[2017] UKFTT 0404 (TC)

TC05868

Appeal number: TC/2013/07874

INCOME TAX – penalty for failure to make returns

FIRST-TIER TRIBUNAL
TAX CHAMBER

D R SUDALL **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

The Tribunal determined the appeal on 2 May 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 13 November 2013 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 23 February 2017 and the appellant's Reply to that Statement of Case dated 10 March 2017 (with enclosures)

DECISION

1. This is an appeal against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit a partnership return for the tax year 2011-12 on time. The partnership in question trades as D&S Sudall. The appellant, Mr Sudall, is "representative partner" for the purposes of paragraph 25(6) of Schedule 55.

2. HMRC have issued the penalties to all partners in accordance with paragraph 25 of Schedule 55. However, paragraph 25(4) of Schedule 55 makes it clear that only Mr Sudall, as representative partner, may bring an appeal against the penalties. That appeal is then treated as an appeal by all partners.

3. 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 12 February 2013. (Mr Sudall accepts that this penalty is due and is not seeking to appeal against it).

(2) "Daily" penalties totalling £900 under paragraph 4 of Schedule 55 imposed on 14 August 2013.

(3) A 6 month late filing penalty of £300 under paragraph 5 of Schedule 55 imposed on 14 August 2013.

4. Mr Sudall's grounds for appealing against the penalties are, very broadly, that a paper partnership tax return was sent to HMRC's Stockport office on or around 21 December 2012. It is acknowledged that this was late (at least for a return in paper form) and so the £100 is due. However, subsequent penalties are not due since the return was not more than three months, still less more than six months, late.

Findings of fact

5. I have made the findings of fact set out at [6] to [17] below.

The preconditions for a penalty to be chargeable

6. HMRC have produced evidence, in the form of a print-out from their computer systems, that indicates that, on 6 April 2012, they sent Mr Sudall a notice under s8 of the Taxes Management Act 1970 ("TMA 1970") requiring him to produce a partnership tax return for 2011-12. HMRC have the burden of proving such a notice was sent. Mr Sudall has not disputed that he received the notice. He was also evidently aware that a partnership return was required (since his appeal to the Tribunal is made on the basis that the return was submitted). I have concluded that

HMRC's records are correct. Therefore, Mr Sudall was validly required to produce a partnership tax return for the 2011-12 tax year and a return for that tax year (in electronic form) was due by 31 January 2013 or a paper return was due by 31 October 2012.

7. HMRC have produced evidence in the form of a print-out from their computer systems which suggests that a paper partnership return was submitted on 7 August 2013. Mr Sudall maintains that it was sent on or around 21 December 2012 and that the Stockport HMRC office must have lost it.

8. HMRC have the burden of proving that the return was submitted sufficiently late to charge daily or six-monthly penalties. Their computer records provide some evidence of this. That is not conclusive evidence as the records demonstrate only that HMRC made a computer entry recording the return as received on 7 August 2013. HMRC have not given any evidence as to what steps they take to ensure that all paper returns received are properly logged. Therefore, HMRC's evidence raises an inference (but nothing more) that no return was received earlier as, if it was, it could be expected to have been recorded on the system.

9. Mr Sudall has produced evidence in support of his assertion. Firstly, his accountants, DKP Accountants Limited ("DKP") have said throughout this dispute that they are aware of other clients' tax returns that have been sent to the Stockport HMRC office, but have not been received. HMRC have not challenged that statement. DKP have also produced a copy of a letter dated 19 December 2012 that they wrote to the partnership, apparently enclosing a tax return (though the enclosures were not provided), and instructing the partnership to sign the return and send it to the Stockport HMRC office. The letter also correctly warned Mr Sudall that late filing penalties would be due (as a paper tax return was being submitted after the deadline of 31 October 2012). However, the letter did not contain an address for the Stockport HMRC office and Mr Sudall has not provided his own confirmation that he followed his accountants' instructions and sent the return off. He has not produced a copy of the signed return he considered was submitted or of any covering letter. Nor has he provided any proof of posting that might engage the provisions of the Interpretation Act 1978 dealing with deemed service of properly addressed documents.

10. Neither side's evidence clearly disposes of the matter. HMRC's evidence leaves open the possibility that a tax return could have been received but lost at HMRC's Stockport Office. Mr Sudall's evidence leaves open the possibility either that he did not follow DKP's instructions or that he mis-addressed the return sent to HMRC. On balance, I have concluded that Mr Sudall's evidence leaves more questions unanswered than HMRC's and I have concluded that no return was submitted to HMRC on or around 21 December 2012. In reaching this conclusion, I am not, of course, accusing either Mr Sudall or DKP of lying and I accept that both had a genuine belief that a return was submitted in December 2012. However, particularly

since I have not been told what address that return was sent to, or given any evidence of posting, I am not satisfied that a return was actually submitted to the correct address.

11. HMRC have, in their Statement of Case, referred extensively to the decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761. In that case, the Court of Appeal held that:

> (1) HMRC made a high level policy decision in June 2010 that all taxpayers who were more than 3 months late in filing a tax return would be charged daily penalties. That "generic policy decision" was sufficient to meet the requirements of paragraph 4(1)(b) of Schedule 55 in Mr Donaldson's case (see paragraph 18 of the judgment of the Master of the Rolls in *Donaldson*).
>
> (2) Mr Donaldson had received an "SA Reminder" (after the deadline for submitting a paper return had expired) that informed him that daily penalties would be charged if his return was not filed by 31 January 2012. He also received an "SA 326D notice" informing him of the first £100 fixed penalty and warning that if the return was more than 3 months late, daily penalties would be charged[1]. Those documents were sufficient to constitute notices to Mr Donaldson that complied with paragraph 4(1)(c) of Schedule 55.
>
> (3) The penalty notice issued to Mr Donaldson did not state "the period in respect of which the penalty was assessed" and did not, therefore, meet the requirements of paragraph 18(1)(c) of Schedule 55. However, that did not prevent the penalty notice from being valid.

12. HMRC have not, however, in their Statement of Case focused on how the requirements of paragraph 4(1)(b) or paragraph 4(1)(c) of Schedule 55 are met in the case of Mr Sudall specifically. The closest they come to addressing this requirement is in the following extract from their Statement of Case:

> HMRC submit that following the Court of Appeal decision [i.e. *Donaldson*] the tribunal should find that in the present case HMRC have satisfied the requirements of paragraph 4(1)(b) and 4(1)(c) and despite the omission of the correct period for which the daily penalties had been assessed in the notice of assessment under paragraph 18, the omission does not affect the validity of the notice.

13. That is a submission. However, no evidence has been produced to make it good. In particular, HMRC have not made a positive assertion that they had sent any

[1] Paragraph 5 of the Court of Appeal's decision suggests that this SA 326D notice was sent on 6 January 2012. However, it is clear from the context that this document notified Mr Donaldson of the first £100 penalty for late submission and so cannot have been sent before 31 January 2012 (as Mr Donaldson had until that date to submit an online return). I therefore deduce that there is a typographical error and the SA 326D notice was sent to Mr Donaldson on 6 February 2012.

document to Mr Sudall specifically notifying him of the date from which daily penalties would become payable. They have not asserted that Mr Sudall received an "SA Reminder" in similar terms to that considered in *Donaldson*. They have not asserted that Mr Sudall received an "SA 326D notice" in a form similar to that considered in *Donaldson* nor have they sent the actual text of the notice notifying Mr Sudall of the £100 penalty (or a document that is expressed to be a standard form of such a penalty notice at the relevant time). It is of course clear that Mr Sudall has received some form of notice telling him that a £100 penalty is due. One can speculate that this notice was identical to the "SA 326D notice" referred to in *Donaldson*. However, if HMRC want to charge Mr Sudall daily penalties, they must prove that the requirements of paragraph 4(1)(c) of Schedule 55 are met, not merely invite the Tribunal to speculate that they may be satisfied. I am not satisfied on the evidence before me that the requirement of paragraph 4(1)(c) of Schedule 55 is met in Mr Sudall's case.

14. I am, however, satisfied that HMRC have made a "decision" of the kind required by paragraph 4(1)(b) of Schedule 55 since the "generic policy decision" referred to in *Donaldson* applied to all taxpayers, which must include Mr Sudall.

Other relevant facts

15. In February 2013 Mr Sudall received a notice informing him that a £100 penalty was due for late submission of the partnership tax return. However, that would not have alerted a reasonable taxpayer in Mr Sudall's position to the fact that the return that he thought had been sent in December 2012 had not been received (as Mr Sudall was, following the letter referred to at [9], expecting to receive a late filing penalty).

16. Mr Sudall has said that he first realised that HMRC had not received the partnership return in July 2013 when he received a late filing penalty. That is confusing as HMRC had issued the first late filing penalty in February 2013 and did not issue subsequent penalties until August 2013. However, HMRC have not challenged Mr Sudall's statements, nor have they referred to any documents that they say should have alerted Mr Sudall to the fact that the partnership return was not received. I therefore find that Mr Sudall did not realise this until July 2013 and, when he realised that the partnership return had gone astray, he promptly filed a further copy on 7 August 2013.

17. On 28 August 2013, Mr Sudall appealed to HMRC against the penalties that had been charged. That appeal was in-time and HMRC refused the appeal by letter dated 16 September 2013. At Mr Sudall's request, HMRC performed a review of their decision in a letter dated 6 November 2013 (which upheld the decision to charge the penalties). By letter dated 11 November 2013, Mr Sudall made an in-time appeal to the Tribunal.

Discussion

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

19. I have concluded that the partnership tax return for 2011-12 was submitted on 7 August 2013. It should have been submitted by 31 October 2012. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the return was more than six months late and the six-month penalty of £300 is due.

20. HMRC have the burden of proving the daily penalties are chargeable. Mr Sudall has not, in his Notice of Appeal or other correspondence, taken any point to the effect that the requirement of paragraph 4(1)(c) of Schedule 55 is not met. However, HMRC have the burden of proof on this point. It is clear from *Burgess and Brimheath Limited v HMRC* [2015] UKUT 0578 (TCC) that HMRC must prove their case even if Mr Sudall has not taken the point. For reasons I have given at [13], HMRC have not discharged their burden on paragraph 4(1)(c). The £900 daily penalties are not, therefore, chargeable.

21. Paragraph 23 applies where there is a reasonable excuse for "a failure to make a return". That raises a question of interpretation, namely whether Mr Sudall must establish a reasonable excuse for the initial failure to file by 31 October 2013, or whether Mr Sudall could argue that, even though there was no reasonable excuse for the original failure to file (so the £100 penalty is still due), he nevertheless has a reasonable excuse for filing more than six months late so that the six-month penalty is not due.

22. I consider that the scheme of the legislation makes it clear that, for the defence of reasonable excuse to be available, there must in all cases be a reasonable excuse for the initial failure to file on time. My reasons are as follows:

(1) Paragraph 1(1) and 1(2) of Schedule 55 make it clear that all penalties imposed by paragraphs 2 to 13 of Schedule 55 are imposed for a failure to submit a return by the filing date. The relevant "failure", therefore, that triggers both a £100 penalty and a six-month penalty is, specifically, a failure to file by the filing date.

(2) Paragraph 5 of Schedule 55 imposes the penalty where the "failure" (namely the failure to file on time) continues more than six months after the penalty date. Paragraph 5 penalties do not, therefore, penalise a new "failure" (to file within six months of the penalty date), but rather the original "failure" to file on time, where that continues for more than six months.

(3) Therefore, the "failure" set out in paragraph 23 (which has to be the subject of a "reasonable excuse") must be a reasonable excuse for the original failure to file on time. That is emphasised by paragraph 23(2)(c) of Schedule 55 which provides for an excuse to be treated as continuing in certain

circumstances. If Parliament had not wanted to impose a requirement that a "reasonable excuse" must excuse the initial failure to file, paragraph 23(2)(c) would not have been drafted in the terms it is. The implication of paragraph 23(2)(c) is that, where there is a continuing failure to file a return, in order for the defence of "reasonable excuse" to be available, the excuse must both exist on the filing date and continue (within the terms of paragraph 23(2)(c)).

(4) If Parliament had wished to deal with the situation where there is no original "reasonable excuse" for late submission, but subsequently a reasonable excuse starts, it would have needed to explain when a reasonable excuse is treated as starting. However, Parliament has not done so, instead focusing its attention in paragraph 23(2)(c) on when a reasonable excuse ceases.

23. I recognise that this interpretation might be thought to produce harsh results. For example, a taxpayer may have no good reason for filing late, but two months and 30 days after the penalty date may have prepared a return and be on the verge of submitting it. If the taxpayer is subsequently struck ill, admitted to hospital and prevented from filing the return for a further month, the defence of "reasonable excuse" would not, on my interpretation of the legislation, prevent daily penalties from accruing. However, in such a case it would still be open to HMRC to mitigate the daily penalties because of "special circumstances" and, if HMRC's decision on this issue was flawed, the Tribunal could change it.

24. Mr Sudall has not put forward any reasons why he did not file his paper return by 31 October 2012. Indeed, by not challenging the £100 penalty, he evidently accepts that there was no reasonable excuse for the failure to file by 31 October 2012. In those circumstances, for the reasons set out at [21] to [23] above, I do not consider that the defence of reasonable excuse applies to the six-month penalty.

25. HMRC have stated in their Statement of Case that they have considered whether there are "special circumstances" and have concluded that there are none. Mr Sudall has not sought to argue that this was a "flawed" conclusion (in the sense applicable in proceedings for judicial review). A case could, perhaps, be made that HMRC should have turned their mind to the fact that Mr Sudall had a genuine belief that he had submitted his return in December 2012. Therefore, even though Mr Sudall was more than six months late in filing, his behaviour was not that of someone who was simply ignoring his obligations and it is arguable that HMRC should have considered whether he should receive the same penalty as someone who simply could not be bothered to file their return for more than six months. However, Mr Sudall has not sought to make the case that HMRC's decision on special circumstances was unreasonable. Moreover, I am not even satisfied that a genuine but mistaken belief that a return had been filed is even capable of being a "special circumstance". In the absence of detailed submissions, I am not satisfied that Mr Sudall has met the high threshold of determining that HMRC's decision was flawed. I will not, therefore, reduce the penalties on account of "special circumstances".

Conclusion and application for permission to appeal

26. My conclusion is that:

(1) HMRC's decision to charge the six-month penalty of £300 is upheld.

(2) HMRC's decision to charge daily penalties of £900 is cancelled.

27. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2017

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.