[2020] UKFTT 346 (TC)

TC07826

INCOME TAX - late filing penalties - whether reasonable excuse - whether appellant "given notice" of daily penalties

FIRST-TIER TRIBUNAL **Appeal number: TC/2019/04303**

TAX CHAMBER

BETWEEN

DAINIUS BIELIAUSKAS **Appellant**

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 19 August without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic and the cancellation of all oral hearings and the Tribunal considered it was able to decide the matter without a hearing. The documents to which I was referred are a Documents Bundle of 122 pages and an Authorities Bundle of 136 pages, both prepared by HMRC.

DECISION

INTRODUCTION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit an annual self-assessment return for the tax year 2016-17 on time.

2. The penalties that have been charged can be summarised as follows:

   (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 13 February 2018

   (2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 10 August 2018

   (3) a £300 "twelve month" penalty under paragraph 6 of Schedule 55 imposed on 19 February 2019. The penalty was imposed under paragraph 6(5) and there is no suggestion that the appellant deliberately withheld information.

   (4) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 31 July 2018.

3. The appellant's grounds for appealing against the penalties can be summarised as follows:

   (1) He argues that there was a "reasonable excuse" for any failure to submit the return on time in that he relied on his accountant to submit the return and the accountant told him it had been submitted in time.

   (2) He argues that he did not receive any of the penalty notices.

FINDINGS OF FACT

4. The notice to file was sent on or around 6 April 2017. A paper return was sent Mr Bieliauskas at his address in Squires Way, Dover. The due date for submission of a paper return was 31 October 2017 and for an electronic return was 31 January 2018. HMRC's records show that the return was submitted electronically on 5 February 2019. Mr Bieliauskas does not dispute the date it was actually filed but he believed it had been submitted in time by his former accountants, The Accounting Room.

5. Mr Bieliauskas engaged the Accounting Room to prepare annual financial statements and personal tax returns. Their engagement letter was dated 4 February 2017 but it stated that the engagement started on 20 September 2016 and the first tax year for which they would be responsible was 2015-16.

6. As Mr Bieliauskas pointed out, HMRC's "SA Notes" indicate that The Accounting Room had submitted his 2015-16 return (and it appears his 2014-15 return) on paper. The entry for 15 September 2017 records that the Accounting Room had submitted both the 2014-15 and the 2015-16 returns in the same envelope without a covering letter. The entry continues "..this appears to have been submitted by the Accounting Room as a new case. However, it is an amendment with a significant increase in [self-employed] turnover...". It would seem that this refers to the 2014-15 return as the figures mentioned do not tally with those in the copy 2015-16 tax return which Mr Bieliauskas says is the one the accountant sent to him. This is supported by the conclusion of the entry "…Tax return for 15/16. This is an original. Return captured". It therefore seems that the 2015-16 return was submitted, on paper, but late. The SA Notes indicate that penalty reminder letters

were sent in relation to the 2015-16 return, in June and July 2017. I include this by way of background. That year is not the subject of this appeal.

7. Mr Bieliauskas states in his Notice of Appeal that he only found out that his 2016-17 return had not been submitted in February 2019 when he telephoned HMRC to check if his 2017-18 return had been submitted (which the Accounting Room were also dealing with). The SA Notes record a web chat on 5 February 2019 querying if the tax return was in and the response that both the 2017-18 and 2016-17 returns were outstanding.

8. In his letter of appeal to HMRC dated 18 February 2019 Mr Bieliauskas states that The Accounting Room had assured him "a year ago" that his 2016-17 tax return had been submitted in time. He enclosed a copy of the return which the accountant had sent to him. It appears as if it was originally intended to submit the return electronically. The copy included an HMRC form attached to the tax return and stating that this was what would be transmitted to HMRC once he had confirmed to his tax adviser that the return was correct and complete and had authorised the advisor to submit it.

9. Mr Bieliauskas also provided extracts from emails and messages between his new accountants, Word Consulting Ltd and The Accounting Room. Mr Bieliauskas must have had some concerns about The Accounting Room as he appears to have instructed the new agent in December 2018, shortly before the deadline for submitting the 2017-18 return online.

10. An email of 17 December 2018 from Word Consulting to The Accounting Room, requested, among other things, a copy of the appellant's latest tax return and the confirmation of submission to HMRC.

11. "Naomi" of The Accounting Room sent a text message on 19 December confirming receipt of the email, but said she had not replied as she was closing for Christmas that week and was very busy. She said she would send the return and submission receipt and "everything else will be resolved in January".

12. In an email from Naomi to Word Consulting of 19 December 2018, Naomi states that Mr Bieliauskas's tax returns have always been submitted on paper and that there is no online submission receipt. She states that her engagement letter was with Mr Bieliauskas 's company, but the copy engagement letter provided is clearly with Mr Bieliauskas in his personal capacity. In a paragraph which appeared to be directed at Mr Bieliauskas she said that it was clear he had consulted another professional and once he had signed an engagement letter with them, they could ask her for the information they required. She stated she was no longer acting for Mr Bieliauskas.

13. This correspondence implies that the return had been sent, although it does not refer specifically to the 2016-17 return, and that it had been sent in paper form. There is, however, no evidence of this, not even a statement of when it was allegedly sent.

14. I have not been provided with any further correspondence and do not know at what point Mr Bieliauskas became aware that the return had not been filed. In his appeal letter to HMRC of 18 February 2019 he says he only became aware on 5 February 2018 when he enquired about his 2017-18 return. This is unlikely, as the return was submitted on that date by his new accountant.

15. In a letter to the Tribunal dated 8 April 2020, Mr Bieliauskas states that he only discovered that The Accounting Room had not submitted his tax return in January 2019. That letter is a little confused in that he goes on to say that he had got an explanation from The Accounting Room that the return had been submitted to HMRC on paper. English is not Mr Bieliauskas's first language. In the Notice of Appeal he stated he would

need the support of a Lithuanian interpreter at the hearing. The letters and written submissions indicate that Mr Bieliauskas has a good standard of English, but a lack of clarity in places may be due to the fact this is his second language.

16. I conclude that Mr Bieliauskas discovered that his 2016-17 tax return had not been submitted some time in January 2019 although he had believed that The Accounting Room had submitted a paper return.

17. In the 8 April 2020 letter, Mr Bieliauskas also states that he relied on his former accountant to submit his return on time and that it was reasonable for him to do so.

18. Although the correspondence implies that The Accounting Room submitted Mr Bieliauskas's 2016-17 tax return and the appellant asserts that they told him in 2018 that it had been submitted in time, there is no evidence to indicate if or when it had been submitted.

19. There is some evidence to show that it had not been submitted.

20. The record of the web chat on 5 February 2019 in the SA Notes state that the 2016-17 return is still outstanding and those Notes also record the issue of daily penalty reminder notices in June and July 2018 which presuppose that the return has not been filed.

21. As noted, Mr Bieliauskas appears to have had concerns about the Accounting Room by December 2018 when he instructed new accountants who began to make enquiries about the 2016-17 return. I have not, however, been provided with any evidence around the time of the submission deadline (paper or internet) to show that Mr Bieliauskas contacted the accountant to check that the return had indeed been submitted. His April 2020 letter indicates that he simply relied on the accountant to submit the return in time.

22. Having considered the evidence, I conclude that, on the balance of probabilities, The Accounting Room did not submit Mr Bieliauskas's 2016-17 tax return to HMRC on paper or otherwise. The return was submitted via the internet by Word Consulting on 5 February 2019. I also conclude that Mr Bieliauskas discovered that the return had not been submitted in January 2019.

23. Mr Bieliauskas states that he did not receive the penalty notices. In his letter of appeal to HMRC dated 18 February 2019 Mr Bieliauskas states that he had a live chat with the HMRC Self-Assessment team, chasing an income tax refund which Word Consulting had informed him was due, and had been informed that the refund would be used to pay his penalties for late filing. This is confirmed by an entry in the SA Notes for 8 February 2019. The letter goes on to say that he had not received any letters in regard to penalties for late filing and continues "If there are any outstanding penalties for late filling, please let me know and please let me appeal these penalties…I haven't received any letters from you informing about any penalties for late filling." (sic)

24. HMRC's computer records show the issue of the late filing penalty, the six month and twelve month penalties and the daily penalties. In their Statement of Case HMRC also state that penalty reminder letters were sent on 5 June 2018 and 3 July 2018 (as recorded in the SA Notes). As with much of the late filing penalty system, the various notices are generated by computer and there is no copy of individual notices sent to individual taxpayers. The Document Bundle included copies of the generic letters.

25. HMRC's Statement of Case refers to section 115(2) Taxes Management Act 1970 ("TMA") and section 7 Interpretation Act 1978 as authority for the proper service of the notices. Those provisions are as follows:

> **"115.— Delivery and service of documents.**

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence:
(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—
(a) at his usual or last known place of residence, or his place of business or employment, or…"

"7. References to service by post.
Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

26. The Document Bundle contained screen shots of HMRC's computer records of Mr Bieliauskas's "base address". The SA Notes also record when the base address is changed.

27. The computer record shows that Mr Bieliauskas lived in Rowlands Road, Dover from 12 November 2014 to 27 June 2016. His address then changed to Flat 1, Westbury House, Dover. There are two entries: 27 June 2016 to 23 July 2016 and 23 July 2016 to 5 February 2019. The current address, at Squires Way, Dover is shown as effective from 5 February 2019.

28. The SA Notes have an entry for 28 June 2016 recording "base address changed from …Rowlands Road..". A further entry for 25 July 2016 records "base address changed from Flat 1…". The Notes do not record the new address. The final entry of this type is on 5 February 2019 (the date of the web chat when Mr Bieliauskas was told his 2016-17 return was still outstanding) which states "base address changed from Flat 1…".

29. HMRC's Statement of Case submits that it sent the notices to the address on its systems and that it used prepaid envelopes for its mail. On the basis of section 115 TMA and section 7 Interpretation Act 1978, HMRC submit that posting was effected on the date the items were generated. As noted, there is no record of the address to which the notices were actually sent, but I infer that all the notices were sent to Flat 1, Westbury House which was the address in the computer records at the time.

30. I do not know when Mr Bieliauskas moved to his current address in Squires Way, Dover but it must have been some time before 6 April 2017 and therefore, before the penalty notices were sent.

31. Although HMRC's computer records state that the effective date for the change of Mr Bieliauskas's base address to Squires Way was 5 February 2019, HMRC must have been aware of the change of address before this. When a tax return is issued to a taxpayer it has, printed on it, the date of issue and the "issue address". The copy of the completed, 2016-17 tax return included in the Documents Bundle was dated 6 April 2017 and the printed issue address was Squires Way, Dover.

32. I do not know why that address was not shown in HMRC's computer records at the time, but I find that HMRC was aware that Mr Bieliauskas's address was Squires Way Dover at the time when the penalty notices were issued, as they had sent the tax return to that address on or around 6 April 2017.

33. I have found that the penalty notices were sent to Mr Bieliauskas's previous address and I accept that Mr Bieliauskas was unaware of the notices.

DISCUSSION

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

35. I have concluded that the tax return for the 2016-17 tax year was submitted on or around 5 February 2019. It should have been submitted by 31 January 2018. Subject to considerations of "reasonable excuse" and "notification" set out below, the penalties imposed are due and have been calculated correctly.

36. There is no statutory definition of a reasonable excuse. The case of *The Clean Car Company Limited v The Commissioners of Customs and Excise* [1991] VATTR 234 sets out helpful guidance in the following well know passage:

> "… the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it can not. 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? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

37. In the case of *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) the Upper Tribunal provided guidance as to the approach to be adopted by this Tribunal:

> "81. When considering a reasonable excuse defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

38. Paragraph 23(2) of Schedule 55 provides that certain matters cannot constitute a reasonable excuse. In particular, paragraph 23(2)(b) provides:

> "(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,…"

39. Mr Bieliauskas makes it clear in his grounds of appeal and subsequent correspondence that he relied on the Accounting Room to submit his return and assumed that they would submit it in time.

40. Mr Bieliauskas did not, however, produce any evidence to support his statement that they had told him "a year ago" that the return had been submitted. The only documents he produced were from December 2018 and although the email/message from The Accounting Room implied that Mr Bieliauskas's returns had been submitted on paper, it did not say which years those returns related to and it did not say when they had been submitted. As we have seen, the SA Notes indicate that the 2014-15 and 2015-16 returns were submitted on paper, albeit late.

41. Mr Bieliauskas considered that it was reasonable for him to expect the accountant to file his return on time. Ultimately however, this is his responsibility. There is nothing to show that Mr Bieliauskas "took reasonable care to avoid the failure", for example by seeking (and obtaining) confirmation from the accountant around the time of the filing deadline that the return had indeed been submitted.

42. Accordingly, Mr Bieliauskas's reliance on his then accountant cannot amount to a reasonable excuse for failing to submit the return on time.

43. The late filing penalty, six month penalty and twelve month penalty become due if, as a matter of fact, the return has not been submitted by the relevant dates. The daily penalties are only due if the requirements of paragraph 4(1)(c) of Schedule 55 are complied with. That paragraph provides:

> "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."

44. The daily penalties are not therefore due unless Mr Bieliauskas was notified in accordance with sub-paragraph (c).

45. As noted, there are no copies of the actual notices showing the address to which they were sent. HMRC has submitted that they would have been sent to the address on record and rely on section 115 TMA and section 7 Interpretation Act 1978 to deem the notices to be properly served.

46. The address on the computer record was Flat 1, Westbury House and I have found that it is more likely than not that this was the address the notices were sent to. This was not Mr Bieliauskas's address at the time and I have accepted that he did not receive them.

47. I have also found that HMRC were aware that Mr Bieliauskas had changed his address, by 6 April 2017, to Squires Way as that is the address printed on the tax return for 2016-17 that they sent him. That was therefore his "usual or last known address" for the

purposes of section 115 TMA. For some reason, HMRC failed to update their computer records.

48. Flat 1, Westbury House was **not** his "usual or last known address" at the time the penalty notices were issued. Therefore, HMRC cannot rely on the deeming provisions of section 115 TMA to say that they have "give[en] notice" to Mr Bieliauskas for the purposes of paragraph 4(1)(c).

49. I conclude that HMRC did not give Mr Bieliauskas notice of the date from which the daily penalties were payable and so have not satisfied the requirement of paragraph 4(1)(c) of Schedule 55. Accordingly, Mr Bieliauskas is not liable for the daily penalties.

CONCLUSION

50. For the reasons set out above I have concluded that Mr Bieliauskas's tax return for the year 2016-17 was late and that he did not have a reasonable excuse.

51. I have also found that the notice requirement of paragraph 4(1)(c) was not satisfied so that Mr Bieliauskas is not liable for the daily penalties of £900.

52. Accordingly, I allow the appeal to the extent of the daily penalties, but dismiss the appeal in relation to the late filing, six months and twelve months penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

Release date: 26 August 2020

APPENDIX

RELEVANT STATUTORY PROVISIONS

54. 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.

55. 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).

56. 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.

57. 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.

58. 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.

59. 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.

60. 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.