[2018] UKFTT 192 (TC)

TC06433

Appeal number: TC/2017/06866

PENALTIES – fixed penalties for failing to file a self-assessment form on time – whether pressure of work, a failure to pay the correct postage on submitting the return in paper form, technological difficulties preventing submission of the return on-line and/or ignorance of the law amount to a reasonable excuse or special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICARDO CORDON ALVAREZ **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

The Tribunal determined the appeal on 27 March 2018 without a hearing 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 13 September 2017 (with attachments), the Respondents' statement of case (with enclosures) acknowledged by the Tribunal on 7 November 2017 and the Appellant's replies dated 23 November 2017 and 7 December 2017 (each with attachments).

DECISION

Background

1. This is an appeal against two penalties imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") in respect of the tax year of assessment ending 5 April 2015. The penalties in question have been imposed under paragraph 3 of Schedule 55 – for the failure to file a self-assessment return in respect of the relevant tax year before the date when it was required to be filed (the "filing date") – and under paragraph 5 of Schedule 55 – for the failure to file a self-assessment return in respect of the relevant tax year before the date falling six months and one day after the filing date.

2. The first of those penalties amounts to £100 and the second of those penalties amounts to £300.

3. The penalties were confirmed by the Respondents' review letter of 8 August 2017 and the Appellant notified the Tribunal of his appeal against them on 13 September 2017. Although this is slightly outside the time limit for notifying his appeal to the Tribunal, the Appellant has explained that this was because he was away for an extended period looking after his father. The Respondents have not objected to the late notice and I am content to proceed with the appeal notwithstanding the lateness of the notice.

4. Initially, the Respondents were also seeking daily penalties under paragraph 4 of Schedule 55 in respect of the failure to file the self-assessment return. Those penalties would have amounted to an additional £900 in this case. However, the Respondents have said in their statement of case that they do not intend to pursue those penalties and therefore the Appellant's appeal against those penalties succeeds. Thus, this decision relates only to the £400 of penalties referred to in paragraph 2 above.

The facts

5. The circumstances which led to the imposition of the relevant penalties may briefly be described as follows:

(a) the Respondents allege that, on 28 October 2015, they sent the Appellant a tax calculation in respect of the tax year of assessment ending 5 April 2015 showing that, by the Respondents' reckoning, the Appellant had underpaid his income tax in respect of the relevant tax year of assessment;

(b) no reply to this letter was received from the Appellant and the Respondents allege that, because, in applying the Respondents' usual practice, the amount of the under-payment in question was more than the Respondents were prepared to collect through the pay as you earn system, they issued a letter to the Appellant on 24 January 2016, explaining why

they were not collecting the tax through that system, asking the Appellant to pay the unpaid tax voluntarily and informing the Appellant that, if the tax was not paid, the Respondents would need to collect the tax through the self-assessment system and that that would require the Appellant to complete a self-assessment return;

(c) the Appellant did not reply to this letter or pay the unpaid tax and therefore the Respondents allege that, on 17 April 2016, they sent the Appellant a further letter to the same effect as the letter of 24 January 2016;

(d) the Appellant did not reply to this further letter or pay the unpaid tax and therefore the Respondents allege that, on 11 July 2016, the Respondents wrote to the Appellant to inform him that he would now need to complete a self-assessment return in respect of the relevant tax year of assessment;

(e) the Respondents allege that, in accordance with their letter of 11 July 2016, they issued a notice to the Appellant on 21 July 2016, requiring the Appellant to file a self-assessment return in respect of the relevant tax year of assessment;

(f) the Appellant was required to file that self-assessment return on or before 28 October 2016. (The filing date required by the legislation is the date falling three months after the notice to file is issued but, by concession, the Respondents allow a further 7 days in addition to the three months to allow for postal delivery times);

(g) in fact, the Appellant did not file the self-assessment return until 28 June 2017, some 8 months after the filing date;

(h) the Respondents allege that, prior to the Appellant's filing the self-assessment return, they issued three notices of penalty assessment. Both the Respondents' statement of case and the review letter of 8 August 2017 say that the first of these was issued on or around 1 November 2016 and that the second and third of these were issued on or around 2 May 2017. The statement of case cites folio 4 as the evidence for specifying those dates as the dates on which the relevant penalty notices were issued but that folio has no reference to either of those dates. Instead, the folio suggests that the first penalty notice was issued on or around 8 December 2016 and that the second and third penalty notices were issued on or around 8 June 2017; and

(i) the Respondents allege that, in addition to the penalty notices mentioned above, between 21 July 2016 (when the Appellant received the notice requiring him to file the self-assessment return) and 28 June 2017 (when the Appellant filed the self-assessment return), they issued various reminders and statements, as outlined in their statement of case. The Respondents allege that penalty reminders were sent to the Appellant on 28 February 2017 and 4 April 2017 and statements showing the penalties

then due or about to become due were sent to the Appellant on 8 December 2016 and 21 May 2017.

Discussion

6. The Appellant has not at any stage alleged that he did not receive the notices which imposed the penalties that are the subject of this appeal (or indeed any of the various communications referred to in paragraph 5 above). The fact that he has not done so, and that the Respondents have enclosed with their statement of case evidence that those notices and other communications were sent to the Appellant, in the form of the Appellant's records and (in most cases) pro forma documents, lead me to conclude that, on the balance of probabilities, the Appellant did receive those notices and other communications, albeit that, in the case of the notices, he received those notices on slightly different dates from the ones set out in the statement of case, as mentioned above.

7. In that regard, I ought just to record that there are various errors and omissions in the Respondents' statement of case and related enclosures. None of those is material to my decision but I set them out for completeness. They are as follows:

(a) first, as noted in paragraph 5(h) above, the evidence produced by the Respondents as to the dates on which the three penalty notices were issued is at odds with the dates that are set out in the Respondents' review letter and in the statement of case. However, nothing turns on those discrepancies – the evidence produced shows that, on the balance of probabilities, the notices were issued to the Appellant, albeit on dates which were slightly different from the ones set out in the review letter and in the statement of case; and

(b) secondly, the statement of case did not enclose an original of, or a pro forma of, the P800 that was allegedly sent to the Appellant on 28 October 2015. This is a significant omission, given that the Appellant alleges in his notice of appeal that the P800 informed him that the unpaid tax would be collected through the pay as you earn system. The statement of case also did not enclose a pro forma of the VPL2 that was allegedly sent to the Appellant on 17 April 2016. The only reason why I consider these omissions to be immaterial in the present context is that the statement of case did enclose both a pro forma of the VPL1 that was allegedly sent to the Appellant on 24 January 2016 and a pro forma of the letter that was allegedly sent to the Appellant on 11 July 2016 and it is quite clear from those two pro formas that, assuming that the Appellant received the relevant communications (which I have concluded he did, on the balance of probabilities), the Appellant was informed on at least two occasions before he received the notice that required him to file the self-assessment return that he needed to file a self-assessment return in respect of the relevant tax year of assessment and that the unpaid tax would be collected through the self-assessment system.

8.

9. It is then necessary for me to determine, pursuant to the decision of the Court of Appeal in *Donaldson v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2511 ("*Donaldson*"), whether, in relation to both penalties – ie each of the penalty imposed under paragraph 3 of Schedule 55 and the penalty imposed under paragraph 5 of Schedule 55 – the requirement in paragraph 18(1)(c) of Schedule 55 – the obligation to state in the relevant penalty notice the period in respect of which the penalty is assessed – has been met, and, if the relevant penalty notice has not met that requirement, whether that failure is a matter of form and not substance such that the relevant penalty notice remains valid by virtue of Section 114(1) of the Taxes Management Act 1970.

10. As noted above, although the material enclosed with the statement of case did not include copies of the specific penalty notices that were sent to the Appellant, it did include pro formas of those notices.

11. The Court of Appeal in *Donaldson* made it clear that, in relation to fixed penalties such as the ones under paragraphs 3 and 5 of Schedule 55, the relevant notice complies with the requirement in paragraph 18(1)(c) of Schedule 55 as long as it states the tax year of assessment to which the relevant fixed penalty relates. In this case, the pro formas of the notices that were sent to the Appellant on or around 8 December 2016 and on or around 8 June 2017 show that the relevant notices did just that. Each of them referred to the tax year of assessment to which the relevant default related. It therefore complied with the requirement in paragraph 18(1)(c) of Schedule 55.

12. Given the above, I hold that the penalties in this case have been properly levied on the Appellant unless there is any provision in Schedule 55 which might apply to relieve the Appellant from his liability to the penalties in question.

13. There are two such relieving provisions in Schedule 55 – paragraph 23, which provides that liability under the Schedule does not arise in relation to a failure to file a return if the taxpayer satisfies the Respondents, or, on appeal, the Tribunal, that there is a "reasonable excuse" for his failure, and paragraph 16, which provides that, if the Respondents think it right because of "special circumstances", they may reduce any penalty under the Schedule, the exercise of which discretion by the Respondents is open to challenge at the Tribunal if the decision is "flawed" in the light of the principles applicable in proceedings for judicial review (see paragraph 22 of Schedule 55).

14. As regards the first of the relieving provisions, paragraph 23 does not elaborate in detail on the meaning of the term "reasonable excuse" beyond stipulating that, in relation to any failure to file a return:

> (a) An insufficiency of funds is not a reasonable excuse unless attributable to events outside the relevant taxpayer's control;
>
> (b) Where the relevant taxpayer has relied on any other person to do anything, that is not a reasonable excuse unless the relevant taxpayer took reasonable care to avoid the failure; and

(c) Where the relevant taxpayer has a reasonable excuse for the failure but the excuse has ceased, the relevant taxpayer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceases.

15. None of the above is particularly enlightening in the present context.

16. However, it is clear from the decided cases in this area, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ("*Clean Car*"), that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

17. As regards the second of the relieving provisions, there is no guidance in the legislation on what may constitute "special circumstances" but it is clear from the terms of paragraphs 16 and 22 of Schedule 55 that the decision as to whether any particular circumstances constitute "special circumstances" is entirely a matter for the Respondents to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents' decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

18. Bearing the above description of the relieving provisions in mind, my views on the application of the relieving provisions to the circumstances of the Appellant in this case are as follows.

19. The Appellant has made various submissions in support of his case for being relieved from the penalties. Some of those submissions relate to whether or not he was entitled to deduct certain expenses in calculating his tax liabilities, why the under-payment of tax arose in the first place and how the under-payment of tax might be discharged. Those are not relevant to this appeal. This appeal is concerned solely with the reasons why the Appellant failed to file the relevant self-assessment return on time.

20. But there are other reasons given by the Appellant which do go to the question of why the Appellant did not file his self-assessment return for the relevant tax year of

assessment until some 8 months after the filing date and those may be summarised as follows:

(a) pressure of work – he was holding down more than one job and therefore was working very hard;

(b) insufficient postage - he originally submitted the relevant self-assessment return by post at an earlier stage but put only a £1 stamp instead of a £1.50 stamp on the envelope so that the post office returned the envelope to him;

(c) technological shortcomings – he tried to file the relevant self-assessment return on-line but could not find a way to do it; and

(d) ignorance of the law – he did not know that he had to file a self-assessment return.

21. In addition to the above, although the Appellant has not specifically made this point in his appeal, I have taken into account the fact that English is clearly not his first language. Given that the *Clean Car* case requires one to take into account, in determining whether or not there is a reasonable excuse, the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself/herself at the relevant time, this does seem to me to be a relevant point.

22. Having said all of that, whilst I am sympathetic to the predicament of the Appellant in having to pay these penalties in addition to his taxes for the relevant tax year of assessment, I am afraid that I do not think that any of the reasons given in paragraphs 20 and 21 above amounts to a reasonable excuse for the Appellant's failure to file his self-assessment return on time. The Appellant was given ample warning in the period leading up to the issue, on 21 July 2016, of the notice to file a self-assessment return that he would be placed in the self-assessment system if he did not discharge the unpaid tax in respect of the relevant tax year of assessment. He was then warned at various time between 21 July 2016 and 28 June 2017 (when he filed the return) that penalties were accruing.

23. I do not think that any of the reasons set out in paragraphs 20 and 21 above meets the test outlined in the *Clean Car* case – ie was this something which a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do. On the contrary, it was incumbent on the Appellant to read the material that he was being sent by the Respondents and to ensure that he complied with his filing obligations, if necessary by communicating with the Respondents or taking the appropriate advice.

24. As the Respondents have pointed out, the obligation with which this appeal is concerned – the obligation to file a self-assessment return – is not particularly complex to understand or onerous to fulfil. That has a direct impact on whether or not an excuse given for the failure to comply with it is reasonable.

25. For similar reasons, even if it was up to me to determine the issue by myself, de novo, I do not think that any of the matters set out in paragraphs 20 and 21 above amounts to "special circumstances". As noted above, I am not permitted to reach my own view on that issue in any event. I am merely permitted to determine whether the view reached by the Respondents was unreasonable in the sense set out in the *Wednesbury* case. In that regard, not only do I think that the view reached by the Respondents on this question was not unreasonable in that sense; I agree with it.

26. For the reasons set out above, I consider that the Appellant did not have a reasonable excuse for the delay in meeting his filing obligations in this case and that the circumstances leading to that delay did not amount to "special circumstances".

Conclusion

27. I therefore uphold the penalties that remain the subject of this appeal following the Respondents' withdrawal of the case for daily penalties under paragraph 4 of Schedule 55 and I dismiss the appeal in relation to those remaining penalties.

28. 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.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 10 April 2018