[2018] UKFTT 0527 (TC)

TC06697

Appeal number: TC/2017/09120

INCOME TAX – penalty for failure to make returns-whether notice to file valid-tribunal jurisdiction—whether penalties due-reasonable excuse

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL KENZIE GRIFFITHS **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 25 August 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 14 December 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 February 2018, the Appellant's Reply dated 22 March 2018 (with enclosures) and HMRC's further submissions dated 21 June 2018 and the Appellant's further submissions dated 18 July 2018 made following Directions by the tribunal released on 23 May 2018.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit a self-assessment return for the tax year 2013-14 on time.

2. The penalties that have been charged can be summarised as follows:

   (1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 8 November 2016

   (2) a £300 "six month" penalty under paragraph 5 of Schedule 55 imposed on 9 May 2017

   (3) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 9 May 2017.

3. In their Statement of Case, HMRC stated that they would not be putting forward a case for the daily penalties and the tribunal should therefore allow that aspect of the appeal.

4. The appellant's grounds for appealing against the penalties can be summarised as follows:

   (1) He argues that the penalties are not due because the notice to file a tax return was invalid.

   (2) He argues that there was a "reasonable excuse" for any failure to submit the return on time.

5. The appellant's appeal was notified to the Tribunal late. However, since HMRC have stated that they are not objecting to the late notification, I give permission under s49G(3) or s49H(3) of the Taxes Management Act 1970 for the appeal to be notified late.

Findings of fact

6. According to HMRC's computer system, they sent a notice to file to Mr Griffiths on 28 July 2016. As this was outside the normal self-assessment cycle, the filing date for both an online and a paper return was 4 November 2016.

7. The return was submitted online, by Mr Griffiths' agent on 8 June 2017.

8. Mr Griffiths left school in his teens with no formal qualifications and at the time of the appeal was 45 years old. He is a lorry driver earning £18,000 to £20,000 a year. He has been in the haulage industry since leaving school and throughout that time has been within the PAYE system. Mr Griffiths' agent states that whilst Mr Griffiths is aware of coding notices, he has little or no knowledge of other matters connected with the tax system and its administration and had had little interaction with HMRC. He had never previously been required to complete a tax

return and the notice to file was the culmination of a series of unfortunate events originating in an error by HMRC.

9. On 31 May 2014 Mr Griffiths was sent a PAYE tax calculation for the tax year 2013-14. The calculation was issued automatically by computer and showed an overpayment of £579.80. This was wrong as it only took into account one of Mr Griffiths' two employments. On 1 June 2014, HMRC issued a payable order in respect of the "overpayment" which was actually paid to Mr Griffiths on 3 June 2014. Mr Griffiths banked the order.

10. On 2 June 2014, that is before the repayment was paid, a revised PAYE calculation was sent to Mr Griffiths showing an underpayment of tax of £581.60. Mr Griffiths had in fact underpaid tax of 80 pence. The balance of the underpayment was a result of HMRC's erroneous repayment.

11. Mr Griffiths states that he telephoned HMRC a short time after receiving these documents and was assured that the underpayment would be collected through a change in his coding. HMRC does not have a record of this call and Mr Griffiths did not keep a record of the precise date or what was said. However, HMRC's "customer service" at the time, to say the least, left a lot to be desired. The Tribunal in *Marc Capuano v HMRC* [2018] UKFTT 5 commented on the criticisms by the National Audit Commission and the House of Commons Public Accounts Committee in that period. The fact that HMRC did not have a record of the phone call does not mean it was not made. Mr Griffiths' subsequent actions are consistent with there having been such a phone call and I find, on the balance of probabilities, that it did take place.

12. HMRC concede that, normally, the underpayment would have been "coded out", but Mr Griffiths' income at the time was so low that HMRC were unable to do this.

13. Mr Griffiths heard nothing from HMRC for over eight months and assumed the matter had been dealt with. On 25 January 2015, HMRC sent Mr Griffiths an unpaid income tax letter or "voluntary payment letter-VPL1". HMRC do not keep copies of VPLs sent to individual taxpayers, but provided a blank copy of the form. It asks the taxpayer to check the underpayment shown in the tax calculation and sets out ways in which the tax might be repaid. It states that they would normally collect the tax by a coding adjustment but cannot in "your" case for one of three reasons. There is nothing to show that the letter was made specific to a particular taxpayer and this could be confusing. The letter sets out that if the taxpayer does not pay, they will consider collecting the amount through the self assessment system and the taxpayer will have to fill in a tax return.

14. On 2 February 2015 Mr Griffiths telephoned HMRC, presumably in response to this letter. This time, the call was recorded. In fact there are two records. It is unclear whether this represented one or two calls, but as they are timed a minute apart and have the same operator ID, I infer it was a single call. As is usual, the record of the "actions" is quite cryptic. The first states "ADV UPAID 13/04

[presumably 13/14] AS REPYT ISSD THAT WAS INCORRECT AS DIDN'T SHOW TOTAL INC." This presumable means that Mr Griffiths was told that the underpayment for the 2013/14 tax year arose because an erroneous repayment was made as the system showed an incorrect amount for his total income. The second record states "SAID STILL AT SPIRALWAY. ADV NEEDED TO SPEAK TO P/ROLL AS P45 RECVD. SHOULD BE ABLE TO COLLECT P800 UPYT THROUGH CODE". It seems HMRC thought that Mr Griffiths was no longer employed by one of his employers, Spiralway. Mr Griffiths said he was still employed, but he left soon afterwards. The final part is consistent with Mr Griffiths statement that he was assured in that phone call (as well as the previous one) that the underpaid tax would be collected through an adjustment to his tax code. Other than this, there is nothing to indicate how much of the conversation Mr Griffiths actually understood. HMRC's Review Conclusion Letter of 12 October 2017 wrongly stated that HMRC had told Mr Griffiths the underpayment could not be coded out, although the Statement of Case, stated the correct position.

15. A further VPL in the same generic form as the earlier one was sent to Mr Griffiths on 19 April 2015. Mr Griffiths did not respond in the light of the previous telephone conversations.

16. Nothing happened for nearly a year, then further VPLs were sent on 1 February 2016 and 19 April 2016. A notice to file for the tax year 2013/14 was issued on 28 July 2016.

17. Mr Griffiths could not understand why he had been asked to complete a tax return. He thought this was something which applied to the self employed. This suggests that he had not understood the VPLs which referred to the possibility that he might be required to complete a tax return. He was also suspicious of the subsequent penalty notices as he thought these could be a scam, there having been a number of scams by people purporting to be from HMRC at the time. Mr Griffiths instructed an agent in April 2017 after he received a letter from HMRC telling him that his tax return was late and penalties were accruing. The Review Conclusion Letter indicated that this prompted him to telephone HMRC and he was told he needed to submit the tax return.

Discussion

18. Relevant statutory provisions are included as an Appendix to this decision.

19. I have concluded that the tax return for the 2013-14 tax year was submitted on or around 8 June 2017. It should have been submitted by 4 November 2016. Subject to considerations of the validity of the notice to file and of "reasonable excuse" set out below, the penalties imposed are due and have been calculated correctly.

Can the tribunal consider the validity of the notice to file?

20. The burden of proof lies on HMRC to show that the penalties were validly imposed. Paragraph 1 of Schedule 55 imposes penalties on a person who fails to

file a return which is subject to the schedule. This includes a return under section 8(1)(a) Taxes Management Act 1970 ("Section 8") ("TMA"). So if a notice to file, purportedly given under section 8, is not validly given, the return is not "under section 8". It is not within the scope of schedule 55 and penalties cannot be charged for a failure to file it. This issue has been considered in a number of recent First Tier Tribunal cases. Whilst these are not binding on me, they provide much useful analysis.

21. The first question is whether the tribunal has jurisdiction to consider the validity of the penalty assessment and the notice on which the assessment is based.

22. In *Crawford v HMRC* [2018] UKFTT 0392, *David Goldsmith* v HMRC [2018] UKFTT 005, *Barry Lennon v HMRC* [2018] UKFTT 0220 and *Abid Mansoor v HMRC* [2018] UKFTT 288, the respective tribunals concluded that there was such jurisdiction.

23. In *Crawford*, Judge Mosedale said:

> "It seems to me that where there is a right to appeal against a penalty, it is implicit that it is a right to appeal whether that penalty is payable in law; and a penalty for non-compliance is not validly imposed where there is no non-compliance. There is no non-compliance where there is no underlying obligation: if the notice to file was invalid, it was not a notice to file and there was no obligation to comply with it.
> **46.**
> However, as I have said, s 8(1) provides a person can be required to make a self-assessment tax return '[f]or the purpose of establishing the amounts in which [he] is chargeable to' income tax and CGT. It seems to me (and to the Judge in *Goldsmith)* that a notice to file issued to a taxpayer for any other purpose is not a notice to file under s 8(1). If it is not a notice to file under s 8(1), a person is not liable to a penalty under s93 for failing to comply with it and under s 100B the Tribunal must allow the appeal as 'no penalty has been incurred'.
> **47.**
> Therefore, applying *Birkett*, it seems that the Tribunal, as a matter of statutory construction, does have jurisdiction to consider the purpose for which a notice to file was issued."

24. Further, there is House of Lords authority in *Wandsorth London Borough Council v Winder* [1984] 3 All ER 976 to the effect that it is not an abuse of process to challenge the validity of a notice by way of a defence to a claim by a public body. The point is that if the notice is invalid, the claim in invalid and the defendant is not liable to pay it.

25. Judge Medd in *Kempton v Special Commissioners for Income Tax & Cir* 52 TC 318 applied the reasoning in *Wandsworth* to conclude that Mrs Kempton was entitled to raise the validity of a notice to produce information under section 20 TMA (now repealed) as a defence in penalty proceedings brought for failure to comply with the notice. Judge Medd held:

> "It is clear from the Coombs case [*R v Inland Revenue Commissioners, Exp T C Coombs & Co* [1991] 2 AC 283] that the Inspector's decision to issue a notice under s 20(3) can be challenged by way of judicial review, and I have no doubt that the same

must apply if the notice is issued under s 20(1). The question is, therefore, whether, in addition to being able to challenge the Inspector's decision by way of judicial review, the taxpayer is entitled alternatively to challenge it by way of a defence to penalty proceedings.

The answer to this question was not given by the House of Lords in the Coombs case but Bingham L.J., in the Court of Appeal in the case of *Regina v. Inland Revenue Commissioners ex parte Taylor (No. 2)* 1990 STC 379 which was a case where a notice was issued to a solicitor under s 20(2) (which gives similar powers to the Board of Inland Revenue as are given to an inspector by s 20(1)), said, at page 384j

'Strictly, however, the taxpayers' remedy is, in the event of non compliance followed by penalty proceedings, to resist the penalty proceedings and then attack the giving of the notice.'

A similar view was expressed by Brightman L.J. in *Essex and Others v. Commissioners of Inland Revenue and Grugan* 53 TC 720, which was an action for a declaration that certain notices were invalid, when he said, at page 743:

'I should mention at this stage that ss 98 and 100 of the Taxes Management Act 1970 impose penalties on a person who fails to comply with the requirements of a notice served under s 490 of the other Act. It would therefore have been open to the Plaintiffs to challenge the validity of the notices in any proceedings which might have been brought under ss 98 and 100 of the Taxes Management Act instead of claiming a declaratory judgment, as had been done in the present action.'

Those two dicta in the Court of Appeal which were both directed to the situation where notices of a similar nature to the one with which I am concerned were served are, of course, strong persuasive authority for the proposition that a person on whom a notice under s 20(1) is served may raise the question of the validity of the notice as a defence in penalty proceedings brought against him for failure to comply with the notice. However, the question seems to me to have been answered even more authoritatively by the reasoning in the decision of the House of Lords in the case of *Wandsworth London Borough Council v. Winder* [1984] 3 All ER 976. …

…

I, therefore, hold that it is open to Mrs. Kempton to challenge the validity of the Inspector's decision to serve a notice on her under s 20(1) by way of defence in these proceedings for a penalty."

26. Judge Popplewell analysed the *Wandsworth* case in some detail in *Lennon*.

27. It seems clear that I can consider the Appellant's argument that the notice to file was invalid. If he is correct, he had no obligation to file a self-assessment tax return and so cannot be liable for a penalty for failing to do so.

Was the notice valid?

28. Section 8(1) TMA provides:

> ***"[8 Personal return]***
> *[[(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, [and the amount payable by him by way of income tax for that year,] he may be required by a notice given to him by an officer of the Board—*
> *(a) to make and deliver to the officer. . ., a return containing such information as may reasonably be required in pursuance of the notice, and*

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

29. A notice to file a tax return may be given "for the purpose of establishing the amounts in which a person is chargeable to income tax". A notice issued for some other purpose is not a notice under section 8.

30. In my view it is clear that "establishing" in this context means "determining the amount of". Where HMRC already know the amount of income tax due, a valid notice cannot be given under section 8. This was the approach in *Goldsmith*, *Lennon* and *Mansoor*. Judge Mosedale took a different view in *Crawford*. She held:

> "…looking at the dictionary definitions first, I find a draft addition to the OED suggests that a 'weakened' use of the word 'establish' is with the meaning 'to determine or ascertain; find out'. Actual definitions given in the OED include 'to place beyond dispute', and other definitions convey the idea of making something secure or permanent. The conclusion from the dictionary is that it is not a normal use of 'establish' for it to mean no more than 'calculate'; its normal meaning would be closer to the idea of securing, or making permanent or final, what is calculated.
> **54.**
> Looking at the word in its context requires looking at what a notice to file does. A notice to file requires a person to make a return which includes a self-assessment. A person is not merely required to make a calculation of the tax which he owes, but to assess himself to that tax (s 9). The effect of a self-assessment is to create a debt to HMRC: s 59B TMA. While I am aware that for certain taxpayers, s 9(2) TMA does not require them to undertake the self-assessment, their return nevertheless results in an enforceable self-assessment because that is what s 9(3) and (3A) provide.
> **55.**
> It seems to me that a self-assessment return does two things:
> - (a) It calculates the taxpayer's tax liability; and
> - (b) It assesses and makes enforceable by HMRC that liability.
>
> **56.**
> 'Establish' should be understood in its context: if a self-assessment return does those two things, then a notice to file (which requires a self-assessment return to be made) should be seen as requiring the taxpayer to do those things. So where s 8 says '[f]or the purpose of establishing the amounts in which a person is chargeable to income tax' it should be read as referring to the effect of a self-assessment return. It should not be read merely as:
> 'for the purpose of calculating the amounts in which a person is chargeable to income tax…'
> But as
> 'for the purpose of calculating and assessing the amounts in which a person is chargeable to income tax….'
> **57.**
> That is in any event closer to the dictionary definition of 'establish' where, as I have said, its more common meaning is to 'make secure' or 'settle' or 'make permanent'. These meanings are closer to 'assess' than to 'calculate'. An assessment fixes or settles a person with liability to the tax as calculated.
> **58.**

> Moreover, it seems to me that 'establish' must not only be read as including *assessment* as well as *calculation* of tax, a notice to file issued simply to assess a known liability to tax would also be within the meaning of 'establish' as a self-assessment return secures/fixes/makes permanent the liability to tax by making it an enforceable debt."

31. With respect, I do not consider that the interpretation of "establish" can be expanded beyond its apparent meaning in the context of section 8 of determining the amount of the liability. Section 9 TMA goes to the contents of the return-that it must include a self assessment of the amounts determined as payable on the basis of the information contained in the return. It does not affect the *purpose* for which the notice may be given, namely in order to make that determination of the amounts due.

32. To the extent that the dictionary definition preferred by Judge Mosedale is relevant, it can be taken to indicate that the return is to provide a final and indisputable calculation of the liability. On the other hand, it is difficult to argue that the amount determined and assessed in a tax return is "secure" or "permanent" when HMRC have the right to enquire into a return and may amend it if they find that the amount assessed is incorrect.

33. I conclude that "establish" as used in section 8 means determine or calculate.

34. The importance of a return being made under section 8, is that the consequent assessment required under section 9 TMA creates an enforceable tax debt under section 59B TMA. The issuing of a calculation of underpaid tax due does not create an enforceable debt. It was suggested in *Goldsmith* that the issue of the calculation was itself an assessment, but I do not need to comment on that.

35. The purpose of HMRC in this case, and in the other cases mentioned above, of placing the Appellant in the self-assessment system, was to create an enforceable debt. They did not need a tax return to "establish" the amount of tax due. They knew exactly how much was owed. They were able to send the P800 Tax Calculation to the Appellant telling him how much he owed.

36. It is apparent from the pro forma VPL that the creation of a debt is the purpose of issuing a notice to file in these circumstances. After telling the taxpayer how much tax they have underpaid and setting out the various ways in which the amount due can be paid, the VPL states, under the heading "If you do not pay":

> "..if you do not pay the amount that you owe…we will have to consider collecting the amount through the Self-Assessment tax system….*Self Assessment is our only way for collecting tax from individual taxpayers*…". (Emphasis added).

37. Judge Thomas, in *Goldsmith*, suggested that there were other ways that the taxpayer in these circumstances could be assessed to tax, for example under section 29 TMA or by treating the P800 as an assessment. I do not consider that that is relevant to the validity of the notice under section 8.

38. I conclude that in this case, the notice to file given to the Appellant was not for the statutory purpose of establishing his liability to income tax. This was already know. The purpose of issuing the notice to file was to create a tax debt. This was *ultra vires* and accordingly the notice to file was invalid. As the Appellant had not been validly required to submit a tax return, he had no obligation to do so and cannot have failed to submit a tax return "under section 8 TMA". It follows that the penalties under schedule 55 Finance Act 2009 are not due.

39. I find support for this conclusion in section 28H TMA. Section 28H TMA was introduced by Finance Act 2016 with effect for the tax year 2016-17 and future years. It provides:

> **"28H Simple assessments by HMRC: personal assessments]**
> [(1) HMRC may make a simple assessment for a year of assessment in respect of a person (other than a person to whom section 28I applies) if, when the assessment is made, the person is not excluded by subsection (2) in relation to that year.
> (2) Subsection (1) does not apply to a person at any time in relation to that year of assessment if—
> (a) the person has delivered a return under section 8 for that year, or
> (b) the person is at that time subject to a requirement *to make and deliver such a return* [imposed] by virtue of a notice [to file] under section 8.
> but nothing in this subsection prevents HMRC from giving the person notice of a simple assessment at the same time as a notice withdrawing a notice under section 8.
> (3) A simple assessment is—
> (a) an assessment of the amounts in which the person is chargeable to income tax and capital gains tax for the year of assessment to which it relates, and
> (b) an assessment of the amount payable by the person by way of income tax for that year, that is to say, the difference between the amount in which the person is assessed to income tax under paragraph (a) and the aggregate amount of any income tax deducted at source;"

40. In other words, HMRC can now issue a "simple assessment" where section 8 does not apple. Section 59BA TMA provides that a simple assessment creates a tax debt which HMRC can recover. Had the events of this case occurred in 2016-17, HMRC could, and presumably, would have used this mechanism to collect the underpaid tax. The fact that Parliament felt the need to create such a mechanism suggests that previously there were categories of case where HMRC could not collect tax using the self assessment system. Cases such as the present would seem to be one of those categories. If HMRC could collect underpayments like this using section 8 there would be no need for simple assessments.

Reasonable excuse

41. If I had concluded that the notice to file was valid, I would have found that the penalties (other than the daily penalties which HMRC do not seek to collect) would be due. For completeness, I therefore consider whether, in these circumstances, the Appellant would have a reasonable excuse for failure to submit the return in time.

42. The test whether the Appellant has a "reasonable excuse" is set out in the well known case of *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?"

43. In the recent case of *Perrin* [2018] UKUT 156 (TCC), the Upper Tribunal explained the test for whether there is a reasonable excuse as follows:

> "[63] From this, it is clear that in the criminal sphere there is a long line of the highest authority to the effect that the concept of "reasonable excuse" includes a requirement that the excuse in question should be objectively reasonable. We see no reason why different rules should apply when considering the same concept in a tax context.
> ….
> [71] In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times….."

44. The Appellant in the present case is not an educated man. He left school at 15 with no formal qualifications and has worked all his life in a manual occupation. The correspondence indicates that he is a skilled mechanic and lorry driver, but his experience and knowledge of the tax system is virtually non-existent. He had previously had little or no interaction with HMRC and had always paid his tax through PAYE. He believed that the self assessment system could not apply to him.

45. I note that HMRC simply issued Mr Griffiths with a notice to file. They did not even send him a paper tax return. The pro forma notice to complete a tax return included in my bundle sets out the deadlines for filing and the penalties for failing to do so. It encourages taxpayers to file their tax return online. Under "How to get a paper tax return" it states "If you want to use a paper tax return you will need to print a copy from our website, go to www.hmrc.gov.uk/selfassessmentforms". Under "If you need more help" it directs the reader to the general self assessment part of HMRC's website, which has a bewildering array of information and gives a telephone number for the self assessment helpline (for opening hours look online). As noted above, the "customer service" at the time was abysmal; half of calls to HMRC were not answered.

46. I do not know whether Mr Griffiths had a computer or had access to a computer, but I infer that for a person in his position, filing online would have been a daunting prospect and it could have been difficult for him to get a paper return.

47. It is important that when Mr Griffiths did contact HMRC, he was told that the underpaid tax would be collected through his notice of coding and his subsequent behavior indicates that he believed that this was being done or would be done.

48. The long delays by HMRC between communications did not help. Mr Griffiths thought it had all been sorted out, he did not understand that he needed to complete a tax return, and he was wary of the penalty notices in the light of the assurances that it would be dealt with through the notice of coding. There was a good deal of publicity at the time about scammers pretending to be HMRC and demanding money.

49. I take into account Mr Griffiths' lack of understanding and experience of the tax system, the fact that he had been told at least once, and probably twice, that the underpayment would be collected through a coding adjustment and the fact that he received limited help when he did contact HMRC.

50. I have considered all the circumstances of this case including Mr Griffiths' "experience, knowledge and other attributes" and the situation in which he found himself. In all the circumstances I consider that Mr Griffiths had a reasonable excuse for failing to submit the tax return.

Conclusion

51. For the reasons set out above I have concluded that no penalties under schedule 55 are due as the notice to file a tax return for the tax year 2013-14 issued to Mr Griffiths was invalid.

52. In the event that the penalties are due, I have concluded that Mr Griffiths had a reasonable excuse for failing to submit the return.

53. In any event, HMRC put forward no case in respect of the daily penalties and agreed that the appeal against that aspect of the appeal should be allowed.

54. I allow the appeal in full and cancel all the penalties.

Application for permission to appeal

55. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE
RELEASE DATE: 30 August 2018

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 4—
>
> (1) P is liable to a penalty under this paragraph if (and only if)—
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 5—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of—
>
> (a) 5% of any liability to tax which would have been shown in the return in question, and
>
> (b) £300.

4. Paragraph 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

> 6—
>
> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 12 months beginning with the penalty date.
>
> (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 100%,

(b) for the withholding of category 2 information, 150%, and

(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 70%,

(b) for the withholding of category 2 information, 105%, and

(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

(a) 5% of any liability to tax which would have been shown in the return in question, and

(b) £300.

(6) Paragraph 6A explains the 3 categories of information.

5. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

23—

(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.

6. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

16—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

1.