[2018] UKFTT 558 (TC)

TC06732

Appeal number: TC/2018/01097

Income Tax – penalties for late delivery of return – application to appeal out of time.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATTHEW J S McKEE **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public in Cardiff on 10 September 2018

The Appellant in person

Robert Bunce for the Respondents

DECISION

1. Mr McKee seeks permission to make a late appeal against penalties assessed by HMRC for the late filing of his tax return for 2010/11. The penalties were:

(1) £100 under para 3 Sch 55 Finance Act 2009 for the failure to deliver the return by the due date;

(2) £900 under para 4 Sch 55, being £10 for each day the failure to deliver the return continued after the day three months after the return was due; and

(3) £300 under para 5 Sch 55 for the failure to deliver the return within 6 months after the due date.

2. The first of these penalties was assessed on 14 February 2012 and HMRC's Statement of Case records that Mr McKee appealed against it on 15 June 2012 (some four months after it was issued) although no copy of the appeal was shown to me by either party.

3. The second and third of these penalties were assessed on 17 July 2012 and Mr McKee wrote to HMRC to appeal against them on 5 December 2017 (some 5 years and 4 months after they were issued.

4. The effect of para 21 Sch 55 and section 31A Taxes Management Act 1970 ("TMA") is that notice of appeal against a penalty under Sch55 must be given in writing within 30 days of the date of the assessment of the penalty, but, by section 49, notice may be given after that period if HMRC agree or the tribunal gives permission. MrMcKee's letters of appeal were given after the 30 day time limit and HMRC did not agree to their being given late. Thus the notices can be effective only if this tribunal gives the permission which Mr McKee seeks.

The obligations and the penalties imposed by the legislation.

5. Section 8 TMA provides that if a person is required by a notice given to him by an officer of HMRC to make a tax return, then he must do so, The effect of subsections 8(1D) to (1G) TMA is that such a return, if made on paper, must be delivered by 31 October after the end of the tax year if the notice is given before 31 July after the end of that year.

6. Para 1 Sch 55 provides that if a person fails to deliver a tax return as required by section 8 on or before the date it is required to be delivered then he becomes liable to pay the penalties specified, in the circumstances specified, in paragraphs 3, 4 and 5 of the Schedule. But para 16 provides for reduction of a penalty in special circumstances, and para 23 provides that a penalty for a failure does not arise if a person has a reasonable excuse for the failure.

My Findings of Fact.

7. There was no dispute, and HMRC's records evidenced, that shortly after 6 April 2011 HMRC sent Mr McKee a notice requiring him to file a tax return for 2010/11. Likewise there was no dispute that Mr McKee's return for that year was received in paper form by HMRC on 15 June 2012.

8. From Mr McKee's oral evidence, the copy documents in the bundle before me and the additional documents provided by Mr the McKee at the hearing, I find as follows.

9. Mr McKee decided to set out on an adventure selling pyjamas. He was keen to do the right thing, so in June 2010 he notified HMRC that he intended to start trading.

10. Later, in January 2012, he set up Pure Pyjamas Limited with the intention that it carry on the trade.

11. Unfortunately Mr McKee's venture was not successful and no trade was conducted either by Mr McKee or by Pure Pyjamas Limited, which was dissolved in June 2015.

12. However Mr McKee's notification to HMRC in June 2010 that he intended to trade prompted them to sent him a tax return for 2010/11 shortly after 6 April 2011. That return would have had on its face a notice requiring him to complete and submit it.

13. Mr McKee did not complete the return, thinking that as he had never traded he did not need to complete a return.

14. Then on 14 February 2012, HMRC, not having received a completed return, sent Mr McKee a letter assessing the £100 penalty under paragraph 3 schedule 55 on the basis that the return had not been submitted by the due date.

15. The receipt of the penalty notice prompted Mr McKee to telephone HMRC on 12 March 2012. In that call he said that he did not receive any income from the business although he had other income. He was told that he would need to complete the return.

16. Mr McKee rang HMRC four days later on 16 March 2012 to say that he had no payslips for his other income. He was advised to try to use his bank statements.

17. There was a further telephone call a month later when Mr McKee explained that there was a mistake. He was again advised to complete the tax return.

18. On 5 June 2012 HMRC sent Mr McKee a reminder letter warning that penalties under paragraph 4 Schedule 55 were accruing from 1 February 2012 for paper returns. Mr McKee phoned HMRC on 13 June 2012 in response to this putting forward that he did not need to complete a return because his income fell below his personal allowances. He was advised that he needed to complete a return all the same.

19. Mr McKee then submitted a return which was received by HMRC on 15 June 2012 in paper form. In this return he declared profits from self-employment of £7,000. Mr McKee told me that this was not correct: it represented his original estimate of what his profits from the pyjama business would be rather than what they were. In fact they were nil.

20. HMRC assessed the second and third penalties against which Mr McKee wishes to appeal on 17 June 2012.

21. Mr McKee entered into no further correspondence with HMRC until 2017. He had moved house a couple of times since 2010 and had boxed up his outstanding correspondence when he moved. HMRC's letters had ended up at his parent's house where he was residing temporarily, and he did not deal with them until 2017.

22. It appear to me that it was only when Mr McKee found some difficulties with a credit agency that he turned again to consider the issue of the outstanding penalties and the tax which had been assessed as a result of the completion and submission of his tax return for 2010/12. That is because in a letter to HMRC of 17 March 2017 Mr McKee says he is writing with reference to a case with 'Fidelite Credit Management' and asks HMRC to correct their records to show that he had no earnings and that the 2010/11 tax return form had been filled out with projected earnings rather than real ones. The letter asked HMRC to let Fidelite know about the mistake.

23. Following this letter Mr McKee also rang HMRC and eventually wrote his letter of appeal against the paragraph 4 and 5 penalties on 5 December 2017.

Mr McKee's submissions.

24. Mr McKee says that his registration for self-assessment with HMRC was a mistake and a result of his naivete in these matters. He says that he should not be penalised for a mistake made in good faith with the intention of permitting HMRC to collect the tax which would be due if his venture were successful. As a result of his mistake he was sent a tax return. Given that he had no self-employment income he says he should not have been sent to return and so should not have been penalised for submitting it late.

25. Likewise his completion of the 2010/11 tax return with figures representing the results for which he hoped from the business, rather than those actually made, was a mistake. Mr McKee described getting a new business to the stage when it paid tax as a 'badge of pride' for start up entrepreneurs; this mistake may have been a premature assumption of that mantle.

26. Mr McKee draws my attention to *Donaldson v HMRC* [2016] EWCA Civ 761 in which the Court of Appeal held that the failure by HMRC to comply with a provision which required the inclusion in a notice of penalty assessment the period over which the penalty had arisen was saved by the operation of section 114(1) TMA. The same principle, he says, must apply to his mistake in notifying his self-employment activity and in completing his 2010/11 tax return.

27. In this context he says that the tribunal should balance the rights of the individual against the rights of the State, and in striking that balance should make allowance for a mistake made in good faith by a person attempting the difficult task of getting a new enterprise off the ground: and give credit to a taxpayer who had been trying to do the right thing.

28. As to the delay in the making of his appeals Mr McKee says that the first appeal was made only 4 ½ months late, and that his telephone calls between March and June 2012 clearly indicated that he wished to dispute the penalty because he was disputing the need to make the return from which the penalty stemmed.

29. He also notes that in the period 2012 to 2017 he was doing several jobs and saving money to go into his business.

Discussion.

30. MrMcKee made a number of mistakes: (i) he told HMRC that he would be trading as a self employed person and yet intended the trade be conducted by a limited company; (ii) he thought that, even though HMRC had sent him a tax return he did not have to complete it and ignored HMRC's advice on the telephone to the contrary and (iii) he put figures on his tax return which represented, not what he had actually earned from the business, but what he hoped the company (which had not yet been formed at that time) would earn. He was, as he said to me, well intentioned but naive.

The Strength of Mr McKee's case

31. In my judgement the grounds Mr McKee advances for his appeal against the penalties have no prospect of success. That is for the following reasons.

32. The requirements of section 8 TMA are clear. If a notice is given to a taxpayer requiring the filing of a return, the taxpayer is under a duty to do so whatever the amount or nature of his income and even if it is nil or a loss. That duty exists even if the notice was mistakenly given by HMRC or was given by HMRC as the result of a mistake made by the taxpayer.

33. The notice to complete a tax return was received by Mr McKee shortly after 6 April 2011. His return was made in paper form; thus it was due on 31 October 2011, It was received on 15 June 2012 and was thus some 7 ½ months late.

34. Schedule 55 provides penalties for the failure to comply with the duty imposed by section 8. The conditions prescribed in that schedule for the liability to a penalty were satisfied: Mr McKee was under a duty to make a return by the filing date, the return was late, HMRC gave (or are, by virtue of section 114(1), to be treated as having given) the information required by Schedule 55 and assessed the penalties. The amounts assessed were in accordance with paragraphs 3, 4 and 5 of the Schedule. Thus Mr McKee can escape or obtain a reduction in penalty only if he has a reasonable excuse for his failure or if the special circumstances provision applies.

35. I do not consider that Mr McKee's mistake in notifying HMRC of his intended business activity is an excuse for failing to comply with the duty to complete the return once that duty had been clearly notified to the taxpayer. Even if it could be an excuse it is not a reasonable excuse.

36. Even if Mr McKee thought he had no such duty because he did not have sufficient income or because the business had not prospered, that belief was in my view unreasonable given the receipt of notice requiring a return to be made. Even if I am wrong in this conclusion and it would initially have been objectively reasonable for him to conclude that he was not required to submit a return, that belief ceased to be reasonable as a result of the telephone communications Mr McKee had with HMRC in March, April and June 2012 in which he was told on three occasions that he had to submit his tax return.

37. I therefore conclude that Mr McKee cannot rely on the reasonable excuse provisions to escape from the penalties. Nor do I see any hope of relief under the special circumstances provision. HMRC considered whether Mr McKee's belief that he did not have to submit a tax return was a special circumstance warranting a reduction in the penalties; they considered that it was not. I see no fault in that determination.

38. I do not consider that the judgement of the Court of Appeal in *Donaldson* can help Mr McKee. Section 114(1) TMA provides:

> "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.".

39. This is a provision which affords relief to HMRC from certain mistakes. It affords no relief to the taxpayer.

40. Mr McKee argues in effect that I should apply this provision is if it affected the same or a similar relief for a taxpayer because otherwise the tribunal would be failing to hold the balance between the State and individual.

41. This tribunal was created by statute. It is given powers by statute to adjudicate on the appeals which statute permits to be brought to it. As a creature of statute it has no jurisdiction to make decisions which are not warranted by the terms of the statutes Parliament has passed. It may be required to interpret a legislative provision, and there may be cases where one statute requires another statute to be interpreted in a particular way. Examples of this are the Interpretation Act 1978, the European Communities Act 1972 which required certain UK statutes to be interpreted in conformity with European legislation and certain provisions of the Human Rights Act 1998 which require legislation to be construed *if possible* in a manner consistent with the certain of the rights guaranteed under the European Convention on Human Rights.

42. But in my judgement it is not possible to read section 114 TMA in the manner Mr McKee suggests even if that were suggested by the Convention. It is plainly intended to apply only to mistakes made by HMRC and not by the taxpayer. In this context I note that section 118(2) TMA contains a provision which relieves a taxpayer of the consequences of a failure for which he has a reasonable excuse, and which does not apply to failures of HMRC: the balance struck by Parliament is to give different escape routes to the taxpayer and HMRC.

43. If I were wrong and section 114(1) could be read as affording a corresponding relief to the taxpayer, I do not consider that it would avail Mr McKee. That is because the kind of mistake made by Mr McKee does not fall within the ambit of the section. In this context I note that in the Court of Appeal in relation to the application of this provision to the omission in that case the Master of the Rolls said:

> "44. Ms Murray submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. In my view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice "affected by reason of a mistake, defect or *omission* therein" (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions.
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> "45 In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donalson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice."

44. In other words the section afforded relief only to non fundamental mistakes or omissions and where the document was in conformity with the intent and meaning of

the Taxes Acts. The section had particular relevance where the recipient of the mistaken document was not misled by it.

45. In Mr McKee's case, assuming that for theses purposes it is correct to regard Mr McKee's notification of his intention to start a business and the information in his tax return as mistakes, HMRC *were* misled by his notification and by his tax return. Neither the notification nor the return were in conformity with the intent of the Taxes Acts because they gave wrong information for those purposes. And the mistake in his tax return was fundamental. The section even if it could be construed as applicable to relieve mistakes of a taxpayer, would not benefit Mr McKee.

46. I can see no other arguments against the penalties which could be successfully advanced in Mr McKee's circumstances I therefore conclude that if permission were given to bring his appeals late they would be dismissed.

The delay and the granting of permission.

47. The authorities make clear that in considering whether to give permission for late of appeal I should consider:(1) the extent of the delay and whether it was serious or substantial; (2) whether there was a good reason for the delay; and (3) all the other circumstances including: (i) the prejudice which might be suffered by either party by giving or withholding permission and in this context whether or not the taxpayer has a good case may be relevant where it possible to make a prima facie assessment - for if he has or may have a good case there is a greater prejudice to him than otherwise in refusing permission;(ii) the need for legal certainty after a period; and (iii) the right given to HMRC to some measure of certainty after an interval has passed.

48. The delay in making the appeals against the second and third penalties was serious and very substantial. Mr McKee adduced no good reason for the delay. Given that his appeal has no prospect of success, no injustice will arise to him by refusing permission to make tan appeal late. The prejudice which would arise to HMRC by contrast would be substantial - they would incur the cost of fighting the appeal and be deprived of the legal certainty to which they are generally otherwise entitled. I refuse permission to appeal out of time against these two penalties.

49. The appeal made against the first penalty was not as late. But it was seriously late. No good reasons were adduced for the delay. It is true that the telephone calls which Mr McKee made to HMRC indicated that he was not happy with what he had been required to do but they did not in my view amount to notification of an appeal. Further his appeal has no chance of success. Thus for the same reasons which I have given above in relation to the second and third penalties I refuse permission to appeal out of time in relation to this penalty.

Conclusion.

50. Permission to appeal out of time is refused.

Rights of appeal

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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 25 SEPTEMBER 2018