



[2021] UKFTT 0276 (TC)

TC08221

SDRT – penalties for late payment and late filing – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04165

BETWEEN

OUTSET GLOBAL LLP

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 21 September 2020. With the consent of the parties, the hearing took place using the Tribunal video platform. A face to face hearing was not held because of restrictions arising from the COVID-19 pandemic. The documents to which I was referred are a document bundle of 191 page and an authorities bundle of 89 pages.

I directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

The Appellant appeared in person (Mr Bandeen and Mr Ryan)

Ms Ralhr, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an appeal against two penalties in respect of Stamp Duty Reserve Tax for the tax period 2018/2019:

(1) a late filing penalty of £20,100 issued under para 3 of Schedule 55 of the Finance Act 2009; and

(2) a late payment penalty of £15,071.11 issued under para 3 of Schedule 56 of the Finance Act 2009

Background

2. The appellant conducts trades in equities on worldwide markets on behalf of clients. Prior to August 2018, the appellant had a third-party broker agreement with a business which dealt on the appellant's behalf with SDRT collection and payment in respect of relevant transactions.

3. On 31 January 2018 the appellant applied to HMRC for intermediary status as it was considering moving to a different clearing provider, which did not deal with SDRT collection and payment. This was granted on 11 July 2018.

4. In August 2018, the appellant moving its clearing/settlement functions to a new provider, which did not provide the same range of back office services as the previous provider. As indicated in the application for intermediary status, the new provider did not provide SDRT payment compliance services.

5. On 11 December 2018 the appellant emailed HMRC with details of off-market transactions that had taken place between 20 August 2018 and 30 November 2018, for which the appellant was the accountable party for the purposes of SDRT compliance.

6. On 17 December 2018 the appellant paid £552,183.28 in SDRT in respect of these transactions.

7. On 3 January 2019, HMRC opened a compliance check in respect of the appellant. The appellant was notified on 13 February 2018 that penalties for late filing and payment would be due.

8. On 28 February 2019, following correspondence as to the correct number of relevant transactions, the late filing penalty amount was reduced to the amount appeal.

9. On 26 March 2019, the appellant requested a review of the decision to issue the penalties. On 3 April 2019, HMRC issued a review of the matter letter which upheld the penalties. On 13 May 2019, HMRC issued a review conclusion letter which varied the late payment penalty and upheld the late filing penalty.

10. On 11 June 2019, the appellant appealed to this Tribunal.

11. On 29 November 2019, HMRC emailed the appellant to advise that the late payment penalty had been reduced to take into account the fact that the payments for transactions with a trade date of November 2018 would not have become due until 7 January 2019. As payment was received in December 2018, these payments were not in fact late.

Appellant's evidence and submissions

12. The appellant contended that they had been unable to file the SDRT return and make payment earlier because there was a complete lack of clarity from HMRC with regard to bulk payment of SDRT, and that HMRC staff had not been able to deal with unique situations such as that facing the appellant.

13. As they were aware that the change of clearing provider would require new processes, the appellant had created a process to collect and separate the SDRT element of payments into segregated accounts at the clearing provider. The same was done for similar payments required by the tax authorities of Ireland, France, and Italy. All these processes were in place by July 2018.

14. For these three jurisdictions, the appellant contended that the process of filing and payment was easy and well documented. The relevant tax authorities had provided spreadsheets to be completed for filing and had explained the banking details for payments. They have had no problems with compliance in these three jurisdictions.

15. The appellant had assumed that they would be provided with a similar template by HMRC, and it was reasonable to expect HMRC to have a standard template for reporting multiple transactions. However, HMRC had not provided any preferred spreadsheet, nor stated the content required for reporting multiple transactions, nor could HMRC staff confirm the correct bank details.

16. The appellant submitted that they could not rely on their previous clearer to provide them with guidance as that clearer operated within the CREST system whereas the appellant was operating outside of CREST.

17. The appellant accepted that the information available from HMRC's website included some details as to making SDRT payments outside of CREST but contended that this information was limited and appeal to apply only to single payment transactions, providing account details and requesting a confirmation letter per transaction. The appellant considered that HMRC could not expect businesses such as that of the appellant to post thousands of payments per month with an equivalent number of letters. The appellant submitted that the website contains no information as to how net payments can be sent for multiple transactions, nor how the underlying trades should be identified.

18. The appellant contended that they had telephoned HMRC for advice on at least ten occasions, calling around the end of each month when reporting information was finalised, but that no guidance had been provided when they called. They had simply been referred back to the website, which did not have the necessary information. The appellant stated that they had tried a number of helplines listed on HMRC's website, any variant of those for SDRT and stamp duty but that often no-one answered the phone. The website did not have any contact details for queries about multiple transactions, so they had called those which seemed the best fit. In cross-examination, the appellant could not recall whether they had called the SDRT helpline number shown on the SDRT website, as these calls had now taken place over two years earlier. However, they agreed that it is possible that they saw the SDRT helpline number on the HMRC SDRT website.

19. The appellant was not prepared to send substantial amounts of money to HMRC until they had received confirmation from HMRC as to the correct paperwork and account details required for multiple transactions. No records of these calls were available, as FCA regulations only required calls to be retained for a few months.

20. On 5 December 2018, the appellant eventually contacted an HMRC officer, Mr Gill, who they had dealt with when applying for intermediary status, who was able to provide details of the correct contact at HMRC in December 2018. They had assumed that Mr Gill was on a different team, dealing with SDRT registration, and had simply hoped that he could help with the impasse. They did not realise that a single team dealt with all SDRT queries.

21. Following this, a method of communicating the underlying trades was agreed. The resulting spreadsheet was created by the appellant, rather than being based on any guidance which should logically be available from HMRC.

22. The appellant contended that they had not benefited from the late payment as the funds were maintained in a separate account at the clearing provider throughout the relevant time. They were not, however, prepared to pay these funds over without clear details as to the appropriate account for payment. The appellant also criticised HMRC for not providing any confirmation of receipt of payments, and noted that HMRC had recently changed the SDRT bank details on the website without informed the appellant that these had changed.

23. The appellant submitted that the delays did not arise from any lack of effort on their part and that they should be considered to have a reasonable excuse for the late payment and filing. They contended that a reasonable taxpayer with their experience would have had the same issues and also would not make payments without the relevant information. The delay was caused by HMRC's failure to provide adequate guidance to intermediaries in their position; the appellant submitted that this was part of a general lack of professionalism on the part of HMRC as evidenced by the fact that the penalties had been recalculated three times, and that they had had issues with bank payments in relation to other taxes.

HMRC submissions

24. HMRC submitted, firstly, that the penalties had been properly assessed and raised. There was no dispute that the filings and payments were made late. Schedule 55 (failure to file a notice charge) and Schedule 56 (late payment) Finance Act 2009 therefore provided that a penalty was chargeable in respect of each late filing and each late payment.

25. As the failure to provide the notice of charge continued for less than three months in each case, the applicable penalty for each of the 201 transactions was £100, for a total of £20,100.

26. The late payment penalty was initially imposed in respect of all of these transactions. The penalty was subsequently modified when it was realised that the transactions which had taken place in November 2018 were paid before the penalty date of 7 January 2019 (31 days after the due date for payment). A small number of the October 2018 trades had also been excluded from the penalty calculation and were subsequently taken into account. Taking all of this into account, the late payment penalty was £15,071.11, being 5% of the SDRT unpaid at the penalty date for each period.

27. HMRC contended that the appellant had not established that there was a reasonable excuse for the delay in providing the notices of charge and making the payments. The legislation sets out three circumstances that do not amount to a reasonable excuse, being: (1) a lack of funds, unless attributable to events outside the appellant's control; (2) reliance on another person unless reasonable care is taken by the appellant to avoid the failure; (3) where a reasonable excuse has ceased to exist, and the failure is not remedied without unreasonable delay thereafter.

28. HMRC submitted that it was the appellant's responsibility to ensure that correct procedures were in place in the business structure, including the compliance functions with regard to SDRT. The appellant was clearly aware that it would be required to undertake these compliance functions and it would not be unreasonable to expect the appellant to have had such processes in place before changing their clearing agent to one which did not provide such compliance function. HMRC submitted that a reasonable taxpayer in the appellant's position with similar knowledge, expertise and experience would have carried out a due diligence exercise and implemented correct processes ahead of the restructure to ensure that they were able to undertake the SDRT compliance functions.

29. HMRC contended that comprehensive guidance was available publicly on HMRC's website with regard to SDRT compliance and that the appellant had confirmed that this had been accessed. HMRC contended that the guidance provides information on how payments should be made, and the payment details to do so.

30. Further, HMRC contended that the appellant had used the SDRT email for initial contact in respect of intermediary status and then used it again when eventually providing the SDRT information on 11 December 2018. The same contact information was available online and had been contained in letters sent to the appellant in respect of their intermediary status. With regard to the appellant's submissions in respect of telephone calls, HMRC undertook internal investigations using the telephone numbers which the appellant had provided as being used to make the calls. HMRC noted that the appellant was unable to provide dates and times as to the calls. HMRC had been unable to locate and substantiate the calls which the appellant states were made.

31. HMRC submitted that they had considered whether there were any special circumstances which might merit a reduction in the penalties. They had concluded that the failure arose as a result of an internal business decision by the appellant to change their clearing and settlement processes. This was not unforeseeable out beyond the appellant's control to mitigate the consequences of that decision.

Discussion

32. There is no statutory definition of "reasonable excuse" and so it is an objective test to be considered in the circumstances of the particular case. The test is what a reasonable and prudent taxpayer intending to comply with their tax obligations, in the position of the appellant, would have done in the same circumstances (*Perrin* [2018] UKUT 156 (TC)). The Upper Tribunal in *Perrin* held that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account" (§75). I consider that the appellant clearly believed that they did not have enough information from HMRC to be able to deal with their SDRT obligations. The question is whether that was objectively reasonable in the circumstances.

33. The appellant has been in business in the financial services sector for a number of years, trading in equities across worldwide markets. It is subject to a considerable amount of regulation and required to have processes in place for compliance with financial services regulatory requirements. It is clear from the appellant was aware as early as January 2018, when they applied for intermediary status, that they would need to make arrangements to collect and pay SDRT in respect of the transactions undertaken after they changed clearing providers in August 2018.

34. Nevertheless, I find that the appellant made no clear effort to establish what processes would be required to file SDRT information and make payment until shortly before the deadline for compliance approached. The appellant's evidence was that they had assumed that the process with HMRC would be the same as with other jurisdictions to which they made similar payments, which indicates that they had not made any particular effort to establish what the process was until shortly before they were required to file SDRT returns and payment. There was no evidence from the appellant that any phone calls had, for example, been made significantly before the reporting deadline approached. I note that their previous providers could not assist, as they accounted for SDRT through the CREST system (an option which was not open to the appellant), but there was no evidence provided to show that the appellant had approached anyone else for advice on dealing with compliance.

35. I consider that a reasonable taxpayer in the appellant's position would have established the filing requirements and process well before the first deadline for compliance, and would not simply have assumed that the same process applied in the UK as applied in other jurisdictions.

36. I do not consider that the appellant therefore has an objectively reasonable excuse for the delay in filing the returns and making payment.

37. Even if it were reasonable to leave dealing with the details of compliance to the last minute, I consider that a reasonable taxpayer in the appellant's position would have looked for other routes to contact HMRC when the first telephone calls did not result in any information that they considered to be useful. The appellant's evidence was that they had looked at the HMRC SDRT website, but there was no clear reason given why they did not contact the SDRT email address on HMRC's website, which was the same email address that they were given when they eventually contacted the HMRC officer who had dealt with their intermediary status application. There was no clear reason why they could not have sought assistance from Mr Gill earlier, or a professional adviser, when their initial enquiries to HMRC did not result in useful information.

38. I also consider that a reasonable taxpayer would have sought that assistance when after the first phone calls were unproductive, rather than then waiting until the next month's figures were finalised. Instead, the appellant's evidence is that they simply made phone calls to a variety of helplines towards the end of each month between September and November.

39. The appellant stated that it was more usual in the financial services sector to simply pick up the phone: whilst this might have been a reasonable initial approach, I do not consider that it was reasonable to repeat the same process each month rather than endeavour to find an alternative source of information. Therefore, even if the appellant could have been regarded to have had a reasonable excuse for the initial failure to file, I find that such reasonable excuse would have ceased around the end of September when no alternatives were explored and the question of compliance was 'parked' until the appellant attempted again to contact HMRC by phone towards the end of October.

40. I have considered HMRC's submissions with regard to special circumstances. The Tribunal has limited jurisdiction with regard to the question of whether there are special circumstances meriting a reduction in a penalty and can only consider whether or not HMRC's decision is flawed in a judicial review sense; that is, that the decision is not one which could have been reached on a reasonable basis. Having reviewed HMRC's submissions on special circumstances I do not consider that their decision is flawed in a judicial review sense.

Decision

41. The appeal is dismissed and the penalties upheld.

Right to apply for permission to appeal

42. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 30 JULY 2021