[2019] UKFTT 0544 (TC)

TC07338

INCOME TAX—Late payment penalties (FA 2009 Sch 56)—Reasonable excuse—Special circumstances

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/07523

BETWEEN

BARBARA ROWLAND **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR CHRISTOPHER JENKINS

Sitting in public at Bournemouth on 8 August 2019

The Appellant in person, assisted by Miss A Watson, Tax Agent

Mr J Kruyer, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against penalties imposed under Schedule 56 to the Finance Act 2009 for late payment of income tax in respect of tax years 2012-13 to 2015-16 respectively.

2. The Appellant is a medical practitioner. For certain periods she has worked as a GP, and for other periods she has worked for South Western Ambulance Service NHS Foundation Trust ("SWASFT").

3. At the hearing, the Tribunal dismissed the appeal. The Appellant requested full written reasons, which are now provided.

PROCEDURAL HISTORY

4. This appeal was commenced by a notice of appeal generated on 10 October 2017. The notice of appeal did not identify the HMRC decision appealed against. It attached a letter from HMRC Debt Management dated 6 October 2017, which indicated that bankruptcy proceedings had been brought against the Appellant, and stated the amount of the petition debt. It also attached a letter from Miss Watson, the Appellant's tax agent, to a firm of solicitors who appeared to be acting for the Appellant in the bankruptcy proceedings.

5. On 9 November 2019, HMRC made an application for further and better particulars in the case, noting that no decision letter was attached, that it was unclear which liabilities were being appealed against, that some of the outstanding liabilities were based on the Appellant's own tax returns, that some of the appeal might be time barred, and that there is no appeal to the Tribunal against interest charges.

6. On 6 December 2017, the Tribunal requested the parties to advise the Tribunal on the outcome of the bankruptcy proceedings that had been scheduled to take place on 21 November 2017.

7. By a letter dated 19 December 2017, the Appellant responded as follows. The bankruptcy proceedings had been adjourned to 21 November 2017. The Appellant indicated that the appeal was against (1) the way that HMRC had allocated payments made by her to HMRC, (2) unfair interest charges, and (3) the fact that she had been required to pay PAYE tax following the introduction of IR35 when she was in fact self-employed. In an e-mail of the same date, the Appellant requested the Tribunal to grant her an extension until January 2018 to prepare a full and accurate submission. However, in a subsequent e-mail she stated that no further response would be made by her to confirm the details of her appeal, and that she presumed that HMRC and then she would be given 40 and 60 days respectively to state their cases.

8. On 26 April 2018, HMRC submitted its statement of case.

9. On 7 June 2018, the Tribunal issued directions, setting dates by which the parties were to provide lists of documents, listing information, and statements of authorities, and dates by which HMRC were to provide bundles.

10. On 27 June 2018, the Appellant confirmed that she did not intend to call any witnesses, gave dates to avoid, and stated that "Documents include my submission and my accountant's submission already sent to all parties".

11. On 5 July 2018, HMRC provided a list of documents and dates to avoid, and confirmed that HMRC proposed to call no witnesses.

12. On 6 August 2018, the appeal was listed for hearing on 22 October 2018.

13. On 14 October 2018, the Appellant requested an adjournment of the hearing on grounds of late service by HMRC of the hearing bundle. On 16 October 2018, HMRC consented to this adjournment, but on 17 October 2018, the Tribunal issued a direction refusing the application for the adjournment.

14. The hearing on 22 October 2018 proceeded before Tribunal Judge Staker and Tribunal Member Batten. At the hearing, it became apparent that it was still not clear exactly what the Appellant was appealing against, and it also became apparent that documents for some of the matters raised by the Appellant were not before the Tribunal. In particular, the Appellant had entered into an individual voluntary arrangement ("IVA") in 2008 to pay off her then existing debts to HMRC, and it appeared that following this she had been given a new UTR by HMRC. The hearing bundle did not include documents relating to the IVA, or all self-assessment statements for both of the two UTRs.

15. The Tribunal accordingly adjourned the appeal, and issued directions to the following effect. By 12 November 2018, HMRC was to provide the Appellant with self-assessment statements relating to the two UTRs and documents relating to the IVA. By 12 December 2018, the Appellant was to send the Tribunal and HMRC a statement setting out which items in the self assessment statements the Appellant claimed to be wrong and why, and evidence in support of such claims on which the Appellant wished to rely in the appeal. HMRC was given until 9 January 2019 to submit a reply to anything submitted by the Appellant. By 23 January 2019, the Tribunal was to be sent an agreed draft of directions for the further conduct of the appeal, or in the absence of agreement between the parties, each party was to send the Tribunal their own proposed draft directions.

16. HMRC subsequently applied for and was granted an extension of time for complying with that direction.

17. Under cover of a letter dated 4 January 2019, in response to the direction, the Appellant sent a number of documents to the Tribunal. The covering letter set out the points that she wished the Tribunal to consider. These were still stated in rather brief terms. The covering letter indicated that the Appellant was contending as follows. (1) She considered that she was correctly to be regarded as self-employed, and therefore moneys paid to HMRC under PAYE should be refunded to her. (2) When her IVA was completed in September 2013 she believed that she was starting in October 2013 with a clean slate and that her tax liabilities would start from that date. She had no idea that she would after October 2013 continue to have tax liabilities in relation to periods before October 2013. (3) Had her tax been calculated from October 2013, the effect of payments she has made to HMRC would be that she owed just over £1,000 for 2016-17 and that she would then owe further tax once her 2017-18 return was submitted.

18. On 12 February 2019, HMRC sent to the Tribunal the agreed draft directions for the further conduct of the appeal. In effect, the draft provided simply that the appeal would be listed for a further hearing. On 26 March 2019, the Tribunal made a direction in those terms.

THE HEARING

19. The directions made following the 22 October 2018 hearing (paragraph 15 above) had been intended to ensure that at the subsequent hearing it would be clear just exactly what decisions of HMRC were appealed against and on what grounds, and that all relevant documents would be before the Tribunal. Regrettably, the intended purpose was not achieved.

20. At the hearing, the Appellant represented herself, but was assisted by her tax agent, Miss Watson. HMRC were represented by Mr Kruyer, who had also been present at the 22 October 2018 hearing.

21. The hearing was conducted in a very informal manner. It was explained to the Appellant and Miss Watson at the outset that the Tribunal would not adopt the formality of requiring witnesses to take an oath or affirmation, and that anything said in the course of presentation of the Appellant's case concerning factual matters would be regarded as oral evidence. Statements regarding facts made by both the Appellant and Miss Watson have been treated as evidence.

22. The Tribunal had before it the bundle of documents that had been produced for the 22 October 2018 hearing. HMRC had additionally produced two further bundles of documents (referred to as the "supplementary bundle" and the "additional bundle").

23. At the outset of the hearing, the Tribunal explained to the Appellant that it had a limited jurisdiction to hear appeals against certain decisions of HMRC, but not all decisions of HMRC, and that it was therefore necessary to identify exactly which HMRC decisions she was appealing against. Having identified the relevant decisions, the Tribunal needed to satisfy itself that it had jurisdiction to hear an appeal against them, and if so, then to ascertain the Appellant's grounds of appeal against those particular decisions.

24. Unfortunately, both the Appellant and Miss Watson, as well as Mr Kruyer, seemed uncertain at the beginning of the hearing exactly which HMRC decisions were being appealed against.

25. In order to seek to ascertain whether any appealable decisions could be identified, the Tribunal posed certain questions to the parties. This had the result that the hearing became a relatively informal discussion between all parties.

26. The Tribunal felt that the Appellant spoke in terms that were often very general, or vague. On various occasions, the Tribunal explained to the Appellant what the Tribunal had understood her to be saying, and invited her to confirm whether that was correct, and if not, to restate what she was saying. On more than one occasion the Tribunal felt that the Appellant, after confirming to the Tribunal that its understanding of what she had said was correct, had gone on to say something that appeared possibly to contradict that understanding. When this occurred, the Tribunal again stated to the Appellant its understanding of what she was saying, and again asked her to confirm whether or not it was correct.

27. At the hearing, the Appellant ultimately confirmed as follows. She did not dispute the amount of tax to which she was liable for each of the tax years relevant to this appeal, the amounts for each of the years having been taken from her own tax returns. She did not dispute that the payments made by her to HMRC were made on the dates and in the amounts claimed by HMRC. She accepted that she did not, before or at the time of making each of these payments, specify to HMRC to which liability the relevant payment was to be allocated.

28. The Appellant explained to the Tribunal how she had entered into the IVA in 2008. HMRC contended at the hearing that the IVA, when it was entered into, covered only the Appellant's tax liabilities in respect of the period until 5 April 2009. The Appellant accepted this.

29. The Appellant then explained that her IVA ended in October 2013, after a period of 5 years. HMRC did not seek to dispute this. She said that during the period of the IVA, there were annual reviews of her payments into the IVA. At these annual reviews, the insolvency practitioner supervising her IVA would look at her annual income and expenditure, and consider how much she could currently afford to pay into the IVA.

30. The Appellant stated that her understanding when she entered into the IVA was that she would emerge at the end of the 5 year period debt free. During the period of the IVA she was required to make the required payments into the IVA, and at the end of the IVA, any amount of the debts that remained unpaid would be written off.

31. The Appellant said that she therefore believed, when she entered into the IVA and thereafter, that with each passing year during the period of the IVA, an additional year's tax liability would be added to the IVA. In other words, she believed that her tax liability in respect of the 5 year period that the IVA lasted would be added to the IVA itself, so that when the IVA ended, any tax liability for that period which had not been paid through the payments into the IVA itself would be written off.

32. The Appellant said that she never imagined that when the IVA ended in in October 2013, she would emerge with a tax liability in respect of the 5 year period from October 2008 to October 2013. She said that this was inconsistent with her belief that in October 2013, when the IVA ended, she would be debt free.

33. At the hearing, the Appellant ultimately accepted that her tax liability in respect of the period from 6 April 2009 until the IVA ended in October 2013 was not part of the IVA. This had been a misunderstanding on her part. The Appellant did not seek to establish that her IVA actually covered debts incurred after approval of her IVA.

34. Ultimately, the Appellant confirmed at the hearing as follows. She was challenging the penalties imposed by HMRC for late payment of tax (variously 30 day late payment penalties, 6 month late payment penalties, and 12 month late payment penalties) in respect of tax years 2012-13, 2013-14, 2014-15 and 2015-16, as set out in the table at paragraph 1.1 of the HMRC statement of case. She accepted that the penalties had been correctly imposed in accordance with the legislation (Schedule 56 to the Finance Act 2009), subject to the question whether she had a reasonable excuse for the late payment, or whether there were special circumstances justifying a special reduction.

35. The Appellant clarified that she no longer sought to appeal against any late filing penalty. The Tribunal determined that it had no jurisdiction to entertain any appeal against interest charges.

THE APPELLANT'S GROUNDS

36. At the hearing, the Appellant ultimately contended that the following constituted reasonable excuses for the late payment, or alternatively, special circumstances justifying a special reduction.

37. First, even if her tax liabilities in respect of the period 6 April 2009 until October 2013 were not included in the IVA, she reasonably believed that they were. Consequently, when the IVA ended in October 2013, she believed that she had no tax liabilities at that point. When making payments to HMRC after October 2013, she believed that she was making payments in respect of the 2013-14 tax year. She did not realise that HMRC was allocating payments to earlier tax years, in respect of which tax liabilities still existed, such that her payments for 2013-14 were ultimately late. This had a knock-on effect in all of the subsequent tax years to which this appeal relates. Thus, when she thought she was making payments in respect of 2015-16, HMRC were still allocating these payments to earlier liabilities which the Appellant reasonably thought had already been paid. The fact that interest charges were contrary to her knowledge being added to unpaid liabilities brought her even further into arrears. Had all of the payments made by her after October 2013 been allocated to the 2013-14 and subsequent tax years only,

she would not have incurred late payment penalties in respect of those years (or alternatively, the late payment penalties would have been much less).

38. Secondly, her cash flow was affected by an unforeseen decision of SWASFT. Until 5 April 2017, she had been working for SWASFT on a self-employed basis, and receiving payment from SWASFT without deduction of income tax and employee NICs. In a letter dated 4 April 2017, the Appellant was notified by SWASFT that with effect from 6 April 2017, SWASFT would only engage GP services through personal service companies (PSCs). This meant that from 6 April 2017, the Appellant received payments from SWASFT with PAYE tax and employee NICs deducted. These deductions were paid by her employer to HMRC which then allocated them to the 2017-18 tax year. However, these deductions diminished the Appellant's cash flow, and reduced the amount available to her for payment of her existing outstanding tax liabilities.

THE TRIBUNAL'S FINDINGS

39. It is unnecessary to set out the evidence in full. The Tribunal refers only to the principal evidence relevant to its decision.

40. The burden of proof is on the Appellant to establish by evidence the existence of the circumstances relied on by her as constituting a reasonable excuse or special circumstances. The standard of proof is the balance of probability. This means that the Tribunal must be satisfied on the evidence that it is more probable than not that the circumstances relied upon by the Appellant existed.

41. The Appellant has produced almost no documentary evidence relating to the IVA. She has produced, for instance, the supervisor's final report to creditors. However, she has produced no documents that in any way support her claim that she reasonably believed on the basis of what she was told at the time that her tax liabilities in respect of the period from 6 April 2009 until October 2013 would be covered by the IVA.

42. Her own oral evidence about the basis for her belief that this was the case was vague and general. Ultimately, her case is that she had fixed in her mind the idea that she would emerge from the IVA in October 2013 debt free.

43. At the hearing, she was asked more specific questions, to which she did not give clear answers. She was asked whether the IVA supervisor, at the annual meetings where he determined her capacity to make payments into the IVA, did not take into account the fact that she had newly accruing tax liabilities. She said that he did, but she did not explain why she thought the IVA supervisor treated these newly accruing tax liabilities as covered by the IVA. At one point in the hearing she said that everything she earned during the period of the IVA was paid into an account controlled by the IVA supervisor. She later said that her earnings were in fact paid into an account controlled by her but that each payment she made from that account had to be approved by the IVA supervisor. She later said that her account was merely "visible" to the IVA supervisor.

44. It was noted that during the period of the IVA, she made various payments of tax to HMRC. She was asked whether these payments were made by her or by the IVA supervisor. At first she said that she did not recall. Later, when she appeared to be saying that her account was controlled by the IVA supervisor, it was put to her that it must therefore have been the IVA supervisor who had made the payments. Later, when she said that the IVA supervisor only needed to approve each of her payments, it was put to her that she must have explained to the IVA supervisor why she was making these payments to HMRC, which would have led to her discussing with the IVA supervisor which tax liabilities she needed to pay herself and which

were covered by the IVA. When she later said that her account was merely "visible" to the IVA supervisor, it was put to her that she must have been aware that she was required to pay tax liabilities accruing after 6 April 2009, since there was no reason why she would have made tax payments to HMRC in this period them if she thought all of her tax liabilities were covered by her payments to the IVA. The Appellant failed to give clear answers to these matters.

45. HMRC has produced extracts from its IDMS database recording communications between HMRC and the IVA supervisor, the Appellant and her agent during the period of the IVA. These indicate that the IVA supervisor, the Appellant and her agent were aware at the time that the Appellant was continuing to accrue tax liabilities in respect of the period after the IVA had been entered into. For instance, an entry dated 14 December 2010 states that "Agent phoned and I explained that there are POA [payments on account] due for 2009/10 and I will not authorise variation unless it is paid". An entry dated 21 July 2011 states "Letter from Supr [IVA supervisor] confirming TP's [taxpayer's] agreement to TTP [time to pay] to clear post arrangement debt". This suggests that the IVA supervisor was discussing with the Appellant her liability to pay tax in respect of the period after 6 April 2009. An entry dated 14 February 2012 states "Post VA [IVA] debt stands at £25,214.77. Letter to Supr [IVA supervisor] instructing them to initiate BY [bankruptcy] if payment in full not made by 6/3/12". An entry dated 4 July 2012 states "Letter to TP [taxpayer] with full update, rejecting the request for a 2nd TTP [time to pay], copy to Supr [IVA supervisor]". An entry dated 19 July 2012 states "Further TTP [time to pay] proposal received from accountant".

46. At the hearing, Miss Watson confirmed that she was the Appellant's agent at the time, and that any references in these notes to the "agent" or the "accountant" would have been references to her.

47. The Appellant stated that at the time she was not receiving mail from HMRC. She acknowledged that the address HMRC had on record for her was the last address she had officially notified to HMRC as her address for correspondence. However, she said that she was moving around a lot at the time and not receiving mail. She said that various parts of HMRC with whom she had contact at the time would have been aware of different contact details for her at different times.

48. On the evidence before it, the Tribunal finds that the Appellant has not discharged the burden of establishing, on a balance of probability, that she has a reasonable excuse for the late payments on the ground that she thought that she had no tax liabilities in respect of the period from 6 April 2009 to October 2013. The Tribunal finds it more likely than not that she was well aware during the course of the IVA that she was continuing to accrue tax liabilities in respect of the period after 6 April 2009, and that she was discussing the situation with her accountant and the IVA supervisor.

49. Furthermore, and in any event, even if she was unaware that she was continuing to accrue tax liabilities, the Tribunal finds that she has not established that it was reasonable for her to believe that she was not continuing to accrue tax liabilities. A reasonable taxpayer, when entering into an IVA, can be expected to ascertain exactly what the effects and consequences of the IVA will be. *Perrin v HMRC* [2018] UKUT 156 (TCC) requires the Tribunal to consider amongst other matters the experience, knowledge and other attributes of this particular Appellant, as well as the situation in which she was at the relevant time. The Appellant is a medical practitioner. She had at the time the services of an accountant, and an IVA supervisor was communicating with her. She had no reason reasonably not to know that tax liabilities were continuing to accrue after 6 April 2009. There is also no reason why she should not reasonably have been expected to inform HMRC of changes of address, or to make

arrangements for mail to be forwarded to her if she was not at the address held on record for her by HMRC.

50. In relation to the Appellant's ground, referred to in paragraph 38 above, the Appellant has also not discharged the burden of establishing a reasonable excuse on a balance of probability. The Appellant has not produced evidence to show what was her financial position on 6 April 2017. She has not shown that there were particular tax payments that she could have, and would have, paid after 6 April 2017, but for the fact that PAYE and NIC deductions after that date made this impossible.

51. For similar reasons, the Appellant has not shown that there are special circumstances justifying a special reduction in the penalty.

CONCLUSION

52. The appeal is accordingly dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

53. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 20 AUGUST 2019