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UT (Tax & Chancery) Case Numbers: UT-2021-000104 UT-2021-000199

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: **The Rolls Building, Fetter Lane, London EC4A 1NL**

Heard on: 12 July 2022
Judgment date: 12 August 2022

Annual Tax on Enveloped Dwellings - Late filing of returns - Daily Penalties - Paragraph 4 of Schedule 55 to Finance Act 2009 – Paragraph 4(3) provides that the date specified in a notice under paragraph 4(1)(c) from which a daily penalty is payable can be prior to the date the notice is issued. HMRC appeal allowed.

Before

MR JUSTICE ZACAROLI
JUDGE PHYLLIS RAMSHAW

Between

PRIORY LONDON LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

JOCOGUMA PROPERTIES LTD

Respondent

Representation:

Priory London Limited was unrepresented at the hearing, but written submissions were received on its behalf from Mr Michael Dawson

Mr Joshua Carey, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for HMRC (the respondents in Priory; the appellants in Jocoguma)

Mr Conor Kennedy, director, on behalf of Jocoguma Properties Limited

DECISION

1. The issue in these two appeals, which were heard together, is whether the date to be specified in a notice under paragraph 4(1)(c) of Schedule 55 to the Finance Act 2009 ("FA 09") from which a daily penalty under paragraph 4(1) is payable, can be a date *prior to* the date the notice is issued by HMRC.

2. The salient facts in each appeal can be shortly stated.

3. In the appeal by Priory London Limited ("Priory"), the penalties imposed by HMRC were for the late filing of Annual Tax on Enveloped Dwellings ("ATED") returns. These related to several dwellings. Priory was required to file ATED returns for each of the dwellings for the chargeable periods 2013/2014 and 2014/15. The returns for the first period were due on 1 October 2013. The returns for the second period were due on 30 April 2014. In respect of both periods, the returns were filed on 7 April 2017. No tax was due under these ATED returns.

4. HMRC issued penalty notices for each property. For example, in respect of one of the properties (2a Grove End Road, London) HMRC issued a notice dated 13 October 2017, imposing a fixed penalty of £100 pursuant to paragraph 3 of Schedule 55 FA 09. In the same notice HMRC stated: "if your tax return is more than three months late we will charge you a penalty of £10 for each day it remained outstanding for a maximum of 90 days starting from 2 January 2014". By a notice dated 19 January 2018, HMRC imposed further penalties totalling £1500 in respect of the same property. This comprised: (1) a daily penalty under paragraph 4 of Schedule 55 FA 09 in the maximum sum of £900, on the basis that the return was not filed for the full period of 90 days from 2 January 2014 to 1 April 2014; (2) a further fixed penalty of £300 under paragraph 5 of Schedule 55 FA 09, because the return was over 6 months late; and (3) a further fixed penalty of £300 under paragraph 6 of Schedule 55 FA 09 because the return was over 12 months late.

5. In the appeal relating to Jocoguma Properties Ltd ("Jocoguma"), the penalties imposed by HMRC were also for the late filing of an ATED return. This related to the year ended 31 March 2019, and the return should have been filed on 30 April 2018, but was not filed until 28 March 2019. No tax was due under this ATED return. HMRC issued an initial late filing penalty on 9 December 2019. This also gave notice that if the return was more than 3 months late, HMRC would charge a penalty of £10 for each day it remained outstanding for a maximum of 90 days starting from 1 August 2018. HMRC then issued daily penalties (totalling £900) and a six-month late filing penalty (of £300) on 18 February 2020.

6. In each of the appeals, it is the first penalty notice that is in issue, because it is this which is relied upon by HMRC as the notice required by paragraph 4(1)(c) of Schedule 55 FA 09.

7. Priory and Jocoguma each appealed against the various penalties to HMRC. HMRC refused the appeals and found that there was no reasonable excuse in each case for the late filings. Each of Priory and Jocoguma appealed to the first-tier tribunal ("FTT").

8. The FTT (Judge Richard Chapman QC and Mrs Catherine Farquharson) in a decision released on 9 August 2021 ([2021] UKFTT 282 (TC)) dismissed Priory's appeal against HMRC's decision.

9. The FTT (Judge Jane Bailey) in a decision released on 27 January 2021 ([2021] UKFTT 20 (TC)) allowed Jocoguma's appeal against HMRC's decision to impose daily penalties in the amount of £900 but dismissed its appeal against HMRC's decision to impose a six-month late filing penalty in the amount of £300.

10. Priory appeals the decision of the FTT in its case and HMRC appeal the decision of the FTT in *Jocoguma* (in each case with the permission of the relevant FTT). In each case, the only ground of appeal relates to the issue we identify in paragraph 1 above. Jocoguma filed a Rule 24 response (this responded to the issue we have identified). Jocoguma did not apply for permission to appeal against the FTT decision dismissing the appeal on the £300 penalty. In its written submission to the Upper Tribunal and in oral submissions Mr Kennedy referred to submissions made to the First-tier Tribunal regarding fairness and proportionality. The First-tier Tribunal dealt with those arguments. We intend no disrespect to Mr Kennedy by not setting out his arguments or not considering them – we cannot do so because those issues were not before us in this appeal.

The relevant legislation

11. The relevant law is to be found in Schedule 55 FA 09. Paragraph 3 provides for a late-filing penalty of £100 in relation to, among other things, ATED returns.

12. Paragraph 4, which is the key provision, provides relevantly as follows:

> "(1) P is liable to a penalty under this paragraph if (and only if) -
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable".
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a)."

13. The penalty date is the day after the filing date: para 1(4) of Schedule 55 FA 09.

14. Paragraph 5 provides for a further penalty of £300 if the failure to file continues after the end of the period of 6 months beginning with the penalty date.

15. Para 10 of the Explanatory Notes to FA 09 states:

> "Paragraph 4(3) provides for the date specified in the notice from which the penalty is payable to be earlier than the date on which the notice is given. This is because HMRC will be unaware of certain returns for taxes such as SDLT and IHT until they are received. The date specified in the notice may not be earlier than the end of the period of three months after the filing date."

16. As with SDLT and IHT, HMRC will be unaware of the need for a taxpayer to submit ATED returns until they are received. The absence of a reference to ATED in this Explanatory Note is explained by the fact that ATED was not introduced until later.

The decision of the FTT in *Jocoguma*

17. In its decision in *Jocoguma*, the FTT concluded that the notice under paragraph 4(1)(c) of Schedule 55 FA 09 could *not* be given retrospectively. In reaching this conclusion Judge Bailey followed the decision of Judge Poon in *Heacham Holidays Limited v HMRC* [2020] UKFTT 406 ("*Heacham Holidays*"), which she considered had been rightly decided.

18. *Heacham Holidays* similarly involved a daily penalty notice given in respect of a late filing of an ATED return after the return had in fact been filed. Judge Poon there applied, but expanded upon the reasoning in, her own decision in *Advantage Business Finance Ltd* [2019] UKFTT 30 ("*ABF*"). Her decision, in essence, was that it was necessary to construe paragraph 4(1)(c) purposively, that the purpose of a notice under paragraph 4(1)(c) was to give a warning to a taxpayer that they will be liable for a daily penalty if their failure to file a return continues during the following 90 day period, and that on a purposive construction the notice *must* be given in advance of the commencement of the 90 day period.

19. Judge Poon considered that support was to be found for her conclusion as to the purpose of a paragraph 4(1)(c) notice in the decisions of both the Upper Tribunal ("UT") and the Court of Appeal ("CA") in *Revenue and Customs Commissioners v Donaldson* [2014] UKUT 536 (TCC) and [2016] EWCA Civ 761 ("*Donaldson*").

20. We consider below the extent to which *Heacham* and *ABF* were rightly decided.

The decision of the FTT in *Priory*

21. As we have noted, the FTT in *Priory* reached the opposite conclusion to the FTT in *Jocoguma*.

22. Priory relied on *Heacham* and *ABF*, but the FTT concluded that those cases had been wrongly decided, for the following reasons. First (and contrary to the reading of those decisions by Judge Poon in *Heacham*) *Donaldson* in the CA and UT were binding authority for the principle that a valid paragraph 4(1)(c) notice can be given retrospectively. Second, the proposition that such a notice cannot be given retrospectively is wholly inconsistent with paragraph 4(3). Third, while it is clear from the CA and UT in *Donaldson* that one of the purposes of paragraph 4(1)(c) is to inform a taxpayer in advance of the liability to daily penalties, it is necessary to construe (purposively) paragraph 4 as a whole, so that account must also be taken of paragraph 4(3). The Explanatory Notes to FA 09 assist in that regard. Fourth, the FTT disagreed with the conclusion in *Heacham* that there is no discretionary power to backdate a notice under paragraph 4(3). Fifth, while it may be said that the absence of a limitation period for service of a paragraph 4(1)(c) notice is an anomaly, it would be an even greater anomaly for the legislation to provide expressly for a penalty which could never be imposed.

These appeals

23. In our judgment, the FTT in *Priory* was correct, largely (subject to two caveats: see paragraphs 34, 35 and 41 below) for the reasons it gave. Conversely, we consider that the FTT in *Jocoguma* reached the wrong conclusion, because the decisions which it followed (principally *Heacham* and *ABF*) were themselves wrongly decided.

24. Given the significance placed on *Donaldson* in both of the decisions under appeal in this case (albeit to opposite effect), we turn to consider the UT and CA decisions in that case.

25. *Donaldson* concerned late filing of an income tax return. In such a case, and in contrast to an ATED return, HMRC are aware in advance of the taxpayer's obligation to file a return. The issue in that case was whether it was possible for the revenue to provide a paragraph 4(1)(c) notice *before* the taxpayer has defaulted and a decision has been taken to penalise him. The UT concluded that it was possible to do so.

26. In reaching that conclusion, the UT considered the interplay between paragraph 4(1)(c) and paragraph 18(1) of Schedule 55 FA 09. Paragraph 18(1), which applies to all notices in Schedule 55 FA 09, is in the following terms:

> "Where P is liable for a penalty under any paragraph of this Schedule HMRC must – (a) assess the penalty, (b) notify P and (c) state in the notice the period in respect of which the penalty is assessed."

27. At [39] – [40] of the UT's decision in *Donaldson*, the UT rejected a suggestion from counsel for HMRC that the function of a notice under paragraph 4(1)(c) was to inform the taxpayer of the amount of the penalty or penalties he had incurred and, so far as relevant, the period or periods in respect of which they had been incurred. That was rejected because that was the function of paragraph 18(1). The UT continued: "…it seems to us improbable that the draftsman intended that there should be two notices performing the same function. We must therefore look for some other purpose for a para 4(1)(c) notice … one purpose, at least, of a para 4 notice is to give the taxpayer warning that, if he does not file his return, he will suffer the daily penalties. On [counsel for HMRC's] approach, that notice can be given before any penalty is incurred so that the taxpayer is reminded of his obligation to file and informed of the further consequences (i.e. in addition to the £100 penalty) which *will* occur if he does not file before the end of the three-month period. He can take steps to avoid the whole penalty by filing his return. This is a sensible and coherent result."

28. It was this paragraph, in particular, on which Judge Poon relied in *Heacham* for concluding that the purpose of a notice under paragraph 4(1)(c) is to warn the taxpayer in advance of the risk of incurring daily penalties. In our judgment, Judge Poon fell into error in so doing. There are two principal reasons for this.

29. First, in seeking to construe any statutory provision, it is necessary to have regard primarily to the wording of the provision, read as a whole, and its purpose to be gleaned from that wording and the surrounding provisions of the statute. Paragraph 4(1)(c) must be read together with the whole of paragraph 4, in particular paragraph 4(3). The wording of paragraph 4(3) is clear and unambiguous. It provides that the date specified in the notice in paragraph 4(1)(c) may be a date earlier than the date of the notice itself. We do not see how that can be read otherwise than to permit the notice to be given retrospectively. While we do not think it is necessary to do so, since paragraph 4(3) is clear in itself, reference to the Explanatory Notes (set out at paragraph 15 above) reinforces this conclusion:

the ability to give a retrospective notice was included to cater for the case (such as ATED) where HMRC cannot know in advance of filing that a return is due or that it is late.

30. Second, the passage in the UT's decision in *Donaldson* must be read in the context of the decision as a whole, the arguments being addressed to the UT and the fact that it related to a tax in respect of which HMRC did have advance notice of the taxpayer's obligation to file a return.

31. The three possible constructions of paragraph 4 with which the UT was faced were as follows. First (as the FTT in *Donaldson* had said), the notice must ordinarily be given in advance of the default occurring, it only being permissible to give it retrospectively in exceptional cases. Second (as contended by HMRC), the timing of the notice was unimportant, so that it could be given before or after the default had occurred (i.e. prospectively or retrospectively). Third (as contended by Counsel appointed to act pro bono for the tribunal), the notice could only be given retrospectively. The UT accepted the contention of HMRC and rejected the other two.

32. Critically, at [35], in rejecting the construction adopted by the FTT, the UT said this:

> "It cannot be right, we consider, that as a matter of construction of para 4, HMRC's power to back-date a notice under para 4(3) is available only in exceptional circumstances. There is no principle of statutory construction which would permit the implication of such a qualification. The power is clearly available in some cases (see para [23] above) which we do not consider can be described as exceptional. Rather, the structure of the provision allows for a back-dated notice in all cases. But that is a power which HMRC do not ordinarily perceive the need to exercise since they see the SA Reminder, which is of course given in advance, as a notice within para 4."

33. The reference to paragraph 23 of the UT's decision is important, because it referred to the FTT's conclusion that paragraph 4(3) was "…designed to cater for those cases, particularly of stamp duty land tax and inheritance tax, in which HMRC cannot know that a return is due at all until it is submitted, thus its operation is to be confined to cases of that kind." The UT rejected the FTT's conclusion that back dating is confined to 'cases of that kind'. The reference to the SA Reminder is also important, because it reinforces the point that the UT's decision was reached in the context of a tax where HMRC *is* aware of the need to file a return in advance of the return being filed.

34. We consider that what the UT said about the ability to back-date a notice under paragraph 4(1)(c) was not strictly necessary for the conclusion on the issue it was required to decide and, for that reason, the decision on that point is not binding. This is our first caveat to the reasoning of the FTT in *Priory*.

35. The second is that we do not see any anomaly arising from the lack of a limitation period. That is because, in agreement with HMRC, we consider that paragraph 19 of Schedule 55 FA 09 *does* impose a limitation period, being one year from the date on which (in the cases before us) it is ascertained that the liability to tax which would have been shown on the return is nil.

36. Judge Poon considered that there was a contradiction in the UT's decision in *Donaldson* between its construction of paragraph 4(3) as permitting a retrospective notice and "the purpose" it attributed to a paragraph 4(1)(c) notice. We do not, however, think there is any contradiction. The UT was not purporting to identify <u>the</u> purpose (i.e. the sole purpose) of a paragraph 4(1)(c) notice. It said, in terms, that it was at least "one purpose". Moreover, it was seeking to identify the purpose of such a notice in the context of a tax where HMRC had advance notice of a taxpayer's need to file a return. In other words, the UT's conclusion was that in circumstances where HMRC is aware of the

taxpayer's need to file a return in advance of the return being filed, a purpose of a section 4(1)(c) notice is to provide a warning to the taxpayer. That is not inconsistent with there being another purpose of a section 4(1)(c) notice, in circumstances where HMRC cannot know that a taxpayer is obliged to file a return until after a return is filed, being to give notice, retrospectively, of the imposition of a penalty and the date from which it is to be levied.

37. We do not think that the fact that the function of a paragraph 4(1)(c) notice would in those circumstances overlap with the function of a paragraph 18(1) notice provides a reason to ignore the clear and unambiguous wording of paragraph 4(3). That is particularly so where paragraph 18 is of general application, applying to all penalties within Schedule 55 FA 09.

38. We agree with the conclusions reached by the UT in *Donaldson*. A notice under paragraph 4(1)(c) can be given retrospectively in all cases.

39. There is nothing in the CA in *Donaldson* which detracts, in our view, from the conclusions we have reached on the basis of the UT decision. The CA did not give any express consideration to whether a paragraph 4(1)(c) notice could be given retrospectively, because the only issue in the case was whether it could be given prospectively. At [21], Lord Dyson MR (with whom Kitchin and Hamblen LLJ agreed) said this:

> "Thirdly, I reject the submission that para 4(1)(c) does not permit a notice to be given until P becomes liable for a penalty ie in advance of a failure to file the return after the end of the three-month period. There is nothing in the language of sub-para (c) which restricts the timing of the notice in this way. Ms Murray has not suggested any reason why Parliament would have intended to do this. All that HMRC is required to do is to inform P that it has decided that, if he continues to fail to file his return after the end of the three-month period, he will be liable for a daily penalty of £10 for each day that the failure continues during the following 90-day period. Subparagraph (3) requires notice to be given specifying the date from penalty 'is' payable. That can be done in advance of any default by P. It is a fair and sensible provision."

40. At [22], Lord Dyson MR said: "These reasons for rejecting Ms Murray's submissions are not, in substance, different from those given by the UT."

41. While we consider it is difficult to construe this as specifically endorsing the UT's conclusion as to the ability to give a notice retrospectively (hence our first caveat to the reasons of the FTT in *Priory*), there is nothing in what the CA said which undermines the UT's conclusion in that respect.

42. For completeness, we consider that the other decision of the FTT which reached the same conclusion as the FTT in *Heacham* and *ABF* was also wrongly decided. That was *D&G Thames Ditton Limited v HMRC* [2020] UKFTT 489 (TC). In that case, at [87], Judge Michael Connell said that a paragraph 4(1)(c) notice "cannot of course be given retrospectively". The basis for this, as explained at [88], was that the purpose of a section 4(1)(c) notice is to give warning allowing a taxpayer to take remedial action. No consideration was given, however, to the express provision for back-dating in paragraph 4(3).

Application by Priory to argue a further point on appeal

43. In its skeleton argument filed shortly before the hearing of the appeal, Priory raised two new arguments. First, whether HMRC had validly considered the applicability of a penalty as required

pursuant to paragraph 4(1)(b) of Schedule 55 FA 09. Second, whether HMRC had issued the notices required pursuant to paragraph 4 and 18 of Schedule 55 FA 09.

44. Judge Ramshaw gave directions on 7 July 2022 requiring Priory, if it wished to pursue these arguments, to issue an application to waive the requirement that it must seek permission first from the First-tier Tribunal, for an order extending time for seeking permission to appeal and an application for permission to appeal on these grounds. She indicated that if such applications were made, they would be dealt with as preliminary issues at the beginning of the hearing of the appeals.

45. On behalf of Priory, Mr Michael Dawson filed a short written submission on 8 July 2022. Priory relied on two decisions of the Upper Tribunal for Scotland: *Revenue Scotland v Begbies Traynor (Central) LLP* [2019] UT 35; and *Revenue Scotland v Harrison* [2019] UT 36. In each of these the tribunal concluded that Revenue Scotland had failed to provide sufficient evidence of its decision to impose the penalties. Mr Dawson noted that the FTT had not considered these decisions, or the argument he now sought to make in relation to them. He stated that he had not been aware of those decisions until recently. He referred to written submissions filed by Priory after the hearing before the FTT, in which the point was made that HMRC had not made a conscious decision to give a penalty notice.

46. HMRC filed responsive submissions, in which they made the following points:

> (1) The sole ground on which permission to appeal had been sought and given by the FTT was whether paragraph 4(1)(c) of Schedule 55 required notice to be given prior to the date on which the penalty began to accrue;
>
> (2) Since December 2021 the parties had proceeded on the basis that this was a single issue appeal, and the case had been listed to be heard together with *Jocoguma* on that basis;
>
> (3) The issues now sought to be argued were not before the FTT: they were not in Priory's appeal to HMRC against its decision; they were not in the FTT notice of appeal and they were not advanced in Priory's skeleton before the FTT;
>
> (4) The reference to the lack of conscious decision by HMRC in Priory's submissions filed after the hearing was not something on which the FTT had sought submissions, and so was not dealt with by the FTT in its decision;
>
> (5) It would not be just in all the circumstances to waive the requirement to seek permission from the FTT first, or to grant an extension of time, in particular because it would require an adjournment of the hearing to enable HMRC to address the new points in evidence, and because Priory had not addressed the merits of the arguments, which were in any event weak.

47. Priory did not attend the hearing and were not represented. They were content to rely on their written submissions. At the start of the hearing, we announced our decision that we would neither extend time to permit the new arguments to be pursued nor waive the requirement that permission should first be sought from the FTT. Our reasons reflect the submissions from HMRC set out above. As to the merits of the point sought to be raised, insofar as it was suggested that a high-level decision to impose a penalty on any taxpayer that failed to file its return by the relevant date was not capable of constituting an exercise of discretion sufficient to amount to a decision under paragraph 4(1)(b) of Schedule 55 FA 09, then that point was determined in HMRC's favour by the UT and CA in *Donaldson*.

48. At the hearing, Mr Conor Kennedy, director of Jocoguma, made similar points to those that were advanced in Mr Dawson's written submissions. There had been no advance notice of any application on the part of Jocoguma to seek permission to cross-appeal the FTT decision on the basis of the new points raised by Priory. This was not a point raised by Jocoguma before the FTT and was therefore not an issue dealt with by it. Any such application would have met the same fate as Priory's, for the same reason.

Conclusion

49. For the above reasons, we dismiss the taxpayer's appeal in *Priory*.

50. We allow HMRC's appeal in *Jocoguma*. For the above reasons we find that the FTT materially erred in law. We set aside the FTT's decision and re-make the decision. Jocoguma's appeal against HMRC's decision to impose daily penalties in the amount of £900 is dismissed.

Signed on Original

Mr Justice Zacaroli
Judge Phyllis Ramshaw

RELEASE DATE: 12 August 2022