[2017] UKFTT 880 (TC)

TC06275

Appeal number TC/2016/04362

Income Tax - s 93 TMA 1970 - penalty assessment for failure to deliver return - Appellant received rent from property - not disclosed to HMRC - abatements - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MARGARITA SOFIANOVA **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NICHOLAS DEE

Sitting in public at Taylor House, Rosebery Avenue, London on 31 August 2017

The Appellant in person

Ms Paula O'Reilly Officer of HMRC, for the Respondents.

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DECISION

1. This is an appeal by Ms Margarita Sofianova ("the Appellant") against penalty assessments totalling £9,755 issued under s 93(5) Taxes Management Act 1970 for her failure to submit SA returns to HMRC relating to rental income received for the years 2007-08, 2008-09 and 2009-10.

2. The issue is whether the penalty assessments have been issued correctly, if so whether the penalty is the correct amount and also whether an appropriate abatement has been made to take into account "disclosure" and "co-operation" by the Appellant and "seriousness" of the failure to submit SA returns to HMRC.

3. The tax charged upon the benefit is not in dispute. The appeal relates solely to the penalties.

Background

4. As a result of enquiries made by the Metropolitan Police, HMRC were passed information via the legal gateway, that the Appellant had been in receipt of income from renting 1 Deacons Rise, East Finchley, London ("the Property") which she had not notified to HMRC.

5. A subsequent review of HMRC's internal systems revealed that the Appellant had not paid any taxes (neither PAYE nor Self-Assessment). HMRC wrote to the Appellant on 7 December 2011 inviting her to disclose any tax irregularities. In the letter the Appellant was advised that the extent of her co-operation would be taken into consideration if penalty charges were levied.

6. On 24 January 2012 HMRC again wrote to the Appellant because she had failed to respond to the letter of 7 December 2011. In this letter the Appellant was informed that formal assessments could be issued if she failed to communicate. A copy of the letter was also sent to Mr J C Hunter who was her appointed advisor at the time.

7. Self-assessment tax returns for the years 2007-08, 2008-09 and 2009-10 were issued to the Appellant on 31 January 2012.

8. On 29 March 2012, Mr Hunter called HMRC to explain that he had obtained information to enable him to quantify income from property, but the Appellant had not provided any of the other information he had requested. Mr Hunter said he would not submit the Appellant's tax returns until after HMRC had met with her. He suggested a meeting in April and agreed to contact the Appellant's intermediary, a builder named Adam, to arrange it.

9. A meeting was held on 17 May 2012 at which the Appellant admitted she had received income for renting the Property for three years and acknowledged she had not informed HMRC of this income within the legislative timeframe of six months from the end of the tax year in which it was received. No explanation has been

provided to HMRC why the returns were not submitted on time. However the returns were not actually submitted to HMRC until 15 June 2016, over four years later.

10. On 22 May 2012, the Appellant was asked to provide details of her bank accounts, provide bank statements and submit a signed Statement of Assets and Liabilities.

5 11. No response was received and therefore a reminder was sent on 30 July 2012.

12. On 2 October 2012, HMRC phoned Mr Hunter because they had not received a response to their letters of 22 May and 30 July 2012. Mr Hunter said this was because he was still waiting for confirmation of the rental income from the letting agents, which the Appellant was supposed to be supplying him with.

10 13. On 9 January 2013 HMRC wrote to the Appellant because the requested information and documents had not been provided. She was informed that the continual delays were not acceptable and advised that formal assessments would be considered if she did not respond.

14. Over the next eighteen months the Appellant engaged several advisers, but the 15 required information was not provided.

15. On 3 December 2013 the Appellant disclosed rental income of £46,225, after claiming expenses of £170,000 for the years 2007-08 to 2009-10 inclusive.

16. It was found that the expenses of £170,000 were not allowable expenses to be claimed against the rental income.

20 17. Further correspondence ensued up until October 2015, during which HMRC asked on three occasions for a meeting to try to discuss the enquiry and bring it to a conclusion. The Appellant would not agree to another meeting, saying that she did not understand why there was an investigation into her tax affairs.

18. A penalty determination under s 93 TMA 1970 was issued on 28 October 2015, 25 the Appellant's failure having extended more than twelve months after the anniversary of the due date.

19. The penalties were based on the tax charged in the assessments and abatements were given to arrive at the appropriate level within the statutory maximum as follows:

Disclosure (max 20%)	15% allowed
Co-operation (max 40%)	15% allowed
Seriousness (max 40%)	15% allowed
Total abatements	45%

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Maximum statutory penalty is 100%, less abatements of 45% = net penalty charge of 55%.

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20. HMRC issued assessments under s 29 TMA 1970 for 2007-08, 2008-09 and 2009-10 on 2 November 2015.

21. An appeal was received on 26 November 2015. HMRC replied with their views on the matter on 1 March 2016.

22. On 29 March 2016 the Appellant requested an independent review. By this stage HMRC say that they still had not received the outstanding returns.

5 23. HMRC received completed tax returns for 2007-08, 2008-09 and 2009-10 on 15 June 2016.

24. The review, which was concluded on 15 July 2016, upheld the assessments but since tax returns were received on 15 June 2016 the amount of the tax was reduced to agree the figures shown on the returns. The review also upheld the penalty but 10 reduced the amount due as the tax had been reduced.

25. An appeal against the penalty was made to the Tribunal Service on 14 August 2016.

Relevant Legislation

15 26. The relevant legislation is contained in s 93 Taxes Management Act 1970

> 93 Failure to make return for income tax or capital gains tax
> (1) This section applies where--
> (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act ... to deliver any 20 return, and
> (b) he fails to comply with the notice.
> (2) The taxpayer shall be liable to a penalty which shall be £100.
> (3) If, on an application made to [it] by an officer of the Board [the tribunal so directs] the taxpayer shall be liable to a further penalty or penalties not 25 exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).
> (4) If--
> (a) the failure by the taxpayer to comply with the notice continues 30 after the end of the period of six months beginning with the filing date, and
> (b) no application is made under subsection (3) above before the end of that period.
> the taxpayer shall be liable to a further penalty which shall be £100.
> 35 (5) Without prejudice to any penalties under subsections (2) to (4) above. if--
> (a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and
> (b) there would have been a liability to tax shown in the return, the 40 taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.
> (6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.
> (7) If the taxpayer proves that the liability to tax shown in the return would 45 not have exceeded a particular amount, the penalty under subsection (2)

above together with any penalty under subsection (4) above shall not exceed that amount.

(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above [that is notified to the tribunal], neither section 50(6) to (8) nor section 1008(2) of this Act shall apply but the [tribunal] may--

(a) if it appears ... that throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside: or

(b) if it does not so appear ... confirm the determination.

(9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date would have been payable by the taxpayer under section 59B of this Act for the year of assessment.

Evidence

27. The bundle included copy correspondence between the parties, HMRC's statement of case, the Appellant's tax returns, penalty determinations, copy relevant legislation and a witness statement from Steven Booth, HMRC's case officer, who also gave evidence on oath to the Tribunal.

The Appellant's case

28. The Appellant accepts that she failed to notify HMRC that she had received income from property and she accepts a penalty is chargeable.

29. The Appellant contends that her behaviour has been misinterpreted by HMRC when considering whether a penalty should be charged. She says that she did not act unreasonably in suggesting that expenses of £170,000.00 would be allowable.

30. The Appellant contends that she has found the assessments and penalties difficult to understand and has not deliberately been uncooperative or delayed matters. The Appellant asserts that a penalty of 20% would be more appropriate on the basis that she has provided full disclosure and co-operation and that maximum abatements of 80% should be applied.

HMRC's case

31. The Appellant failed to advise HMRC of her income from 1 Deacons Rise, East Finchley, London for the years 2007-08, 2008-09 and 2009-10. No satisfactory explanation for this has ever been given.

32. HMRC contend that they were entitled to make assessments under s 29 TMA 1970 for the years 2007-08, 2008-09 and 2009-10 as they assessed the failure to disclose income was as a result of deliberate behaviour. The assessments are not under appeal.

33. HMRC issued SA returns to the Appellant for the years 2007-08, 2008-09 and 2009-10 on 31 January 2012. The due date for submission of these returns was 30 April 2012.

34. As the returns remained outstanding on the due date, HMRC issued a penalty in respect of each year under s 93(5) TMA 1970.

35. Section 93 (5) of TMA provides that the maximum penalty that can be imposed is 100% of the tax due. Subject to that maximum, s 100 TMA confers on an officer the discretion to impose such penalty as the officer considers is "correct or appropriate". No further guidance is given in the legislation as to how that discretion should be exercised in individual cases.

36. However, HMRC has a long-established policy setting out how it will exercise that discretion and the factors which will be taken into account. Prior to 2014, that policy was set out in the Inland Revenue Investigation Handbook at sections 5500-5551. Since 2014, it is found in the HMRC Enquiry Manual at sections 6051 to 6089. Under this policy, the starting point in every case is the statutory maximum. That sum is then reduced, if appropriate, by a process called abatement.

37. Abatement requires HMRC officers to take account of three factors:

> (1) The extent of the taxpayer's disclosure (for which the penalty can be reduced by up to 20%.
>
> (2) The extent of the co-operation received from the taxpayer during the enquiry (for which the penalty can be reduced by up to 40%), and
>
> (3) The seriousness of the offences (for which the penalty can be reduced by up to 40%).

38. The penalty has been abated in line with HMRC's practice to 55%, [see paragraph 19 above]. Officer Booth explained how the abatements had been applied:

> Disclosure - The Appellant admitted she had failed to notify her chargeability to income tax by virtue of failing to declare profits from the rental income she had received. This failure was deemed to be indicative of deliberate behaviour. Despite the admission no formal disclosure has been made.
>
> Cooperation - The Appellant was advised at the start of the investigation and on several occasions thereafter, that the degree of co-operation afforded to HMRC would be taken into account for the purposes of assessing her liability to penalties. The enquiry had been running for four years and during that time the Appellant has shown very little commitment to resolving the enquiry. She failed to complete a number of forms (e.g. A Statement of

5 Assets & Liabilities) despite being reasonably requested to do so on several occasions. She also prolonged the enquiry by her use of multiple advisers, and despite detailed explanations continued to claim to not fully understand matters. Even when the Appellant admitted to being in receipt of income from a rental property she stated the total income she received over the three year period was £46,225.57 when HMRC hold evidence to show the rents received were £121,592.83.

10 Seriousness - Tax returns for 2007/08, 2008/09, 2009/10 were issued on 31 January 2012. The failure to submit returns where there is clearly a source of taxable income for a period of three years is seen as a serious offence. The level of the income received was substantial. The omissions were large and the period covered was long.

Conclusion

15 39. The Appellant neither appeals the fact that she failed to deliver returns for years 2007-08 to 2009-10 when obliged to do so nor that penalties are payable. The returns were over four years late.

20 40. She argues that the abatement should be 80% thus reducing the penalty to 20%, but does not explain why the abatement should be greater than 45% in terms of disclosure, co-operation and seriousness.

41. It is clear from the evidence of Officer Booth that abatements for disclosure, co-operation and seriousness were correctly applied. His reasoning is set out in paragraph 38 above. We entirely agree with that reasoning.

42. The appeal is accordingly refused and the penalties confirmed.

25 43. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL
35 **TRIBUNAL JUDGE**

RELEASE DATE: 18 December 2017