TC03494

Appeal numbers: TC/2013/06851 & 06854

Failure to comply with information notice – daily penalties – FA 2008 Sch 36 paras 39, 40 & 46 – applicable time limits – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WONG YAU LAM & SAU YAU LAM **Appellants**

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR DUNCAN MCBRIDE

Sitting in public at 45 Bedford Square, London, on 4 April 2014

Mr Michael Feng of Feng & Co for the taxpayer

Ms Eleanor Gardiner of HMRC for the Crown

DECISION

1 This appeal concerns daily penalties awarded against the taxpayers under paragraph 40 of Schedule 36 to the Finance Act 2008 for failure to comply with an information notice, and the time limits applicable to them.

Facts

2 An information notice under paragraph 1 of Schedule 36 to the 2008 Act was issued to the taxpayers on 20 June 2011. The notice was the subject of appeal to the tribunal which was dismissed: *W Y Lam & S Y Lam v RCC* [2012] UKFTT 118 (TC/2011/05321), full decision released on 8 February 2012. An application to appeal that decision was refused both by the first instance judge and by the Upper Tribunal on 17 December 2013 and 21 January 2014 respectively. The decision dismissing the appeal against the information notice gave the taxpayers until 8 April 2012 to comply with it; they have not complied with it in any respect to date.

3 On 29 May 2013 the tribunal had also refused an application for a closure notice in respect of the inquiry giving rise to the information notice: *W Y Lam & S Y Lam v RCC* (TC2012/10443, 10445 & 11041). Paragraph 39 fixed penalties of £300 were awarded to each taxpayer on 19 December 2012 for failure to comply with the information notice and these were also the subject of an appeal to the tribunal, which was dismissed on 29 October 2013: *W Y Lam & S Y Lam v RCC* (TC/2013/02609 & 02610).

4 On 25 June 2013, daily penalties for £60 were awarded to each taxpayer in these terms:-

> The penalty is £60 a day from 19 December 2012 to 24 June 2013. This is a total of 186 days. The total amount of the penalty is £11,160. The law covering this penalty is in paragraphs 40 and 46 of Schedule 36 to the Finance Act 2008.

This is the only matter under appeal, all previous matters having been determined.

Legislation

5 Taxes Management Act 1970

> **114 Want of form or errors not to invalidate assessments, etc.**
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.
> (2) An assessment or determination shall not be impeached or affected—
> (a) by reason of a mistake therein as to—
> (i) the name or surname of a person liable, or
> (ii) the description of any profits or property, or
> (iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination.

118 Interpretation

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

6 Finance Act 2008 Schedule 36

39 Penalties for failure to comply or obstruction

(1) This paragraph applies to a person who–

(a) fails to comply with an information notice, or

(b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.

(2) The person is liable to a penalty of £300.

(3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

40 Daily default penalties for failure to comply or obstruction

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

46 Assessment of penalty

(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A –

(a) HMRC may assess the penalty, and

(b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

(a) the date on which the person became liable to the penalty,

(b) the end of the period in which notice of an appeal against the information notice could have been given, and

(c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

7 European Convention on Human Rights

6 Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Submissions

8 Mr Feng for the taxpayers made the following submissions:

(a) The daily penalty notices issued on 25 June 2013 were out of time by virtue of paragraphs 46(2) & (3)(a),(b)&(c) of Schedule 36 of the 2008 Act.

(b) There was therefore a reasonable excuse under section 118(2) for failure to comply with the information notice and were deemed by the section not to have failed to comply.

(c) The daily penalties assessment, being calculated from 19 December 2012 instead of 20 December, as it should have been, was bad on account of this error.

(d) The daily penalties were classifiable as criminal sanctions for the purposes of article 6 of the ECHR by reason of their size and were in breach of article 6(3) since the assessment to them was not expressed in a language that the taxpayers could understand, namely Cantonese.

(e) The penalties were intended simply to raise money, contrary to what the Revenue claimed.

9 Ms Gardiner for the Revenue submitted that:-

(a) We are bound by the previous decisions of the tribunal and cannot reopen the matters decided.

(b) It is accepted that the penalty should run from 20 December 2012, the day after the issue of the fixed penalty. The date is wrong, but the number of days is correct to 23 June 2013 inclusive, and the error does not invalidate the assessment.

(c) The taxpayers became liable to a paragraph 39 fixed penalty on 9 April 2012, the day after the expiry of the time allowed by the tribunal for compliance.

(d) Paragraph 46(2) of Schedule 36 does not apply and the penalty assessment was made within time under paragraph 46(3), namely within the period of 12

months from the date on which the taxpayers became liable to the penalty i.e. the day after the determination of the appeal against the initial penalty notice.

(e) While it is not accepted that these penalties are criminal, the taxpayers are nonetheless not being denied an oral hearing and there has been no breach of the right to a fair hearing within a reasonable time.

(f) The taxpayers do not therefore have a reasonable excuse for not complying with the notice.

Conclusions

- time limits

10 The appeal concerns daily penalties assessed under paragraph 40 of Schedule 26. Under paragraph 40, such penalties may only be imposed if the failure to comply continues after a penalty has been imposed under paragraph 39, which provides for the fixed penalty of £300. A fixed penalty for £300 was imposed on 19 December 2012, so that daily penalties can only run from that point. It follows that the 12 month time limit referred to in paragraph 46(2) and (3) cannot begin to run earlier, because the taxpayers only became "liable" to the paragraph 40 penalties after 19 December 2012 if they continued to default after that date.

11 This is a case within paragraph 46(3) because it is one where the taxpayers "may appeal" – and, as we have seen, did in fact do so. It was common ground at the hearing that (3)(a) is the latest of the three possible dates in that subparagraph and that in regard to the fixed penalty the date was 9 April 2012. The fixed penalty assessment was made on 19 December 2012, and was therefore made within 12 months and complies with the time limits. As we have noted, penalties under paragraph 40 can only be assessed for non-compliance after 19 December 2012, and since they were assessed on 25 June 2013 they also were within the 12 month time limit running from that date. The time limit argument therefore fails.

- the commencement date error

12 Mr Feng submits that the paragraph 40 daily penalty assessment is bad because it specifies that the first date on which daily penalties were incurred was 19 December 2012, when that was the date on which the fixed penalty under paragraph 39 was assessed. Since paragraph 40(1) prescribes the daily penalties where "the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed" it is obvious, he says, that the power to assess daily penalties was exercised prematurely and in contravention of the statute.

13 Ms Gardiner accepts the criticism that the first day of the daily penalties was stated incorrectly, but points out that the total of the number of days referred to in the assessment is correct, and she submits that the error is cured by section 114(1) of the 1970 Act. In these circumstances, it is hard to disagree. This situation is clearly the sort of one envisaged by the section where what is effectively a minor typing or clerical error has crept in to an otherwise valid assessment, which "in substance and effect" is in conformity with the assessing power.

14 In support of the objection, Mr Feng cited *Sokoya v RCC* [2009] SFTD 480 in which the date specified for compliance with an information notice was 30 days from its date, instead of 30 days from the date of an appeal decision, as it should have been. We see no comparison between the circumstances of this case and that. Nor is any assistance to be derived from *Reg. ex parte Murat v Inland Revenue* CO/948/2004

where Moses J (as he then was) specifically refused at [18] to decide whether an inaccuracy in the date of an information notice would vitiate the effect of a penalty assessed by reference to it.

- reasonable excuse

15 Mr Feng had submitted that as in his analysis the penalty assessment was bad for being out of time, the taxpayers had a reasonable excuse for not complying with it. In so far as we have found the assessment to be within the time limits, this argument cannot succeed. In so far as it depends upon making reference to the taxpayers' underlying complaint – that the information notice cannot be complied with – we accept Ms Gardiner's argument that we cannot reopen matters already decided in previous appeals, and this particular point has been so decided in the first of the appeals mentioned above. The reasonable excuse argument thus fails in those respects.

16 However, the decision of the tribunal in *Sokoya* which has been referred to in connection with the date error, also considered the issue of reasonable excuse in circumstances in which the default in question occurs during the appeal process. The case involved an appeal against a fixed penalty of £50 for failure to comply with an information notice; a previous appeal against the information notice to the Special Commissioners and onward to the High Court had not succeeded. Did the taxpayer have a reasonable excuse for not complying with the information notice while the appeal against that notice was in course?

17 Judge Berner in addressing this question said:-

> [22] Although Mr Sokoya did not raise the question of reasonable excuse, on the basis of the facts found in this case I considered it appropriate to put the argument to Mr Mear. The penalty notice was issued on 18 September 2007, after the special commissioner's decision in the original appeal, but before Mr Sokoya's appeal to the High Court and his application for permission to appeal to the Court of Appeal had been determined.
>
> [23] It must be reasonable for a recipient of a section 19A notice not to comply with such a notice whilst that notice is being challenged in the tribunal or in the courts. Otherwise any such appeals would be rendered nugatory. For this reason, even if the penalty notice were to have been valid, I find that at the date of issue of the penalty notice Mr Sokoya would have had a reasonable excuse for failure to comply with the s 19A notice, and that accordingly he is deemed by section 118(2) TMA not to have failed to comply with it at that time.
>
> [24] I have considered whether this conclusion could be affected by the uncertainty over whether section 19A(11) precludes any onward appeal from the decision of the special commissioners, and the fact that a stay of execution of the s 19A notice was not granted. In this case, however, the issue does not in my view arise. Mr Sokoya's appeal to the High Court was permitted to proceed, and his application to the Court of Appeal was entertained, and so, notwithstanding that a stay of execution had been denied prior to the appeal in the High Court, I find that Mr Sokoya would have a reasonable excuse for failure to comply up to the time his possibilities of appeal were legally exhausted.

> [25] Mr Sokoya's legal avenues of appeal closed on 28 January 2009 on the refusal of his application to appeal to the Court of Appeal. In the absence of any other evidence of an excuse, in my view Mr Sokoya's excuse for failure to comply ceased on that date. I have considered whether this affects the operation of the reasonable excuse in relation to the penalty. The issue is whether the fact of the cessation of the excuse means that Mr Sokoya can at no time be regarded as not having failed to comply. I do not consider that would be the correct analysis of section 118(2). In my view there are two limbs of section 118(2). The first limb provides that the effect of a reasonable excuse is to deem non-failure up to the time that the excuse ceases, and separately the effect of the second limb is further to deem non-failure after the excuse has ceased if the person in question does what is required to be done without unreasonable delay after the excuse has ceased. Unreasonable delay can prevent something being deemed not to have failed to be done under the second limb, once the excuse has ceased, but cannot prevent the reasonable excuse from having effect up to the time the excuse ceases.
>
> **[26]** Mr Sokoya had not, at the date of the hearing of this appeal, complied with the section 19A notice. On the basis of my findings therefore I consider that he has been guilty of unreasonable delay after his reasonable excuse ceased. However, I do not consider that this conclusion means that the penalty notice, if it were valid, could apply so as to render Mr Sokoya liable to the penalty on account of his continuing default after 28 January 2009. In considering the effect of a reasonable excuse, it is in my view the time of the penalty determination that must be considered, and subsequent events up to the hearing cannot be taken into account. Otherwise the liability to a penalty would depend on the timing of the hearing of the appeal; if that hearing were to take place before the excuse ceased the appeal would be allowed, but it would be otherwise if the hearing were delayed beyond the cessation of the excuse. This cannot be the intended effect of section 118(2), and so I conclude that the cessation of Mr Sokoya's excuse on 28 January, and his unreasonable delay thereafter, cannot prevent his reasonable excuse at the time of the penalty notice from deeming him not to have failed at that time to comply with the section 19A notice.

18 As we have seen, paragraph 40 penalties only become possible after a paragraph 39 penalty has been imposed, in this case after 19 December 2012. The appeal against that penalty was determined by the tribunal on 29 October 2103, but the paragraph 40 daily penalties were assessed on 25 June 2013 in respect of the period which had elapsed since 20 December 2012. That period was accordingly covered entirely by the appeal process. There could therefore be an argument that, while the fixed penalty remained under appeal, there was a reasonable excuse for not complying with the information notice.

19 The point was not raised at the hearing by Mr Feng, nor in consequence answered by Ms Gardiner, but because it has an initial plausibility we think it right to record that we have considered and rejected it. The reason we have rejected it is that the reasonable excuse envisaged as possible by section 118(2) would be an excuse for not complying with the information notice, not an excuse for failing to pay the daily penalties. If the fixed penalty assessment was found to be defective, no doubt that would impact on the ability to assess daily penalties, but it would not in itself be a reason for non-compliance with the information notice. We do not therefore see the reasoning of Judge Berner in *Sokoya* as of any help to the taxpayers in this case.

- Human Rights Convention

20 Mr Feng is on surer ground in arguing that, for the purposes of the Human Rights Convention, the paragraph 40 penalties are to be regarded as criminal sanctions. We did not find the decision by the Court of Appeal that Mr Feng cited on the European Human Rights Convention, *Han & Yau v CCE* A3/2001/0149A, to be of assistance since it involved penalties levied at high percentages - 50% or 90% - of the tax at issue. Here, the penalties are not tax-related and may or may not build up to significant sums, depending upon the circumstances of the case.

21 But in *Pipe & Ors. v RCC* [2008] STC 1911, Henderson J was considering daily penalties of £60 then chargeable under section 93(3) of the 1970 Act for failure to comply with notices under section 8 of that Act. At [55], the learned judge said:-

> 55 In view of the conclusion which I have reached, it is strictly unnecessary for me to decide whether the taxpayers were indeed "charged with a criminal offence" within the meaning of Article 6(3). However, as the point was fully argued I will briefly express my view. In the light of the guidance in *Han* and *King v Walden*, I consider that continuing daily penalties imposed pursuant to a direction under section 93(3) are penalties imposed for a criminal offence within the autonomous convention meaning of Article 6(3). Such penalties do in my judgment have a distinct and substantial punitive and deterrent element, as well as the administrative purpose of securing belated compliance with the taxpayers' obligations. The punitive element is brought out by the discretion as to the amount of the penalties, subject only to the upper limit of £60 a day, and the fact that the amount of the penalty imposed for each default can become quite substantial over a fairly short period (for example 30 days at a daily rate of £60 makes a total of £1,800, and as the present case shows one such penalty may be imposed for each outstanding return). In addition, the need for HMRC to make a positive decision to impose daily penalties, and the need (in the context of section 93) to obtain a prior direction from the Commissioners, are in my view pointers towards the same conclusion.

22 This is very much on all fours with daily penalties of £60 under paragraph 40 and we consider that although these observations were *obiter* in the context in which they were made, we should be guided by the views expressed. We conclude therefore that the penalties under appeal are to be seen as criminal penalties for Convention purposes and that Article 6 is brought into play in regard to them. The part of Article 6 on which Mr Feng sought to rely was the stipulation in Article 6(3)(a) that the person charged has a right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. That language, said Mr Feng, was Cantonese.

23 Mr Feng led no evidence as to the need for this. Certainly, we are told that the Revenue have throughout the inquiry provided a Cantonese interpreter for Mr and Mrs Lam, but Mr Feng candidly accepted that he had himself explained the assessment letter of 25 June 2013 to his clients, and we see him therefore as having effectively been an interpreter. Moreover, the correspondence throughout has been conducted in English; and we were told by the Revenue officer present that he had received a four page handwritten letter from Mr and Mrs Lam in English during the course of the investigation, a statement which was not challenged by Mr Feng.

24 We also note the reference, at [3] of the tribunal's decision dismissing the closure application, to Mr Lam having been cross-examined in English without an interpreter during the appeal against the information notice. The purpose of Convention rights is to protect persons charged with what are regarded as criminal offences, not to provide the opportunity to raise technical objections where there is no evidence of prejudice to the persons concerned – and where indeed the contrary appears to be the case. This is such a situation, and we therefore reject the objection that the taxpayers have been denied their rights under Article 6 so that the penalty assessments must fall on that account.

- other arguments

25 From the cases in the bundle presented to us, it appears that there might have been an intention to argue that the taxpayers have been denied a hearing within a reasonable time contrary to Article 6(1), but no such argument was in the event pursued and we cannot see any basis upon which it could have been.

26 The argument that the daily penalties are there to raise money – and presumably thus in some way impeachable in law – seems to us to be without foundation either in evidence or in logic, and it is beyond debate that their purpose is to put pressure on the recipient of an information notice to comply with it. This ground of appeal must therefore also be rejected.

Costs

27 We record that Ms Gardiner made an application in principle for costs under Rule 10. We indicated at the hearing that it would not be practicable to deal with this application at the same time as the substantive issues, not least since it was dependent upon our reaching a conclusion on those issues. It was not clear either whether we were being invited to take previous appeals and their outcome into account, with the obvious question arising as to whether taking other cases into account is within the intendment of the Rule.

Decision and Direction

28 For the reasons given above, the appeal must be dismissed. We direct that the Respondents have liberty to apply further to the tribunal with regard to costs within 30 days of the release of this decision.

Appeal rights

29 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 15 April 2014