



TC07857

Value added tax – information notice under Schedule 36 Finance Act 2008 – penalties raised for failure to comply by the deadline and continued failure to comply for 30 days – was there a reasonable excuse for the failure? – appellant appointed accountants to deal with notice – accountant absent from work due to death of his mother – did the appellant take reasonable care to avoid the failure to comply? – held: no, as it did not monitor progress with compliance – penalties confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01189

BETWEEN

NEW YORK KRISPY FRIED CHICKED LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ZACHARY CITRON

The Tribunal determined the appeal without a hearing under the provisions of rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the notice of appeal dated 21 March 2020 (with enclosures) and HMRC's statement of case (acknowledged by the Tribunal on 2 June 2020); the Tribunal also had before it a hearing bundle pdf of 158 pages prepared by HMRC.

INTRODUCTION

1. This was an appeal against penalties totalling £1,500 for failure to comply with an information notice issued under Schedule 36 Finance Act 2008 (“Sch 36”).

BACKGROUND TO THE APPEAL

2. HMRC issued an information notice under paragraph 1 Sch 36 on 17 July 2019 (the “IN”). On 20 September 2019, following a request from the appellant, HMRC extended the deadline for compliance with the IN to 30 November 2019.

3. HMRC issued a £300 penalty for failure to comply with the IN on 11 December 2019. On 13 January 2020, HMRC issued further default penalties for such failure, at the rate of £40 per day in respect of a 30-day period (11 December 2019 to 10 January 2020) in which the failure to comply continued after issuance of the initial £300 penalty, totalling £1,200.

4. Salim & Co, the appellant’s tax agent, notified HMRC of the appellant’s appeal against the penalties on 23 January 2020.

5. On 13 March 2020 HMRC wrote to the appellant with the outcome of their statutory reviews of the decisions to issue the penalties, upholding the decisions. (HMRC accepted the appellant’s request for statutory review of the first penalty out of time).

6. The Tribunal received the appellant’s notice of appeal on 21 March 2020.

FINDINGS OF FACT

7. The IN was issued after the appellant did not respond to a request for documents made by HMRC in a letter dated 12 June 2019, to check the appellant’s VAT position.

8. The documents requested in the IN, each for the period from July 2015 to the date of IN, were:

- (1) statements from JustEat and FoodHub
- (2) bank statements
- (3) card transaction statements
- (4) sales books
- (5) business premises lease agreement

9. The original deadline for compliance in the IN was 18 August 2019. Mr Nabi sent an email to HMRC on 16 August 2019, referring to a conversation earlier that day, saying that he had asked his accountant to deal with the IN; that he had contacted his bank and JustEat; and that he had family concerns relating to his mother.

10. Salim & Co sent an email to HMRC on 20 August 2019, following up a telephone conversation with them. In it they said they had been appointed tax agents of the appellant and enclosed the form of appointment; that the appellant’s JustEat and bank statements had been requested; that the appellant had never traded with FoodHub; that there were no card transaction statements; and that the sales books and lease agreement would follow.

11. Salim & Co’s email also said that Mr Nabi was operating the business single handed, working long daily hours; that Mr Nabi’s mother was extremely ill, and Mr Nabi was travelling to Birmingham (from Manchester) to visit his mother on a near daily basis. Salim & Co requested that the IN deadline be extended to 30 September 2019.

12. HMRC initially extended the deadline by one week. Further emails were exchanged between HMRC and Salim & Co. On 13 September 2019 Salim & Co requested extension

until 30 November 2019, owing to the recent death of Mr Nabi's mother. After a further exchange of emails on 20 September 2019, HMRC accepted this request.

13. Mr Amir of Salim & Co was absent from work between mid October 2019 and January 2020, due to the death of Mr Amir's mother in November 2019. He did not have a colleague who could assist the appellant with the IN in his absence.

14. Both penalty notices were addressed to Mr Nabi as director of the appellant (and not copied to Salim & Co).

RELEVANT LAW

15. References in what follows to the Schedule are to Sch 36, and references in what follows to paragraphs are to paragraphs of that Schedule.

16. A person who fails to comply with an information notice under the Schedule is liable to a penalty of £300 – paragraph 39. If this failure continues after the date on which this £300 penalty is imposed, the person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure continues – paragraph 40.

17. But such liabilities do not arise if the person satisfies the Tribunal that there is a reasonable excuse for the failure – paragraph 45(1). Where a person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure – paragraph 45(2)(b). Where the person had a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased – paragraph 45(2)(c).

18. In *The Clean Car Co Ltd v C&E Comrs* [\[1991\] VATTR 234](#) Judge Medd QC set out his understanding of “reasonable excuse”:

“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?...

It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had 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. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.”

29. That this is the correct test was confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

“(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...In doing so, the Tribunal 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 Tribunal, 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 reasonable 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.”

BURDEN AND STANDARD OF PROOF

19. The burden of establishing that the appellant is prima facie liable for a penalty which has been properly notified and assessed lies with HMRC. The burden of establishing that the appellant should not be liable for the penalty because, for example, there is a reasonable excuse for its failure, lies with the appellant. In each case the standard of proof is the balance of probabilities.

ARGUMENTS OF THE PARTIES

20. The appellant’s grounds of appeal were the “mitigating circumstances” of the deaths of the mothers of both Mr Nabi and Mr Amir. The grounds state that Mr Nabi forwarded “records” to Salim & Co, but these were not sent on to HMRC due to Mr Amir’s bereavement.

21. In addition, Salim & Co’s letter of 23 January 2020 states that there was not sufficient time for the appellant to gather the records, as they went back to 2016. The letter also noted that HMRC had not sent the penalty notices to Salim & Co as the appellant’s tax agent. The letter said that bank statements had been sent to HMRC; that the appellant had sent log in details for JustEat to Salim & Co, who would print off statements and make them available for collection by HMRC (as they were too voluminous to send by post).

22. In a letter dated 18 February 2020, Salim & Co also stated that other HMRC officers they were dealing with in other cases had granted extensions based on Mr Amir’s bereavement.

23. HMRC submitted that the penalties were notified to the appellant in accordance with paragraph 46 Sch 36; there was no legal requirement for the notice to be copied to the tax agent.

24. HMRC contended that the responsibility to comply with the IN by the deadline remained with the appellant regardless of whether it delegated that task to another person:

(1) entrusting the agent with responsibility to respond to the IN did not absolve the appellant of responsibility to make any necessary checks. In the absence of evidence to demonstrate that the appellant took reasonable steps to ensure their tax agent had responded, HMRC submitted that this does not amount to a reasonable excuse.

(2) the bereavement suffered by Mr Amir as the appellant’s representative cannot provide a reasonable excuse for the appellant’s failure to comply, as the ultimate responsibility remains with the appellant.

Discussion

25. The matter in question in this appeal is whether HMRC were correct to raise the penalties. The burden of proof is on HMRC to show, on the balance of probabilities, that the circumstances were such as to justify the raising of the penalties – which, in this case, means proving that the appellant failed to comply with the IN by 30 November 2019 and continued such failure to comply up to 10 January 2020. If HMRC are able to do that, the burden of proof then moves to the appellant, to show, on the same basis, that there was a reasonable excuse for the failure.

26. I find it sufficiently proven that the appellant did fail to comply with the IN by 30 November 2019 and continued such failure to comply up to 10 January 2020: it had not provided some or all of the required bank statements, JustEat statements, sales books and premises lease by those dates, documents which were either in its possession, or, in the case of the statements, in its control (as it was able to obtain them from the bank or from JustEat).

27. I now turn to whether there was a reasonable excuse for this failure. The facts which give rise to the appellant's excuse are that:

- (1) Mr Nabi was running the appellant's business single-handedly and was unable to focus his attention on the IN due to the illness and subsequent death of his mother, shortly before 13 September 2019;
- (2) Mr Nabi asked the appellant's accountants, Salim & Co, to deal with the IN on or around 18 August 2019;
- (3) Mr Nabi was unable to focus his attention on the IN due to the illness and death of his mother in November 2019 (which caused Mr Nabi to be away from work from mid October 2019 to January 2020); and
- (4) there was no one else at Salim & Co who could assist the appellant with the IN in Mr Amir's absence.

28. I accept these facts as proven, on the balance of probabilities.

29. It is clear from the facts that the deadline of 30 November 2019 was fixed taking into account Mr Nabi's circumstances, including the illness and death of his mother and the fact that he was running the business single-handed. It was also clear that Mr Nabi was relying on Salim & Co to assist the appellant with compliance with the IN. However, the law stipulates that where a person relies on another person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure in question.

30. I am not satisfied on the evidence that Mr Nabi, as director of the appellant, took reasonable care to ensure compliance with the IN by 30 November 2019. In my view, a small company like the appellant, managed by a single individual, conscious of its obligations as imposed by the IN and behaving responsibly, would have monitored compliance with the IN even after appointing accountants to deal with it. Such a company would have periodically checked with the accountants on progress with compliance in the weeks and days prior to the deadline. Had the appellant acted in this way, it would have discovered Mr Amir's absence from work and then perhaps contacted HMRC to discuss the situation, and/or itself sent HMRC those documents which were easily to hand (like bank statements or sales books). The evidence does not indicate that the appellant, acting through Mr Nabi, acted in this way. Rather, it appears from the evidence that, having asked Salim & Co to deal with IN in late August 2019, the appellant paid the matter no further attention. Even when it received the first penalty notice, issued on 11 December 2019, it appears from the evidence that the appellant took no steps to contact either its accountants or HMRC.

31. I therefore find, on the evidence before me, that the appellant did not take reasonable care to avoid the failure in question. It follows that, applying the law as it stands, there was no reasonable excuse for the appellant's failure to comply with the IN.

32. I note, for completeness, that this conclusion is not affected by the fact that HMRC did not copy the penalty notices to Salim & Co – this does not assist the appellant in showing that it took reasonable care to avoid the failure. Nor can it be relevant that Salim & Co were aware of other cases where HMRC did not raise penalties related to Mr Amir's absence – this appeal can be decided only on the evidence before the Tribunal relating to this appellant and the relevant law: the Tribunal has no jurisdiction in general to review the administrative actions of HMRC.

33. HMRC's decision to raise the penalties is accordingly CONFIRMED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

RELEASE DATE: 29 SEPTEMBER 2020