



TC07246

Appeal number: TC/2019/00025

Corporation Tax – Late Filing - Flat-Rate Penalties - Schedule 18 Finance Act 1998 - Were the penalties correctly imposed? - Yes - Was there a reasonable excuse? - No - Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ADVANTAGE ROCK LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

TRIBUNAL: DR KAMEEL KHAN

The Tribunal determined the Appeal on 1 June 2019, without a hearing, and 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 20 December 2018 and the attachments to HMRC's Statement of Case dated 11 January 2019

The hearing bundle had attached a case - Khan Properties Ltd v The Commissioners For Her Majesty's Revenue & Customs TC/2017/05868 ("Khan Properties")

DECISION

1. This is my decision in relation to the Appellant's appeal against penalties imposed in relation to the late filing of a Corporation Tax return for the accounting period ended 30 September 2017.
2. The penalties are:
 - i. A flat-rate penalty of £100 imposed on 16 October 2018 pursuant to Schedule 18 Paragraph 17 of the Finance Act 1998, on the footing that the return was not filed on time.
3. The Appellant seeks the removal of the penalty.
4. In a penalty appeal of this type, HMRC bears the burden of proving (albeit only to the civil standard, namely the balance of probabilities) that the penalties were lawfully imposed.

This means that the Tribunal must look to see whether the penalties were imposed in accordance with the legislation, following the giving of notice.

5. I am satisfied that HMRC gave the Appellant company the requisite notice that the Corporation Tax return in issue was to be filed by no later than 30 September 2018 and a notice to file was sent by HMRC to the Appellant on 22 October 2018.
6. The CT return was filed online on 25 October 2018, which is 25 days late.
7. As the return was not received by the filing date, HMRC charged the Appellant a late filing flat-rate penalty on 16 October 2018 of £100. The late filing notice was issued to the Appellant's address at London E4 9LD.
8. I am therefore satisfied that the return was filed late; the delay being about 25 days and HMRC sent the requisite notices to the Appellant.
9. Accordingly, and subject to any consideration of reasonable excuse, I am satisfied that the penalties were lawfully imposed, are due, and have been calculated correctly.
10. Section 118(2) Taxes Management Act (TMA) 1970 provides statutory protection from a penalty if the company has a reasonable excuse for failing to file their return on time. We must look at the arguments put by the Appellant.
11. In summary, the Appellant's arguments are as follows:
 - i. They tried to submit the return in the new ixbri format. However, this filing was rejected and no reply was received from the taxation software operated for filing returns. The Appellant was only aware of the rejected filing when they received the penalty notice.
 - ii. The Appellant requested a review on 19 November 2018. They stated that "an automated penalty which means no-one physically checked that the corporation tax return was not received and according to the case of Khan Properties (2017), the penalty has to be cancelled." HMRC undertook a review and on 5 December 2018 upheld the penalty.

iii. On 20 December 2018, the Appellant filed an appeal with the tribunal on the grounds as stated above.

12. HMRC provided evidence showing that the Appellant did not try to file their returns before the 30 September 2018 since there were no recorded unsuccessful attempts to submit reports. They should have been aware of their filing responsibilities, the date and month for filing, as they had the primary responsibility for their own filing of the CT return.

13. Further no evidence was provided by the Appellant to show there was a software problem or unsuccessful filing attempts and therefore no reasonable excuse can be considered. There was simply no evidence to support their position.

14. On their second ground of appeal, HMRC reject any assertion that the penalty was invalid because it was issued by a computer.

Discussion

15. The meaning of reasonable excuse in the context of tax law is well-established. In *The Clean Car Co Ltd v Customs and Excise Commissioners [1991] VATTR 234* (a VAT Case), HHJ Medd QC stated:

“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?”

16. In the First-tier Tribunal case of *Nigel Barrett [2015] UKFTT0329* (a case on late filing penalties under the CIS), the Judge held:

‘The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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.’

The test as explained in these cases is applied in this case. There is no suggestion that the Appellant acted in bad faith or dishonestly. They have stated that they made an attempt to file the return but were failed by the software. However, the point is that this attempt at filing the CT return was made after the due date for filing the return.

17. Even if they were successful, a penalty would still have arisen on a late filing. They had made only one attempt to file and that attempt was made on the 25 October 2018 which was 25 days after the filing date of 30 September 2018. They had not filed nor attempted to file the return by the statutory due date.

This would be the end of the matter. However, the Appellant have raised another point – that according to the *Khan Properties* case, the penalty notice is invalid since it was issued by a computer and not a real person.

Let us look at the case. In the *Khan Properties* case, the Judge pointed out that the burden of proof was HMRC’s and therefore they had to show that the penalty had been validly assessed. This point had not been addressed by HMRC.

18. The penalty notice had been issued to Khan Properties by HMRC, Corporation Tax Services, but no name of any officer appeared on it.

19. Despite this, HMRC's letter stated:

"I attach a formal notice of penalty determination I have made..."

20. Section 100 of the Taxes Management Act 1970 sets out the determination of penalties by an officer of HMRC and subsection 1 states an officer:

21. *"...may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."*

22. In the Judge's view, this required a real person from HMRC to decide to impose the penalty and give instructions which may be executed by a computer.

23. There was no evidence of any decision-making by an HMRC officer. Despite the letter accompanying the penalty notice referring to "I", it had not been issued by a person but generated automatically by the computer.

24. Judge Thomas in a very well-reasoned decision made clear that the judgment was confined to penalties levied under FA 1998 Sch. 18 para 17 (company taxation) and would not extend to those issued under FA 2009 Sch.55 and 56 (personal taxation).

25. How does this apply to our case?

The decision in Khan Properties is not binding on this tribunal. It is possible; indeed likely, that the Khan Properties decision will go on appeal to the Upper Tribunal. For our purposes, it is clear that the Appellant did not file their returns on time and indeed made no attempt to do so in spite of receiving notices reminding them of the filing date. They have failed to file by the statutory date and there is no reasonable excuse which has been put forward.

We can distinguish our case from Khan Properties in that in the latter case, there was a reasonable excuse. It was found that the taxpayer in Khan Properties had acted reasonably when all the circumstances were considered. The conduct of the Appellant in this case cannot be considered reasonable and hence there is no reasonable excuse.

Decision

The Appeal is dismissed and the penalties of £100 are upheld.

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.

**Dr K KHAN
TRIBUNAL JUDGE**

RELEASE DATE: 25 June 2019