxation.

34. I have reviewed the appellant's evidence to see whether she has acknowledged receipt of a Notice to File, which would have determined the point against her (see Burgess and Brimheath at [49] and Platt at [4]). She has not. Because, in my view, the statements in Perrin and Burgess and Brimheath quoted respectively at [19] and [21] above are accurate descriptions of the law in relation to the initial burden of proof on HMRC in penalty appeals, I consider that the appellant's silence in this regard should not be misconstrued as acquiescence of the inference alleged by HMRC; neither does it absolve HMRC from pleading a positive case supported by evidence.

35. As a result, I conclude that it is not possible to make a positive finding of fact – on the balance of probabilities – that a valid Notice to File was issued to the appellant on any given date in respect of the tax year 2016/17. I do not believe it likely that such a Notice was prepared and sent on 6 April 2017 as purported by the Return Summary printout – I believe that date to be a "fiction". Nor can I presume or infer on the balance of probabilities the existence of a valid Notice to File from the evidence actually presented: to do so would be to speculate rather than to draw a proper judicial inference from a primary fact. In particular, the lack of evidence as to HMRC's systems and processes makes it impossible for me to infer that those systems and processes were such as to make it more likely than not that a valid Notice to File was sent to the appellant. HMRC has not satisfied the burden of proof on it. It follows that I am unable to conclude that the appellant had an obligation to file an Individual Tax Return for that year. Her appeal must therefore be allowed in full and the penalties set aside".

17. I am not bound by either of the foregoing decisions. And indeed this case deals with company tax returns rather than individual tax returns. But the sentiments of both judges concerning the importance of primary evidence, and the difficulty of inferring, from that primary evidence, that a taxpayer has been given a notice of a certain type, containing prescribed information by the appropriate limb of HMRC, are just as relevant to the giving of notices to file a company tax return as they are to the giving of notices to file an individual tax return.

18. During the hearing I asked Mr Price what evidence he was adducing to prove that notices to file been given to the appellant for each of the periods under appeal. He said it was the

printouts previously mentioned. Having been through them he asked if I was satisfied that these established what HMRC need to prove; namely the service of valid notices to file. I said that I could not decide at that stage and wanted to see what happened later in the appeal when the appellant gave evidence. The evidence of the appellant and Mr Davies, as set out above, was that they could not say whether they had or had not received the notices. I questioned both of them closely on this and they confirmed that that was the position for all three periods.

19. In the absence of any admission that they had received the notices, HMRC must establish a positive case that notices were given to the appellant. They have put forward such a positive case but, just as Judge Jones and Judge Austen in their cases were unable to infer service of notices to file individual tax returns, I am unable to do so in this appeal. It is true that the computer printouts referred to a "Notice", and that there is a correspondence between the End Dates on the printouts and the accounting periods for the periods under appeal. But there is no evidence of the nature of the actual document which might have been sent to the appellant which the printouts reflect. Mr Price suggests that it was a notice to file a company return, but he was not giving evidence and HMRC have adduced no witness evidence on the point, nor do they provide any evidence of system. The printout might reflect the giving of notices to file a company tax return. But there is nothing to link the printout, on the one hand, with any actual notices on the other. A notice requiring a company to file a return must be given by an officer of HMRC. The printout is silent on whether an officer gave a notice. A notice requiring a company to deliver a return may require it to deliver information, accounts, statements and reports which are relevant. The computer printout does not give any indication of what information was sought by any of the notices. Under paragraph 5 of Schedule 18, a notice requiring company to file a tax return must specify the period to which the notice relates. Whilst the printout, it is true indicates the periods, I cannot infer that that specification was also included in any notices to file. HMRC in other appeals on which I have sat have tendered pro forma notices so at least it is possible to see what sort of document they say corresponds to the associated computer printout. They have not done so in this case.

20. I am afraid that, like Judge Austen, I cannot infer from these printouts a positive finding of fact that valid notices to file for the periods under appeal were given to the appellant as claimed by HMRC. It would be speculation to do so rather than judicial inference. I find that HMRC have not established on the balance of probabilities that they gave valid notices to file company tax returns to the appellant for the years under appeal.

21. Neither HMRC's Statement of Case, nor Mr Price's submissions refer to paragraph 20A of Schedule 18. However, I have considered the application of paragraph 20A (all be it with some hesitation given that this new legislation and I was not addressed on its application). And given that it was intended to deal with "voluntary returns", I am not wholly persuaded that it applies where HMRC purport to have given a notice to deliver a return to the taxpayer but that notice, is, in some way, defective.

22. However if paragraph 20A does apply, then I am not sure that it assists HMRC in this case. The result of it applying is that a notice under paragraph 3 of schedule 18 is deemed to have been given to the company on the day that the company tax return was delivered to HMRC by the company. That date was 22 August 2018. As mentioned above the penalties under paragraphs 17 and 18 depend on the company failing to deliver a return by the filing date. The filing date where a notice is given under paragraph 3 is three months after that date, in other words 22 November 2018 in this case. Clearly the company has not delayed in delivering its returns in the circumstances. And so no penalty under either paragraph 17 or 18 can be visited on the appellant.

DECISION

23. Since I am unable to conclude that HMRC gave valid notices to file a company tax return for any of the periods under appeal, I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 12 SEPTEMBER 2019