[2018] UKFTT 274 (TC)

TC06504

Appeal number: TC/2017/07742

Income Tax – penalties for late returns; penalties for late payment;

FIRST-TIER TRIBUNAL
TAX CHAMBER

GLEN EVANS **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
SONIA GABLE

Sitting in public in Cardiff on 16 April 2018

The Appellant in person

Laura Morgan and Lucy Lawrence for the Respondents

DECISION

Introduction

1. Mr Evans appeals against: (i) three penalties (the "late payment penalties") each of £55 imposed by HMRC on the basis that he did not pay the tax due for 2013/14 on time, (ii) penalties of £100, £900, £300 and £300 (the "2014/15 late filing penalties") imposed by HMRC on the basis that he failed to deliver his tax return for 2014/15, and (iii) penalties of £100, £900, £300 and £300 (the "2015/16 late filing penalties") imposed by HMRC on the basis that he failed to deliver his tax return for 2015/16.

2. The statutory basis for the late filing penalties is in Schedule 55 Finance Act 2009 which provides among other things for penalties if a person fails to deliver a return required by section 8 Taxes Management Act 1970 ("TMA") on time. Sch 55 prescribes penalties of £100 if the return is late (para 3), and further penalties of (a) £10 for each day the failure continues after 3 months after the date the return was due up to a maximum of 90 days (para 4(2)), (b) at least £300 if the return is more than 6 months late (para 5), and (c) another £300 if the return is more than 12 months late (para 6).

3. Para 16 Sch 55 provides that HMRC may reduce a penalty if they consider that there a special circumstances warranting such a reduction; and that the tribunal may make such a reduction if it considers that HMRC's decision in relation to such circumstances is defective, that is to say if it took into account irrelevant factors, failed to take in to account relevant factors, was made under a relevant mistake of law, or was a decision that no reasonable person could have made,

4. Para 18 Sch 55 provides for the method by which HMRC must notify liability to a penalty, and para 20 makes provision for an appeal to this tribunal against a penalty or its amount. Para 23 provides that if a person has a reasonable excuse for a failure then the person is not liable to a penalty for the failure.

5. Each of these penalties is dependent upon the taxpayer having failed to make a return as required by section 8 TMA. We should, in view of Mr Evans' submissions quote the relevant provisions in full:

> "(1) For the purpose of establishing the amounts in respect of which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board-
>
> (a) to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice, …
>
> "(1D) A return under this section for a year of assessment (Year 1) must be delivered-
>
> (a) in the case of a non electronic return, on or before 31st October in Year 2, and

(b) in the case of an electronic return, on or before 31st January in Year 2."

6. The statutory basis for the late payment penalties is in Sch 56 Finance Act 2009. The combined effect of paras 1 and 3 of that schedule is that if a person is liable to pay tax under section 59B Taxes Management Act 1970 he is liable to a penalty of 5% of the tax if the payment is not made on time, a further 5% is the payment is more than 6 months late, and an additional 5% if it is more than 12 months late.

7. In like manner to the provisions of Sch 55, para 9 Sch 56 permits a reduction if warranted by special circumstances and para 16 provides that a reasonable excuse can exonerate a failure to make payment.

8. Section 59B TMA provides that a person must pay the difference between the amount of tax shown as due in a self assessment for a year of assessment (which includes the tax shown as due in a self assessment as amended by HMRC after an enquiry) and tax paid by him or deducted from payments made to him, and that payment must be made (where a tax return was required of him) by 31 January in the year following the year of assessment.

9. Mr Evans' grounds of appeal in his notice of appeal to this tribunal are (i) that he has never registered as self employed or authorised anyone so to register him, (ii) that his income in the relevant years was limited to income subject to PAYE, and (iii) that HMRC already have all the details of his earnings.

The Evidence and our findings of fact.

10. We heard oral evidence from Mr Evans and had before us a bundle of correspondence between Mr Evans and HMRC and HMRC's records and notes of phone calls. We find as follows.

11. Mr Evans is a lorry driver. In the relevant years he drove lorries for the benefit of a number of different agencies which required him to provide his services through a "service company" which would provide them in turn to the agency. These service companies *generally* took the form of "umbrella companies" which performed the same function for a number of other drivers in a similar position. The umbrella companies: employed the drivers, made a charge to the agencies which received the benefit of the drivers' services, and then paid the drivers what they had received from the agencies less PAYE and commission. The umbrella company which engaged Mr Evans in 2014/15 was Plus Pay; more recently it was Easy Account Solutions.

12. We say that this was "generally" the form of the relevant arrangements. In 2013/14 the company which mediated between Mr Evans and the agencies was Inland Solutions. For the reasons which follow it may for some reason have been that in 2013/14 the arrangement was that Mr Evans was expected to set up a service company which provided only his services to the agency and by which he was not treated as employed.

13. Mr Evans' problems started with 2013/14. Although the evidence was scanty we concluded for the reasons which follow that it was likely that in October 2013 Inland

Solutions had submitted a form CWF1 to HMRC registering Mr Evans as self employed, and that after the end of that year Inland Solutions had arranged for a tax return for Mr Evans to be completed and electronically submitted which showed him as self employed (and not employed) with earnings for the year of £10,993.

14. We came to this conclusion because: (1) HMRC's records indicated that a form CWF1 had been received, (2) those records also indicated that a tax return had been submitted by an agent, (3) Mr Evans said that the umbrella company in 2013/14 was Inland Solutions, and (4) it appeared that an associated company of Inland Solutions had in May 2014 incorporated a company using Mr Evans' name and date of birth.

15. There was no direct evidence that Mr Evans had authorised Inland Solutions to take these steps and Mr Evans had no recollection of having done so. Indeed HMRC's record for the submission of the 2013/14 tax return shows that it was submitted by an agent whose identity was not recorded in their records and no record that Mr Evans gave any authority to the submitting agent. We shall return to address the consequences of this later.

16. This tax return showed that Mr Evans owed some £599 in tax and national insurance contributions for 2013/14. It is likely that HMRC wrote to Mr Evans in early 2015 seeking payment of this amount, because, on 24 February 2015, Mr Evans rang HMRC querying the amount of tax sought from him. HMRC's note of a telephone conversation indicates that Mr Evans said that an umbrella company had submitted his tax return and had wrongly omitted expenses. Mr Evans told us that he suspected (rather than knew) at the time that the return had been made by an umbrella company but it appears that he did not say to HMRC at that time that he thought the return had been made without his authority. Mr Evans did not indicate that he had taken the matter up with Inland Solutions following that call or at any later time.

17. HMRC opened an enquiry into the 2013/14 tax return by a letter of 10 December 2015 which indicated that employment income from three agencies had been omitted from the return. Mr Evans did not respond to that letter, and, after sending a reminder in January 2016, to which Mr Evans did not respond, HMRC closed the enquiry on 16 February 2016, writing to Mr Evans and amending his return so that it showed that a further £1,115.60 was due from him. Mr Evans did not appeal against this amendment and made no other response.

18. On 6 April 2015 HMRC sent Mr Evans a notice requiring him to complete a tax return for 2014/15. The notice did not enclose a return but merely said that that was required. It explained how a return might be obtained if he required a paper version.

19. Mr Evans did not submit a 2014/15 return and on 17 February 2016 HMRC sent him notification of a £100 penalty.

20. On 6 April 2016 HMRC sent Mr Evans at a further notice requiring the submission of a tax return for 2015/16.

21. Mr Evans rang HMRC on 8 June 2016 and told the officer that he had not completed the 2013/14 return. He was advised to put this in writing whereupon

HMRC would investigate. There was an undated letter in the bundle before us from Mr Evans to HMRC in which Mr Evans says that he never applied for self assessment registration or authorised someone to do it on his behalf, had never been self employed and had never completed a CWF1 form.

22. Mr Evans did not submit a 2015/16 return.

23. Further penalties were assessed and notified to Mr Evans in respect of 2014/15 on 12 August 2016 and 21 February 2017, and in respect of 2015/16 on 11 August 2017 and 20 February 2018

24. Mr Evans took no action in relation to these notices save to ring HMRC on 7 April 2017 to say that he had never been self employed and to write on 15 June 2017 to say that the 2013/14 return had been submitted fraudulently.

25. On 27 June 2017 Mr Evans requested a review. In his request he said that he had never authorised anyone to apply for self assessment and had not himself applied for it, and that it had been done fraudulently without his consent.

26. HMRC replied saying that they would take the matter forward after Mr Evans had reported it to the police. This was an unhelpful and confused response: the issue Mr Evans raised for the administration of the tax system was not whether there had been a fraud, but whether the return had been filed with Mr Evans' authority.

27. It was clear to us that the reasons Mr Evans took no notice in relation to the notices to make a tax return for 2014/15 and 2015/16 were that:

(i) his only source of income (apart from the few pounds of deposit account income) was from the relevant umbrella companies

(ii), that such income was paid under deduction of PAYE, and

(iii) that he believed that such income did not have to be declared on a tax return - with the result that he believed that he did not have to make a return despite the letter from HMRC requiring him to do so. In addition since he had not been sent a return to fill in (in which he would have seen that there were boxes in which to put such employment income) his belief that his employment income was not declarable was not upset.

28. It is plain that Mr Evans thought that a person was liable to fill in a tax return only if he had applied for self assessment or registered as self employed. Mr Evans was so fixedly of this view that even after receiving penalty notifications for the failure to make a tax return for 2014/15 of £100 on 17 February 2016, £900 on 12 August 2016, £300 and 12 August 2016 and £300 on 21 February 2017 and a reminder for 2015/16 of his obligation to make return, the only actions he took were: (1) to phone HMRC (8 June 2016 and 7 April 2017) to say that he was not, and never had been, self-employed and the 2013/14 return had not been completed by him, (2) to write to HMRC on 15 June 2017 to say that he had been put into the self-assessment regime fraudulently and (3) to make the request for a review referred to earlier.

Discussion

(A) late filing penalties

29. The difficulty which faces Mr Evans in his appeals against the penalties for failing to submit tax returns for 2014/15 and 2015/16 is that he was wrong in believing that he did not have to submit a tax return when required to do so by HMRC.

30. It can be seen from the words quoted from the Act of Parliament in para 5 above that section 8 TMA requires a person to submit a return if he is given notice requiring him to do so. That is the case whether he has no income, or many sources of income. In particular it is the case even if his only source of income has been subject to PAYE.

31. HMRC's records are evidence that notices to file returns for 2014/15 and 2015/16 had been sent to Mr Evans on or shortly after 6 April after the end of the relevant tax year. Mr Evans could not confirm that he had received them but could not say that he had not received them. We conclude that they were received by him. As a result he had an obligation to make a tax return even if his only income was PAYE income.

32. Schedule 55 FA 2009 prescribes the penalties which may be assessed for the failure to comply with the obligation to make a tax return. Where the requirements of that schedule are fulfilled a person becomes liable to the penalties prescribed by it unless he has a reasonable excuse for the failure or there are special circumstances which justify a reduction in the penalty. The penalties of £100, £900, £300 and £300 assessed for the years 2014/15 and 2015/16 were, we find, assessed in accordance with that schedule and the procedures it prescribes. We must therefore confirm the penalties unless either we find that Mr Evans had a reasonable excuse for failing to deliver his tax returns or the special circumstances provision applies.

Reasonable Excuse

33. We therefore ask first whether Mr Evans' belief that he was not liable to file a return because his income was all PAYE income was a reasonable excuse for his failure.

34. In the period before the receipt of the first penalty notice we had some sympathy for Mr Evans' position. It was not unreasonable for someone with his understanding of the system to assume that a mistake had been made when HMRC sent a letter a requiring a tax return (although a reasonable person would have queried the matter with HMRC on receipt of the notice) . But then the first penalty notification arrived. At that stage a reasonable person would have become concerned that his view of his responsibilities may not have been correct. A reasonable person would have contacted HMRC to obtain an assurance that he did not have to make a return. Without an assurance from HMRC that he did not have to make a return, it was not in our view reasonable to continue to believe that no return was due because all his income was subject to PAYE. Without such an assurance a reasonable person would have competed a return.

35. Some four months after receiving the first penalty notice Mr Evans phoned HMRC to say that he was not self-employed and had not completed a 2013/14 tax return. That raises the question as to whether his belief that his 2013/14 return had been submitted without his authorisation was a reasonable excuse for failing to submit returns in 2014/15 and 2015/16.

36. We do not consider that it was: even if the 2013/14 return had been submitted fraudulently, he had been notified of a requirement to submit returns for those years and had received notification of a penalty of £100 for failing to do so in relation to the first of them. *After* the receipt of that penalty notification he cannot *reasonably* have considered that it was clear that he did not have an obligation to submit a tax return when required to do so.

37. Nor, in our view was the fact that he was not sent a tax return form - merely being sent a notice with details of how to do it online and how to get a return paper return from HMRC if he needed one - a reasonable excuse. The notice had a phone number on it to use to get help, and a reasonable person would have made a phone call to secure a paper return to complete.

38. Thus we find that Mr Evans did not have a reasonable excuse for any of his failures to submit tax returns.

Were there special circumstances?

39. Ms Lawrence said HMRC had considered Mr Evans' evidence that he had never authorised the submission of the form CWF1 and his evidence that the 2013/14 return had been made without his authorisation but they did not regard those circumstances as warranting a reduction in any of the penalties.

40. Mr Evans' misguided belief that he was not in law required to submit a return was not known to HMRC before the hearing. Ms Lawrence did not argue that this was not a special circumstance but submitted that if it were it could only be such for a limited time and that time had expired.

41. Although ignorance of the law is no excuse it seemed to us that Mr Evans' ignorance was a circumstance peculiar to him which could fairly be described as "special". As it was not considered by HMRC and is in our view a relevant consideration we are able to make a reduction if we consider that such is warranted. But in the circumstances when reminders and penalties had been sent to Mr Evans we do not consider that his initial misunderstanding of the system justifies any reduction in the penalty.

42. As a result we dismiss the appeals against the appeals for failing to file tax returns.

(B) Non-payment of tax.

43. The reason Mr Evans offers for his failure to pay the tax shown the amended assessment for 2013/14 is that the tax return for that year was not submitted by him or with his authority.

44. If it were the case that tax return had not been submitted by him then that return would not be a return for the purposes of the Taxes Management Act, and the amendments to the self-assessment in that return would not be amendments to a self-assessment for the purposes of that Act. If that were the case then there would have been no payment due under section 59B and no failure to make payment by reference to which a penalty could attach.

45. The evidence which HMRC offers that the return was submitted with Mr Evans' authority is the note of the telephone conversation of 24 February 2015 in which Mr Evans is recorded as having stated that the return was made by an umbrella company.

46. Mr Evans consistently denied that he had authorised any person to make a tax return for this year on his behalf. The question for us is whether his recollection of what he did was sufficiently reliable to conclude on balance that he did not make or authorise the return which HMRC received. We have to decide whether it is likely that Inland Solutions (which we have found was likely to have submitted the return) acted without Mr Evans' authority or whether they were given authority but the scope of their authority was not remembered or was not appreciated by Mr Evans (perhaps being contained in some long forgotten and possibly unread small print).

47. The lack of any record in HMRC's system of the name of, or of any authority given to, the agent leaves open the possibility that there was something unorthodox in the submission of the return. Further, the return did not set out all Mr Evans' sources of income although he told us that the total income declared was of the right order. These factors point away from the return having been made or authorised by Mr Evans.

48. But four doubts arise about the clarity of Mr Evans' recollection that he had not authorised anyone to submit a return (rather than a form CWF1) on his behalf.

49. The first is that it is in relation to a time more than four years ago, and old recollections without contemporaneous notes or documentary support can be erroneous. It might have been for example that he did not authorise the submission of the form CWF1 but did authorise the completion of a return: thinking that Inland Solutions would have arranged for him to be treated as employed, but giving them authority to submit a return.

50. The second is that in the record of the telephone conversation of 24 February 2015 it is said that Mr Evans indicated that a tax return had been submitted on his behalf by an umbrella company and that he disputed the amount of expenses which had been deducted in the computation of the tax due. The fact that he disputed the amount of expenses suggests – contrary to his present recollection – that he must have had some idea of the content of that return and accordingly knowledge that one had been made. Mr Evans told us that he did not recall saying that the return had

been made on his behalf by an umbrella company although that was what he suspected at the time.

51. The third is that Mr Evans did not say to HMRC at the time of that call that he had not authorised the return and did not take the matter up with Inland Solutions.

52. The fourth is that when HMRC opened their enquiry into the return in December 2015 and when they closed the enquiry making amendments to the self assessment Mr Evans made no response. If at that time he had believed that the return was not "his" it would have been natural to have complained loudly.

53. These doubts lead us not to be able to conclude that the return was not submitted on behalf of Mr Evans. It seems to us that it is more likely than not that somewhere in long forgotten small print Mr Evans authorised a relevant company to make a return in his name.

54. On that basis the self-assessment as adjusted by HMRC is a self-assessment for the purposes of the Taxes Management Act and the money shown it as due from him is due as tax under section 59B.

55. On that basis the late payment penalties have been properly calculated in accordance with the Schedule and are properly due unless there was a reasonable excuse for the delay in making payment or special circumstances which must justify reduction.

56. Had Mr Evans responded to the letter from HMRC opening the enquiry or to the reminder letter of 20 January 2016, appealed against the closure notice or made some form of timely protest in relation to it then we would have considered that he might have had a reasonable excuse for delaying the making of payment. But his first response was on 8 June 2016 some four months after the closure notice and his next almost a year later in May 2107

57. He did not appeal against the closure notice thereby leaving the liability unchallenged. Where there is an unchallenged liability it seems to us that it cannot be reasonable not to pay it.

58. As a result we do not consider that Mr Evans had a reasonable excuse for not paying the additional tax for 2013/14 on time.

59. We see no special circumstances which warrant a reduction in the penalties. Thus even if HMRC's decision not to allow a reduction was defective we would not allow a reduction.

60. We must therefore dismiss the appeals against the late payment penalties.

Conclusions

61. We dismiss the appeals against the late filing penalties and against the late payment penalties.

Rights of Appeal

62. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2018