[2017] UKFTT 0706 (TC)

TC06125

Appeal number: TC/2017/04367

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed - yes – reliance on accountants to submit return - whether reasonable excuse - yes - whether special circumstances - yes - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RODERICK NORTHAM **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 20 September 2017 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 23 May 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 11 July 2017 and various correspondence between the parties.

DECISION

Background

1. The appellant has been assessed to a late filing penalty of £100, a daily penalty of £900 and a six month late filing penalty of £300. In each case for his failure to file his individual tax return for the tax year 2011/2012 on time.

2. His notice of appeal identifies an amount of £2,097 as the amount of tax or penalty or surcharge against which he is appealing. The respondents (or "HMRC") believe that some part of this might be tax penalty or surcharge relating to his trade as a partner in a partnership; but HMRC and I are both treating the appeal as being against the penalties set out in [1] above.

Evidence and findings of fact

3. From the papers before me I find the following facts:

(1) A notice to file an individual tax return for the year ending 5 April 2012 was issued to the appellant on 6 April 2012. The filing date was 31 October 2012 for a non-electronic return or 31 January 2013 for an electronic return.

(2) The appellant had employed Bray Accountants Limited of Tiverton to compile and submit his accounts and also his tax returns for the accounting year 30 September 2010 and 30 September 2011 and his tax returns for 2010/2011 and 2011/2012.

(3) The appellant had signed the 2011/2012 return before 31 January 2012.

(4) At that time, the appellant was very ill with depression. On 5 May 2017 he was 80 years old.

(5) The appellant's electronic return for the year 2011/2012 was received by HMRC on 18 October 2013 and was processed on that date.

(6) As the return had not been received by the due filing date, HMRC issued a notice of penalty assessment to the appellant on or around 12 February 2013 in the amount of £100.

(7) As the return had still not been received three months after the filing date, HMRC issued a notice of daily penalty assessment on or around 14 August 2013 in the amount of £900, calculated at £10 per day for 90 days.

(8) On or around 14 August 2013 too, HMRC issued a notice of penalty assessment for £300 since the return had not been received six months after its due filing date.

(9) On 28 August 2013 Bray Accountants appealed against the penalties, on the appellant's behalf, citing the cases of Morgan and Donaldson as justification for removal of those penalties.

(10) HMRC sent the appellant a letter on 17 September 2013 indicating that HMRC could not consider his appeal until they had received his tax return and that pending that they were postponing collection of the penalty.

(11) Following publication of the Donaldson decision on 7 April 2017 HMRC sent the appellant a letter rejecting his appeal.

(12) The appellant did not request a review of that decision, but appealed to the Tribunal direct.

(13) The appeal was notified to the Tribunal on 23 May 2017.

(14) The appellant trades as a farmer and the accounting profit that he made in 2011 (the year ended 30 September 2011) was £3,360, and for the year ended 13 September 2012, it was £425.

The Law

Legislation

4. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970, a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by HMRC to submit a tax return, must submit that return by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 (and references below to paragraphs are to paragraphs in that Schedule).

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(d) failure to file for 12 months (i.e. the 12 month penalty) - 5% of payment due or £300 (whichever is the greater) (paragraph 6).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Special circumstances

(8) If HMRC think it is right to reduce a penalty because of special circumstances, they can do so. Special circumstances do not include (amongst other things) an ability to pay (paragraph 16).

(9) On an appeal to me under paragraph 20, I can either give effect to the same percentage reduction as HMRC have given for special circumstances. I can only change that reduction if I think HMRC's original percentage reduction was flawed in the judicial review sense (paragraph 22(3) and (4)).

Reasonable excuse

(10) A taxpayer is not liable to pay a penalty if he can satisfy HMRC, or this Tribunal (on appeal) that he has a reasonable excuse for the failure to make the return (paragraph 23(1)).

(11) However, an insufficiency of funds, or reliance on another, are statutorily prohibited from being a reasonable excuse. Furthermore, where a person has a reasonable excuse, but the excuse has ceased, the taxpayer is still deemed to have that excuse if the failure is remedied without unreasonable delay after the excuse has ceased (paragraph 23(2)).

Case law

(12) A summary of the relevant case law is set out below

Notification of penalty

(13) As can be seen from 4(4) above, in order to visit a daily £10 penalty on a taxpayer under paragraph 4, HMRC must make a decision that such a penalty should be payable, and give an appropriate notice to the taxpayer.

(14) These issues were considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*").

(15) The Court of Appeal decided that:

(a) The high level policy decision taken by HMRC that all taxpayers who are more than three months late in filing a return will receive daily penalties constituted a valid decision for the purposes of paragraph 4.

(b) A notice given before the deadline (i.e. before the end of the three month period (and so issued prospectively) was a good notice. In Mr Donaldson's case, his self-assessment reminder and the SA326 notice both stated that Mr Donaldson would be liable to a £10 daily penalty if his return was more than three month's late and specified the date from which the penalties were payable. This was in compliance with the statute.

(c) HMRC's notice of assessment did not specify, however, the period for which the daily penalties had been assessed. On this it agreed with Mr Donaldson. However, there is a saving provision in Section 114(1) of the Taxes Management Act 1970 which the Court of Appeal held applied to the notice. And so they concluded that the failure to specify the period for which the daily penalties had been assessed did not invalidate the notice.

Reasonable excuse

(16) The test I adopt in determining whether the appellant has a reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

(17) Although the Clean Car case was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

(18) Indeed, in the First-tier Tribunal case of *Nigel Barrett* [2015] UKFTT0329 (a case on late filing penalties under the CIS) Judge Berner said:

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

(19) HMRC's Compliance Manual recognises that reasonable care cannot be identified without consideration of a particular person's abilities and

circumstances, and HMRC recognises the wide range of abilities and circumstances of persons completing returns or claims.

> "So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances".
>
> "In HMRC's review it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice".

Special Circumstances

(20) There have been a number of cases on special circumstances from which I derive the following principles (see *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 0095 and the cases cited therein):

(a) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152).

(b) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(c) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(d) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(e) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(f) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(g) I can allow the taxpayer's appeal if I find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same decision on the evidence before him (as per Lord Justice Neill)

(*John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941).

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(h) In deciding whether HMRC's decision was unreasonable, I should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(i) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome - whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(j) Having undertaken that assessment:

(i) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.

(ii) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

(21) In relation to the doctrine of proportionality and its application to the issues in this case, I have considered the following cases:

(a) Paraskevas Louloudakis v Elliniko Dimosio (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(b) International Transport ROTH GmbH v Secretary of State for the Home Dept [2003] QB 728 ("*Roth*")

(c) James v UK (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(d) Wilson v SoS for Trade and Industry [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(e) R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent) [2015] UKSC 41 ("*Lumsden"*)

(22) A summary of the principles relating to proportionality are set out below:

(a) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (*Lumsden* at [33])

(b) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (*Lumsden* at [23]).

(c) In the context of its application to penalties, the principle of proportionality is that:

(i) penalties may not go beyond what is strictly necessary for the objective pursued; and

(ii) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (*Louloudakis* at [67]).

(d) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (*Wilson* at [62]).

(e) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (*James* at [46]) or "not merely harsh but plainly unfair" (*Roth* at [26]).

Burden and standard of proof

5. The burden of establishing that the appellant is prima facie liable for penalties which have been properly notified and assessed lies with HMRC.

6. The burden of establishing that he should not be liable for such penalties because, amongst other reasons, he has a reasonable excuse, or that the penalties are disproportionate, lies with the appellant.

7. In each case the standard of proof is the balance of probabilities.

Discussion and conclusion

Late appeal

8. The appellants' appeal has been made late. HMRC recognise this, and recognise too the wide jurisdiction of the Tribunal when considering applications for late appeals. They say they would not oppose such an application. It is my view that neither party has been prejudiced by this appeal being made out of time, and the prejudice to the appellant of not hearing it outweighs any prejudice to the respondents for its lateness. Indeed *Donaldson* has made a bit of a mockery of timely hearings for Schedule 55 appeals. I am, therefore, prepared to deal with the appeal.

Service of penalty notices

9. It is incumbent on HMRC to establish that they have decided that penalties are payable and that they have been properly notified. These requirements are in paragraph 4 of Schedule 55 which is 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.

10. As can be seen from [5(15)] above, *Donaldson* dealt with HMRC's decision under 4(1)(b) and notification under paragraph 4(1)(c).

11. HMRC must prove, on the balance of probabilities that they have made a decision of the kind required by paragraph 4(1)(b) in respect of this appellant, and also that they have given him notice pursuant to paragraph 4(1)(c). This requires more than a submission that I should find that HMRC have satisfied these requirements generally. It requires evidence that they have done so in respect of this particular taxpayer.

12. In this case, HMRC have provided an extract from their computer records which (they say) shows that a late filing penalty notice was issued to the appellant on 12 February 2013. They also say that the form of that notice is as per the pro forma notice, which is provided in their bundle form of SA326D.

13. HMRC also assert that a notice to file a tax return for the year ended 5 April 2012 was issued to the appellant on 6 April 2012, and I have found as a fact that is the case. HMRC have provided a copy of a pro forma notice to complete a tax return for that year in which it is clearly stated that if a return is 3 months late, the taxpayer will also receive a daily penalty of £10 a day up to £900. Although this is not a copy of the specific notice to complete which HMRC have stated was given to the taxpayer, I find that on the balance of probabilities, the specific notice given to this taxpayer was in the form of the pro forma provided to me by HMRC; and that on 12 February 2013 a penalty notice for £100 late filing penalty, which includes a statement that if a tax return is made more than 3 months late a taxpayer will have to pay a daily penalty £10 every day for 90 days, was also sent to this taxpayer.

14. Accordingly, I am satisfied on the evidence before me that the requirement of paragraph 4(1)(c) of Schedule 55 is met in the case of this taxpayer.

15. I am also satisfied that HMRC have made a decision of the kind required by paragraph 4(1)(b) since the "generic policy" referred to in *Donaldson* applies to all taxpayers including this appellant.

16. Under paragraph 18(1) of Schedule 55:

(1) 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.

17. As evidence that the penalties have been notified (and that notification states that the period in respect of which the penalty is assessed) HMRC have provided their standard extract from their computer records, a pro forma penalty notice of assessment and the 30 day and 60 day penalty reminders, as pro formas (those specific to the appellant have not been included).

18. No pro forma notice for the 30 or 60 day penalties has been tendered as evidence and there is nothing in the pro forma notice tendered by HMRC which refers to paragraph 4 of Schedule 55, something which is identical to the position in *Donaldson*. However, given in *Donaldson* the Court of Appeal decided that Section 114 TMA "cured" such defect, and that it is clear from the reminder pro formas, which I find as a fact were sent to the appellant as HMRC have asserted, that notification of the penalties was given to him. I therefore find that HMRC have satisfied their notification requirements under paragraph 18(1).

Appellant's grounds of appeal

19. The appellant puts forward the following grounds of appeal.

(1) He had signed his tax return before 31 January 2013, but left it to his accountants to send it off

(2) The accountants promised to do this even though they had to estimate certain information.

(3) He was too ill with chronic depression to follow this up.

(4) He was 80 on 5 May 2017 (and so, I surmise, 76 or 77 in January 2013).

(5) He cannot afford to pay the penalties.

Respondents' submissions

20. The respondents submit as follows:

(1) The appellant has been completing tax returns since 1997 and as a self-employed farmer should be aware of his filing obligations.

(2) His chronic depression is insufficiently serious to comprise a reasonable excuse.

(3) There is no evidence that either the appellant or his agents contacted HMRC between 31 January 2013 and 28 October 2013 to explain why his return had not been submitted on time, and that one of the reasons for this late submission was that the appellant had serious depression.

(4) If this illness was ongoing, HMRC would expect a taxpayer to make arrangements to ensure that his or her tax return was filed on time.

(5) The penalty notice issued to the taxpayer on 20 February 2013 should have alerted him to the fact that the return had been filed late, and should have acted as a catalyst for him to chase his accountant.

(6) The appellant is required to submit a tax return even if he has no taxable income.

(7) An insufficiency of funds is specifically excluded by legislation as being either a reasonable excuse or a special circumstance.

Reasonable excuse

21. The test of whether a taxpayer has a reasonable excuse is set out above at [4(16)ff].

22. The reasonable excuse provisions in paragraph 23 apply where there is a reasonable excuse for a "failure" to make a return. As Judge Richards said in the case of *Sudall* [2017] UKFTT 0404 ("*Sudall*")

> "That raises a question of interpretation, namely whether Mr Sudall must establish a reasonable excuse for the initial failure to file by 31 October 2013 or whether Mr Sudall could argue that, even though there was no reasonable excuse for the original failure to file (so the £100 penalty is still due), he nevertheless has a reasonable excuse for filing more than 6 months late so that the 6-month penalty is not due".

23. Judge Richards continued in *Sudall*.

> "22 I consider that the scheme of the legislation makes it clear that, for the defence of reasonable excuse to be available, there must in all cases be a reasonable excuse for the initial failure to file on time. My reasons are as follows:
>
> (1) Paragraph 1(1) and 1(2) of Schedule 55 make it clear that all penalties imposed by paragraphs 2 to 13 of Schedule 55 are imposed for a failure to submit a return by the filing date. The relevant "failure", therefore, that triggers both a £100 penalty and a six-month penalty is, specifically, a failure to file by the filing date.
>
> (2) Paragraph 5 of Schedule 55 imposes the penalty where the "failure" (namely the failure to file on time) continues more than six months after the penalty date. Paragraph 5 penalties do not, therefore, penalise a new "failure" (to file within six months of the penalty date), but rather the original "failure" to file on time, where that continues for more than six months.
>
> (3) Therefore, the "failure" set out in paragraph 23 (which has to be the subject of a "reasonable excuse") must be a reasonable excuse for the original failure to file on time. That is emphasised by paragraph 23(2) of Schedule 55 which provides for an excuse to be treated as continuing in certain

> circumstances. If Parliament had not wanted to impose a requirement that a "reasonable excuse" must excuse the initial failure to file, paragraph 23(2)(c) would not have been drafted in the terms it is. The implication of paragraph 23(2)(c) is that, where there is a continuing failure to file a return, in order for the defence of "reasonable excuse" to be available, the excuse must both exist on the filing date and continue (within the terms of paragraph 23(2)(c).
>
> (4) If Parliament had wished to deal with the situation where there is no original "reasonable excuse" for late submission, but subsequently a reasonable excuse starts, it would have needed to explain when a reasonable excuse is treated as starting. However, Parliament has not done so, instead focusing its attention in paragraph 23(2)(c) on when a reasonable excuse ceases .
>
> 23 I recognise that this interpretation might be thought to produce harsh results. For example, a taxpayer may have no good reason for filing late, but two months and 30 days after the penalty date may have prepared a return and be on the verge of submitting it. If the taxpayer is subsequently struck ill, admitted to hospital and prevented from filing the return for a further month, the defence of "reasonable excuse" would not, on my interpretation of the legislation, prevent daily penalties from accruing. However, in such a case it would still be open to HMRC to mitigate the daily penalties because of "special circumstances" and, if HMRC's decision on this issue was flawed, the Tribunal could change it."

24. Having reviewed the legislation, I find myself in agreement with Judge Richards' views in *Sudall* set out above, and I gratefully adopt them for the purpose of this Decision.

25. The time at which you test whether an appellant has a reasonable excuse is at the time of the initial failure to file on time. In the case of this appellant, that is 31 January 2013. If the appellant had a reasonable excuse at or immediately prior to 31 January 2013, then that will exonerate him from not just the £100 late filing penalty but also the daily penalties and six month penalty to which the appellant has been assessed.

26. This cuts both ways. As Judge Richards has recognised in the extract from *Sudall* above, it can produce harsh results for a taxpayer.

27. But equally, if an appellant has a reasonable excuse for the failure to file on time, any subsequent failures by the appellant can be disregarded. A reasonable excuse at the filing date exonerates him from all subsequent penalties.

28. It is my view that this latter situation applies to this appellant.

29. He is clearly a man who, in the words of Judge Medd set out at [4(16)] above) is a reasonable trader conscious of and intending to comply with his obligations regarding to tax.

30. This is not a taxpayer who has disregarded his obligations to submit a tax return on time. This is a man who has employed accountants; and who ostensibly has an unblemished record for submitting his returns on time (HMRC have not suggested that although the appellant has been in the self-assessment system since 1997, he has been dilatory in filing any previous tax return); he asked his accountants to submit his return, and he had signed the return before the filing date.

31. This signing needs further consideration. It is dealt with in three places in the papers before me. Firstly, in a letter dated 5 May 2017 which the appellant has written and which, according to HMRC, was included with his appeal to the Tribunal. In it the appellant states

> "*although I did sign the 11/12 tax returns for the year 11/12 it appears that the accountant did not return them on time, he promised he would even if he did have to estimate the info.*"

32. In the appellant's grounds for appeal contained in his notice of appeal dated 23 May 2017 he states that

> *"this decision is wrong in the first place as I did sign the tax returns on time but left it to the accountant to send them off which he promised to do."*

33. In the same notice of appeal in the context of why a hardship application should be allowed, the appellant states that

> *"I did sign the tax returns before the end of Jan, 12 but [*if the – illegible, my best guess*] accountant says he could not send it in on time as he says <u>now</u> he needed more details."* [appellant's emphasis not mine]

34. So there are three slightly different representations. Firstly, in the grounds of appeal, the accountants promise to send off the signed tax return. Secondly in the letter of 5 May, the accountants promise to send it off even if they did have to make estimates of the information needed to complete it.

35. Thirdly the accountants are <u>now</u> saying that they could not have sent it off because they needed more details.

36. Clearly if the appellant was told that notwithstanding that he had signed the return, the accountants were not going to send it off, that could not comprise a reasonable excuse. He would know at the time that the return was due to be submitted, that it was not going to be submitted on time.

37. But the way I read the appellant's testimony is that he was not told by the accountants at that time (i.e. prior to 31 January 2013) that they were intending not to send it off because they had insufficient information. They are only saying that <u>now</u> (i.e. at the time of the appeal in 2017). In January 2013 they said that they would send it off even if they had to estimate some of the information that was needed to complete the signed return.

38. It is clear that the appellant and his accountants have been engaged in some low level dispute (probably over fees) and I can see a number of reasons why the accountants might, at the time of the appeal "now" be saying that they could not submit the return without further information.

39. But it is my view, and I find this as a fact, that the appellant was not told by his accountants, between signing his return and the due filing date of 31 January 2013, that they were not proposing to submit the return on 31 January because they required further information. It is my finding that they said no such thing, and that if any comment was made about including further information, it was (as the appellant has indicated), that the accountants would submit the return with estimated information included in it.

40. The appellant was entirely entitled to expect that his return would be submitted by his accountants on or prior to the due filing date.

41. The failure by the accountants to do so can, in my view comprise a reasonable excuse.

42. I am fully aware that paragraph 23(2)(b) of Schedule 55 states that

> "*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.*"

43. The "failure" referred to in this subparagraph is the failure to submit the return on time.

44. So provided the appellant has taken reasonable care to avoid submitting the return late, he can rely, as a reasonable excuse, on the fact that he relied on his accountants to submit the return on time.

45. What comprises reasonable care in this circumstance is something on which I have seen no specific judicial guidance. But the test of whether a taxpayer has taken reasonable care is well known in the context of penalties under Schedule 24 to the Finance Act 2007.

46. And in that context, the test was described by Judge Berner in *Anderson (Deceased) v Revenue & Customs Commissioners* [2009] UKFTT 206 at [22],

> *"the test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done"*

47. I have adapted and amended this test in the context of considering what comprises reasonable care to avoid a failure. The test I am applying is to "consider what a reasonable taxpayer, exercising reasonable diligence to ensure that his return is filed on time, would have done".

48. It is my firm view that the taxpayer has done all that he could do to ensure that his return was filed on time. He employed a firm of accountants who he understood to be competent, (and who we suspect had advised him in respect of previous tax returns). There had been no blemishes on his filing record. He signed his tax return before the due date in circumstances where he was told that it would be submitted on time even if the accountants had to estimate certain numbers to complete it in order to do so. He was not told that the return would not be submitted on time because the accountants required further information.

49. In these circumstances I find that the appellant has a reasonable excuse for failing to submit his return on time, with the consequence that he is liable for none of the penalties to which he has been assessed.

50. A final word on this subject. Many of the appellant's and respondents' submissions focus on acts or omissions of the appellant after 31 January 2013. In view of the principle in *Sudall*, i.e. the time at which you judge reasonable excuse is, in this case, 31 January 2013, what happened thereafter is irrelevant. I have therefore not considered such submissions in coming to my conclusion.

Special circumstances

51. HMRC say that they have taken into account a number of matters, but in light of them do not believe they comprise special circumstances which would merit a reduction of the penalties to which they have assessed this appellant.

52. In view of my decision on reasonable excuse, I do not have to come to a conclusion on special circumstances. But if I had to, it would be that HMRC's decision not to reduce the penalties, because in their view they believe there are no special circumstances, is flawed in the judicial review sense.

53. I say this because even though HMRC indicate that one of the matters they have taken into consideration is that the appellant signed his return but left it to the accountants to send it off (which the accountants promised to do) they have given insufficient weight to that particular circumstance. It seems to me that this is a man, as I have said above, who is conscious of his responsibilities to the tax system and has done everything in his power to ensure that his return is submitted on time. His failure to do so is because of a failure by his accountants. He has taken reasonable care. All these points go to whether or not he has a reasonable excuse, but they are also relevant when considering special circumstances. It seems to me that it is very unusual, having signed a tax return and being told that it will be submitted on time, that a firm of professional accountants would not go on and do so. This is something that is specific to this particular taxpayer, and, as I say, is abnormal or unusual and is outside the ordinary run of events.

54. In my view HMRC have given too much credence to the statement in the hardship part of the notice of appeal, and have mis-interpreted the word "now" used by the appellant in that part of his notice of appeal. They have given insufficient weight to the statements made in the letter of 5 May and in his grounds of appeal

concerning the unqualified nature of the assurance that he was given by his accountants regarding filing on time.

55. And so, if I needed to decide on the reasonableness of HMRC's decision on special circumstances, I would have found it flawed. I would have substituted my decision for theirs and reduced the penalties to zero.

Proportionality

56. In view of the decisions I have come to above, there is no need to consider whether or not the penalties are proportionate.

Decision

57. In light of the above I allow this appeal.

Appeal rights

58. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2017