NCN: [2020] UKFTT 0287 (TC)

TC07771

Appeal number: TC/2017/02800

INCOME TAX – penalty for failure to make returns– whether reasonable excuse – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD WARD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
NOEL BARRATT

Sitting in public at Bradford on 23 July 2019

The Appellant did not attend and was not represented

Ms Truelove, litigator, for the Respondents

DECISION

1. The appellant did not attend. At the request of the Tribunal the Clerk telephoned the telephone numbers in the papers for the appellant and for his representative, but there was no response and it was not possible to leave a voicemail.

2. It was clear from the file that the appellant and his representative had been notified of the hearing and had not objected to the listing of the hearing on this date. Although there was a typographical error in the address for the appellant on the letter informing him of the hearing we noted that the house number, road name, and postcode were correct and so we concluded that there was no reason for the letter not to have reached the appellant.

3. HMRC argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and had made no objection to its proceeding, having been warned of the consequences of not appearing.

4. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33 of the Rules since there was no explanation as to the non-appearance by or for the appellant. The appellant's attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

Introduction

5. This is an appeal against penalties for the late filing of a self-assessment return for the tax year 2012-13. The penalties under appeal are:

(1) Daily penalties of £900 charged under para 4, Sch 55, Finance Act 2009, issued on 24 June 2014;

(2) Six month late filing penalty of £300 charged under para 5, Sch 55, Finance Act 2009, issued on 24 June 2014;

6. The notice of appeal refers to an appeal against a total of £1,300 rather than the £1,200 noted above. That would indicate that the appellant wished also to appeal an initial late filing penalty of £100. However, in the grounds of appeal the appellant states that as the return was "only submitted one day late … the late penalties should have been only £100 not the £1,300 that has been applied/imposed".

7. Accordingly, we consider that the appeal is against penalties totalling £1,200 and that the reference to £1,300 in the appeal form refers to the total penalties in error.

8. In correspondence dated 9 November 2016, the appellant's representative advised HMRC that the appellant would like to "claim overpayment relief" for the 2012-13 tax year. HMRC established that the request was in fact for a reduction of penalties under paragraph 16, Schedule 55, Finance Act 2009.

9. The appellant appealed against the penalties to HMRC, and then appealed to this tribunal on 27 March 2017, appealing against a decision made on 13 December 2016 when HMRC finalised their response to his appeal following the *Donaldson* case.

10. We note that it appears that Mr Ward's appeal to this tribunal was made late, although HMRC have not made any submissions on the point. Since HMRC have not objected to the late appeal, and in the interests of justice, we give permission under s49G(3) or s49H(3) of the Taxes Management Act 1970 for the appeal to be notified late.

Appellant's submissions

11. The appellant's grounds of appeal were that the return was hand-delivered to Keighley tax office on 1 February 2014 and was therefore only one day late.

12. In correspondence with HMRC dated 18 March 2014, the appellant stated that he had filed his self-assessment return on time.

13. In correspondence dated 12 July 2016, the appellant explained that:

(1) he could not file the return online due to problems with his gateway access;

(2) he had not earned enough to be liable to further tax;

(3) he had returned his self-assessment returns within the time frame although he explained that he had had to file paper returns for two years because of problems with his gateway access.

14. In correspondence with HMRC on 3 August 2016, the appellant stated that:

(1) he was unable to file his return online on one occasion and therefore had to submit the return by paper and rely on the postal system as the Keighley tax office had closed down.

(2) he had never filed a tax return late, whether electronically or when submitted by hand or by royal mail.

HMRC submissions

15. HMRC submitted, in summary, that:

(1) The appellant had provided no evidence of problems accessing the online gateway to file his tax return and had not contacted HMRC to attempt to fix the problem;

(2) The appellant's 2010-11 and 2011-12 tax returns were filed on paper and were filed late, with the 2011-12 return having been filed on 12 March 2013 and the 2010-11 tax return having been received by HMRC on 12 September 2014, having previously been sent back to the appellant twice as incomplete.

(3) The appellant states that he hand-delivered his return to Keighley tax office on 1 February 2014. That date was a Saturday and the office would not have been open. If the return had been posted through the letter box it would have been marked as received on 31 January 2014.

(4) Even if the return had been hand delivered on 1 February 2014, as the return was a paper return, it was submitted late as the due date for delivery of paper returns for the 2012-13 tax year was 31 October 2013.

(5) On 10 April 2014, HMRC wrote to the appellant to advise him that they could not accept the self-employment short page as a completed tax return and that his tax return for the 2012-13 tax year was therefore still outstanding. In the same letter they advised the appellant that a late filing penalty had been charged and that additional penalties would be charged the longer that the return remained overdue.

(6) On 4 June 2014, HMRC received the completed tax return for the 2012-13 tax year.

16. HMRC submitted that the appellant had given no good reason for the delay in filing his tax return and that it was the taxpayer's responsibility to be aware of the filing deadlines. Even if the appellant was unaware that paper returns were required to be filed by 31 October 2013, this does not amount to a good reason for the delay. Lack of awareness of appropriate deadlines is also not a special circumstance meriting a reduction in the penalties.

17. HMRC considered whether the appellant's stated difficulty in filing his return online amounted to a special circumstance and, in the absence of any evidence from the appellant as to those difficulties, concluded that it did not amount to special circumstances.

Discussion

18. Relevant statutory provisions are included as an Appendix to this decision.

19. The appellant does not dispute that his self-assessment tax return for the 2012/13 tax year was filed late although he disputes the degree of lateness.

20. From the documents provided, we find that:

(1) The appellant had been self-employed for a number of years and knew that he was required to file a tax return for the 2012-13 tax year.

(2) The appellant submitted a paper tax return for the 2012-13 tax year.

(3) As the appellant filed a paper return, the due date for filing the return was 31 October 2013.

(4) HMRC received a completed tax return from the appellant on 4 June 2014.

21. We find therefore that the appellant's tax return for the 2012-13 tax year was filed late and subject to considerations of "reasonable excuse" and "special

circumstances" set out below, we consider that the penalties imposed are due and have been calculated correctly.

Reasonable excuse

22. The test of whether something is a "reasonable excuse" for the late filing of a tax return is not set out in statute but, in our view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

> "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

23. We find that the appellant's reasons for the failure to submit his tax return do not amount to a reasonable excuse because:

(1) He has provided no evidence of the problems encountered with the online gateway;

(2) The information provided by the appellant in correspondence is inconsistent and we do not consider that we can rely upon it.

24. The appellant has argued that the penalties charged are disproportionate. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, as set out below in this decision, we have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Bosher*, [2013] UKUT 01479 (TCC), we do not consider that we have a separate power to consider the proportionality or otherwise of the penalties.

25. Finally, we must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. Applying the judicial review standards we see no reason to overturn HMRC's decision.

Conclusion

26. The appeal is dismissed and the penalties are confirmed.

27. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE FAIRPO

TRIBUNAL JUDGE

RELEASE DATE: 07 JULY 2020

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.