[2018] UKFTT 142 (TC)

TC06395

Appeal number: TC/2015/00208

Income Tax – penalties – section 7 Interpretation Act – Scots law – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

OLAYINKA OLALEKAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN MALCOLM

Sitting in public at George House, Edinburgh on Thursday 14 December 2017

Mr Olayinka Olalekan, the Appellant

Mr Matthew Mason, Officer of HMRC, for the Respondents

Preliminary matter

1. Although the appeal, as presented to the Tribunal in the Bundle, related to the penalties imposed for the year 2012/13, the Notice of Appeal referred to penalties amounting to £2,081.31. Both parties agreed that there were extant £100 late filing penalties, £900 daily penalties and £300 six month penalties for each of the years 2010/11, 2011/12 and 2012/13 and that all of those penalties should be considered in the course of the hearing since the facts and arguments were identical in relation to all three years. We had due regard to Rules 2 and 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and granted that application.

The issue

2. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit an annual self-assessment return for the years 2010/11, 2011/12 and 2012/13 on time.

3. The penalties that have been charged can be summarised as follows:

> (1) the £100 late filing penalties under paragraph 3 of Schedule 55 imposed on or about 4 March 2014,
>
> (2) "Daily" penalties totalling £900 in each year under paragraph 4 of Schedule 55 imposed on or about 9 September 2014,
>
> (3) £300 "six month" penalties under paragraph 5 of Schedule 55 imposed on or about 9 September 2014.

Legislation

4. In summary, paragraph 3 of Schedule 55 provides for a penalty of £100 if a return is not received by the filing date for a return.

5. Paragraph 4 provides that if after a period of three months beginning with the penalty date, the return remains outstanding, then daily penalties of £10 per day up to a period of 90 days are payable.

6. Paragraph 5 provides that if after a period of six months beginning with the penalty date, the return remains outstanding, then a penalty is payable which is the greater of 5% of any liability to tax or £300.

7. Paragraph 23 provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, the Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse has ended.

8. That paragraph specifies explicitly that insufficiency of funds is not a reasonable excuse unless attributable to events outside the taxpayer's control and where the taxpayer relies on any other person to do anything then that also is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

HMRC's Arguments

9. HMRC argue that on 24 November 2013, the appellant having not responded to requests for voluntary payment of underpaid tax of £531.42 arising in 2009/10, a decision was taken to issue tax returns for the years 2009/10 to 2012/13. Those returns were issued on 25 November 2013. The due date for filing of those returns whether electronically or on paper (paper returns having been issued) was 2 March 2014.

10. Since the returns had not been received by HMRC by the due date, on or about 4 March 2014 the £100 late filing penalties were issued. Those carried a warning that the returns were late and that any appeal should be lodged within 30 days.

11. On 12 June 2014 a self-assessment statement was issued to the appellant showing the three £100 late filing penalties which had been deducted from an outstanding credit on 10 April 2014.

12. The next contact was from the appellant who telephoned HMRC on 26 June 2014 "about a letter that had been received" which was presumably that statement. He was advised that he was required to complete the outstanding returns from 2009/10 to 2012/13. Duplicate returns were issued to him on 27 June 2014. Although the appellant has produced part of the covering letters sending same, it is evident that that is incomplete, not least because the employment pages for 2012/13 are not included and evidently were ultimately filed.

13. On 8 July 2014, 30 day daily penalty reminder letters were issued for each of the three years.

14. On 1 August 2014, the 2011/12 and 2012/13 returns were received by HMRC but unfortunately the 2012/13 return was unsigned. It was returned to the appellant on 3 September 2014.

15. On 18 August 2014, at least one 60 day penalty reminder for 2010/11 was issued.

16. On 9 September 2014, the daily penalties amounting to £900 and the six month late penalties amounting to £300, in respect of each year were issued to the appellant.

17. On 10 September 2014, the taxpayer telephoned HMRC and it was confirmed that the 2010/11 return had not been received and a further return was reissued. The appellant stated that he had that day sent back the 2012/13 return which he had signed. It was received by HMRC on 15 September 2014.

18. On 17 September 2014, the appellant telephoned HMRC about the penalties and was told that the 2010/11 return had still not been received. The 2010/11 return does not appear to have ever been filed. A duplicate return for 2009/10 was issued to the appellant on 14 July 2016 and that was ultimately lodged on 2017.

19. On 8 December 2014, HMRC issued a decision confirming the daily and six month late penalties and following a review on 9 December 2014, those penalties were again confirmed. The appellant appealed to the Tribunal on 9 January 2015 (not 2014 as indicated on the Notice of Appeal).

The appellant's arguments

20. On 30 August 2014, the appellant wrote to HMRC referring to a letter dated 18 August 2014 which he had apparently received that day. That letter was in fact the 60 day penalty reminder for 2010/11. He stated that the return for 2010/11 had been filed and returned in July 2014. He went on to state that in June 2014 he had telephoned HMRC stating that he had not received the tax returns for the years 2010-2013 inclusive and that he had been sent paper returns thereafter. He enclosed a copy of two letters. He stated that he had completed those documents separately and posted them to HMRC in or around July 2014. He denied that the penalties should be due and stated that he had received no other correspondence from HMRC.

21. On 1 November 2014 he wrote to HMRC stating that "Due to numerous letters I received from the HMRC informing of late penalties…" he had telephoned HMRC in June 2014 stating that he had not received any tax returns.

22. He argued that he had had "… a difficult situation throughout the duration the HMRC claimed they had corresponded to 3 June 2013 to 25 November 2013" for the following reasons:-

(a) he lost his job with his employer on 31 July 2013;

(b) he had filed his case to the Employment Tribunal for unfair dismissal;

(c) he had attended court regarding debts; and

(d) his father had suffered from a stroke in June 2013 and ultimately died in September 2014.

23. He stated that he had only received "the late penalties notice" in June 2014 and he had always ensured that all correspondence was properly attended to.

Reasons for decision

24. HMRC established quite clearly that a number of letters had been sent to the appellant relating to the underpayment of tax which had arisen in 2009/10. There had been no response. He was therefore put into the self-assessment regime and the relevant tax returns referred to above were issued. The letters and those returns were issued to the address where the appellant has lived since 2012 and where he continues to live and from whence he has had correspondence with both HMRC and the Tribunal.

25. It is not disputed that the returns were not lodged on time. The appellant's only argument is that he never received any correspondence until June 2014. He also alleged that mail that he had sent to HMRC had been lost. He argued that he had responded promptly to any and every communication received from HMRC.

26. HMRC relied on Section 7 of the Interpretation Act 1978. We were not referred to the case but the opinion of the Lands Tribunal for Scotland in *EK v The City of Edinburgh Council* LTS/TR/2016/30 issued on 27 September 2017 reviewed the relevant Scottish and English authorities in relation to the Interpretation Act. That makes it clear at paragraphs 40 to 43 that in Scots law as the Lord Justice General stated in *Duffy v Normand* [1] "… in a case where proof of service on a particular date is

[1] 1995 SLT 1264

immaterial, evidence of non-receipt will be irrelevant, as it can be assumed in terms of the first part of section 7 of the 1978 Act that service has been effected".

27. In *EK*, based on that, the Tribunal found, and we agree, that the second part of section 7 only comes into play (ie it is open to the alleged recipient to say that he did not receive the documents at all) only where the legislation requires a document to be served by a certain time. In this case the issue of the letters and the returns was not time critical and therefore the second part of section 7 does not apply. Even if we were wrong on that in regard to the distinction in Scots law, we rely on *Calladine-Smith v Saveorder Limited*[2] where Mr Justice Morgan stated quite clearly at paragraph 26 "Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which you established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings on fact".

28. Shortly put, the issue for the Tribunal was the credibility of the appellant. He argued that mail frequently went missing in his block of flats and that might be one of the reasons why he had not received correspondence from HMRC. It was put to him that he stated that his request to HMRC in June 2014 had been in response to "numerous letters" received from HMRC, yet he argued that he had received no letters until June 2014. The only letter issued in June 2014 was the statement of account dated 12 June 2014 showing the penalties. When that clear conflict was put to him he suggested that the problem might be his command of the English language and that he had not meant "numerous". That did not sit well with his previous assertion that he was educated to almost PhD standard and held a BSc. His education had been completed in English. We did not accept that as a credible explanation.

29. Furthermore when it was explicitly put to him that he had stated that large quantities of mail from HMRC appeared to have gone missing yet he appeared to have received mail from the court in relation to his court cases dealing with debt, he initially denied that he had had such a court case or cases. When referred to his letter of 1 November 2014, he then conceded that he had indeed had court cases but said correspondence was by email. When it was pointed out to him that although, quite possibly, his solicitor had corresponded with him by email it was anticipated that the court would have corresponded with him by letter, he conceded that it had done so.

30. He was asked why the Tribunal should believe that numerous letters from HMRC and also from him to HMRC had been missing because that seemed unlikely. His only argument on the latter point was that on one occasion an HMRC officer had said to him that it was possible that he had sent something to them but it had not been received in the correct department. We accept that that may be the case since on 10 September 2014 in the telephone conversation he was told, again, that the 2010/11 return had not been received and a further return was reissued to him. In the telephone conversation on 17 September 2014 he was again told that the 2010/11 return was still outstanding. It may be that that was when that conversation occurred as it is perfectly feasible that a return issued on 10 September would not have been received in that timescale.

31. In summary, whilst we accept that it is possible that mail does occasionally go missing, nevertheless it is inherently unlikely that the letters about the voluntary

[2] 2011 EWHC 2501 (CH)

payment, the issue of the tax returns and the issue of the first late penalties for each of the three years in March 2014 were all not received by the appellant.

32. In any event his assertion that he acted promptly in responding to HMRC is not borne out in the case of 2010/11 return where, once he had received the duplicate return in July 2014, it had certainly still not been received by September 2014. Indeed on the balance of probability, based on the returns summary produced by HMRC dated 14 December 2017, it has still not been received. Furthermore his letter of 30 July 2014 is wholly inconsistent with the telephone conversations of 10 and 17 September 2017 when he recognised that the return had not been filed.

33. In summary we did not find the appellant to be a credible witness. We accept that the returns were properly issued to the correct address and that they were not filed timeously. The appellant was properly notified about his potential exposure to late and daily penalties.

34. The appellant argued that the penalties were unfair. He had not worked since 2012 and could not pay the penalties. Firstly, in November 2014 he stated that he had lost his job on 31 July 2013 which is not 2012. Secondly, the Tribunal cannot take into account his ability to pay the penalties.

35. Paragraph 16 of Schedule 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*[3] said "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

36. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances.

37. We did consider whether HMRC had acted in a way that no reasonable body could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. We think not. We have also considered whether HMRC have erred on a point of law. They have not. We find no reason to disagree with their conclusion. HMRC's decisions in that regard are not flawed when considered in light of the principles applicable in proceedings for judicial review.

38. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Bosher*[4] makes it clear that we do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. We are bound by that decision and have no discretion.

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[3] 1971 3 All ER 967

[4] 2013 UKUT 579 (TCC)

39. The decision of the Upper Tribunal in *HMRC v Hok*[5] is binding on us and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

Decision

40. The Tribunal decided that the appeal is dismissed and the penalties in respect of the years 2010/11, 2011/12 and 2012/13 are confirmed.

41. 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 SCOTT

TRIBUNAL JUDGE
RELEASE DATE: 16 MARCH 2018

[5] 2012 UKUT 363