TC02706

Appeal number: TC/2012/09476

CORPORATION TAX – Penalties – Whether return filed on time – No – Whether reliance on firm of chartered accountants a reasonable excuse for late filing – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

S R DERIVATIVES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
NIGEL COLLARD

Sitting in public in Brighton on 22 February 2013

Tim Durrant of Advanta Chartered Accountants for the Appellant

Karen Weare of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal, by S R Derivatives Limited (the "Company"), against penalties of £200 and £4,989.97 imposed for the late filing of its company tax return for the accounting period to 30 June 2010.

Law

2. The legislation applicable to company tax returns, assessments and related matters is contained in schedule 18 to the Finance Act 1998. Unless otherwise stated, all subsequent references to paragraphs in this decision are to the paragraphs in schedule 18.

3. Paragraph 3 provides that HMRC may by notice require a company to file a company tax return. The filing date for such a return is 12 months from the end of the period for which the return is made (see paragraph 14(1)(a)).

4. From 1 April 2011 a company must file its tax return for periods ending on or after 1 April 2010 electronically (ie online) in accordance with the Income and Corporation Tax (Electronic Communications) Regulations 2003 (as amended by the Income and Corporation Tax (Electronic Communications) (Amendment) Regulations 2009).

5. If the return is not filed on time, a company will be liable, under paragraph 17, to a fixed-rate penalty of £100 if the return is filed within three months or £200 in any other case. In addition, a company which fails to deliver a return within 18 months after the filing date is liable to a tax-related penalty, under paragraph 18, with the penalty being 10% of the unpaid tax if the return is delivered within two years of the end of the period or 20% in any other case.

6. However, s 118(2) of the Taxes Management Act 1970 provides that a company will not liable to a late filing penalty if it had a reasonable excuse for the failure and that reasonable excuse continued throughout the period of default.

7. There is no definition of 'reasonable excuse' in the legislation which "is a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

Facts

8. The following facts which gave rise to the penalties in this case were not disputed:

(1) The Company was incorporated on 20 June 2007. Its registered office is that of its accountants, Advanta Chartered Accountants ("Advanta").

(2) The Company relied on Advanta to prepare and file its company tax return and to advise its director of any liability to corporation tax including how and when this should be paid to HMRC.

(3) On 19 July 2010 HMRC sent the Company a notice to file a return for the period 1 July 2009 to 30 June 2010.

(4) The Company was therefore required to file its return by 30 June 2011 in accordance with paragraph 14.

(5) On 6 December 2010 Advanta wrote to the Company's director enclosing draft accounts for the year ended 30 June 2010 and a company tax return form, Form CT600, requesting that these be signed and returned to Advanta for submission, by Advanta, to HM Revenue and Customs ("HMRC").

(6) The letter also stated that corporation tax of £49,899.78 was due for payment on or before 1 April 2011.

(7) The Company accounts and Form CT600, signed by the director, were returned to Advanta by the Company on 17 December 2010.

(8) These, together with tax computations, were enclosed with a covering letter to HMRC, dated 30 March 2011, from Advanta.

(9) The post book kept by Advanta records that this letter was sent to HMRC on 30 March 2011.

(10) HMRC have no record of receipt of this letter and its enclosures.

(11) HMRC issued a penalty notice in the sum of £100 on 18 July 2011.

(12) On 18 October 2011 HMRC issued a further penalty notice increasing the penalty to £200, in accordance with paragraph 17.

(13) The penalty notices were sent to the Company's registered office.

(14) On 19 January 2012 HMRC sent the Company, at its registered office, a revenue determination for the year to 30 June 2010 estimating the corporation tax charge at £98,000 together with a 10% tax-related penalty in accordance with paragraph 18.

(15) The return was filed online on 8 March 2012. This showed a corporation tax liability of £49,899.78.

(16) This corporation tax liability was paid on 9 March 2012

(17) Following receipt of the return, as the corporation tax liability was less than the revenue determination, the tax-related penalty was reduced to £4,989.97.

(18) Other than in the letter of 6 December 2010, Advanta did not remind the Company's director to pay the corporation tax or take any action following receipt of the penalty notices at its office, the Company's registered office, despite being aware of the imposition of penalties.

Submissions

9. For the Company Mr Durrant contends that as a paper return had been sent to HMRC on 30 March 2011 it had been submitted on time.

10. Alternatively, he submits, that if the return had not been filed within the statutory time limit the Company had a reasonable excuse and should not therefore be liable to a penalty.

11. The reasonable excuse advanced by Mr Durrant was that it was reasonable for the Company to rely on Advanta to file its return and that the failure to do so was the fault of Advanta not the Company.

12. He relies on the authorities of *Rowland v HMRC*, *Thorne* v *General Commissioners for Sevenoaks* (1989) 62 TC 341, *Enterprise Safety Coaches v Customs and Excise Commissioners* [1991] VATTR 74 and *Stephen Rich v HMRC* [2011] UKFTT 533 (TC) in support of the proposition that reliance on a third party can amount to a reasonable excuse in a direct tax context.

13. Ms Weare, for HMRC, argued that there was no evidence that the return had been received by HMRC and even if it had been posted on 30 March 2011 it could not have been expected to have arrived before 1 April 2011. Any paper return received by HMRC on or after 1 April 2011 would have been rejected as after that date an electronic return was required. As such the return had not been filed on time.

14. HMRC's Statement of Case refers to *Stewarton Polo Club Ltd v HMRC* [2011] UKFTT 668 (TC) in which Judge Staker said, at [14]:

> "The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist."

He continued, at [17]:

> "The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse."

15. Ms Weare, for HMRC, contends that, in this case, as the filing of the return was an obligation of the Company's director, the failure of its agent, Advanta, to file the return cannot be a reasonable excuse for the Company and if the agent has failed in its professional capacity the Company should seek redress from the agent.

Discussion and Conclusion

16. We first consider whether the return was filed on time.

17. The relevant extract from the post book maintained by Advanta was produced to the Tribunal. It records that the letter to HMRC, dated 30 March 2011, was posted on that day and we find that, despite the fact that HMRC have no record of its receipt, it was indeed posted on 30 March 2011.

18. Until 1 April 2011, when the Income and Corporation Tax (Electronic Communications) Regulations 2003 (as amended by the Income and Corporation Tax (Electronic Communications) (Amendment) Regulations 2009) took effect requiring a company tax return to be filed electronically, a company tax return could be delivered by post (see s 115 Taxes Management Act 1970).

19. In such circumstances s 7 of the Interpretation Act 1978 provides:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

20. Guidance on the "time at which the letter would be delivered in the ordinary course of post" can be found in Part 6.26 of the Civil Procedure Rules 1998 ("CPR"). This provides that a document served within the United Kingdom by first class post is deemed to be served on the the second day after it has been posted provided that day is a business day or if not the next business day after that day.

21. 30 March 2011 was a Wednesday; the second day after the Advanta letter was posted was therefore Friday 1 April 2011, the day on which an electronic return was required and a paper return received on or after that day cannot have been filed in accordance with the legislation. As such, we are unable to find that the return was filed on time and it unnecessary for us to consider whether the evidence that HMRC had not received the return, eg the letter from HMRC to Advanta dated 3 April 2012, is sufficient to rebut the deemed delivery of the letter under s 7 of the Interpretation Act.

22. Having found that the return was not filed on time, we turn to whether the reliance, by the Company, on Advanta to file its return amounts to a reasonable excuse.

23. We note that reliance on a third party did constitute a reasonable excuse in the cases cited by Mr Durrant, as, indeed, it did in *RW Westworth Ltd v HMRC* [2010] UKFTT 477 (TC) and *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199.

24. However, it is clear from these cases, as noted by Judge Staker in *Stewarton Polo Club Ltd v HMRC*, at [12] that:

> "... reliance on a third party "can" be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse."

25. In *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC) (to which Judge Staker also referred) Judge Tildesley OBE held that reliance on an agent did not amount to a reasonable excuse. He said, at [7], that:

> "The Appellant's reason for not filing the return on time was essentially its agent made an honest mistake. … The mistake could have been avoided if the agent had exercised proper care. The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts.

26. This is consistent with the decision of the former President of this Tribunal, Sir Stephen Oliver, in *Jeffers v HMRC* [2010] UKFTT 577 (TC), where he held that reasonable reliance on accountants did not constitute a reasonable excuse in the absence of any underlying cause, saying, at [17]:

> "The obligation to make the tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with, eg, the obligation to make the return on time can amount to a "reasonable excuse". To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional."

27. After citing the above passage from *Jeffers*, the Tribunal in *Bushall v HMRC* [2010] UKFTT 577 (TC) (Judge Hellier and Mr Laing), in an observation particularly apposite to the facts of the present case and which we adopt, said:

> "56. It seems to us that reliance on an agent may be an excuse or a reason for non compliance, but such reliance is normal and customary, and the statute cannot have intended such reliance to constitute a *reasonable* excuse in every case. It seems to us that it cannot be the intention of legislation to permit the reliance on a competent person who fails unreasonably to fulfil the task with which he is entrusted to absolve the principal in all cases.
>
> 57. We concur with the President when he said that to be a reasonable excuse the excuse must be something exceptional. In our view, in determining whether or not that is the case it may be necessary to consider why the agent failed (and thereby to regard the agent as an arm of the taxpayer). To give a simple example, if a return was given to someone to post, and that person failed to do so, the reasons for that failure will illuminate whether or not there is a reasonable excuse: if the messenger was run over by a bus the position will be different from the case where the messenger merely forgot."

28. Similarly in the present case, in the absence of any satisfactory explanation for the failure by Advanta to file the Company's return on time, we find that the reliance on Advanta by the Company cannot amount to a reasonable excuse.

29. We therefore dismiss the appeal and confirm the penalties.

Right to Apply for Permission to Appeal

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 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 14 May 2013