[2018] UKFTT 183 (TC)

TC06424

Appeal number: TC/2016/04231

INCOME TAX – penalties for taxpayer's delay in filing his tax return – paragraphs 3, 4 and 5 of Schedule 55 to Finance Act 2009 – penalties for taxpayer's delay in paying tax due under his self assessment – paragraph 3 of Schedule 56 to Finance Act 2009 – whether taxpayer had reasonable excuse for delay – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAN DEAL **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR LESLIE HOWARD

Sitting in public at Taylor House, London on 11 January 2018

Mr Deal in person

Mrs Clissold, presenting officer, for the Respondents

DECISION

Introduction

1. This appeal by Mr Deal is against HMRC's decision to issue him with six penalties imposed in respect of the tax year 2013/14:

- four penalties (imposed under paragraphs 3, 4 and 5 of Schedule 55 to the Finance Act 2009) in respect of delay in filing a tax return for the tax year 2013/14:
  - an initial penalty of £100,
  - daily penalties totalling £900,
  - an initial six months delay penalty of £300, and
  - a tax-geared six months delay penalty of £2,199;

and

- two penalties (imposed under paragraph 3 of Schedule 56 to the Finance Act 2009) in respect of late payment of tax due for 2013/14:
  - a tax-geared 30 days late payment penalty of £2,499, and
  - a tax-geared six months late payment penalty of a further £2,499.

2. The total amount of penalties imposed upon Mr Deal for late filing and late payment for 2013/14 is £8,497.

3. The amount mentioned in Mr Deal's Notice of Appeal as being in dispute is £11,260. This higher figure appears to be taken from a July 2016 Statement of Account issued to Mr Deal, which shows four of the penalties set out above, £111.31 of accrued interest and tax of £3,651.94 (due from Mr Deal as the outstanding part of an amount of £24,995.68 due as the first payment on account of the tax due from Mr Deal for 2015/16). As no appeal lies against either the imposition of interest upon outstanding tax or against an amount of tax due as a result of filing a self-assessment, we are satisfied that the only amounts under appeal before us are the six penalties set out above.

Findings of fact

4. Mr Deal gave evidence of fact as part of his submissions to us. We found Mr Deal to be a well-educated and articulate witness, who was capable in presenting his case and in responding to questions asked by the Tribunal. Mr Deal described himself as not good at business and not good with paperwork, and we accept that Mr Deal was not as successful in business as other members of his family.

5. Mr Deal also described himself as being vulnerable and told us that he found it difficult to cope with everyday matters due to the financial strain upon him. However, Mr Deal had not sought any medical or psychological assistance (due to the perceived stigma of seeking such help), and so Mr Deal lacked a clinical diagnosis of any illness or disorder. Without any medical or corroborating evidence to suggest that Mr Deal is less able to deal with the vicissitudes of life than other people, and without any other factors (such as old age) to suggest that Mr Deal is particularly vulnerable for other reasons, we treat Mr Deal as ordinarily capable of managing the stresses and strains of ordinary life.

6. On the basis of the documents before us and the oral evidence of Mr Deal, we find as follows:

a) In around 2008, Mr Deal concluded bitter divorce proceedings. As a result of that divorce Mr Deal was required to transfer a house in London, and two apartments he had owned abroad, to his ex-wife. Mr Deal moved to his current address, a rented apartment in London. Mr Deal described himself as financially "wiped out" by the divorce. Mr Deal unsuccessfully appealed against the divorce settlement, and this appeal concluded in around 2010.

b) From about 2010, Mr Deal became involved in a tax dispute with HMRC. Although he was represented by a large and well regarded firm of accountants, Mr Deal found this period and the investigation to be very stressful. This dispute concluded towards the end of 2013 and Mr Deal was advised to instruct accountants to file tax returns for him to ensure that his tax affairs were in order and up to date. A small firm of accountants in north London was recommended to Mr Deal.

c) On or about 21 September 2014, Mr Deal registered with HMRC for self-assessment. Following this registration, on or about 2 October 2014, HMRC sent Mr Deal a Notice to file a tax return for the tax year 2013/14. The deadline for a return to be filed was 31 January 2015 if filed by electronic means. It is not disputed that Mr Deal received this notification.

d) Mr Deal did not file his tax return by the due date. On or about 18 February 2015, HMRC issued Mr Deal with a late filing penalty of £100.

e) Mr Deal sent his paperwork to the small accountancy firm recommended to him, for the firm to file a tax return of his behalf. From what Mr Deal told us about how long this firm held his paperwork, we find that Mr Deal sent his paperwork to this firm in about March 2015. (HMRC's SA Notes do not show a change of accountant at this time and the large firm appears to have stayed on the record for Mr Deal, at least as far as HMRC were concerned.)

f) On 2 June 2015, HMRC issued a letter to Mr Deal warning him that daily penalties were accruing due to his failure to file a tax return, and that 30 days' worth of penalties had been incurred. On 30 June 2015, HMRC issued a 60 days daily penalties reminder letter to Mr Deal.

g) On 14 August 2015, HMRC issued Mr Deal with an assessment to 90 daily penalties of £10 each, and a penalty of £300 as his tax return had been outstanding for more than six months.

h) HMRC's SA Notes show that the large firm ceased to represent Mr Deal on 27 August 2015.

i) Mr Deal did not hear back from the small accountancy firm following his submission of paperwork, even though he had stressed the importance of filing his tax return on time. Mr Deal told us, and we accept, that the small firm held Mr Deal's paperwork for six or seven months, before returning the papers to Mr Deal in approximately September or October of 2015.

j) On 11 December 2015, HMRC received a form 64-8 providing details of a new agent (Mr Deal's current accountant) for Mr Deal. This agent was recommended to Mr Deal by his brother.

k) On 26 January 2016, HMRC received Mr Deal's tax return for 2013/14. Mr Deal's return showed that he had been resident in the UK for 12 or more of the preceding 14 years, that Mr Deal was domiciled outside the UK and that Mr Deal had elected to make a claim for the remittance basis for 2013/14 and pay the remittance basis charge of £50,000 (rather than declare his foreign income and gains). The only other item declared in Mr Deal's tax return was a very small amount of UK interest from which tax had already been deducted. The tax due under Mr Deal's return was £49,995.35.

l) Also on 26 January 2016, HMRC received a payment from Mr Deal of £75,000 (allocated by HMRC to the tax due for 2013/14, and to other amounts outstanding at that date). Mr Deal told us, and we accept, that this payment was made for him by his sister as he did not have funds of that size.

m) On 23 February 2016, HMRC issued Mr Deal with a tax geared late filing penalty for 2013/14. As a six months late filing penalty of £300 had already been issued to Mr Deal in August 2015, the further penalty assessment issued in February 2016 was in the sum of £2,199 (the two penalties together totalled £2,499, being 5% of the tax due under Mr Deal's return). HMRC also issued two tax geared late payment penalties to Mr Deal, each in the sum of £2,499 (calculated as 5% of the tax due).

n) On 22 March 2016, HMRC received an appeal sent on behalf of Mr Deal, against the penalties imposed in respect of 2013/14. On 21 April 2016, HMRC rejected this appeal, on the basis that Mr Deal did not have a reasonable excuse for his delay either in filing his return or in making late payment of the tax due.

o) Mr Deal sought a review of this decision. On 4 July 2016, HMRC upheld their earlier decision. The reviewing officer also considered that there were no special circumstances which would make it right to reduce the penalties imposed on Mr Deal.

p) On 3 August 2016 Mr Deal filed his Notice of Appeal to this Tribunal.

Discussion and decision

7. In an appeal against the imposition of penalties the onus of proof is first upon HMRC to satisfy the Tribunal that the penalties are, on the face of it, properly imposed. If we are satisfied that is the case then the onus switches to Mr Deal to demonstrate either that he has a reasonable excuse for the failures which made him liable to the penalties, or that the penalties are otherwise not due.

8. The standard of proof in both cases is the civil standard of the balance of probabilities.

HMRC's case

9. By virtue of Section 8(1F) Taxes Management Act 1970, the deadline for Mr Deal to file his 2013/14 return by electronic means was 31 January 2015. It is common ground, and we have found, that Mr Deal's 2013/14 tax return was filed by electronic means on 26 January 2016. Therefore we are satisfied that Mr Deal's 2013/14 tax return was not filed until more than eleven months after the due date.

10. HMRC have imposed late filing penalties on Mr Deal under paragraphs 3, 4 and 5 of Schedule 55 to the Finance Act 2009. Paragraph 3 applies if the return is filed at all late, paragraph 4 applies if the return is outstanding for a period of up to 90 days which starts after the return has been outstanding for three months, and paragraph 5 applies if the return is outstanding after six months.

11. We are satisfied that Mr Deal's return was filed sufficiently late for him to be liable to all the late filing penalties imposed, and that HMRC have met the requirements of Schedule 55 to the Finance Act 2009.

12. By virtue of Section 59B of the Taxes Management Act 1970, the due date for payment of any outstanding tax due under Mr Deal's return for 2013/14 was 31 January 2015. It is common ground, and we have found, that Mr Deal paid HMRC £75,000 on 26 January 2016, and part of this amount satisfied the outstanding tax due under the 2013/14 return. Therefore we are satisfied that the tax due under Mr Deal's 2013/14 return was not paid until more than eleven months after the due date.

13. The two late payment penalties imposed on Mr Deal have been imposed under paragraph 3 of Schedule 56 to the Finance Act 2009. Sub-paragraph 3(2) of Schedule 56 provides that a taxpayer is liable to penalty of 5% of the outstanding tax due under the return if any tax is outstanding one month after the due date for payment. Sub-paragraph 3(3) of Schedule 56 provides that a taxpayer is liable to a further penalty, also of 5% of the outstanding tax due under the return, if any tax remains outstanding six months after the due date.

14. We are satisfied that HMRC have met the requirements of Schedule 56 of the Finance Act 2009 in imposing late payment penalties upon Mr Deal.

Mr Deal's case

15. The basis of Mr Deal's appeal was that he has a reasonable excuse for his delay in filing and making payment as he was badly let down by his accountant and that he was also going through extreme personal and financial hardship.

Reasonable excuse

16. As noted above, the penalties imposed on Mr Deal are imposed under Schedules 55 and 56 to the Finance Act 2009. Both of these schedules provide that liability to a penalty imposed does not arise if there is a reasonable excuse. Neither Schedule 55 nor Schedule 56 provides a definition of "reasonable excuse", but both of these schedules do exclude certain matters from being a reasonable excuse.

17. Sub-paragraph 23(2) of Schedule 55 and sub-paragraph 16(2) of Schedule 56 are in similar terms. Sub-paragraph 23(2) of Schedule 55 provides:

> (2) For the purposes of subparagraph (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.

Mr Deal's reliance upon his accountant

18. The first aspect of Mr Deal's explanation for his delay was that he had been let down by the small firm which had been recommended to him. This firm had returned his papers after six or seven months, without undertaking any work or, critically, filing Mr Deal's tax return.

19. Although Mr Deal instructed an accountant to file his tax return, responsibility for ensuring that his return was filed with HMRC on time remained with Mr Deal. It appears, from Mr Deal's own account of events, that Mr Deal did not instruct this small firm until about March 2015, after the deadline for filing his tax return for 2013/14 had already passed and after he had received the first of the late filing penalties imposed.

20. Even if (contrary to his recollection of the dates) Mr Deal had instructed his agent in good time, it was still incumbent upon Mr Deal to ensure that his agent carried out his instructions by meeting the filing deadline. Mr Deal should have taken action to chase his agent, or find another representative promptly, if his agent was not acting upon Mr Deal's instructions. Mr Deal received a first late filing penalty, and then the two daily penalty reminder letters, without taking any action. Mr Deal's

paperwork was returned to him in September or October 2015 but Mr Deal's current accountants were not instructed until December 2015, two months later and almost a year after the tax return for 2013/14 was due to be filed.

21. Reliance upon a third pay can only constitute a reasonable excuse if Mr Deal has taken reasonable care to avoid the delay. In this case Mr Deal did not take action to ensure his agent acted timeously, nor did Mr Deal act particularly quickly himself once his papers were returned to him. We conclude that this part of Mr Deal's explanation does not provide him with a reasonable excuse for his delay for his delay in filing his return or in making payment of the tax due.

Mr Deal's straitened circumstances

22. In both the correspondence we saw and in his submissions before us, Mr Deal relied heavily on what he described as his penury. He explained that he was reliant upon his siblings to support him and that he had virtually no UK income of his own. Mr Deal did not provide us with details of any income he had outside the UK but told us that he had not been in a position to realise any of the investments held by his family abroad (due to the stage which those investments were at). Mr Deal told us that although his jewellery business had very recently begun to pick up, that business had essentially collapsed following his divorce and that the period between 2008 and 2016 had been a very difficult time for him financially and emotionally. Mr Deal told us that he was only able to focus upon living day to day due to his lack of funds, and that he had run up three months of rent arrears. Mr Deal described himself as the victim of very difficult circumstances.

23. As set out above, an insufficiency of funds does not constitute a reasonable excuse unless attributable to events outside Mr Deal's control. Mr Deal told us that he had been heavily hit by his divorce settlement, that he had no funds in 2015 and that he was reliant upon his siblings. However, Mr Deal's divorce was concluded in 2008. We consider that sufficient time had elapsed between 2008 and 2015 for Mr Deal to adjust to his more limited resources following his divorce, and to make appropriate changes to reflect those reduced circumstances.

24. Mr Deal was involved in a tax dispute with HMRC from 2010 but that dispute was settled at the end of 2013, presumably on the basis that Mr Deal had already paid, or that he paid in 2013, the appropriate amount of tax. While the investigation would have stressful for Mr Deal, it had concluded by the end of 2013 and Mr Deal's finances became more settled at that point. We consider that enough time had elapsed between the end of 2013 and the beginning of 2015 for Mr Deal to have acclimatised sufficiently to his financial situation following that investigation.

25. We have concluded that Mr Deal's insufficiency of funds in 2015 was not attributable to events outside his control, and so that insufficiency cannot provide him with a reasonable excuse for his failure to file his tax return for 2013/14 or to pay the tax due under his self assessment. We conclude that this part of Mr Deal's explanation also does not provide him with a reasonable excuse for his delay.

HMRC's decision to impose penalties upon Mr Deal

26. Finally, Mr Deal also suggested that there had been injustice in HMRC seeking to penalise him rather than directing their resources in identifying others who had deliberately avoided tax. This Tribunal has no jurisdiction to consider any public law arguments to the effect that there has been unequal treatment between taxpayers. However, even if we had jurisdiction, there is no evidence before us to suggest that Mr Deal has been singled out for special treatment or that any resources had diverted from investigations into other taxpayers in order to investigate him. We note the comments of Moses J. (as he then was) in *R (oao Weston) v HMRC* (2004) 76 TC 267 that specific evidence of unfair treatment is required in an application for judicial review of a decision by HMRC to pursue sums which are apparently due to them.

Special reduction

27. Even when a taxpayer is unable to establish that he or she had a reasonable excuse and so remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. In this case HMRC have declined to exercise that discretion. Mr Deal suggested that he had suffered very difficult circumstances and that HMRC were at fault if they failed to identify his case as one deserving clemency.

28. We are only able to interfere with HMRC's decision on special reduction if we consider that their decision was flawed (in the sense understood in a claim for judicial review). That is a high test and we do not consider that HMRC's decision in this case (set out in their review decision letter date 4 July 2016) is flawed. Therefore we have no power to interfere with HMRC's decision not to reduce the penalties imposed upon Mr Deal.

Conclusion

29. We have looked carefully at all the circumstances of this case but do not consider that Mr Deal has provided a reasonable excuse for his delay either in filing his tax return for 2013/14 or in making payment of the tax due for 2013/14. Therefore, for the reasons set out above, this appeal is dismissed. The six penalties imposed are confirmed in the total sum of £8,497.

Summary decision

30. A summary decision was released to the parties on 26 January 2018. By email dated 23 February 2018, Mr Deal expressed his dissatisfaction with that decision. On 26 March 2018, that expression of dissatisfaction was conveyed to the Judge who directed that Mr Deal's email should be treated as an in-time request for full written findings and reasons.

Full decision

31. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 5 APRIL 2018