[2018] UKFTT 0714 (TC)

TC06857

Appeal number: TC/2017/07240

INCOME TAX – self-assessment – penalty for deliberate failure to notify chargeability – HMRC failed to inform taxpayer he had been removed from self-assessment – reasonable excuse for failure to notify – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATTHEW REDMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS ELIZABETH POLLARD

Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue on 3 July 2018

Mr Michael Perry of Michael J Perry & Co for the Appellant

Mrs Gemma Adams of HM Revenue and Customs' Solicitors Office, for the Respondents

DECISION

1. This was Mr Redman's appeal against two penalties issued by HM Revenue & Customs ("HMRC") for failure to notify chargeability under Taxes Management Act 1970 ("TMA"), s 7. The penalty for the tax year 2011-12 was £40,269.20; that for 2012-13 was £57,552.

2. HMRC's primary position was that Mr Redman had acted deliberately; in the alternative they submitted he had acted carelessly.

3. The Tribunal decided that Mr Redman did not act deliberately or carelessly and that he had a reasonable excuse for his failure to notify. We allowed his appeal. The penalties are therefore cancelled.

4. The Tribunal originally issued a summary decision. However, HMRC have asked for a full decision, and this is that full decision.

Mr Redman's failure to attend

5. Mr Redman did not attend the hearing. Mr Perry, a chartered accountant who was Mr Redman's representative in relation to this appeal, informed the Tribunal that his client was travelling overseas.

6. The Tribunal pointed out that Mr Redman was facing penalties for deliberate behaviour and that he might be disadvantaged if he did not attend to give evidence. Mr Perry said that his client had asked that the hearing go ahead in his absence. HMRC did not raise any objection to the case continuing, despite Mr Redman not being present.

7. The Tribunal considered Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Mr Redman had been notified of the hearing and we decided it was in the interests of justice to proceed.

Application to admit witness evidence

8. On 25 April 2018, HMRC made an application to admit witness evidence from Mr Steve Duffy, the HMRC Officer who had imposed the penalties on Mr Redman. Mr Perry emailed the Tribunal, objecting to the provision of that witness evidence.

9. However, at the beginning of the hearing, the Tribunal observed that the directions given in advance of the hearing did not require the production of witness statements or advance notification of witness attendance. Mr Perry reviewed Mr Duffy's witness statement and the related exhibits and confirmed that he was not taken by surprise by any of this material. He withdrew his objection.

10. The Tribunal decided that Mr Duffy's witness statement and exhibits should be accepted into evidence and that Mr Duffy would be allowed to give oral evidence.

The penalties charged

11. The penalties were levied under Finance Act 2008, Schedule 41 for failure to notify chargeability for 2011-12 or 2012-13, as required by Taxes Management Act 1970, s 7. The relevant provisions are set out in the Appendix to this decision.

12. They were calculated on the basis that Mr Redman had deliberately failed to notify chargeability, but as the disclosure had been unprompted, and as Mr Redman had fully co-operated with HMRC, the penalties were mitigated to the minimum permitted by the legislation, namely 20% of the tax liability for the relevant years.

13. If the Tribunal were to decide, in the alternative, that Mr Redman had been careless and had not acted deliberately, the parties asked the Tribunal to impose penalties on the same basis, namely that disclosure had been unprompted and Mr Redman had fully co-operated with HMRC. This would have resulted in a penalty of £20,135 for 2011-12 and nil for 2012-13, because the tax was paid within twelve months (see Sch 41, para 13).

The evidence

14. The Tribunal was provided with a bundle of documents from HMRC, which included:

(1) correspondence between HMRC and Mr Redman;

(2) correspondence between HMRC and Myers Clark, the firm of Chartered Accountants who prepared Mr Redman's self-assessment ("SA") returns; and between HMRC and Mr Perry;

(3) a Myers Clark engagement letter signed by Mr Redman, dated 11 May 2009;

(4) notes of telephone conversations between HMRC and Mr Richard Horn of Myers Clark, and between HMRC and Mr Perry;

(5) emails between Mr Horn and Mr Redman, and between Mr Redman and Mr Power, another accountant who was briefly instructed by Mr Redman in 2011;

(6) a chronological summary prepared by Mr Horn from 10 January 2011 to 9 May 2014;

(7) schedules to Mr Redman's SA returns for the 2011-12 and 2012-13 fiscal years.

15. As already noted, Mr Duffy provided a witness statement with exhibits. He also gave oral evidence and was cross-examined by Mr Perry. We found him to be a credible witness.

The facts

16. On the basis of the evidence provided, the Tribunal finds the following facts.

17. Mr Redman is an evangelical Christian who earns his living as a self-employed singer/songwriter and musician. He began his self-employment in 1996 and worked

in the UK. On 11 May 2009 he signed an engagement letter with Myers Clark; this refers to the fact that the firm had submitted a form 64-8, authorising them to act as Mr Redman's agent for tax purposes.

18. In 2008-09 Mr Redman moved to the USA and worked there, paying US tax. He returned to the UK during the 2011-12 tax year. On 21 March 2011, he emailed Mr Power, an accountant who lived locally, and said he needed help with his tax, which was not straightforward as he continued to work some of the time in the US and receive income from his engagements in that country. His email explained the position and said "I'd love some advice on all this" and asked Mr Power to arrange a meeting to discuss his tax position.

19. That meeting was held on 4 May 2011; Mr Redman's subsequent email says it was "very helpful" to discuss his tax with Mr Power, and said "the important thing to do quite soon is to figure out what % of Beth [his wife] and my earnings we should be setting aside for future tax payments".

20. However, in September 2011, Mr Redman decided to revert to Myers Clark, and held a meeting with that firm on 4 October 2011. Mr Horn asked Mr Redman to provide the dates on which he had been in the UK since 5 April 2009, and reminded him that his SA return for 2008-9 was overdue.

21. Mr Horn continued to press Mr Redman for the details he needed to establish when he had become UK resident. On 23 January 2012 Mr Redman provided the dates for 2010-11, but not for the later period.

22. On 21 March 2012 Mr Horn told Mr Redman that, if his 2010-11 SA returns were not submitted by the end of April 2012, he would incur penalties of £10 a day and a further £300 after 6 months, plus a 5% surcharge on late paid tax. Myers Clark issued further reminders to Mr Redman in April 2012; Mr Horn offered to visit him at home but the offer was not taken up; he then warned again about SA penalties.

23. On 7 May 2012 Mr Redman replied, saying he was just back from a European tour and would attend to the matters without further delay. On 23 May 2012 he provided the relevant dates, but Mr Horn had some follow-up questions. He continued to put pressure on Mr Redman to attend to his tax affairs. On 11 August 2012, Mr Redman said he was on a US tour and would deal with it on his return; Mr Horn responded by warning that he would have accumulated penalties of at least £1,300.

24. On 7 October 2012 Mr Redman replied, saying he "found the whole tax thing very stressful" and he appreciated he would have to pay some penalties. He promised to get the relevant information to Mr Horn, and on 22 October 2012 he provided the dates for 2011-12, but this was only part of the information required. Mr Horn continued to press him, making contact at least once a month.

25. On 10 December 2012, HMRC issued a determination for the tax year 2009-10. This prompted Mr Redman to work with Mr Horn to finalise the position, so that

Myers Clark was able to submit that year's SA return. On the basis of that return, HMRC accepted that Mr Redman was non-resident in 2010-11.

26. On 4 January 2013, Mr Horn wrote to Mr Redman, saying:

> "Aside from 2010-11 being a year late, I'd remind you that your 2011-12 tax returns are due at the end of this month – but as these will be dependent on accounts then I think you may have to accept the possibility of not meeting the 31 January deadline."

27. In July 2013, Mr Redman told Mr Horn that he had US tax complications which were not his fault, but which had proved very stressful. There was then another gap, with Mr Redman sending Mr Horn a long email in December 2013, saying that he was finding the tax position "intimidating and a daily pressure". Over the next four months he provided the necessary information to Mr Horn.

28. However, when Mr Horn tried to file Mr Redman's 2011-12 and 2012-13 SA returns in April 2014, he was unable to do so, because HMRC had removed Mr Redman from the SA system on 18 December 2011 for years after 2010-11.

29. On 28 April 2014 Mr Horn called HMRC to notify chargeability on behalf of Mr Redman. On 7 May 2014, he wrote to HMRC saying (emphasis added):

> "Only when recently coming to submit Mr Redman's late 2011-12 and 2012-13 SA tax returns did we realise that HM Revenue & Customs appeared to have removed our client from Self-Assessment after 2010-11, not issuing tax return notices for those two later years.
>
> This left Mr Redman not with late tax returns but with effective failure to notify liability under s 7 TMA 1970 for the affected years. We understand from you that your records show that the removal from SA occurred on 18 December 2011. <u>We have no evidence of this ever having been notified to our client or us.</u>"

30. Neither Mr Perry nor Ms Adams had identified the importance of this issue until the hearing. We therefore adjourned the proceedings to give the parties an opportunity to provide evidence as to whether HMRC had informed Mr Redman and/or Myers Clark that Mr Redman had been removed from SA.

31. However, shortly before the date of that relisted hearing, the Tribunal was told that neither party had any further evidence on that issue, and the further hearing was cancelled.

32. We therefore had to decide on the basis of the evidence which had already been provided, whether HMRC had notified Mr Redman and/or Mr Horn that he had been removed from the SA system. We took into account the following:

(1) Mr Horn reiterated the warnings about daily and six month penalties and told him, in January 2013, that he was about to miss the 2011-12 filing deadline. This is very strong evidence that he genuinely believed Mr Redman remained in SA;

(2) Mr Horn successfully filed Mr Redman's 2009-10 return in December 2012 using the SA system;

(3) Mr Horn's evidence in his letter to Mr Duffy in May 2014 is that neither he nor Mr Redman had been notified that he had been removed from the SA system; HMRC did not challenge this evidence;

(4) although Mr Redman failed to give his tax affairs the attention they required, the evidence shows that he always believed he had to complete SA tax returns and accepted that he would have to pay penalties for late filing of those returns, and late payment of the related tax;

(5) HMRC was given the opportunity to provide evidence from their SA system to show that they told Mr Redman and/or Myers Clark, who was Mr Redman's authorised agent, that he had been taken out of SA, but they provided no evidence.

33. We therefore find as facts that neither Mr Redman, nor Myers Clark, was aware that Mr Redman had been removed from the SA system, and that this was because HMRC did not issue any notification of his removal.

34. HMRC levied penalties on the basis that Mr Redman's failure to notify had been deliberate. Mr Redman appealed, and his appeal in due course reached the Tribunal.

The law and its application to Mr Redman

35. We considered the meaning of deliberate, and the meaning of careless, and whether either applied to Mr Redman's behaviour.

Deliberate?

36. In *Tooth v HMRC* [2018] UKUT 38 (TCC) ("*Tooth*") at [55] the Upper Tribunal (Smith J and Judge Hellier) said, in the context of the TMA, that "deliberate" applied where there was "a most serious case, tantamount to fraud"; this is reiterated at [63] where the UT says that "an allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud".

37. There have also been various First-tier Tribunal ("FTT") decisions, which were helpfully summarised by Judge Swami Ragavan in *Dorothy Lyth v HMRC* [2017] UKFTT 549 (TC):

> [23] In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the tribunal, noting that the legislation did not further define the word 'deliberate', took the view (at [62]) that 'a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document'. The tribunal emphasised this was a subjective test and that the question was not whether a reasonable taxpayer might have made the same error or even whether the taxpayer failed to take all reasonable steps to ensure that the return was accurate, 'it is a question of knowledge and intention of the particular taxpayer at the time.' In *Salim Miah v HMRC* [2016] UK FTT 644 (TC) put the

> meaning in a similar way (at [44]); something was 'deliberate' if it had been 'thought about'. The penalty there (which concerned a sale which should have been reported on a VAT return was deliberate if the appellant 'knew that the sale should been reported on...the...return but decided that it should not be'. Similarly in *Bhagya Raj Subbrayan t/a Swiss Cottage Diet Clinic v HMRC* [2013] UKFTT 161 (TC) the tribunal, in finding the taxpayer's conduct there had been deliberate because 'she must have known that the amount of taxable income shown on her return was less than her actual income...', used a test of knowledge of the inaccuracy.
>
> [24] However in *Anthony Clynes v HMRC* [2016] UKFTT 644 (TC) the tribunal considered (at [86]) that an inaccuracy 'may also be held to be deliberate where it is found that the person consciously or intentionally chose not find out the correct position, in particular where the circumstances are such that the person knew that he should do so.'"

38. It is clear from *Tooth* and from these other FTT judgments, that a person can be liable to a penalty for a "deliberate" failure to notify liability, only if he knew about that obligation and decided not to comply, or (possibly), if he intentionally chose not to find out the true position, even though he knew that he should do so.

39. We have found as a fact that Mr Redman and Myers Clark were unaware that he had been taken out of the SA system, so he did not know about the obligation and decided not to comply, and he did not intentionally shut his eyes to the true position. It is therefore not possible for Mr Redman to be liable to a penalty for deliberate failure to notify.

Careless?

40. HMRC submitted, in the alternative, that Mr Redman had been careless. Mr Perry's position was that Mr Redman had a reasonable excuse for his failure to notify.

41. In *Perrin v HMRC* [2018] UKUT 156 at [81] the Upper Tribunal ("UT") has recently set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question

"was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time. In doing so, the Tribunal should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

42. The Tribunal has found as a fact that neither Mr Redman nor Myers Clark was informed that he had been removed from the SA system. That is an objectively reasonable excuse for a person in Mr Redman's position. He had been in the SA system since 1996. He knew he had missed the filing deadlines, but he had no reason to think he had an obligation to notify chargeability.

43. Mr Horn called HMRC very soon after he became aware that he was unable to file Mr Redman's 2011-12 and 2012-13 returns, in order to notify liability to tax under TMA s 7. Thus, the failure to notify was remedied "without unreasonable delay" after Mr Horn had been informed of the position.

44. The Tribunal therefore finds that Mr Redman has a reasonable excuse for his failure to notify.

Decision and appeal rights

45. Mr Redman's appeal is allowed, and the penalties are cancelled.

46. This document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. 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.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 11 December 2018

APPENDIX

TAXES MANAGEMENT ACT 1970

7 Notice of liability to income tax and capital gains tax

(1) Every person who–

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

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

FINANCE ACT 2008
SCHEDULE 41 PENALTIES: FAILURE TO NOTIFY AND CERTAIN VAT AND EXCISE WRONGDOING

FAILURE TO NOTIFY ETC

1. A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

Tax to which obligation relates	*Obligation*
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

DEGREES OF CULPABILITY

5

(1) A failure by P to comply with a relevant obligation is--

(*a*) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(*b*) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation.

AMOUNT OF PENALTY: STANDARD AMOUNT

6

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the failure is in category 1, the penalty is--

(*a*) for a deliberate and concealed failure, 100% of the potential lost revenue,

(*b*) for a deliberate but not concealed failure, 70% of the potential lost revenue, and

(*c*) for any other case, 30% of the potential lost revenue.

POTENTIAL LOST REVENUE

7

(1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is as follows.

(2) In the case of a relevant obligation relating to income tax or capital gains tax and a tax year, the potential lost revenue is so much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

REDUCTIONS FOR DISCLOSURE

12

(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by--

(*a*) telling HMRC about it,

(*b*) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(*c*) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure--

(*a*) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(*b*) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

13.

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it--

(*a*) for a prompted disclosure, in column 2 of the Table, and

(*b*) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B--

(*a*) the case A minimum applies if--

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

(*b*) otherwise, the case B minimum applies.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	case A: 10% case B: 20%	case A: 0% case B: 10%
45%	case A: 15% case B: 30%	case A: 0% case B: 15%
60%	case A: 20% case B: 40%	case A: 0% case B: 20%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%

REASONABLE EXCUSE

20

(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or [(on an appeal notified to the tribunal) the tribunal][1] that there is a reasonable excuse for the act or 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 relevant act or failure, and

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