



TC06591

Appeal number: TC/2017/08023

PENALTY- did taxpayer have reasonable excuse? – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARTIAL ARTS NETWORKS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 2 March 2018

The appellant did not appear and was not represented

Mr Fleming, HMRC officer, for the Respondents

DECISION

Non-appearance of appellant

5 1. The appellant was not represented at the hearing. I considered whether or not to
proceed with the hearing. I was satisfied that the appellant was properly notified of
the hearing as the notice of hearing was sent to the email address which was used by
the appellant's director (Mr O'Conner-Read) to communicate with the Tribunal; for
that reason, and also because HMRC had written to Mr O'Conner-Read two weeks
10 ago with the bundle for the hearing in which they had mentioned the date of the
hearing, I was satisfied the appellant was aware of the hearing today and its time and
location.

2. I also considered it to be in the interests of justice to proceed with the hearing
because it appeared that Mr O'Conner-Read knew of the hearing and had nevertheless
15 chosen not to attend. While I was aware that due to the snow there were some issues
with transport, Mr O'Conner-Read's location (New Barnet) did not appear to be one
which had significant transport difficulties and, in any event, he had not emailed or
telephone the Tribunal to say that he would be unable to attend. Lastly, Mr
O'Conner-Read had set out his case in detail in writing and the Tribunal would be
20 able to take account of it: in particular, there did not appear to be any disputed
matters of fact such that the appellant would be disadvantaged if Mr O'Conner-Read
was not present.

3. Taking account that the judicial resolution of disputes should not be unduly
delayed and that there appeared no good reason for the appellant's failure to send a
25 representative, I decided to proceed with the hearing in the absence of the appellant.

The appeal

4. The appeal was against a £500 penalty imposed for failure to file its tax return
covering its accounting year ending 31 December 2015 on the due date. The return
was filed on 15 February 2017.

30 *Was the penalty due?*

5. The first question which arose was whether the penalty appealed against had
been properly imposed on the appellant company. HMRC had to prove that it had
been. To do so, they had to show that HMRC had served a 'notice to file' its 2015
income tax return.

35 6. HMRC's evidence comprised a computer print-out from their system showing
that 'notice to file' for tax year 2015 had been served on the appellant company on 17
January 2016 at 64 Southwark Bridge Road. I was satisfied that this was the correct
address at that time as I was shown a companies' house print out which showed that
as at that date that was the company's registered office address.

7. The law deems post sent to have arrived in the normal course of the postal system unless it is shown otherwise. The appellant did not really suggest the notice to file had not arrived: his case was that he would not know either way because the address was the business address of the company's erstwhile accountants with whom the company had no relationship at the time the notice to file was served. Therefore, I find that the notice of file did arrive at that address. It was therefore properly served on the company, albeit the company did not receive it.

8. The next question is whether HMRC have proved that the appellant company was in breach of its obligation to file the return in line with that notice to file. I was shown a print out of HMRC's system which showed that the tax return for 2015 was received on 15 February 2017. There was nothing to contradict the accuracy of this report: the appellant accepted its return was late.

9. I accept that the penalty was also duly served: it must have been as the appellant appealed it. In any event, I was shown a print out that recorded it was served on 19 January 2017.

10. Was the penalty in the correct amount? It was for £500. The legislation (§17 of Sch 18 of Finance Act 1998) provides that the flat rate penalty is £500 where it is the third successive failure (which means that the company must have been liable to a penalty for late filing for the previous two consecutive accounting periods). I find (based on HMRC print outs produced to me) that the company filed its returns late for tax years 2013 and 2014 (and in fact was penalised for both late filings). So I find the penalty was correctly imposed at £500.

Was there a reasonable excuse for late filing?

11. The second question which arises is whether the company has a reasonable excuse for its non compliance.

12. S 118(2) of the Taxes Management Act 1970 (which applies to penalties levied under s100 of the same Act, which in turn applies to failures to file under Sch 18 FA 1998) provides:

‘...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....’

13. Mr O’Conner-Read put forward many grounds of defence to the penalty, which I summarise as follows:

- (a) The company did not receive the notice of filing;
- (b) HMRC behaved improperly
- (c) The company has virtually no income to report on the tax return;

(d) The penalty was disproportionate to the offence, particularly where there was no tax to declare.

(e) The company cannot afford the penalty;

14. I will deal with each in turn.

5 *The company did not receive notice of filing?*

15. As I have already said, the company did receive the notice of filing in the sense that it was properly served by being sent to the company's registered office. Mr O'Conner-Read's position is that, however, the company was not aware of it because its erstwhile accountants, whose office was the company's registered office, did not
10 pass on the company mail to Mr O'Conner-Read.

16. Mr Fleming did not challenge the factual accuracy of this, which he was prepared to accept; he just did not accept that it amounted to a reasonable excuse.

17. I agree that it was not a reasonable excuse. It was the company's responsibility to put in place arrangements to ensure it would get post sent to its registered office.
15 Mr O'Conner-Read's case (by implication) is that the company had ceased to have a contractual arrangement with its erstwhile accountants at the time the notice to file was served. But I consider that the company failed to act reasonably in not moving its registered office from its accountants at the moment those accountants ceased to act for it: it would not be reasonable to expect the accountants to act as an unpaid post
20 box once the contractual relationship had ceased.

18. In any event, even if the accountants were to blame for not passing on the post, reliance on a third party as a matter of principle is not a reasonable excuse. When Parliament imposes a duty on a person or company, it is no excuse that that person or company relied on a third party to carry it out. A duty imposed by Parliament cannot
25 be passed on to someone else.

HMRC acted improperly?

19. There are various grounds on which Mr O'Conner-Read states HMRC acted improperly, including that they initially refused to accept the company's appeal out of time, they referred the penalty to a debt collectors when it was under appeal, and they
30 refused to accept his offer to settle the matter for a lower figure.

20. I am far from certain that HMRC acted improperly in this matter but it is irrelevant. The Tribunal has no jurisdiction to reduce or cancel a penalty to compensate for what the appellant or Tribunal might believe to be improper behaviour by HMRC. HMRC's behaviour would only be relevant if it *caused* the failure to file
35 on time and it did not.

Lack of income to report?

21. HMRC are entitled to require any company to file a tax return. Moreover, there is no exemption from liability to file, nor from liability to penalty for failure to file, because the company has no income and/or no tax liability.

5 22. It is not reasonable to fail to file a return HMRC have asked for simply because there is no income to report. The tax return should be filed showing what income there is, if any.

The penalty was disproportionate?

10 23. While Mr O’Conner-Read does not use the word ‘disproportionate’, his case appears to be that a £500 penalty for late filing of a return that disclosed no liability to pay any tax was out of all proportion.

15 24. The allegation a penalty was disproportionate is not strictly a matter of ‘reasonable excuse’ but it is accepted that the Tribunal does have jurisdiction to discharge a disproportionate penalty. The Tribunal has jurisdiction to consider the proportionality of a penalty because the European Convention of Human Rights confers a right to property, and a person cannot be deprived of his property (such as by the imposition of a penalty) unless in exercise of the right of the government to levy tax and enforce laws. In doing so, the Government must act proportionately. What that means was explained in *International Transport Roth* [2002] EWCA Civ
20 158 where it was said that to lack proportionality a penalty must be ‘not merely harsh but plainly unfair’

25 25. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC). These cases indicate that the penalty legislation as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate, without the entire scheme of the legislation being disproportionate.

30 26. But I am unable to agree that in this case the penalty was disproportionate. HMRC must be able to check whether a company has income to report and it achieves that in the first instance by requiring returns to be filed: therefore returns which disclose no tax liability are properly required as much as those that do. To ensure that returns are filed by the due date, to enable HMRC to do its job of checking that it is collecting the right amount of tax, it is proportionate to impose a fine and the legislation provides for a flat rate fine of £100. A fine of £100 for non-compliance
35 cannot be described as ‘plainly unfair’. Where it is the third successive failure it increases to £500. It is proportionate for fines to increase while non-compliance continues, and again a fine of £500 for continued non-compliance cannot be described as ‘plainly unfair’.

The company has no income to pay the penalty

27. This is not a reasonable excuse for the late compliance. It did not cause the late compliance.

Conclusion

5 28. The penalty of £500 is upheld and the appeal is dismissed.

29. A summary decision having originally been released, this document now 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
10 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.

15

**BARBARA MOSEDALE
TRIBUNAL JUDGE**

RELEASE DATE: 09 JULY 2018