

[2020] UKFTT 457 (TC)



**TC07932**

**Appeal number: TC/2018/06867**

*Income tax - HMRC determination for 2007-08 - appellant out of time to submit Self-Assessment and displace determinations - claim for special relief under TMA Sch 1AB para 3A - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ABIMBOLA BALOGUN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER LESLIE HOWARD**

**Sitting in public at Taylor House, Rosebery Avenue, London 28 February 2020**

**The appellant did not attend and was not represented**

**Ms Siobhan Brown, Officer of HMRC for the Respondents**

## DECISION

### Introduction

1. This is an appeal by Mr Abimbola Balogun ('the appellant') against the decision by HMRC to refuse his claim for Special Relief in respect of the 2007-08 determination raised in the absence of his Self-Assessment ('SA') tax return, in the amount of £4,320.

### Preliminary issues

2. The appellant's Notice of Appeal to the Tribunal stated that the total tax in dispute was £26,508.48 including not only the £4,320 determination, but also late filing penalties for 2007-08 and later years. However, the only HMRC decision that the appellant submitted with his appeal to the Tribunal was HMRC's letter dated 4 October 2018 refusing his claim for special relief in respect of the 2007-08 tax year.

3. HMRC wrote to the appellant on 14 December 2018 requesting clarification and a full breakdown of what he wished to appeal against, as HMRC records indicated that there were a number of other decisions totalling £15,515.30 on the appellant's record, mainly relating to an assessment in 2010-11 and late filing penalties for the years 2010-11 to 2016-17 inclusive.

4. On 19 December 2018 the appellant responded, advising that he disputed the 2007-08 determination and the interest element. He said that some of the late filing penalties were repetitive and punitive in nature but provided no further information as to what he wished to appeal.

5. On 4 January 2019 HMRC sent a further letter to the appellant enclosing a schedule of the outstanding liabilities totalling £19,835.30 (inclusive of the £4,320 determination) which carried a right of appeal and asked him to respond by return with details of the items he wished to appeal. He was advised that there was no right of appeal against interest charged in accordance with s 86 of the Taxes Management Act 1970 for late payment of taxes.

6. The appellant did not respond. As no formal appeal had been made to HMRC in respect of the assessment and penalty decisions totalling £15,515.30 within 30 days of the notices being issued no decision or review of those matters had been issued which carried a right of appeal.

7. This appeal therefore only relates to the 2007-08 determination of £4,320.

8. The appellant did not attend the hearing. The Tribunal was satisfied that the appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed

### Background

9. The appellant registered for self-assessment in October 2004. The nature of trade was shown as accountant. The appellant has also been a director of several companies and owns rented property.

10. On 6 April 2008 the appellant was issued with an SA return for 2007-08. The filing due date was 31 January 2009.

11. On 8 September 2009 in the absence of a return, HMRC raised a determination in accordance with s 28C of the Taxes Management Act 1970 in the amount of £4,320.

12. The appellant submitted the outstanding return for 2007-08 on 2 January 2018, more than eight years after the filing due date, and so the self-assessment was out of time to displace the determination. The return showed profits from self-employment of £12,464 on which tax and national insurance contributions totalling £1,904.10 would have been due at the return been submitted on time.

13. A claim for Special Relief was submitted on 5 April 2018. The appellant claimed that he initially thought he had submitted his self-assessment return by post but realised that in fact he had not. He said that during the period 2007-09 he was faced with a set of difficult circumstances; his father was extremely ill as he had suffered a severe stroke, the appellant endured a difficult marriage, his wife suffered two miscarriages and he was going through a divorce.

14. On 11 April 2018 HMRC notified their decision in respect of the special relief claim for 2007-08 to the appellant, advising that conditions A and B as defined in paragraph 3A, Schedule 1AB of TMA 1970 had not been satisfied.

15. Paragraph 3A sets out the requirements for a claim to special relief and applies where a determination has been made under s 28C but the person believes the tax is not due and relief would be available under that Schedule but for the fact that more than 4 years have elapsed since the end of the relevant tax year. The Commissioners are not liable to give effect to a claim made in reliance on paragraph 3A unless conditions A, B and C are met:

Condition A is that in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold repayment of it, if it has already been paid).

Condition B is that the person's affairs (as respects matters concerning the Commissioners) are otherwise up to date or arrangements have been put in place, to the satisfaction of the Commissioners, to bring them up to date so far as possible.

Condition C is that either--

(a) the person has not relied on this paragraph on a previous occasion (whether in respect of the same or a different determination or tax), or

(b) the person has done so, but in the exceptional circumstances of the case should be allowed to do so again on the present occasion.

16. In a letter to HMRC of 5 April 2018 setting out personal difficulties that had caused the delay in submitting his return, the appellant states:

“I actually thought that I had submitted my self-assessment returns by post (2007 – 08 and 2008 – 09) but it transpired that I did not.”

17. HMRC replied on 19 April 2018 advising the appellant that numerous reminders had been sent to him regarding the late return, in addition to 15 individual statements, 10 of which showed the determination which was payable in absence of a tax return. The appellant was also advised that a SA tax return becomes time barred 4 years after the filing date.

18. On 2 July 2018 HMRC issued a closure notice under paragraph 7(1), (2) & (3) of Schedule 1A of the Taxes Management Act 1970 in respect of the special relief claim for 2007-08. The notice confirmed that conditions A and B, as defined in paragraph 3A of Schedule 1 AB of TMA 1970 had not been satisfied.

19. The appellant requested a review of the decision by letter dated 16 July 2018. He said that:

- He had sent his 2007-08 [and 2008-09] returns by post but HMRC mustn't have received them.
- The amount of the determination was excessive. He had been deeply distressed at the time, because of his late father's poor health and his wife's two miscarriages
- The penalties were extreme and unfair.
- He was financially unable to pay the determination and penalties.

20. HMRC issued their review conclusion letter on 4 October 2018 stating that the decision not to allow the 2007-08 special relief claim was correct and had been upheld. HMRC explained that condition A required him to show that they had either been completely unreasonable or unreasonably excessive in raising the determination of £4,320. He had not filed a tax return for 2007-08 despite the issue of 11 statements showing £4,320 as due. In fact, the return was not filed until 2018.

21. A medical report which the appellant had produced relating to his own ill-health and his marital problems did not show that he had been unable to function between 31 January 2009 and 31 January 2012 being the deadline to file the 2007-08 return.

22. It was clear that to some extent the appellant had been involved in the management of limited companies and also the administration and management of property rentals during the relevant period.

23. The submission of tax returns should therefore have been within the appellant's abilities between January 2009 and January 2012. In fact his 2007-08 return, filed in 2018, showed that he had carried on business throughout the return year and therefore must have been aware that as a self-employed individual he was obliged to complete a tax return and declare the profits from his business.

24. Even if the appellant had been able to satisfy condition A, his tax affairs were so seriously in arrears that he would not satisfy condition B. He had incurred substantial amounts of penalties and interest by failing to file his tax returns on time. Further he had paid nothing towards the undisputed £1904.10 element of his 2007-08 liability and the last payment he had made to HMRC was £69.48 in March 2007

25. On 19 October 2018 the appellant submitted a Notice of Appeal to the Tribunal

### **Onus and standard of proof**

26. The onus of proof is on the appellant to demonstrate that he has met condition A and B of paragraph 3A of schedule 1AB of the Taxes Management Act 1970.

27. The standard of proof is the ordinary civil standard, which is the balance of probabilities

### **The appellant's case**

28. The appellant's grounds for appeal, as set out in the Notice of Appeal are:

i. I consider the 2007-08 determination is excessive in relation to previous years and subsequent years and has no basis in reality. It is also contrary to established case law as regards the Tribunal's findings in *James Ronaldson Scott v HMRC* [2015]UKFTT 420 (TC)

ii. I did send my returns for 2007-08 [and 2008-09] by post on time, but the HMRC did not acknowledge either

iii. The penalties are excessive and repetitive

iv. I am unable to afford the charge.

v. My personal circumstances with regards to my health condition.

29. The appellant had earlier produced a copy of his GP medical records to HMRC. However this covered the period from September 2016 to February 2018 and was therefore of no evidential value in relation to the appellant's assertions that he was suffering ill health during the period of default between 2009 and 2012.

### **HMRC's case**

30. A determination was correctly issued on 8 September 2009 in accordance with s 28C of the Taxes Management Act 1970 as the appellant failed to submit his 2007-08 self-assessment return by the due date of 31 January 2009.

31. The time limit for displacing the determination is the later of 3 years from the filing date for the return or 12 months from the date of the determination. In this case the time limit is 31 January 2012.

32. The appellant submitted the 2007-08 self-assessment return on 2 January 2018, only after ongoing recovery action by HMRC's Debt Management team.
33. The claim for special relief under paragraph 3A of schedule 1 AB of the Taxes Management Act 1970 should not be allowed as the appellant has failed to meet all of the conditions as outlined within paragraph 3A.
34. Condition A requires the appellant to be able to show that HMRC are either completely unreasonable or unreasonably excessive in seeking payment of the £4,320 due for 2007-08. The appellant practices as an accountant in addition to being director of a number of companies and landlord of rental properties. HMRC do not consider the amount of the determination to be excessive. It reflects the tax due for a level of income that could not be regarded as being unattainable.
35. Condition B has not been satisfied, as in addition to the £4,320 due for the 2007-08 determination, the appellant has other outstanding liabilities in excess of £20,000 relating to late filing and payment penalties, under schedule 24 and schedule 36 penalties and tax assessments,
36. Condition C has been met as the appellant has not relied on this paragraph on a previous occasion.
37. HMRC contend that the First-tier Tribunal decision in the case of *James Ronaldson Scott v HMRC* is not legally binding and HMRC further contend that the circumstances of that case are entirely different to this. As such, the Tribunal are entitled to make their decision based on the facts of this case alone.
38. HMRC have no record of having received the 2007-08 return prior to or at the filing date of 31 January 2009. HMRC further contend that given the appellant's nature of trade it would have been prudent of him to have been in contact with HMRC on receipt of the late filing penalties or indeed when the determination was issued to establish the whereabouts of the alleged return and/or to make arrangements for the return to be resubmitted.
39. There is no record of a "determination" having been made for 2008-09. [Nor is there any evidence to suggest the 2008-09 self-assessment return had been received by the filing deadline of 31 January 2010].
40. The appellant's inability to pay the outstanding liability is not a matter over which the Tribunal has jurisdiction.
41. The medical evidence submitted to HMRC, being a report dated 26 January 2018, makes reference to low mood over a period of 4 years. This was for a period considerably after the period within which the return should have been submitted. The report also states that the ongoing issue with the appellant is not one which the doctor is familiar with, which therefore suggests that the appellant has not attended his GP on a previous occasion regarding this. Further the report does not give any indication as to how 'low moods' would have prevented the appellant from dealing with his tax

affairs for a period of up to 10 years. A previous record from the GP covering the period 22 September 2016 to 15 February 2018 related to back pain.

42. HMRC have a duty to both Parliament and taxpayers generally to collect tax due under the relevant tax law and to ensure that the tax system is operated fairly. HMRC cannot simply disregard time limits for making a self-assessment if it appears that a determination might be excessive.

43. HMRC records indicate that bankruptcy action commenced with the issue of a statutory demand on 30 January 2017 and it would appear that the appellant only became interested in addressing some of the outstanding issues when the petition was served and a court hearing date set. The appellant has clearly not given his tax affairs the attention that he should have.

### **Conclusion**

44. Although the appellant's notice of appeal states that he filed his 2007-08 tax return by post to HMRC, he conceded in his letter of 15 April 2018 to HMRC that, in fact, he had not done so. Furthermore if the appellant's tax return had been submitted, he has not explained why he failed to make payment of the tax liability. If he had not been in a position to make payment, the question has to be asked why he did not contact HMRC to discuss matters, at which time he would have been notified that no return had been received.

45. Numerous statements, 11 in total, were sent to the appellant which clearly showed the determination of £4,320 as due and therefore put him on notice that HMRC had not received his 2007-08 return. Upon receiving the statements we would have expected the appellant to have queried why the determination was still in place and had not been displaced by his actual tax liability, if in fact he had filed his 2007-08 return.

46. The appellant asserts that the determination is excessive in relation to prior years and later years and refers to the case of *Scott v HMRC*. In the event of a taxpayer not submitting his self-assessment, HMRC has the power to raise a determination to the best of their knowledge and on the information available to them. The case which the appellant refers to was decided on entirely different facts and issues not relevant to this appeal.

47. The medical evidence which the appellant supplied does not cover the relevant period. Nor does it demonstrate how he may have been unable to function during that period and deal with this tax affairs.

48. The appellant asserts that the penalties are excessive and unfair, but he is out of time to appeal the penalties. They were not appealed to HMRC when first raised and cannot now be considered by this Tribunal. In any event the penalties are fixed, in accordance with statute and the Tribunal has no jurisdiction to consider unfairness.

49. The Tribunal cannot consider the appellant's financial circumstances and inability to pay the determination. He is of course entitled to ask HMRC to consider hardship

but that is something with which he would have to raise with the debt management division.

50. The determination of 8 September 2009 was correctly issued in accordance with s 28C of the Taxes Management Act 1970. The appellant's claim for special relief under paragraph 3A of schedule 1 AB of the Taxes Management Act 1970 is not allowed as he has failed to meet conditions A and B as set out in paragraphs 35 and 36 above.

51. The appellant's appeal to the Tribunal is refused

52. 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.

**MICHAEL CONNELL**

**TRIBUNAL JUDGE**

**RELEASE DATE: 11 NOVEMBER 2020**