

TC03725

Appeal number: TC/2014/01297

Late return penalties - reasonable excuse for late returns - appeal dismissed

FIRST-TIER TRIBUNAL TAX CHAMBER

JAG INTERIORS LTD

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S Respondents REVENUE & CUSTOMS

TRIBUNAL: JUDGE MALACHY CORNWEL-KELLY MRS SONIA GABLE ATII

Sitting in public at Portal House, 27 Southway, Colchester, Essex on 2 June 2014

Mrs Lynn Carder, tax advisor, for the taxpayer

Mr Mark Ratcliffe of HMRC for the Crown

CROWN COPYRIGHT 2014

DECISION

- 1 This appeal is against late filing penalties totalling £3,600 imposed for the late submission of P35 end of year returns for the years 2009-10, 2010-11 and 2011-12. The due date for the returns was 19 May in each year, but they were not received until 24 June 2013. The issue in the appeal is whether the taxpayer had reasonable excuse for the lateness of the returns. In addition to the usual documentary evidence, we received oral evidence from Mr Bronislaw Jagniaszek, the Managing Director of the appellant company.
 - 2 The appeal was submitted late. HMRC did not oppose the late appeal and we gave leave for it to be admitted.

Facts

15

20

25

30

- 3 The genesis of the appeals lies in the operation of a time to pay agreement made between the taxpayer and HMRC, recorded in a letter dated 29 October 2009 from the Collector of Taxes at Southend, concerning the deferred payment of £7,234.80. That sum was made up of PAYE underpayments for 2008-09 of £6,640.70, interest of £194.10 and a late payment penalty of £400. None of these amounts is under appeal. The agreement provided that £716.25 should be paid on 15 November 2009, followed by £500 on 15 December 2009, and the same monthly thereafter until 15 May 2010. It was a condition of the agreement that the taxpayer should "keep your tax affairs up to date and submit any tax returns on time".
 - 4 All went according to plan until the £500 payment due in February 2010 was sent in by cheque on 25 February; £400 of the payment was allocated to another liability which HMRC claimed was then in existence, leaving only £100 for the monthly time to pay agreement schedule. We received no evidence to explain why this had been done, or what the other liability was, and the taxpayer took the view that its money had been misappropriated to the extent of the £400. HMRC subsequently took the view that the agreement had been breached and by a letter dated 21 October 2010 effectively ended it. Mr Jagniaszek considered that until this dispute as to what he regarded as the misappropriation of the £400 had been resolved, he would cease sending in the P35 end of year returns due from the company; his words to us were: "I did not send in the [P35] forms because HMRC would not resolve the dispute".
- 5 It became clear at the hearing that Mr Jagniaszek had, and still has, a complaint of maladministration in regard to this alleged "misappropriation" and we advised him making it plain that we expressed no view on the merits of the matter what course he should take to pursue that complaint if he still wished to do so, and that it was not an issue within the tribunal's jurisdiction to resolve. Mr Jagniaszek agreed that the issue of the alleged misapplication of the £400 was not related to the late return penalties under appeal, except to the extent that the former had prompted the latter. At first, Mr Jagniaszek said that this was by way of retaliation, or to put pressure on HMRC to resolve the misapplication dispute, but later in the hearing he retracted that statement.

6 Mr Jagniaszek had mentioned in a letter to the Revenue on 3 November 2010 that he was about to be admitted to hospital for heart surgery. This was at about the midway point between the due dates for the returns of 15 May 2010 and 15 May 2011, and the company records show that there were two other directors in office at this period.

7 Next, Mr Jagniaszek said that before 2009 he had found that penalties issued were cancelled when returns were actually made showing no tax due, and that he had expected the penalties under appeal to be cancelled in the same way, bearing in mind that his company had to operate the CIS Scheme and that a shortfall of tax to the Revenue was therefore unlikely. When Mrs Carder had taken over the company's tax affairs in October 2013 and brought them up to date, the net amount of tax found to be due for the three years in question had amounted only to £334 which, Mr Jagniaszek said, illustrated this point.

8 Mr Jagniaszek says that he was unaware that the penalty regime had become stricter following a change in legislation in 2009, and that there being little or no tax outstanding no longer meant that a late filling penalty would be cancelled. Because the Revenue had not collected the penalties for late filling as and when they had been issued – and received by the company, that was accepted by Mr Jagniaszek – it was claimed by Mr Jagniaszek that he was lulled into a false sense of security about them on account of not knowing about the change in legislation. HMRC had no explanation for the non-collection of the nine separate penalties (£100 per month, but the notices were issued quarterly), except possibly a lack of resources.

9 Mr Jagniaszek had earlier indicated in connection with the appeal that he had supposed the returns for the three years to have been filed by his accountant. At the hearing, Mr Jagniaszek repeated this claim, but on reflection he conceded that he knew that the returns had not been filed. In any event, it was submitted for the taxpayer that the penalties totalling £3,600 were out of proportion to the tax of £334 finally found to be payable for the periods. Mr Jagniaszek estimated the turnover of the business at this time at about £1,000,000, but it was not showing an overall profit.

30 Legislation

5

10

15

20

25

35

40

45

10 The Taxes Management Act 1970 provides:-

118 Interpretation.

(2) 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.

Conclusions

11 It has already been made clear that the "misappropriation" issue is not under appeal and is not justiciable by the tribunal. It is a matter of possible maladministration and the courses open to the taxpayer company in that regard have been spelled out. If he remains in any doubt about it, Mr Jagniaszek or his advisor should formally request written details of HMRC's complaints procedure.

12 We have indicated the various possible grounds upon which the late filing of the P35 returns for the years 2009-10, 2010-11 and 2011-12 could attract the defence of reasonable excuse. Firstly, Mr Jagniaszek's admission to hospital in November 2010 was too unrelated in point of time to the due dates for the returns to have been an operative cause of their lateness; and the fact that there were two other directors of the company in office at this period leads to the same conclusion.

13 The ground that Mr Jagniaszek thought an accountant had filed the returns has been withdrawn and, even if it had not been, we would have needed evidence that the company had taken active steps to ensure that the accountant had discharged his duty. We are left therefore with Mr Jagniaszek's misunderstanding of the law in regard to the relationship between penalties for late filing and the amount or otherwise of tax actually due.

14 This ground amounts to saying that it is reasonable to neglect due dates for filing if little or no tax is likely to result, whereas it is obvious that in the absence of returns HMRC are obliged to conduct checks and investigations meanwhile to ensure that tax is not going unpaid. Whether the checks turn out to be unnecessary or not is beside the point: an indifference to the cost of the public administration is inconsistent with there being a reasonable excuse for failure to discharge a legal duty to cooperate with it, especially on the part of a taxpayer who has in the past accumulated unpaid tax debts. And, in the event, there was a debit balance due for these years, albeit a small one.

15 In the matter of proportionality, we note simply that of a yearly turnover of some £1,000,000 the annual equivalent of the penalties at £1,200 amounts to 0.12%. We cannot set this as a percentage of net profit, but it suffices to say that if the net profit of the business were to be as low as 3% that would produce a figure of £30,000 per annum, of which a year of the penalties would amount to 4%. Decided cases in connection with value added tax indicate that even a figure of 34% of net profit for the relevant period is not, in law, disproportionate, and the percentage amount in this case is, on the most favourable hypothesis, evidently a very great deal lower.

16 It is true that as a percentage of the tax lost in each of the three years – an average of £111 – a year's penalty at £1,200 represents 1,081%. On the other hand, according to Mr Ratcliffe's calculations (which were not challenged), the penalties under appeal together represent about £1.50 per day for the total periods of delay. As we have indicated already, the final tally of tax at issue is not the only factor to be taken into account: the cost and disruption to the public administration caused by noncompliance with legal obligations are equally important factors, and ones that are difficult to quantify in monetary terms. Moreover, this is a case concerning direct taxation in which the European Community law doctrine of proportionality is not automatically in play. We do not see any basis for asserting that penalties prescribed by parliament offend any overriding principle of law, and there is certainly no statutory basis upon which we may exercise a discretion in this regard.

17 In these circumstances, we cannot find that there was a reasonable excuse for the late filings and the appeal cannot therefore succeed.

45 Further appeal rights

5

10

15

20

25

30

35

40

18 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

5

10

MALACHY CORNWEL-KELLY TRIBUNAL JUDGE

RELEASE DATE: 10 June 2014