Neutral Citation: [2023] UKFTT 00659 (TC)

Case Number: TC08880

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01370

INCOME TAX – penalties for failure to file RTI returns – whether one person company whose director received employment income was required to file those returns – yes – whether reasonable excuse – no – appeal dismissed

Heard on 20 July 2023
Judgment date: 28 July 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR JOHN ROBINSON

Between

PURPLE SUNSET LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mike Kerridge FCA of KCMJ LLP and Chater Financial Consultants Ltd, instructed by Mr McDonald, director of the Appellant

For the Respondents: Ms Vicki Anne Wood, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Purple Sunset Limited ("the Company") has a single shareholder and director, Mr John McDonald. In years before 2018-19 he received income from the Company which was included in his self-assessment ("SA") return as earnings from an employment. However, the Company did not file Real Time Information ("RTI") returns or pay National Insurance Contributions ("NICs").

2. On 11 December 2018, HMRC carried out a compliance visit. After correspondence with Mr Kerridge on behalf of the Company, HMRC issued NIC assessments totalling £37,785.44 for the four years 2014-15 through to 2017-18, and penalties totalling £3,300 under Finance Act 2009, Sch 55 ("Sch 55") para 6C for failing to file RTI returns for 2015-16, 2016-17 and 2017-18 ("the relevant years").

3. The Company appealed the RTI penalties but not the NIC assessments. Mr Kerridge submitted that as Mr McDonald did not have an employment with the Company, but was only a director, he had received his money in that capacity, and there was no requirement to file RTI returns.

4. HMRC's litigator, Ms Wood, explained in a thorough and well-structured skeleton argument why Mr Kerridge was wrong. In summary:

   (1) the PAYE Regulations 2003 require that RTI returns be made for all employees;

   (2) the term "employee" in those regulations is defined by reference to the same word in the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") s 5;

   (3) that section provides that the term "employee" includes office holders; and

   (4) as Mr Kerridge had rightly accepted, directors are officer holders.

5. Having rejected Mr Kerridge's key submission, we went on to consider whether the Company had a reasonable excuse, either because it had relied on Mr Kerridge's incorrect advice, or because of ignorance of the law. However, Mr McDonald's evidence was that he did not seek advice from Mr Kerridge about RTI filing, and we found that ignorance of the law did not provide the Company with a reasonable excuse.

6. The appeal is therefore dismissed and the penalties confirmed.

THE EVIDENCE

7. The Tribunal had a bundle of 263 pages, which included the communications between the parties and between the parties and the Tribunal. Mr McDonald provided a witness statement, which contained factual matters which were not in dispute, and also reiterated Mr Kerridge's view of the question of law to be decided by the Tribunal.

8. Mr McDonald was cross-examined by Ms Wood, answered questions from the Tribunal and was re-examined by Mr Kerridge. We found him to be a straightforward and honest witness.

9. On the basis of the evidence summarised above, we make the following findings of fact.

THE FACTS

10. The Company has a single shareholder and director, Mr McDonald. Mr Kerridge (or one of the firms for which he works) has been instructed for at least ten years to produce the Company's accounts; to calculate the corporation tax on the Company's profits and to complete Mr McDonald's SA return. Mr McDonald said in response to a question from Mr Kerridge in

re-examination that at some point the Company had also instructed a payroll provider, but he could not remember the provider's name or for which years it had acted.

11. Mr McDonald received income from the Company; Mr Kerridge included this in Mr McDonald's SA returns on an employment page, with the Company identified as his employer. It was common ground that this income was not dividends: Mr Kerridge described it as "fees".

12. The Company filed no RTI returns, and no NICs were paid on the income earned by Mr McDonald. During the relevant years Mr McDonald did not look for guidance about his RTI filing responsibilities and did not seek advice, either from Mr Kerridge or from any other person, about the Company's RTI or NIC responsibilities. As a result, he was unaware of both obligations.

13. On 11 December 2018, Mrs Waugh, an HMRC officer, carried out a compliance visit. On 3 September 2020, HMRC assessed the Company to NIC totalling £31,084.44 for four years, including the relevant years. The Company accepted it had a liability to NIC for those years and did not appeal.

14. On 25 March 2021, HMRC issued the Company with penalties of £1.100 under Sch 55 para 6C for each of the relevant years for failing to file RTI returns. On 12 October 2021, on behalf of the Company, Mr Kerridge made a late appeal against the penalties. Following a statutory review, he notified the appeal to the Tribunal.

THE FIRST ISSUE: WHETHER THE COMPANY WAS REQUIRED TO COMPLETE RTI RETURNS

15. We set out below the parties' case on this issue, followed by our conclusion.

HMRC's case on liability

16. The burden is on HMRC to show that the Company was liable to the penalties. Ms Wood relied on the legislation, the regulations and the case law set out below.

17. The RTI requirements are set out in the PAYE Regs 2003 and apply to employers in relation to their employees. Ms Wood said that the meaning of the terms "employee" and "employer" in the PAYE Regs is found as follows:

(1) Reg 2 provides that "employment" has the meaning given in ITEPA ss 4 and 5, and that the terms "employer" and "employee" have "corresponding meanings".

(2) ITEPA s 4 is headed "'Employment' for the purpose of the employment income Parts", and reads:

> "(1) In the employment income Parts 'employment' includes in particular
>
> (a) any employment under a contract of service,
>
> (b) any employment under a contract of apprenticeship, and
>
> (c) any employment in the service of the Crown.
>
> (2) In those Parts 'employed', 'employee' and 'employer' have corresponding meanings."

(3) ITEPA s 5 is headed "Application to offices and office-holders" and begins:

> "(1) The provisions of the employment income Parts that are expressed to apply to employments apply equally to offices, unless otherwise indicated.
>
> (2) In those provisions as they apply to an office
>
> (a) references to being employed are to being the holder of the office;
>
> (b) 'employee' means the office-holder;

> (c) 'employer' means the person under whom the office-holder holds office.
>
> (3) In the employment income Parts 'office' includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders."

18. Ms Wood said that ITEPA s 5 codified long-standing case law as to what is meant by an office-holder. In *GWR v Bater (Surveyor of Taxes*) (1920) 8 TC 231, the House of Lords had held that an office was:

> "A subsisting, permanent, substantive position, 'which had an existence independent from the person who filled it, which went on' and was filled in succession by successive holders."

19. This had been confirmed in by the House of Lords in *Edwards v Clinch* [1982] STC 631, where Lord Wilberforce said that:

> "…if any meaning is to be given to 'office' in this legislation, … the word must involve a degree of continuance (not necessarily continuity) and of independent existence: it must connote a post to which a person can be appointed, which he can vacate and to which a successor can be appointed."

20. Ms Woods submitted that a director is plainly an office-holder within the meaning of ITEPA s 5, because a directorship is a "position which has an existence independent of the person who holds it and may be filled by successive holders". She said Mr Kerridge had accepted in correspondence that a director held a "statutory office" recognised by company law, and he had also accepted that Mr McDonald held such an office.

21. Since "employee" in the PAYE Regs includes office holders, and "employer" includes "the person under whom the office-holder holds office", Ms Woods submitted that the following provisions required the Company to complete RTI returns for the relevant years:

(1) Reg 2A is headed "Real Time Information employers" and para (1)(d) of that regulation provides that all employers are RTI employers unless they are within "special arrangements". The Company was not within that exception.

(2) Reg 67B is headed "Real time returns of information about relevant payments, and so far as relevant, reads:

> "(1) Subject to paragraph (1A), on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation unless the employer is not required by regulation 66 (deductions working sheets) to maintain a deductions working sheet for any employees
>
> (1A) But a Real Time Information employer
>
> (a)…
> (b) which for the tax year 2015-16 meets Conditions A and C,
>
> may instead for that tax year deliver to HMRC the information specified in Schedule A1 (real time returns) in respect of all relevant payments made to an employee in a tax month on or before making the last relevant payment in that month.
>
> (1B) Condition A is that, at 5th April 2014, the Real Time Information employer is one to whom HMRC has issued an employer's PAYE reference
>
> (1C) …

> (1D) Condition C is that, at 6th April 2015, the Real Time Information employer employs no more than 9 employees
>
> (2) The information must be included in a return.
>
> (3)-(4) …
>
> (5) The return is to be made using an approved method of electronic communications."

(3) The exception in Reg 67B(1) relating to Reg 66 did not apply to the Company, and para 1A also did not apply, because HMRC had not issued the Company with an employer's PAYE reference.

(4) As result the Company was required to file a monthly return in accordance with Sch A1. This is headed "Real Time Returns" and specifies that employers must provide, *inter alia*, the name, date of birth and NI Number of each employee, as well as the tax year and the payments made to the employee and the tax deducted from those payments.

22. Ms Wood submitted in conclusion that the Company was required to file RTI returns for Mr McDonald because under ITEPA s 5 he was an "employee" for income tax purposes, and the RTI filing requirements were expressly defined to include office holders.

Mr Kerridge's submissions on liability

23. Mr Kerridge confirmed that he accepted Mr McDonald was an office holder. However, he submitted that:

(1) Mr McDonald's remuneration came only from his holding of this office as a director of the Company; and

(2) the burden of proof rested on HMRC to show that Mr McDonald was an employee, and they could not meet that burden, because Mr McDonald did not have a separate contract of employment with the Company.

24. When asked during the hearing whether he accepted that Mr McDonald's "fees" had been correctly shown as employment income in his SA returns, he said that this money "had to be returned somewhere" and could have equally well been shown as "other income". In his skeleton argument he said that the purpose of ITEPA s 5 was:

> "to ensure that individuals that hold office are taxed and that income is taxed as such. It does not convey or impute that a director is an employee and therefore there is an obligation by the Employer to apply the regulations for RTI purposes."

25. Mr Kerridge also submitted that Mr McDonald was not within RTI because the conditions in Reg 67B(1A) did not apply to the Company, and he provided extensive references to other parts of ITEPA, including to s 7 and s 62, as well as extracts from guidance taken from Croner-i Tax and Accounting.

The Tribunal's view

26. It is clear that Ms Wood is correct for the reasons she gave. In summary,

(1) Mr McDonald is an office holder, and ITEPA s 5 provides that he is therefore an employee for the purposes of income tax: that is why, entirely correctly, his income was declared on an employment page of his SA returns.

(2) The PAYE Regulations impose an RTI obligation in relation to all employees.

(3) Reg 2 of those Regulations provides that the meanings of "employee" and "employer" for the purposes of those Regulations (including the RTI provisions contained within them) is the same as their meaning in ITEPA s 5.

(4) The term "employee" in Sch 1A (RTI returns) includes officeholders, and so includes directors such as Mr McDonald.

27. As noted above, Mr Kerridge also submitted that Mr McDonald was not within RTI because the conditions in Reg 67B(1A) did not apply to the Company. We were unable to understand why this provision was relevant. Para 1A is a concessionary provision for the single tax year 2015-16; it allowed a small employer to file an annual return rather than a monthly return, but only where the employer has been issued with a PAYE reference. The Company had not been issued with a PAYE reference, so this concessionary basis was irrelevant. As a result, s 67B(1) applied, requiring the Company to comply with Sch A1 and file a monthly RTI return.

28. We considered the other provisions and guidance provided by Mr Kerridge, but none addressed the key definitional interface between the PAYE Regs and ITEPA, on which HMRC's case rested.

29. It follows that we agree with Ms Wood that the Company was t required to complete RTI returns for Mr McDonald and we find that Mr Kerridge's arguments to the contrary are wrong in law.

REASONABLE EXCUSE

30. The penalties were charged under Sch 55. Para 23(1) of that Schedule provides that penalties are not due if the person satisfies HMRC or the Tribunal that it has a reasonable excuse. However, Reg 23(2)(b) states that where a person "relies on another person to do anything, that is not a reasonable excuse unless [the person] took reasonable care to avoid the failure".

31. The Grounds of Appeal filed by Mr Kerridge did not include any submissions on whether the Company had a reasonable excuse for its failure to file the RTI returns for the relevant years. There was also no reference to reasonable excuse in his skeleton argument, and when asked about this by the Tribunal, Mr Kerridge said that the case rested on his reading of the law, and not on reasonable excuse.

32. Ms Wood had nevertheless included submissions on reasonable excuse in her skeleton argument, and we decided it was in the interests of justice to consider whether the Company had a reasonable excuse either because (a) Mr McDonald had relied on Mr Kerridge's incorrect understanding of the law, or (b) he was ignorant of the legal requirements.

Reliance on Mr Kerridge?

33. Mr McDonald's evidence (which we accepted) was that he had not asked Mr Kerridge for advice about whether or not to file RTI returns. It was thus not possible for reliance on Mr Kerridge to provide the Company with a reasonable excuse.

34. We add that it is also rare for reliance on an adviser to provide a person with a reasonable excuse, both because such reliance is prevented by Sch 5 para 23(2)(b) from providing such an excuse unless the person can show he took reasonable care, and for the reasons given by Ward LJ in *Hytec Information Systems v Coventry City Council* [1997] 1 WLR 666 at p 1675:

> "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: firstly, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in

> appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent..."

Ignorance of the law?

35. Mr McDonald had not looked for any online guidance about his tax filing responsibilities was not aware of these obligations. In *Perrin v HMRC* [2018] UKUT 156 at [82] the Upper Tribunal ("UT") said:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long…"

36. We considered whether it was objectively reasonable for a person in Mr McDonald's position to have been ignorant of the RTI requirements, and took into account the following:

(1) Mr McDonald accepted that he had not done any research or taken any advice and had thus not tried to inform himself of the Company's RTI obligations:

(2) Ms Wood had provided copies of HMRC's online guidance which explains when RTI applies, and specifies that the obligation extends to one-person limited companies and sets out the steps which must be followed.

(3) We agreed with Ms Wood that this was not a complex or obscure area of tax law.

37. We therefore decided that Mr McDonald's ignorance of the law did not provide the Company with a reasonable excuse for its failure to file its RTI returns in the relevant years.

OVERALL DECISION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. For the reasons set out above, we refuse the Company's appeal and confirm the penalties.

39. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 28th JULY 2023