[2017] UKFTT 838 (TC)

TC06233

Appeal number: TC/2017/05153

INCOME TAX – failure to file return by due date – Schedule 55 FA 2009 – whether penalties validly assessed – held notice to file not given to appellant, so no penalties due – penalties for failure to file continuing after 3, 6 and 12 months from filing date in any case out of time for assessing: para 19 Sch 55 – decisions cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DOROTHY NNAJI **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 15 November 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 28 June 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 August 2017.

DECISION

1. This was an appeal by Miss Dorothy Nnaji ("the appellant") against penalties assessed by the respondents ("HMRC") under Schedule 55 Finance Act ("FA") 2009 for her failure to file her return for the tax year 2013-14 on time.

Facts

2. The following matters in this section are my findings of fact taken from the bundle of papers sent to me by the Tribunal. They are not in dispute (save that the appellant says she was not given a notice to file – see §3 and §16(3)).

3. The appellant was issued with a notice to file an income tax return for the tax year 2013-14 on 25 April 2014. That notice required the appellant to deliver the return by 31 October 2014 if filed in paper form or by 31 January 2015 if filed electronically ("the due date").

4. On 16 June 2015 HMRC issued a notice to the appellant informing her that a penalty of £100 had been assessed on her for failure to file the return by the due date.

5. On 21 February 2017 HMRC issued a notice to the appellant informing her that a penalty of £900 had been assessed on her for failure to file the return by a date 3 months after the due date, a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date and that a penalty of £300 had been assessed for failure to file the return by a date 12 months after the due date. These penalties ("the additional penalties") totalled £1,500.

6. The return was filed electronically on 14 March 2017.

7. On 17 March 2017 the appellant appealed to HMRC against the additional penalties of £1,500.

8. On 20 April 2017 HMRC rejected the appeals against the additional penalties. They said nothing to indicate that the appellant could request a review or notify her appeal to the Tribunal.

9. On 25 April 2017 the appellant repeated her appeal with further grounds and referred to "the late filing penalty".

10. On 6 June 2017 HMRC addressed this letter. They again rejected the appeals against the additional penalties. She was told now that she could request a review or notify her appeal to the Tribunal.

11. In a separate letter of the same day HMRC refused to accept a late appeal against the £100 initial penalty. They informed her that she could apply to the Tribunal for permission to make the appeal to HMRC late.

12. On 28 June 2017 the appellant notified her appeals to the Tribunal through the online portal. It is not possible to tell from the printout how much the penalties were said to be that she was appealing against, as the range is from £100 to £20,000.

Law

13. The appeals against the additional penalties were made in time and notified to the Tribunal in time.

14. The appeal against the initial penalty was made late, but HMRC has taken no point on this and offered no objection to the determination of the appeal. In those circumstances I give permission for that appeal to be given late to HMRC, and waive any formalities and give any permissions that might be necessary so that the initial penalty is also before the Tribunal.

15. The law imposing these penalties is in Schedule 55 FA 2009 ("Schedule 55") and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC's decision as to whether there are special circumstances was flawed.

Submissions

16. The grounds of appeal given by the appellant are that:

(1) she was not self-employed during 2013-14, but was working for another company as an employee through PAYE.

(2) she was a director but the company was dormant, and she did not notify HMRC to say that this company was trading or that she was earning income.

(3) she did not receive a notice to file. She assumes it was sent to her old address.

17. HMRC say in response that:

(1) The appellant completed an online CWF1 form to register for self-assessment, but did not say whether she was self-employed or a director.

(2) Companies House records show she was appointed a director of Dcan Anco Services Ltd on 28 February 2014.

(3) Once a notice to file is issued the obligation to complete it remains, irrespective of whether the person is self-employed or a director or neither.

(4) HMRC may withdraw a notice to file under s 8B (not s 8A as they say) Taxes Management Act 1970 ("TMA") if the appellant requests that the notice be withdrawn.

(5) HMRC withdrew the return for 2012-13 because the appellant told them she did not meet SA criteria. They told her that because of the directorship she must make a return for 2013-14.

(6) HMRC records show that the notice to file, penalty reminders and statements of liability and the 2017 penalty notice were sent to the address on record at those times.

(7) The warning on the notice of initial penalty is sufficient for the *Donaldson* criteria for notifying the period of the daily penalties to be met.

Discussion

Burden of proof and the issues

18. HMRC's 10 page Statement of Case does not explicitly refer to the burden of proof. The nearest I can find is a statement that HMRC's submission is:

> "HMRC request that the Tribunal find that the late filing penalties charged are in accordance with legislation and there is no reasonable excuse for [the appellant's] failure to file on time."

19. HMRC have the burden of proving that the penalty assessment meets all the requirements of Schedule 55 FA 2009. It is irrelevant that the appellant has not raised the absence of any such requirement in their grounds of appeal (see eg *Michael Burgess & Brimheath Developments Ltd v Commissioners for Her Majesty's Revenue And Customs* [2015] UKUT 578 (TCC)).

20. If the assessment does meet the requirements of Schedule 55 FA 2009 it is for the appellant to show that she had a reasonable excuse for her failure. The evidence she puts forward as constituting her reasonable excuse may then put an evidential burden on HMRC to rebut it, as of course may any grounds she puts forward for saying that the assessments are not valid, as she has done in this case.

21. HMRC in this case say they have considered whether there are special circumstances but have found none. I can consider whether this decision was flawed in the judicial review sense, and if so what are the consequences.

Was the notice to file received by the appellant?

22. A penalty under Schedule 55 FA 2009 can only arise if the appellant failed to file, by the due date, a return under s 8(1) TMA. Such a return is only required to be filed if a notice to file was "given" to the appellant, and if given, not withdrawn.

23. The appellant in her grounds of appeal refers to the fact that she did not receive a return for 2013-14. The SA Notes enclosed with the bundle show a very confusing picture. Among the entries is:

> "13/5/14 SEES referral sent to cancel SA returns and close SA record."

24. Although there is a reference to the 2012-13 return in this context being cancelled, the closure of the SA record is not limited to one year. There is no reference to an SA record being reopened.

25. Another entry is:

> "28/8/14 Base address RLS set".

26. RLS means a letter was returned by Royal Mail (Returned Letter Service). The address list in the file is also confusing, showing a number of entries for the same address and cutting off the year. Nor does the Statement of Case explain why it took over a year and a half to issue the notice if additional penalties after the issue of the initial penalty which itself was issued four months after the time limit for filing. The setting of an RLS marker may have something to do with the delay.

27. I further note that although HMRC say certain documents were sent to the address on record, they do not mention the initial penalty assessment in this context.

28. In all other cases I have seen where the appellant has argued that they did not receive a notice to file or a penalty notice, HMRC have prayed in aid s 7 Interpretation Act 1978. They have not done so in this case, perhaps because they usually use the absence of an RLS event as showing that a notice was validly served, and here there is evidence of an RLS event.

29. In these circumstance and because of the confused and confusing picture of addresses and faced with the appellant's unchallenged evidence that she did not receive the notice to file, I hold that HMRC have not shown that the notice to file was validly issued.

The penalty time limit

30. In case I should be found wrong to hold as I have done in §29 and because the point is to my knowledge one that has not arisen in these particular penalties before now (at least in any published decisions) I consider whether HMRC has complied with the time limit in Schedule 55 for making the assessment of the additional penalties, all included in the same notice. The initial penalty assessment was clearly in time.

31. Paragraph 19 Schedule 55 governs this aspect of assessing and says:

> **"**(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.
>
> (2) Date A is—
>
> …
>
> (c) … the last day of the period of 2 years beginning with the filing date.
>
> (3) Date B is the last day of the period of 12 months beginning with—

> (a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return … or
>
> (b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.
>
> (4) In sub-paragraph (3)(a) "appeal period" means the period during which—
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn.
>
> … "

32. Date A is 31 January 2017. The evidence in the bundle, a screenshot of the "View/Cancel Penalties" screen on HMRC's SA computer system, shows the date of making the assessment as 21 February 2017. This is therefore after Date A.

33. The question then is whether there is a Date B at all (see the chapeau of sub-paragraph (1)) and if there is, what is it.

34. The reference in sub-paragraph (3)(a) to "the appeal period for the assessment of the liability to tax" can only, in the context of income tax, be to an assessment which is not a self-assessment. A taxpayer cannot make an appeal againstt their own self-assessment (even if it is HMRC who have in practice made the self-assessment under s 9(3) TMA) – see eg *Volkwyn v HMRC* [2017] UKFTT 771 (TC) (Judge Robin Vos). There is no such assessment in this case.

35. Out of curiosity I looked at HMRC's Compliance Manual to see what if anything was said there. At CH64200 an example of the operation of paragraph 19 is given:

> "Example
>
> Solomon filed his 2014-15 ITSA return on 20 July 2017. We issued an income tax/CGT assessment on 1 August 2017. The filing date is 31 January 2016. We can assess a penalty up to the later of
>
> * 31 January 2018, being 2 years from the filing date, and
>
> * 1 September 2018, being 12 months after the end of the 30 day appeal period for that return.
>
> Therefore, we have until 1 September 2018 to issue a penalty assessment to Solomon."

36. The assessment in this example is clearly a s 29 TMA discovery assessment ("we issued …") so the example is, if it is of anything, of a paragraph (3)(a) case, which this case is not.

37. Date B in this case can then only be given, if at all, by sub-paragraph (3)(b). The question then is what is meant by "ascertained", and who is it who does the ascertaining. It is difficult to see how a taxpayer can be said to "ascertain" their own liability even by making a return and self-assessment. And it is even more difficult to

see why a time limit should operate by reference to the date of making a return when the penalties are imposed for a failure to make it.

38. Bearing in mind that Schedule 55 is intended to cover a multitude of taxes and duties (even if many of them are not yet currently within the scope) it is not surprising if Date B does not make sense in relation to one of them, income tax, especially when the legislation contemplates expressly that it may not apply.

39. A formulation like that in paragraph 19(3) Schedule 55 for Date B is also found in Schedule 41 FA 2008 (failure to notify and VAT and excise wrongdoings) and Schedule 56 FA 2009 (failure to pay tax by due date). Schedule 56 also contains Date A with the same definition as that in paragraph 19 Schedule 55. Schedule 41 FA 2008 does not contain a date A equivalent.

40. In both Schedule 41 FA 2008 and Schedule 56 FA 2009 the penalty is determined by reference to an amount of tax, either the tax not notified or the tax lost by the wrongdoing for Schedule 41 or the tax not paid in Schedule 56. In Schedule 55 income tax return filing failure cases the penalty is not determined by an amount of tax, except in the unusual cases where the net tax shown on the return when filed exceeds £6,000 (ie 20 times the minimum penalty of £300, the penalty being 5% of the tax shown if higher).

41. The predecessor of Schedule 55 FA 2009 was s 93 TMA. Penalties for failures to file returns were charged by the making of a determination. Section 103 TMA gives the time limit for all forms of determination and s 103(1) sets out two dates the later of which is the time limit, just as in paragraph 19 Schedule 55 FA 2009.

42. The first date, equivalent to Date A, is 6 years after the date the penalty was incurred.

43. The second date is 3 years after the "final determination of the amount of tax by reference to which the amount of the penalty is ascertained".

44. It seems to me that this second date did not apply to a late filing penalty under s 93 except where s 93(5) applied as this was a tax geared penalty. The s 103 time limit also applied to penalties under s 95 TMA (equivalent to the current Schedule 24 FA 2007) which were tax geared.

45. Schedule 24 FA 2007 penalties are also all tax geared, and the Schedule has a time limit which in an incorrect income tax return case is 12 months after the time when the inaccuracy in the return is corrected. Such a time limit, and indeed an assessment to a Schedule 24 penalty, can only apply where a return has been filed, and an inaccuracy is corrected either when an amendment to a self-assessment is made or when a s 29 TMA discovery assessment is made. Such a correction is made by HMRC and I conclude from this and from what I say in §37 that the "ascertainer" in paragraph 19 is HMRC and possibly also the Tribunal on appeal.

46. The outcome of my consideration of all these matters is that in an income tax late filing case Date B is inapplicable. Therefore the assessments made in February 2017 were out of time.

Reasonable excuse

47. It is not necessary to address this issue, but I do not see anything in the grounds of appeal in §16(1) and (2) that would constitute such an excuse.

Special circumstances

48. HMRC have addressed the question whether there were special circumstances, but have found none. Were it necessary to consider the issue I would say that I can see no grounds on which I can say that that decision was flawed.

Paragraph 4 penalties

49. If it were necessary to consider the daily penalties I would hold that because there is no "SA reminder" or "SA 326D" in the papers, HMRC have not shown that the condition in paragraph 4(1)(c) Schedule 55 FA 2009 has been complied with (see *Duncan v HMRC* [2017] UKFTT 340 (TC) (Judge Jonathan Richards)). The statement recorded at §17(7) may be true but there is no evidence of it in the papers. Copies of specimen blank forms do not help.

Decision

50. Under paragraph 22(1) Schedule 55 FA 2009 I cancel HMRC's decision to assess penalties under paragraphs 3, 4, 5 and 6 Schedule 55 FA 2009.

51. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 November 2017