[2018] UKFTT 0042 (TC)

TC06320

Appeal number: TC/2017/07107

INCOME TAX – failure to file income tax return by due date – penalty under paragraph 3 Schedule 55 FA 2009 – whether reasonable excuse – whether "statutory" requirement to register for self-assessment and file return because person is a director – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KAREN SYMES **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 25 January 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 23 September 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 18 November 2017 and the appellant's reply of 21 November 2017.

DECISION

1. This was an appeal by Mrs Karen Symes ("the appellant") against a penalty of £100 assessed on her for her failure to file a tax return by the due date.

Facts

2. The facts I find in this section are not in dispute and are taken from the bundle of papers I was sent. I find further facts below (see §20).

3. The appellant was issued with a notice to file an income tax return for the tax year 2015-16 on 15 December 2016. That notice required the appellant to deliver the return by 22 March 2017 ("the HMRC due date").

4. On 28 March 2017 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the HMRC due date.

5. The return was filed in paper form on 7 April 2017, accompanied by a letter from the appellant explaining why the return was late, and for the "waiver of the penalty fee".

6. On 13 April 2017 she appealed through her agent against the penalty.

7. On 26 May 2017 HMRC rejected the appeals as they said that the appellant had shown no reasonable excuse for the failure to file on time. They informed her that she could provide further information, request a review or notify her appeal to the Tribunal.

8. On 1 June 2017 the appellant gave further information.

9. On 7 July she wrote again asking for a reply.

10. On 18 September 2017 HMRC wrote to the appellant with what were described as the conclusions of a review which the appellant had apparently requested. The conclusion was that the penalties were upheld

11. On 23 September 2017 the appellant notified her appeal to the Tribunal.

The law

12. The law imposing this penalty is in Schedule 55 Finance Act ("FA") 2009 ("Schedule 55") and in particular paragraph 3 which makes a person liable to a penalty of £100 if a return is not delivered by the filing date, which in this case was 15 March 2017 (not the HMRC due date). The penalty may only be cancelled, assuming it is procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed. On the question of reasonable excuse, paragraph 23 Schedule 55 says:

> "(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on

appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased."

13. In view of the grounds of appeal I add the following.

14. Section 7 Taxes Management Act 1970 on notifying liability provides for 2015-16:

"(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) …,

shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

…

(1C) In subsection (1) "the notification period" means—

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment, …

…

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year—

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

…

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted; or

(b) income from or on which income tax is treated as having been deducted or paid...,

and that person is not for that year liable to tax at a rate other than the basic rate, … the dividend ordinary rate ...

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year."

15. For 2016-17 subsection (6) is amended and a subsection (6A) inserted:

"(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted; or

(b) income from or on which income tax is treated as having been deducted or paid...,

and that person is not for that year liable to tax at a rate other than the basic rate**, the dividend nil rate,** … the dividend ordinary rate...

(6A) A source of income falls within this subsection in relation to any person and any year of assessment if for that year—

(a) all income from the source is dividend income (see section 19 of ITA 2007), and

(b) the person—

(i) is UK-resident,

(ii) is not liable to tax at the dividend ordinary rate,

(iii) is not liable to tax at the dividend upper rate,

(iv) is not liable to tax at the dividend additional rate, and

(v) is not charged to tax under section 832 of ITTOIA 2005 (relevant foreign income charged on remittance basis) on any dividend income."

16. For the year 2015-16 the "dividend ordinary rate" is 10% - s 8(1) Income Tax Act 2007 ("ITA"). An individual in receipt of UK source dividends in that year was entitled

to a tax credit of 10% under s 397 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), which nullifies the dividend ordinary rate liability.

17. For the year 2016-17 the dividend nil rate is 0% (section 8(A1) ITA 2007) and applies to the first £5,000 of dividends (see the extraordinarily convoluted provisions of s 13A ITA). The dividend ordinary rate is 7.5% (s 8(1) ITA as amended by s 5 Finance Act 2016) but there is no tax credit available to nullify the tax charged at that rate, as that Act also repealed s 397 ITTOIA.

Grounds of appeal & HMRC's response

18. The grounds of appeal are

(1) the appellant received a letter from HMRC dated 16 December which acknowledged that her accountants had sought to register her for self-assessment for 2016-17 so that dividends she received could be returned and the tax on them paid. Accompanying that letter was a notice to file a tax return

(2) the appellant assumed that this notice to file was for 2016-17, the year for which she was being registered for self-assessment

(3) it was only when she received a notice to file dated 6 April 2017 requiring her to file a return for 2016-17 that she realised that the notice to file accompanying the letter of 16 December 2016 was for 2015-16

(4) she does not understand why she was required to make a return for that year as she had a letter from HMRC showing that a calculation of her tax liability (P800) for 2015-16 shows a small repayment due which was paid to her

(5) as soon as she realised what had happened she filed the return (the next day).

19. HMRC say in response that

(1) as the appellant was appointed a director of a company, NSymes Ltd, on 20 June 2014 in the tax year 2014-15, she had a statutory obligation to notify HMRC of her requirement to complete a Self-Assessment tax return

(2) the appellant's accountants sent an SA1 (Registering for self-assessment and getting a tax return) on 23 November 2016. As a result HMRC reopened her SA record and issued a paper tax return on 15 December 2016. The return clearly shows the due date

(3) the law in s 8 TMA does not specify which "customers" are obliged to file a return. HMRC selects them according to criteria "set out under Self-Assessment" [sic]. The appellant met two criteria: she was a director in 2015-16 and she had a dividend of over £10,000 from a UK company (as shown on the 2015-16 return she filed

(4) as to the P800 it informs the recipient that they should "tell us about in-year changes". The appellant's appointment as a director and her receipt of dividends were such changes, and changed her tax position so a return was required

(5) because the 2015-16 return showed that the appellant was a director and that she had received £25,285 in dividends, she was required to complete a tax return whether or not she had received a P800, as her personal circumstances had changed

(6) the SA1 was completed to show the appellant started as a director on 6 April 2015 so she was aware she became a director in 2015-16

(7) when she received the SA250 (the letter of 16 December 2016) and the notice to file, she could have contacted HMRC to see if she needed to complete it and to confirm which year it reacted to. This is what a reasonable prudent taxpayer would have done

(8) the return was late and so the penalty is due. The appellant had no reasonable excuse for the failure; and

(9) HMRC have considered the facts that HMRC made no reference on the SA250 to the year for which the return was required; that she had had an assessment [*their words*] in August 2016 and that she took immediate action when she realised her error, but say they are not special circumstances which would warrant a reduction of the penalty.

Discussion

20. I first make some further findings of fact from the papers I have. I find that

(1) the appellant was appointed a director of NSymes Ltd on 20 June 2014 (that is apparent from the Companies House file for the company and is publicly available information).

(2) a comparison of the P800 and the tax return for 2015-16 shows that the P800 included employment income taxed under PAYE only. It did not include any dividends or interest. The tax return shows dividends of £25,285 received from UK companies (ie net of tax credit), £104 interest net of tax and £589 before any credit is added in "other dividend income".

(3) in 2015-16, when the basic rate band was £31,785, the appellant's total income as shown on her return and after deducting the personal allowance was £29,249, less than the basic rate band. The amount of income falling to be taxed which does not carry a nullifying credit or has tax deducted at source is nil.

(4) The letter of 29 November 2016 from the appellant's accountants enclosing an SA1 and 64-8 (authorisation of agent) did not either in itself or in an entry on the forms give any indication that the request to register for self-assessment was only for 16-17 onwards. The form SA1 she completed (or at least signed) states that a return was needed because the appellant had ticked a box against wording saying she became a company director and she showed the date she started as 6 April 2015. [*my emphasis*]

(5) The P800 says "Tax calculation for the year 6 April 2015 to 5 April 2016. You have paid too much tax. HMRC owes you £62.20".

(6) What the P800 says about changes in circumstances is "Please check this calculation. You must tell us if you think the information we hold is wrong or

about any changes to your taxable income. Please see the notes". The notes are not in the bundle.

(7) The tax return actually filed says about deadlines for filing:

> "We must receive your tax return by these dates:
>
> If you are using a **paper** return – by **31 October 2016** [or 3 months after the date on this notice if that's later]
>
> If you are filing a return **online** – by **31 January 2017** [or 3 month after the date on this notice if that's later]"

(8) The letter of 16 December 2016 from HMRC accompanying the notice to file says:

> "We will normally write to you after the 5 April to tell you
>
> - to complete a self assessment and for which tax year
> - when you need to send that completed return to us.
>
> If we need you to complete a tax return before this we will send you a letter explaining when you have to send it back to us."

(9) There is no letter in the bundle explaining that a return is needed earlier than the normal procedure or what the deadlines are. Neither the appellant nor HMRC have referred to any such letter.

21. I find that the following information was shown on HMRC's website as at November 2016. It is not currently on the website in this form, but the same page searched for at http://archive.org/web/web.php (Internet Archive Wayback Machine) for the appropriate time shows, under the heading "Who needs to complete a tax return?", the following which are relevant to the appellant's situation.

> "You'll need to send a tax return if, in the last tax year:
>
> …
>
> you were a company director - unless it was for a non-profit organisation (such as a charity) and you didn't get any pay or benefits, like a company car
>
> …
>
> you got dividends from shares and you're a higher or additional rate taxpayer - but if you don't need to send a return for any other reason, contact the helpline instead
>
> …"

22. Another page as at November 2016 covers what to do if you fall within these criteria:

> "3. Register if you're not self-employed
>
> If you have to send a tax return and didn't send one last year, you need to register for Self Assessment by 5 October."

23. Although a lot has been said about taxpayers' responsibilities, particularly in relation to the need to register for self-assessment and the requirement to file a return,

this case boiled down to the question: did the appellant have a reasonable excuse for her failure to file the 2015-16 return by either the actual due date or the one HMRC said was the due date?

24. A clear statement of what is involved in the Tribunal considering whether a reasonable excuse exists is in *Barrett v HMRC* [2015] UKFTT 329 (TC) (Judge Roger Berner). At [154] Judge Berner says:

> "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. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance."

And at [161]

> "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

25. The penalty provisions which Judge Berner was considering did not contain any qualification of what might be a reasonable excuse where a third party was involved. But Schedule 55 FA 2009 does. In paragraph 23(2)(b) it says:

> "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"

26. Although I need to heed Judge Berner's warning in [154] about seeking guidance from other cases, I note that on the question of reliance on a professional adviser, he says:

> Nor do I consider that there can be any principled distinction between cases which involve complex or "arcane" provisions of tax law, and those which may be regarded as more commonplace. That is nothing more than one of the circumstances to be taken into account in the application of the objective standard.

27. The issue then is whether what the appellant did, or did not do, in her particular circumstances, was a reasonable, or not unreasonable, action or omission on her part, including whether her reliance on her accountant was in those circumstances reasonable in that she herself took reasonable care to avoid the failure the file.

28. The particular circumstances in which she found herself include that her accountant had properly advised her that for 2016-17 any dividends she received from NSymes Ltd would give her a liability to tax at the dividend ordinary rate of 7.5% so far as the amount exceed £5,000. That meant that she would be notifying liability to tax for 2016-17 well before the statutory deadline, which was 5 October 2017.

29. I have no reason to think that the appellant appreciated that by entering the date she became a director as 6 April 2015 (if she in fact entered it or noticed it when she signed the form) she would be required by HMRC to file a return for a year for which she had, so far as she knew, in fact correctly, no liability to tax.

30. It is not unreasonable, in my view, for the appellant, to think that, knowing as she did that she had been given a P800 and a repayment for the tax year 2015-16 a few months earlier, the HMRC letter of 16 December was saying that if she was required to file a return for 2015-16 she would get a letter telling her clearly of that requirement and the deadlines. That was what the letter promised, not the paper return that was included with the December letter, which on no basis is a letter that "we will send you" which implies the future not the present.

31. Is there anything in HMRC's submissions which would show that she was not acting as a reasonable person in her circumstances? I take each of the submissions in §19 in turn.

32. As to (1) I do not understand what the "statutory obligation" HMRC refer to is. No one has a statutory obligation to do anything in relation to income tax simply because they are a director of a company which is not a not-for-profit company. The statutory obligation on every person is to notify liability if they are chargeable to tax and their income and gains do not fall within at least one of the exceptions in subsections (4) to (7) of s 7 TMA. A director is, in relation to any profits from their directorship, chargeable to tax on income falling within the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Prima facie all such income is within the scope of PAYE, either because it is PAYE income within the meaning given in ITEPA and the PAYE Regulations or it is taken into account in determining a code number, for example benefits in kind, and so falls within s 7(4) and (5) TMA.

33. Being a director per se does not entitle a person to dividends. Being a shareholder is what does that. Many small family companies will, mainly for reasons connected with National Insurance Contributions liability, pay dividends, which are not earnings for that purpose, rather than salary or fees which are. Up to and including 2015-16 dividends still coming within the basic rate band when treated as they must be, as the top slice of income, fall within the s 7(6) TMA exclusion, as in this case. If dividends from the company of which a person is a director fall within the higher rate band or above, then there was a liability to notify, but not because of being a director.

34. What is said by HMRC in this case confuses the criteria by which HMRC exercise their discretion to issue a notice to file with the statutory obligation to notify liability.

35. As to §19(2) that simply states fact, apart from the last sentence. The last sentence does raise the question whether the appellant should have studied the paper return more closely than she did. I have to say that what is least clear about it is the due date. The period which it covers is much clearer. This is certainly though a point to be weighed in the balance against the appellant.

36. As to §19(3) I agree she meets the "director" criterion. And I have no doubt that HMRC considered they were within their rights to issue the return for 2015-16 to her. But as §21 shows I am doubtful if she met the dividend criterion published in November 2016. There is a bit of projecting back current criteria here I think.

37. As to §19(4) I do not think this is a fair interpretation of what the P800 says (see §20(6)). It may be the notes are clearer one way or the other but I do not have them.

38. As to §19(5) that is simply wrong. She had no liability to notify for 2015-16.

39. As to §19(6) I agree, but so what?

40. As to §19(7) she could have contacted HMRC, I agree. That is a point to be weighed against what her accountant told her and what she reasonably expected to be required to do as a result of registering for SA foe 2016-17 as she thought.

41. And as to §19(8) that is for me to decide, having weighed up all the matters I have described.

42. In my view the appellant had a reasonable excuse for her failure to file the 2015-16 return by 15 or 22 March 2017. I do not think it was unreasonable for her to rely on what she had been told was being applied to HMRC for, registering for SA for 2016-17, because for that year but not 2015-16 she had a liability to tax that might not be capable of being coded out, given her limited earnings from NSymes Ltd and her other employment. If that is reliance on a third party I think it amounts to her taking reasonable care to avoid a failure to file by the due date and that it was reasonable for her to rely on her accountant to advise her properly, which he did, and not to second guess him on a matter of statutory interpretation and best practice.

43. And as the appellant remedied the error immediately she discovered it, then I cannot say that paragraph 23(2)(c) Schedule 55 FA 2009 prevents the reasonable excuse from operating.

44. HMRC have addressed the question whether there were special circumstances, but have found none. This might not have been the decision I would have come to had I been the decision maker, but as HMRC have set out what they took into account I do not think I can say that this decision was flawed. But it is not necessary to consider it in any depth.

45. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 6 FEBRUARY 2018