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First-tier Tribunal (Tax)

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[2020] UKFTT 463 (TC)

Appeal number: TC/2019/0100

INCOME TAX - late filing and late payment penalties - whether deliberate behaviour - no reasonable excuse - no - appeal upheld in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS H DHALI WAL

- and -

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

**TRIBUNAL: JUDGE ANNE FAIRPO
MR IAN MENZIES-CONACHER**

Sitting in public at Birmingham on 17 April 2019

Mr Vaghela, accountant, for the Appellant

Mrs Chekley, presenting officer, for the Respondents

DECISION

Background

1. This is an appeal against penalty determinations raised for the tax years 2010/11 and 2012/13.

2010/11

(1) Penalty under Schedule 55 Finance Act (FA) 2009 for deliberate behaviour, in the amount of £40,681.32

2012/13

- (2) Penalty under Schedule 55 FA 2009 for deliberate behaviour, in the sum of £19,562.27
- (3) Two automatic late filing penalties under para 5(2) and para 6(2) Schedule 55 FA 2009 in the sum of £5,920
- (4) 30 day late payment penalty under para 3(2) Schedule 56 FA 2009 in the sum of £3,260
- (5) 6 months late payment penalty under para 3(3) Schedule 56 FA 2009 in the sum of £3,260
- (6) 12 months late payment penalty under para 3(4) Schedule 56 FA 2009 in the sum of £3,260

2. There was no dispute that the appellant's tax returns for 2010/11 and 2012/13 were filed late, payment was made late, nor was the amount of the penalty disputed: the issue for the Tribunal was whether the appellant had a reasonable excuse for the late filing.

Chronology

3. The appellant's tax returns were filed as follows:

- (1) 2009/10 - liability £11,474.42 - filed 31 January 2011
- (2) 2010/11 - liability £116,232.37 - filed 18 January 2017 (sent 12 December 2016)
- (3) 2011/12 - liability £1,646.00 - filed 31 January 2013
- (4) 2012/13 - liability £65,206.50 - filed 18 January 2017 (sent 12 December 2016)
- (5) 2013/14 - liability £867.65 - filed 30 January 2015
- (6) 2014/15 - liability £1,287.85 - filed 27 January 2016
- (7) 2015/16 - liability (£0.25) - filed 27 January 2017

4. The following penalties were issued but not appealed:

- (1) On 14 February 2012, HMRC issued a late filing penalty of £100 in respect of the 2010/11 tax return; this was followed by daily penalties on 7 August 2012, a six month late filing penalty on 19 August 2012 and a twelve month late filing penalty on 19 February 2013.
- (2) On 18 February 2014, HMRC issued a late filing penalty of £100 in respect of the 2012/13 tax return; this was followed by daily penalties on 18 August 2014, a six month late filing penalty on 19 August 2014 and a twelve month late filing penalty on 24 February 2015. Tax-gear penalties were issued on 4 April 2017, after the returns had been filed.

5. HMRC issued a compliance check letter to the appellant on 5 October 2016, as a compliance check. The appellant, a company of which the appellant was a director showed that a gross dividend of £358,300 (plus tax) had been paid to the appellant during the 2010/11 tax year and that tax returns had not been filed for the 2010/11 or the 2012/13 tax year. The appellant's returns were filed on 12 December 2016.

Appellant's evidence

6. The appellant provided a witness statement and gave oral evidence at the hearing. Her evidence is summarised as follows:

- (1) She ran the restaurants owned by the family business; during 2011 they had restaurants in several cities across the UK. The appellant managed the restaurants and so spent a considerable amount of time travelling between the sites.
- (2) The restaurants were owned by a company, of which she and her husband were directors. This was also another earlier company, owned by her parents-in-law, which held the first three restaurants in the business.
- (3) The two companies were sold to a venture capital business in 2013. The appellant and her husband were initially retained by the purchasers. The appellant was made redundant after about six months and her husband after about 2 years. The companies were placed into voluntary liquidation in 2015.

(4) During the same period, she was also responsible for looking after sick relatives: her p became ill during 2011; her father-in-law subsequently died in 2015 and her mother-in-law appellant's father also became ill in 2012 and died in late September 2016. She had responsibilities for them.

(5) As a result of all this, the appellant's tax returns were filed late because of the pressure o problems in the business and dealing with the illness of relatives.

(6) Throughout the relevant tax years, all financial matters were dealt with by her husb accountant. The appellant did not deal with any such matters, as her husband's knowledge o was much better than hers. She believed that there had been problems obtaining informat liquidators of the companies. She agreed that tax returns were a personal responsibility and a failure to file by her husband would still be her responsibility. She did recall that she had been she received the HMRC correspondence, when it became clear that the return had not been file

7. The appellant could not remember dealing with most of the matters put to her:

(1) She could not recall signing company accounts, although she accepted that the acco Companies House had her signature on;

(2) She could not recall making a Time To Pay arrangement with HMRC in March 2011, accepted that it was likely to have happened as HMRC records showed the conversation. S recall how the payments were made, although she thought that they were probably not p personal account. She would have expected that her husband had dealt with it;

(3) She did not know why the returns were not filed on the basis of estimated figures o problems obtaining the detailed information, although she did not know that it was possible to

(4) She did not know why her 2011/12 tax return had been completed before the 2010/11 r the period in which the same pressures and responsibilities noted above had existed. She husband would have dealt with the return, but could not remember discussing it with him

(5) She could not recall why there had been employment income omitted from an earlier t thought that this would have been dealt with by her husband;

(6) She was not aware that a substantial dividend had been declared during the period co 2010/11 tax return. She supposed that she would have been responsible for that as a director, husband would have dealt with that. She did not know which account the dividend would ha into, nor a subsequent dividend in the 2012/13 return period;

(7) She was aware that tax returns had to be filed but did not know what the deadlines fo She did not know why her returns had not been filed, nor why the tax due was paid late.

Appellant's submissions

8. For the appellant, the following submissions were made:

(1) The behaviour that led to the failure to make the returns was not deliberate: the pressure family illness on the appellant meant that she left tax compliance and other such financial r husband and simply signed papers when requested. She was not aware that he had not filed the does not know why the returns were not filed.

(2) The work pressures and family pressures also amounted to a reasonable excuse for th failure to file the returns. In addition, it was not possible to obtain the necessary informat liquidators and the purchasers of the appellant's business.

HMRC submissions

9. HMRC submitted that:

(1) There was no dispute that the penalties had been notified to the appellant, nor any disp tax liability for the two tax years in question.

(2) All other tax returns for the periods before, between and after the two tax years in question were filed on time. The tax liability for each of these periods was substantially lower than the tax liability in question. The appellant was therefore aware of, and able to comply with, her obligations and she did not fail to file her return on time. Even if not deliberate, HMRC submitted that the failure to file was careless, such that penalties are due.

(3) Even if the appellant delegated responsibility for filing her returns to her husband, the responsibility to file remains with the appellant.

(4) The appellant has also not shown any reasonable excuse for the failure to file. The appellants' representatives mentioned an inability to file the returns online, this was in late 2016 and not before the filing deadlines for the returns. In addition, the appellant has not appealed the late filing penalties, the enhanced deliberate behaviour penalties and the late payment penalties.

Relevant law

10. Sch 55 FA 2009

1—

(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return or other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out—

- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P's failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

(4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

“penalty date”, in relation to a return or other document, means the date on which a penalty is payable for failing to make or deliver it (that is to say, the day after the filing date).

2—

Paragraphs 3 to 6 apply in the case of a return falling within any of items 1 to 5 and 7 to 10 in the Table.

3—

P is liable to a penalty under this paragraph of £100.

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 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).

5—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues at 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.

6—

(1) P is liable to a penalty under this paragraph if (and only if) P's failure continues at 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).

...

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

- (a) 70% of any liability to tax which would have been shown in the return in question, and
- (b) £300.

(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.

14—

(1) Paragraph 15 provides for reductions in the penalty under paragraph 6(3) or (4) or 11(3) where P discloses information which has been withheld by a failure to make a return ("relevant information").

(2) P discloses relevant information by—

- (a) telling HMRC about it,
- (b) giving HMRC reasonable help in quantifying any tax unpaid by reason of its failure to disclose the information which has been withheld, and
- (c) allowing HMRC access to records for the purpose of checking how much tax is unpaid.

(3) Disclosure of relevant information—

- (a) is "unprompted" if made at a time when P has no reason to believe that HMRC has discovered or are about to discover the relevant information, and
- (b) otherwise, is "prompted".

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

15—

(1) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC must reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC must reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.

(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC must reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.

(4) Where a person who would otherwise be liable to a 70% penalty has prompted disclosure, HMRC must reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

(5) But HMRC must not under this paragraph—

(a) reduce a penalty under paragraph 6(3) or (4) below £300, or

(b) reduce a penalty under paragraph 11(3) or (4) below the amount set by paragraph 11(3)(b) or (4)(b) (as the case may be).

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 gain from 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.

17—

(1) Where P is liable for a penalty under any paragraph of this Schedule which is determined by reference to a liability to tax, the amount of that penalty is to be reduced by the amount of any other penalty incurred by P, if the amount of the penalty is determined by reference to the liability to tax.

(2) In sub-paragraph (1) the reference to “any other penalty” does not include—

(a) a penalty under any other paragraph of this Schedule, or

(b) a penalty under Schedule 56 (penalty for late payment of tax).

...

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.

11. Sch 56 FA 2009

1—

(1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraph 9, the amount of the penalty.

3—

(1) This paragraph applies in the case of—

(a) a payment of tax falling within any of items 1, 3 and 7 to 24 in the Table,

(b) a payment of tax falling within item 2 or 4 which relates to a period of 6 months or less, and

(c) a payment of tax falling within item 2 which is payable under regulations under section 688A of ITEPA 2003 (recovery from other persons of amounts due from managed companies).

(2) P is liable to a penalty of 5% of the unpaid tax.

(3) If any amount of the tax is unpaid after the end of the period of 5 months beginning on the penalty date, P is liable to a penalty of 5% of that amount.

(4) If any amount of the tax is unpaid after the end of the period of 11 months beginning on the penalty date, P is liable to a penalty of 5% of that amount.

9—

(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 increase in 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.

16—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or the 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.

Discussion

12. The burden of proof is on HMRC to satisfy the tribunal that the penalties have been correctly issued, that the returns and payments were late and that the appellant deliberately withheld information from HMRC by failing to make the return. To the extent that the penalties are correctly issued, the burden of proof is on the appellant to satisfy the Tribunal that there is a reasonable excuse for the failure to file the return and to make payment.

13. Neither party referred us to any case law as to what amounts to deliberate behaviour for the purposes of the penalties. We consider, however, that for deliberate behaviour to occur, there must be a conscious and

of the relevant person to undertake that behaviour.

14. We note that HMRC records included in the bundle indicated that the appellant did endeavour to deal with tax matters when she became aware of them; for example, organising a Time To Pay arrangement in late 2011 to deal with an outstanding debt after a letter in respect of that debt had been issued in mid-February 2011. We also note that, by the date of the hearing, the appellant had no particular recollection of doing this.

15. The outstanding returns were sent to HMRC on 12 December 2016 by post because the appellant was unable to file the returns online; the delay in sending these was explained as being due to the appellant having recently died and to difficulties encountered in filing the returns online. No further explanation of the overall delay in filing was given by the appellant, or her agents, until the penalties were charged. The appellant did not dispute that the returns were required and, we consider, acted reasonably promptly once the check had been opened.

16. We considered that the appellant was a credible witness and that, as she had clearly relied on her husband with financial matters, she had very little knowledge of what had been done and why there had been a delay in filing her returns and paying the taxes due.

17. We note HMRC's submissions that the failure to file the returns was a deliberate act, as there were only two returns with substantial amounts of tax owing and the only two returns which were not filed.

18. However, we accept the appellant's evidence that she left tax matters to her husband, because he had more knowledge in dealing with such matters and because she was busy with both the family illnesses, and that she would have given him any penalty letters to deal with. We also accept that she did not know that the returns had not been filed.

19. The penalty legislation requires that the taxpayer deliberately withholds information from HMRC by failing to making the returns. We find that the appellant herself did not deliberately withhold information from HMRC by failing to file the returns.

20. Although we note that the responsibility to file returns remains with a taxpayer where the taxpayer has delegated such filing to another person, we consider that in order for HMRC to satisfy the burden of proof on them to show that the failure to file was deliberate, it would be necessary to show that such other person deliberately failed to file the return if the appellant was unaware of the failure to file.

21. Although the appellant left tax compliance matters to her husband, it appears that the tax returns were in practice dealt with by agents. No submissions were made as to specifically who, other than the appellant, may have acted deliberately. We do not consider that the fact that the returns were late and that the amount of tax owing was substantially higher than normal is sufficient evidence to demonstrate that there was, on the balance of probabilities, the necessary deliberate behaviour on the part of another unspecified person which should be attributed to the appellant.

22. We find that HMRC have not discharged the burden of proof upon them to show that the appellant deliberately withheld information from HMRC by failing to make the return.

23. As such, we find that the appellant's appeal against the deliberate behaviour penalties is upheld.

24. However, as the appellant did not dispute that the returns and payments were made late, the question remains whether the appellant had a reasonable excuse for the delay in filing the returns and making the payments.

25. We consider that the appellant does not have a reasonable excuse for the delay in filing the returns and making the associated payments. We note the submissions as to the state of the business, the pressure on the appellant and the illness of relatives, but it is clear that the appellant's other returns were filed during the relevant period such that the appellant was not prevented from filing returns by these matters. The appellant's evidence

she did not deal with tax matters herself but someone clearly did deal with such matters on her behalf during the relevant period, although they failed to do so in respect of these returns. Reliance on a third party in these circumstances does not amount to a reasonable excuse, as there was no evidence that the appellant exercised reasonable care to avoid the delay in making the returns. The appellant accepted that she knew what needed to be made, and tax paid, but she had not taken any steps to ensure that this occurred within the relevant tax years under appeal.

26. We note that it was submitted that there was some difficulty obtaining information from the companies, but, as the companies did not go into liquidation until 2015, we do not consider that this had any bearing on the failure to file the returns by the due dates as both returns were due considerably earlier than 2015. In relation to the missing information appears to have been the dividends paid in 2010/11 and 2012/13, the information in relation to which would have been available to the appellant and her agents as these dividends were declared before the company was sold. As such, neither the liquidation nor any difficulty obtaining information from the liquidator amounts to a reasonable excuse for the delay in filing the returns.

27. The online filing issues similarly do not amount to a reasonable excuse, as these occurred after the compliance check was started.

28. As we find that the appellant does not have a reasonable excuse for the delay in filing the returns and the delay in making payment of the relevant tax, the appeal against the automatic late filing penalty and the late payment penalties is dismissed.

Conclusion

29. The appeal against the deliberate behaviour penalties is upheld; the appeal against the automatic late filing penalty and the late payment penalties is dismissed.

30. 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 Rules (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal within 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany notices of appeal from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

ANNE FAIRPO

TRIBUNAL JUDGE

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