NCN: [2020] UKFTT 0289 (TC)

TC07773

Employment Intermediaries Returns - penalties for failing to file returns – whether reliance on professional advice is a reasonable excuse – yes - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02004

BETWEEN

FASTKLEAN LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE KIM SUKUL

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 25 February 2020

Steven Vryonides, accountant, for the Appellant

Mary Donnelly, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Fastklean Ltd appeals against penalties totalling £5750 imposed by the Respondents ("HMRC") under section 98(1)(b) of the Taxes Management Act 1970 ("TMA 1970") for the failure to file Employment Intermediaries Returns (the "returns") on time, as required under regulation 84F of the Income Tax (PAYE) Regulations 2003, for seven quarterly periods ending 5 July 2016 (£250), 5 October 2016 (£500), 5 January 2017 (£1,000), 5 April 2017 (£1000), 5 July 2017 (£1000), 5 October 2017 (£1000) and 5 January 2018 (£1,000).

RELEVANT LEGISLATION

Employment Intermediaries Returns

2. Section 716B Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") requires an employment intermediary, who is essentially a person who makes arrangements for an individual to work for a third person, to provide to HMRC specified information relating to payments made to those workers when PAYE has not been operated. The information to be provided must be included in a return in a form prescribed by HMRC as specified in the PAYE Regulations. The intermediary is required to submit the return no later than the month end date of the relevant tax quarter.

> Section 44 ITEPA 2003 provides
>
> (1) This section applies if—
>
> (a) an individual ("the worker") personally provides services (which are not excluded services) to another person ("the client"),
>
> (b) there is a contract between—
>
> (i) the client or a person connected with the client, and
>
> (ii) a person other than the worker, the client or a person connected with the client ("the agency"), and
>
> (c) under or in consequence of that contract—
>
> (i) the services are provided, or
>
> (ii) the client or any person connected with the client pays, or otherwise provides consideration, for the services.
>
> (2) But this section does not apply if—
>
> (a) it is shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person, or
>
> (b) remuneration receivable by the worker in consequence of providing the services constitutes employment income of the worker apart from this Chapter.

3. The section 44 ITEPA 2003 provision therefore removes the requirement to file a return if the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person.

Penalties for non-compliance

4. An employment intermediary who fails to file a return for a tax quarter on time is liable to a penalty under section 98(1)(b) TMA 1970.

5. The amount of the penalty is based on the number of offences. HMRC's policy is to assess an amount of £250 for the first offence, £500 for a second offence and £1,000 for a third and later offences.

6. In order to impose a penalty under section 98 TMA 1970, HMRC must determine the penalty pursuant to the provisions of section 100(1) TMA 1970;

> "Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting at such amount as, in his opinion, is correct or appropriate."

7. The section 100 TMA 1970 provision therefore requires a determination imposing a penalty to be made by an officer of the Board.

Reasonable excuse

8. Under section 118(2) TMA 1970, the Appellant can avoid liability for the penalties provided it can show that it had a reasonable excuse for failing to submit the returns on time.

9. Section 118(2) TMA 1970 provides;

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased"

EVIDENCE

10. The bundle of documents prepared by HMRC included the following:

- the notice of appeal
- HMRC's outline of the penalty process and penalty information
- the exchange of correspondence between the parties.

11. In addition, Ms Antoaneta Tsocheva, the Director of the Appellant company, gave oral evidence. I found her to be a credible witness. HMRC tendered no oral evidence.

12. During the hearing, the Appellant sought to admit copies of emails dated 11 January 2017, 17 March 2017 and 10 April 2017 that set out Counsel's advice to the Appellant. HMRC did not object to this application and I admitted this documentary evidence because I considered it to be credible, relevant and in the interests of fairness and justice to do so.

FACTS

13. From this evidence, I find the following facts:

(1) The Appellant company specialises in providing cleaning services through the provision of workers (cleaners) to mainly corporate clients.

(2) The Appellant has operated a PAYE scheme since 2003 and registered as a contractor in 2010.

(3) The Appellant sought professional tax advice prior to registration to establish their PAYE status issues and obligations, as the Appellant does not have expertise in these matters.

(4) HMRC wrote on 15 February 2016 to notify the Appellant that they intended to conduct a check of the Appellant's employer and Construction Industry Scheme records.

(5) Further to their check, HMRC held a meeting with the Appellant on 26 October 2016 where the Appellant's PAYE obligations were discussed.

(6) The Appellant subsequently sought legal advice and was informed that the PAYE provisions were inapplicable, given the manner in which their cleaners provide services, namely that the cleaners were not subject to, or subject to the right of, supervision, direction or control by any person.

(7) On 2 June 2017, HMRC completed their check and concluded that the Appellant's obligation to provide returns applied to all supplied workers by virtue of the relevant legislation.

(8) Despite Counsel's advice that returns were not required, and in order to comply with HMRC's request to bring their tax affairs in order, on 18 February 2018 the Appellant submitted the returns for the seven periods in question.

(9) On 5 March 2018, HMRC imposed late filing penalties against the Appellant in accordance with Section 98 TMA 1970.

(10) On 9 April 2018, the Appellant appealed to HMRC against the penalties.

(11) Further correspondence was subsequently exchanged between the parties regarding whether the Appellant had a reasonable excuse.

(12) On 6 November 2018, the Appellant requested a statutory review to be undertaken by HMRC.

(13) On 14 December 2018, HMRC issued a review conclusion letter upholding the penalties.

(14) On 3 April 2019, the Appellant lodged an appeal to this Tribunal.

THE BURDEN OF PROOF

14. The burden of establishing that the Appellant is liable to the penalties rests with HMRC. Should HMRC establish that the Appellant is liable to the penalties, the burden of establishing that the Appellant has a reasonable excuse then shifts to the Appellant.

15. The standard of proof is the civil standard, namely on the balance of probabilities.

DISCUSSION

16. There are two issues in this case:

(1) Whether or not the Appellant is liable to the penalties imposed by HMRC under section 98(1) TMA 1970 for failure to deliver returns within the statutory time limits?

(2) Whether or not the Appellant had a reasonable excuse under section 118(2) TMA 1970 for the failure to deliver timely returns?

PENALTY LIABILITY

17. The Appellant does not dispute the lateness of the returns. However, the Appellant does not accept there was a requirement to make returns, nor that HMRC complied with the required statutory procedure when issuing the penalty notices.

Supervision, direction or control

18. The requirement to submit returns of specified information relating to payments made to agency workers does not apply if it is shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person.

19. The Appellant contended that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person. The advice they received from Counsel supports this view and Ms Tsocheva's evidence was that she did not control or supervise the workers, nor direct them regarding the manner of their work.

20. The notes of the parties' meeting on 26 October 2016 makes reference to the issue as to whether or not the workers provided services in the absence of supervision, direction or control. Ms Tsocheva is recorded as having said that "The client checks the work and if they are not satisfied the company doesn't get paid and so the cleaner doesn't get paid." Ms Tsocheva did not agree, during the meeting, that this quality check amounted to a measure of control.

21. On 28 November 2016, HMRC wrote to the Appellant stating that "a decision has been made to contact and interview some of Fastklean's workers to gather further information on the terms and conditions under which they carry out work for the company." The Appellant responded on this point on 6 December 2016 stating, "We believe that the action to contact and interview some of Fastklean Ltd workers would create an inconvenience and disturb our client's business and such we kindly request that no action to do this is taken at this time."

22. No further evidence regarding this issue was presented to the Tribunal by the parties.

23. The legislation requires it to be shown that the manner in which the worker provides the services is not subject to (or to the right of) supervision, direction or control by any person, in order to disapply the requirement of a return. The Appellant did not provide evidence, such as copies of agreements or statements from the workers, to demonstrate the specific working arrangements in this case. Consequently, I do not find the manner the services were provided to have been shown to meet the statutory criteria to disapply the requirement of a return.

Procedure

24. The Appellant contended there was considerable doubt as to whether HMRC had complied with the requisite statutory procedure and referred to several 2018 First-tier Tribunal decisions which found that penalties generated by a computer, and not by an officer of the Board, failed the legislative requirements.

25. HMRC referred the Tribunal to an unpublished 2019 First-tier Tribunal decision. In *Ardmore Construction Ltd v HMRC* [2014] UKFTT453 the First-tier Tribunal did not consider it proper for HMRC to cite an unpublished decision. Judge Brooks stated, at [20]:

> "This clearly raises the question of fairness and whether HMRC should be permitted to rely on an unpublished (as opposed to an unreported) decision not freely available to the general taxpayer, especially as we are obliged to give effect to the overriding objective, contained in Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Rules"), to "deal with cases fairly and justly" which includes dealing with a case in ways which "are proportionate" to the "resources of the parties".

26. I do not consider it proper for HMRC to have cited an unpublished decision in this case and I have not relied upon it.

27. HMRC also referred the Tribunal to their current internal procedure for issuing these penalties, which I accept applied in this case, as set out by HMRC in an email dated 15 May 2019; namely that the notices were computer generated, supervised by a HMRC officer and checked before they were issued.

28. Given that the process undertaken, as described in the 15 May 2019 email, involves supervision and checking by a HMRC officer, the determination imposing a penalty was made by an officer of the Board. As the process is not entirely a computer generated one but instead a computer assisted operation for the purposes of producing penalty notices, I find that the process amounts to compliance with the required statutory procedure.

29. On the basis of my findings, the Appellant is liable for the penalties imposed by HMRC under section 98(1) TMA 1970 for failure to deliver the returns within the statutory time limits.

REASONABLE EXCUSE

30. The test I adopt to determine whether the Appellant had a reasonable excuse for their failure to submit the returns within the statutory time limit is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC stated:

> "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. In giving her evidence, Ms Tsocheva testified that the company always endeavoured to pay the right amount of tax. HMRC did not challenge this evidence. The evidence is Ms Tsocheva has no expertise in tax matters and was entirely dependent on the company's tax advisors to ensure compliance with their tax obligations. The Appellant sought tax advice prior to their PAYE registration and sought Counsel's advice during HMRC's check, with which the Appellant cooperated fully. Ms Tsocheva did not understand the intricacies of the dispute at hand, especially as the advice given to her by Counsel, that the legislation does not apply to her business arrangements, contradicts HMRC's contention. I accept that Ms Tsocheva, on the Appellant's behalf, took the decision to submit the returns not because she knew she was obligated to do so, but because she felt that was what was required by HMRC to resolve the matter.

32. HMRC contended "that the Appellant ought to have taken greater steps than it did to ascertain the extent of their filing obligations. HMRC expect a person who encounters a transaction or other event which they are not familiar with to take care to find out about the correct tax treatment or seek appropriate advice."

33. HMRC did not dispute that the Appellant sought tax advice from their Accountant prior to the requirement to submit the returns and similar advice from Counsel subsequent to the requirement to do so. Such conduct corroborates Ms Tsocheva's evidence as to her predisposition to comply with the company's tax obligations. Both advices, according to that evidence, informed the Appellant that it had no obligation to file the returns.

34. HMRC contended that the fact that the Appellant sought Counsel's advice after they started their checks in February 2016 undermines the reliance upon that advice as a reasonable excuse. HMRC contended that "it is the Appellants responsibility to keep themselves aware and up to date with any legislative changes that affect their specific circumstances."

35. HMRC made no submissions as to the reasons why the Appellant's conduct taken as a whole, and in particular the Appellant's reliance upon the advice given by the Accountant prior to the change in legislation, did not amount to a reasonable excuse, save to say that a reasonable person should be aware of their tax obligations.

36. In *Rowland v HMRC* [2006] UKSPC SPC00548, the Special Commissioner held "it was sensible and reasonable for Mrs Rowland to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not possess personally." The Appellant contended that this principle should apply in this case and the evidence is probative of the fact that the Appellant adopted a similar approach.

37. On this point, I have considered the decision in *HMRC v Katib* [2019] UKUT 189 (TCC), where the Upper Tribunal, when considering the merits of the reason given for the delay in submitting an out of time application, accepted the general point that, in most cases, failings by a litigant's advisers should be regarded as failings of the litigant. Mann J said, at [59]:

> "Mr Katib did not have the expertise to deal with the dispute with HMRC himself, but that does not weigh greatly in the balance since most people who instruct a representative to deal with litigation do so because of their own lack of expertise in this arena. We do not consider that, given the particular importance of respecting statutory time limits, Mr Katib's complaints against Mr Bridger or his own lack of experience in tax matters are sufficient to displace the general rule that Mr Katib should bear the consequences of Mr Bridger's failings and, if he wishes, pursue a claim in damages against him or Sovereign Associates for any loss he suffers as a result. This conclusion is fortified by the fact that the FTT's findings demonstrate that there were some warning signs that should have alerted Mr Katib to the fact that Mr Bridger was not equal to the task."

38. I acknowledge the general principle that the Appellant should bear the consequences of their agent's failings. I do not, however, consider the principle precludes the Appellant from having a reasonable excuse in this particular case. Unlike Mr Katib's circumstances, it has not been established in this case that the delay in compliance with the statutory time limits was as a consequence of failings by the Appellant's advisors.

39. The tax advice, that returns were not required, relied upon by the Appellant, was later endorsed by legal advice. My finding, that the manner the services were provided was not shown to meet the statutory criteria to disapply the requirement of a return, is not a finding of failings or unreasonableness on the part of the Appellant's advisors, that should be bourne by the Appellant. There were no warnings signs that should have caused the Appellant to question that advice.

40. Relying on that advice was a reasonable thing for the Appellant to do, conscious of and intending to comply with their obligations regarding tax, but having the experience and other relevant attributes of the Appellant and placed in the situation of the Appellant at the relevant time.

41. I have given careful consideration to the facts as I have found them based upon the evidence in the case. I conclude that the Appellant had a reasonable excuse within the meaning of section 118(2) TMA 1970 for failing to submit the returns within the statutory time limits.

CONCLUSION

42. For the reasons I have set out above, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

KIM SUKUL

TRIBUNAL JUDGE

RELEASE DATE: 8 JUNE 2020