[2017] UKFTT 466 (TC)

TC05929

Appeal number: TC/ 2017/01149

INCOME TAX – penalty for failure to make returns- whether a company director has an obligation to submit a self-assessment tax return without receiving a notice to file – No, whether a notice to file was correctly served on the appellant – No, Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOHAMMED SALEM KADHEM **Appellant**

- and -

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

TRIBUNAL: PRESIDING MEMBER :
PETER R. SHEPPARD FCIS FCIB CTA AIIT
MEMBER: RICHARD LAW

Sitting in public at Fox Court, 30 Brooke Street, London on 9 May 2017

Ali Mosawi for the Appellant.

Mohammed Udden, HMRC Officer, assisted by Bisi Sanu for the Respondents.

DECISION

1. The appellant is appealing against penalties totalling £1,300 that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit his self-assessment tax return for 2014-2015 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 or around 17 February 2016.

(2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on or around 12 August 2016.

(3) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on or around 12 August 2016.

3. Except where set out in the body of the decision relevant statutory provisions are included as an Appendix to this decision.

4. The following case decisions were included in the bundle of documents presented to the Tribunal:

Keith Donaldson v HMRC [2016] EWCA Civ 761

Rowland v Revenue & Customs Commissioners Sp C 548

International Transport Roth Gmbh and Anor v Secretary of State for the Home Department [2002] EWCA Civ 158

David Collis v HMRC [2011] –UKFTT 588 (TC)

Clarks of Hove Ltd v Bakers' Union [1979] All ER 152

Hinchliffe (HMIT) v Crabtree [1971] WLR821, [1971} All ER 967

5. The appellant's grounds for appealing against the penalties are that there was a "reasonable excuse" for any failure to submit the return on time.

In the Notice of appeal dated 25 January 2017 the appellant submits:

"There is no legislation stating an individual has to file a tax return on the basis that they are director of a company. Tax returns are required to be submitted by individuals that receive income from several different sources. My only source of income is the *(income subjected to)* PAYE received as director of the company. The review officer in charge of my case claimed that as a director of a company I am required to complete a return and as proven above, this is evidently not the case. This is one of the reasons my appeal was rejected and I believe this is incorrect as well as unfair.

"As it *(is)* impossible for me to assume based on my given circumstances that I have to file a return I would have required a letter informing me that I was obliged to file a tax return. I have not received any such letter. Had I received a letter I would have filed a return immediately; as I had no liability that tax year, it would have been very easy and straight forward for me to do so." (Words in italics inserted by the Tribunal).

6. Towards the end of the hearing the appellant's agent indicated that the appellant wished to give evidence. However although the appellant could understand English and had been able to follow the proceedings he was not confident at speaking English. He therefore requested permission for the appellant to give evidence in his native tongue and the appellant's agent would then translate for the Tribunal. The Tribunal pointed out that that the information sent to the parties about the conduct of hearings requested that if a translator was needed the Tribunal should be notified before the hearing so that they could make arrangements for an independent translator to be in attendance. In the circumstances the Tribunal asked for HMRC's views on the appellant's agent translating his client's evidence. HMRC objected to the Appellant's proposal.

7. The Tribunal therefore decided that the appellant's agent's proposal should not be allowed but offered an adjournment until another day when an independent translator would be present. After a brief discussion with his client the Appellant's agent indicated that the appellant wished to continue the hearing without him giving evidence.

8. **Findings of fact**

The appellant submitted his tax return for 2014-2015 electronically on 21 September 2015. He accepts that if as HMRC say he was required to submit a tax return by 31 January 2015 it was received late.

9. The appellant was appointed a director of Tadmor Property Services Ltd on 27 May 2014 at which time his correspondence address was 145-157 St. John Street, London which is the company's address. The appellant is described as a machine operator from Sweden.

10. **Appellant's submissions**

The appellant's submissions were made by the appellant in his Notice of appeal dated 25 January 2017 and at the hearing by his agent Mr. Ali Mosawi of Ali and Ali Ltd. chartered certified accountants.

11. At the hearing the appellant's agent was adamant that the appellant did not register for self-assessment. He did not complete any application form for that purpose. It was pointed out that no copy correspondence or form to that effect was included in the bundle of documents prepared by HMRC. It was suggested that the reason was that the documents do not exist.

It was pointed out that self-assessment was set up on 18 December 2014 and it was submitted that this was done independently by HMRC. It was also pointed out that

there is a considerable and unexplained delay between 31August 2014 when HMRC say the appellant registered for self-assessment and 18 December 2014 when self-assessment was set up by HMRC.

12. The appellant did not receive a self-assessment return. He was not expecting to receive one. In respect of his directorship he had received no remuneration and the company had not paid any dividends. He had received income as an employee and tax had been paid through PAYE.

13. The appellant said that as a director he used the company's registered address. If a notice to file a tax return had been sent he would expect it to be sent there but he had not received one nor had he been expecting one.

14. **HMRC submissions**

HMRC say that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with ordinary every day responsibilities of the appellant to ensure his 2014-2015 tax return was filed by the legislative date.

15. HMRC say that a notice to file a self-assessment return was sent to the appellant at the address held on record on 6 April 2015. As there is no record of any mail being returned as undelivered the document is deemed to have been served within the ordinary course of postal delivery in line with Section 7 of the Interpretations Act 1978

16. HMRC say that as a company director one of the appellant's responsibilities is to register for self-assessment and send a personal self-assessment tax return each year without prompt or reminder from HMRC.

17. HMRC say they do not issue reminders to file tax returns and have no obligation to do so.

18. In respect of reasonable excuse HMRC say that they consider the actions of a taxpayer should be considered from the perspective of a prudent person exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. The decision depends on the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

HMRC refer to the case of *Rowland* and say the matter is to be considered in the light of all the circumstances of the particular case.

19. HMRC say the penalties are not disproportionate. They say that in order for a national measure to be considered disproportionate it must be "not merely harsh but plainly unfair." They refer to the decision in International Transport Roth Gmbh v SSHD.

20. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They say special circumstances must be "exceptional, abnormal or unusual" *(Crabtree v Hinchcliffe)* or "something out of the ordinary run of events" *(Clarks of Hove Ltd. v Bakers' Union).* They say the special circumstances must also apply to the particular individual and not be general circumstances that apply to many taxpayers *(David Collis v HMRC)*

They consider that in this case the fact that the appellant was unaware a return was due because he pays tax via PAYE does not represent special circumstances which would allow them to reduce the penalty.

Discussion

21. The Tribunal has concluded that the tax return for the 2014-15 tax year was submitted on or around 21 September 2016. It should have been submitted by 31 January 2016. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

22. There are two issues for the Tribunal to determine. These are whether HMRC are correct in their submission that the appellant as a director of a company must submit a self-assessment tax return each year without prompt or reminder; and whether the appellant has reasonable excuse for his failure to submit his self-assessment tax return for the tax year 2014-2015.

23. The Tribunal does not agree with HMRC's contention that as a company director one of the appellant's responsibilities is to register for self-assessment and send a personal self-assessment tax return each year without prompt or reminder from HMRC.

24. The Tribunal considered the terms of paragraph (1) of Taxes Management Act 1970 Section 8 – Personal return which states:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year] he may be required by a notice given to him by an officer of the Board-

> (a) To make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) To deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is-

(a) The 31st January next following the year of assessment, or

(b) Where the notice under this section is given after 31st October next following the year, the last day of the period of three months beginning with the day on which the notice was given…….

…….(1D) A return under this section for a year of assessment (Year 1) must be delivered-

(a) In the case of a non-electronic return, on or before 31st October in Year 2, and

(b) In the case of an electronic return, on or before 31 January in Year 2."

25. This matter was raised with HMRC during the course of the hearing and it appears that the origins of HMRC's contention are to be found in a Government guidance notice on running a limited company www.gov.uk/running-a-limited-company. Under the paragraph headed 1. Directors' responsibilities there is a bullet point which states

"As a director of a limited company, you must:……..

- register for Self-Assessment (http//www.gov.uk/log-in-file-self-assessment-tax-return) and send a personal Self-Assessment tax return (https//www.gov.uk/self-assessment-tax-returns) every year.

The Tribunal considers that this guidance does not have the force of law and the appellant was under no obligation to follow it, even if he was aware of the guidance - which The Tribunal considers was doubtful. In the Tribunal's opinion this Government guidance notice does not accurately reflect what the law says.

26. The Tribunal accepts that if a person receives a notice to file a return he is under an obligation to file a return by the due date, but that is not what the Government guidance says.

27. In respect of whether the appellant had reasonable excuse for his failure to submit his 2014-2015 self-assessment return on time HMRC say that a notice to file was sent to the appellant on 6 April 2015. The appellant says he never received a return and was not expecting one.

There was some debate at the hearing over the address which HMRC had sent the notice to. In their statement of case they say they used an address which the appellant accepts is his current address but says was not his address on 6 April 2015. HMRC could not confirm what address they had for the appellant on the day they said they had sent the notice to file.

28. The Tribunal was not entirely satisfied that HMRC had sent a notice to file a self-assessment tax return to the appellant, but even if they had they were not satisfied that it had been sent to the correct address. The Tribunal member asked HMRC to confirm

the address included in their statement of case was the address they had on record for the appellant at 6 April 2015 but they were unable to confirm this.

29. The Tribunal accepts the appellant's submission that absent a notice to file a tax return the appellant had no reason to believe that a self-assessment tax return was required. He had paid tax on his employment through PAYE and had no other income to declare. As the appellant said in his notice of appeal had he received a return for completion it would have been very easy and straightforward for him to file it immediately.

30. In respect of the £100 penalty for late filing which HMRC say they sent to the appellant on or around 17 February 2016 a copy of this notice was not provided to the Tribunal. HMRC's internal computer record shows for the appellant's tax year 2014/15 a penalty of £100 dated 17 February 2016 was incurred. The record does not show either when the penalty notice was issued or to which address it was sent. In their statement of case HMRC say that a notice of penalty assessment was issued to the appellant on or around 17 February 2016 and include a copy of the above-mentioned computer record in support. At the hearing HMRC could not confirm which address for the appellant was on their record at 17 February 2016. The Tribunal notes that the appellant has made no appeal to HMRC about the £100 penalty whereas the appellant's agent wrote to HMRC to appeal the £900 and £300 penalty on 26 October 2016.

31. In addition to the doubt about the address to which the notice to file was sent to the tribunal was not satisfied with HMRC's explanations about how the appellant came to be registered for self-assessment. There was a suggestion by the appellant's agent that HMRC had received a communication from Companies House but this was denied. However it was observed that it is open to anyone to search at Companies House and find names of a company's directors. The appellant contended that there was a considerable and unexplained delay between 31August 2014 when HMRC say the appellant registered for self-assessment and 18 December 2014 when self-assessment was set up by HMRC. At the hearing HMRC were unable to explain the delay.

32. In the light of the Tribunal's findings on the Government guidance notice on setting up a business and the lack of clear evidence or explanation in respect of both the address to which the notice to file was sent and the appellant's registration for self-assessment the Tribunal finds that the appellant did not receive the notice to file which it is alleged was sent to him on 6 April 2015 and therefore has a reasonable excuse for not submitting it.

33. The Tribunal also finds that the Notice of assessment of the £100 late filing penalty was not received by the appellant. From the papers before the Tribunal and statements from both parties made at the hearing the Tribunal has concluded that the first time the appellant realised that HMRC required him to make a self-assessment return was when he received the two penalty notices totalling £1,200 which HMRC sent to him on 12 August 2016. His reasonable excuse therefore ended on that date. However by 21 September 2016 the appellant had filed the return so the Tribunal

considers that the error was corrected by the appellant within a reasonable period after it was discovered the reasonable excuse is extended in accordance with Schedule 55 paragraph 23 (2) (c) to 21 September 2016.

34. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009. They consider that the fact that the appellant was unaware a return was due because he pays tax via PAYE does not represent special circumstances which would allow them to reduce the penalty. The Tribunal does not consider that HMRC's decision is flawed.

35. **Conclusion**

In the light of the comments made above the Tribunal considers that the appellant has established that he had reasonable excuse for the delay in filing his-self assessment tax return for the year ending 5 April 2015. Therefore the appeal against the penalties is allowed.

36. 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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 6 June 2017

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.