TC08008

Appeal number: TC/2020/02519

ANNUAL TAX ON ENVELOPED DWELLINGS – late filing of return – late filing penalties imposed under Schedule 55 to Finance Act 2009 – whether the conditions met for imposition of penalties – conditions met for paragraph 5 penalty but not for paragraph 4 penalties – whether Appellant had reasonable excuse for its delay in filing – no – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

BENNEDY'S DEVELOPMENTS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 8 December 2020 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 July 2020 (with enclosures), HMRC's Statement of Case dated 19 October 2020, the Appellant's Reply dated 29 October 2020 (with enclosures) and the hearing bundles filed by the Respondents in respect of this appeal.

DECISION

Introduction

1. This is an appeal against the imposition of penalties in the total amount of £1,200, for the delay in filing an Annual Tax on Enveloped Dwellings ("ATED") return for the year ending 31 March 2019. These penalties were imposed under paragraphs 4 and 5 of Schedule 55 to the Finance Act 2009.

Background facts

2. The parties appear to be agreed about the underlying facts. On the basis of the documents before me I find:

a) The Appellant was liable to file an ATED return for the year ending 31 March 2019. This was the first ATED return due to be filed by the Appellant. The deadline to file this return was 30 April 2018.

b) The Appellant was unaware of its obligation to file an ATED return, and did not file a return by the 30 April 2018 deadline. No explanation has been provided for how this lack of awareness came about.

c) In March 2019, the Appellant's accountant made the Appellant aware of its filing requirement.

d) On 28 March 2019, HMRC received the Appellant's ATED return for the year ended 31 March 2019. This was almost eleven months late. No tax was due under this ATED return.

The penalties issued by HMRC

3. An initial late filing penalty of £100 was issued by HMRC to the Appellant on 9 December 2019. The Appellant appealed against this penalty to HMRC but now accepts that it was late in filing its ATED return and it is liable to this penalty. The Appellant does not challenge the imposition of this penalty in its appeal to the Tribunal.

4. HMRC issued daily penalties (in the total sum of £900) and a six month late filing penalty (of £300) to the Appellant on 18 February 2020. The Appellant appealed unsuccessfully against these penalties to HMRC, and now appeals against these penalties to the Tribunal. In support of its appeal, the Appellant argues:

- HMRC do not have the right to impose the daily penalties,
- the daily penalties and the six month penalty of £300 (taken either together or separately) are disproportionate given that there was no loss of tax,
- there is a common law duty for the state to act fairly, and the maximum penalty should be reserved for those who act deliberately,

- it acted in good faith throughout,
- it did not gain from the late filing,
- the initial late filing penalty of £100 was paid promptly, and
- HMRC did not need to chase the Appellant for the ATED return.

Discussion and decision

5. In any appeal against a Schedule 55 penalty, the onus is first upon HMRC to establish that the penalty has been issued in accordance with Schedule 55. If HMRC satisfy the Tribunal that a penalty in dispute has been issued in accordance with Schedule 55 then the onus switches to the Appellant to show that it has a reasonable excuse for its delay. In both cases the standard of proof is the civil standard of the balance of probabilities.

The daily penalties

6. These penalties are imposed under paragraph 4 of Schedule 55. Paragraph 4 provides:

> (1) P is liable to a penalty under this paragraph if (and only if)—
>
> > (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
> >
> > (b) HMRC decide that such a penalty should be payable, and
> >
> > (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> (2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph (1)(c).
>
> (3) The date specified in the notice under sub-paragraph (1)(c)—
>
> > (a) may be earlier than the date on which the notice is given, but
> >
> > (b) may not be earlier than the end of the period mentioned in sub-paragraph (1)(a).

7. HMRC must satisfy all three of the conditions under sub-paragraph (1). When they filed their Statement of Case, HMRC were unaware that the Appellant would argue that HMRC had not met the statutory conditions for imposition of these penalties (as this argument was not raised until the Appellant filed its Reply with the Tribunal). Therefore, HMRC have not made any contentions about the document they rely upon as constituting the notice required by paragraph 4(1)(c). However, as such notice must be given to the Appellant and must specify the date from which daily penalties are payable, I consider that the only document in this case that HMRC could rely upon as constituting a notice is the notification of the initial late filing penalty sent to the Appellant on 9 December 2019.

8. The £100 penalty notification included in the bundle contains the following statement:

> **What you need to do next**
>
> If your return is more than 3 months late we'll charge you a penalty of £10 for each day it remains outstanding for a maximum of 90 days starting from 1 August 2018.

9. That penalty notification was issued on 9 December 2019. Therefore, a period of 90 days that began on 1 August 2018 had expired long before the £100 late filing penalty notification was issued to the Appellant.

10. In cases where HMRC are expecting a return to be filed by a specified deadline and, at the expiry of that deadline, know whether or not the relevant return has been filed, then it is possible for the notice under paragraph 4(1)(c) to be issued in advance of the 90 days period. The most obvious example of these kind of cases is where an individual income tax return is not filed by the filing deadline. The taxpayers subject to the filing requirement are known to HMRC and, on the day after the deadline has expired, HMRC know whether such a return is late. HMRC are able to send an initial late filing penalty (that also constitutes a paragraph 4(1)(c) notification) within a couple of weeks of the filing deadline being missed.

11. However, in any case where the requirement for a person to file a return is not known to HMRC before a late return is filed, it is possible that the 90 days period will have expired (in whole or in part) before it comes to HMRC's attention that a return was due. That applies to ATED returns but also applies to other returns such as Non Resident Capital Gains Tax returns. In the case of NRCGT returns, HMRC agreed in 2017 to withdraw/no longer issue daily penalties to people who had filed late NRCGT returns in situations where the notice required by paragraph 4(1)(c) had not been issued until after the expiry of the 90 days period. It appeared – at that time – that this concession by HMRC was on the basis that no prior notice of the daily penalties had been given.

12. In *Chartridge Developments Limited v HMRC* [2016] UKFTT 766, which also concerns ATED returns, the Tribunal stated that a paragraph 4(1)(c) notice was still a valid notice even if it was issued after the 90 days period had been expired. However, there was limited consideration of in that decision of the validity of retrospective notices. *Chartridge* also predated HMRC's apparent concession in relation to the NRCGT returns.

13. The issue of whether the notice required by paragraph 4(1)(c) must be issued in advance of the 90 days period, or could be issued afterwards, was considered in far greater depth in the recent Tribunal decision of *Heacham Holidays Limited v HMRC* [2020] UKFTT 406. In *Heacham*, Judge Poon concluded that the paragraph 4(1)(c) notice must predate the 90 days period in order that such a notice provided actual notification to the person affected.

14. In paragraphs 24 to 72 of *Heacham*, Judge Poon reviewed her earlier decision in *Advantage Business Finance Limited* [2019] UKFTT 30 (TC) ("*ABF*"), and set out in detail the relevant passages from the decisions of the First-tier Tribunal, Upper Tribunal and Court of Appeal in (what concluded as) in *HMRC v Donaldson* [2016] EWCA Civ 761. HMRC had argued that notice under paragraph 4(1)(c) could be given retrospectively, and that *ABF* was wrongly decided as insufficient consideration had been given to paragraph 4(3)(a).

15. Judge Poon's analysis began (paragraphs 34 to 40 of *Heacham*) with a consideration of what the First-tier Tribunal and Upper Tribunal in *Donaldson* had understood to be the purpose of the paragraph 4(1)(c) notice, quoting paragraphs 39 and 40 (of the Upper Tribunal decision in *Donaldson*) where the Upper Tribunal had held that at least one purpose of a paragraph 4(1)(c) notice was to give a taxpayer notice of the consequences of further default before that taxpayer had incurred any further liability.

16. Judge Poon then considered what the Upper Tribunal had stated about paragraph 4(3)(a), and how this appeared contrary to the Upper Tribunal's view that the purpose of paragraph 4(1)(c) was to give warning. Judge Poon considered how this apparent conflict in views may have arisen on the facts of *Donaldson*, before setting out her conclusions about how paragraph 4(3)(a) should be interpreted:

> 53. As I see it, para 4(3)(a) is to be interpreted within the context as concerns the burden to be discharged, rather than the conferment of a discretionary power, since: (1) Paragraph 4(1) establishes the burden for HMRC to prove that the three conditions specified under paras 4(1)(a) to (c) are met for imposing a daily penalty. (2) Paragraphs 4(2) and 4(3) are complementary provisions to para 4(1)(c), whereby: (a) Para 4(2) quantifies the daily penalty at £10 a day, beginning with '*the date specified*' in the para 4(1)(c) notice, and sets the upper limit of 90 days; (b) Para 4(3) qualifies the date-range that may be specified on a notice given under para 4(1)(c).
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> 54. In my view, the 'may' in para 4(3)(a) is designed to cover particular occasions rather than a general condition. It covers, for instance, the issue of the 30-day Penalty Reminder, and the 60-day Penalty Reminder, both of which are given during the currency of the daily penalty period. The date specified in these Penalty Reminders will be earlier than the date on which the 30-day or the 60-day Penalty Reminders are given; and hence, covered by para 4(3)(a).
>
> 55. These Penalty Reminders, whilst issued *after* 'the date specified' on the notice for a daily penalty to be payable, are still to be regarded as notices given under para 4(1)(c), as these Reminders are given during the currency of the daily penalty period, and perform the function of warning against further daily penalties. Furthermore, these Penalty Reminders, given at 30 and 60 day intervals, are served in addition to other para 4(1)(c) notices, such as the SA Reminder and SA326D, which are given in advance of the daily penalty period.

17. Judge Poon concluded that *ABF* was correctly decided, and went on to consider how the legislation should be applied to the facts of *Heacham*. Judge Poon stated:

> 69. In the context of Sch 55, a notice under para 4(1)(c) is unique to the imposition of a daily penalty and is not required in like manner for the imposition of other penalties such as the £100, or the £300 fixed penalty. This extra requirement for a daily penalty to be imposable would seem to be a legacy of the predecessor provisions for the imposition of a daily penalty under s 93 of the Taxes Management Act 1970 ('TMA').
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> 70. Prior to the enactment of Sch 55 to FA 2009, an application under s 93(3) TMA had to be made to this Tribunal before a person could become liable to a daily penalty. In my judgment, the unique requirement under para 4(1)(c), to some extent, is to compensate for the removal of the safeguard that was formerly under s 93(3) TMA.
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> 71. Notwithstanding the anomalies outlined at §67, a taxpayer company which has delayed the filing of its ATED returns for the first time would incur the fixed penalties in proportion to the length of delay. Furthermore, where an ATED tax charge is due, the late filing of the relevant ATED return could give rise to a tax-geared penalty under Sch 55, as well as penalties under Sch 56 for the late payment of the ATED charge. In other words, while a daily penalty may not be imposable for the lack of a valid notice having been given under para 4(1)(c), the suite of other penalties that remain imposable regardless of para 4(1)(c) is a sufficient deterrent against prolonged delay.

18. Judge Poon concluded:

> In conclusion, I find no competent notice was given to Heacham to discharge the burden under para 4(1)(c). It is not because HMRC were not diligent in giving a timely notice for para 4(1)(c) purposes. It is simply a logistic impossibility when it comes to a company filing its arrears ATED return(s) for the first time, when no equivalent grace period is afforded by the service of a notice in terms similar to SA316 under the Self-Assessment regime before a Sch 55 penalty can be triggered. For these reasons, the appeal against the daily penalties succeeds.

19. I am satisfied that *Heacham* is correct for the reasons set out by Judge Poon. Applying the reasoning in *Heacham* to the facts of this case, I conclude that a notice given to the Appellant on 9 December 2019 is not a valid notice for the purposes of paragraph 4(1)(c) in respect of a 90 days period which began on 1 August 2018.

20. Therefore, HMRC have not satisfied me that the daily penalties have been imposed in accordance with the legislation. This aspect of the Appellant's appeal is successful.

21. Since the issue of my summary decision in this matter, my attention has also been drawn to the decision of Judge Michael Connell in *D&G Thames Ditton Limited*

v HMRC [2020] UKFTT 489 (TC), that also concerned an appeal against penalties for delaying in filing an ATED return. At paragraphs 86 to 88, Judge Connell reached the same conclusion as Judge Poon about the 4(1)(c) notice being required to be given before the 90 day penalty period. Judge Connell stated:

> **86.** The warning of daily penalties being chargeable is routinely contained in the initial fixed £100 penalty notice, which specifies the date from which daily penalties will start to accrue. After the initial penalty notice, there is a three-month period for the return to be filed before the daily penalty period commences. In the instant case, the £100 penalty notice was not issued to the appellant until 9 December 2019, over a year and three months after the start of the daily penalty period and over eight months after the return had been filed.
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> **87.** For the daily penalties to be properly imposed, all three conditions must be satisfied under para 4 of Sch. 55 FA 2009, the third of which under sub-para 4(1)(c) above is that HMRC have given notice to [the taxpayer] specifying the date from which the penalty is payable. Therefore, a taxpayer is liable to a penalty under paragraph 4 only if the required notice has been given. Notice cannot of course be given retrospectively.
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> **88.** HMRC's notices of 9 December 2018 and 23 January 2020 respectively notifying the appellant of the £100 penalty and that daily penalties had been imposed cannot be construed as having given the requisite *notice* under para 4(1)(c). Whilst the 9 December 2018 letter gave a "warning" of daily penalties and the 23 January 2020 letter stated that the daily penalties of £900 were in relation to the relevant period of delay, the notices were given retrospectively. Whilst this does not affect the £100 penalty notice, the warning does not satisfy the provisions of para 4(1)(c), the purpose of which is to ensure that the taxpayer has been given due notice allowing him to take remedial action at any time during the daily penalty period. In this instance the appellant was not afforded that opportunity. Clearly the requisite notice was not given under para 4(1)(c).

<u>The six month delay penalty</u>

22. This penalty is imposed under paragraph 5 of Schedule 55. Paragraph 5 provides:

> (1) P is liable to a penalty under this paragraph if (and only if) P's failure continues after the end of the period of 6 months beginning with the penalty date.
>
> (2) The penalty under this paragraph is the greater of—
>
> > (a) 5% of any liability to tax which would have been shown in the return in question, and
> >
> > (b) £300.

23. The penalty date is the day after the filing date. It is agreed that in this case the filing date was 30 April 2018. The Appellant's ATED return was filed on 28 March 2019. Therefore, I am satisfied that the Appellant's failure did continue after the end of 6 months beginning with the penalty date, and so the Appellant is liable to a penalty of £300.

24. The onus now switches to the Appellant. Paragraph 23 of Schedule 55 provides that a person will not be liable to a penalty if that person shows a reasonable excuse for their failure. So, the onus is on the Appellant to show it has a reasonable excuse for its delay. I deal with each of the Appellant's arguments in turn

Does the Appellant have a reasonable excuse?

25. The Appellant argues that the £300 penalty is disproportionate to the error when no tax was lost.

26. As the Upper Tribunal discussed in *Edwards v HMRC* [2019] UKUT 131, Schedule 55 late filing penalties are imposed where there has been delay, and these penalties are imposed irrespective of whether there is an amount of tax that has not been disclosed. (Late payment penalties are additionally issued where an amount of tax is paid late.) The six months late filing penalty of £300 is imposed only when there has been a delay of at least six months. The Upper Tribunal concluded that the late filing penalties were not disproportionate to the aim of Schedule 55 to incentivise timeous filing. The Upper Tribunal also concluded that this was the case even when no tax was due under the return that was late. I conclude that this ground of appeal is unsuccessful.

27. The Appellant has also argued that there is a common law duty on HMRC to act fairly and that the maximum penalty should be reserved for those who act deliberately. In making this argument the Appellant relied upon the First-tier Tribunal decision in *Hok v HMRC* [2011] UKFTT 433 (TC).

28. The First-tier Tribunal decision in *Hok* was overturned by the Upper Tribunal (see *HMRC v Hok* [2012] UKUT 363). The Upper Tribunal made clear that the First-tier Tribunal does not have either a common law jurisdiction or a judicial review jurisdiction to discharge penalties that are considered to be unfair. As set out above, paragraph 5 imposes a penalty in the fixed sum of £300 when there is delay of six months or more in filing a return. The Tribunal does not have the power to discharge the six months delay late filing penalty on the basis that the Appellant considers HMRC should impose such a penalty only on the small proportion of people who are more than six months late in their filing but who did so deliberately. If the Appellant considers that HMRC has unfairly applied the six months delay late filing penalty because HMRC impose such a penalty on all those who are late and not only on those who are deliberately late, then the Appellant can challenge HMRC's decision by making an application to the Administrative division of the High Court. The Tribunal's jurisdiction extends only to deciding whether the conditions for imposing a penalty under Schedule 55 have been met and, if so, whether the Appellant has a reasonable excuse for the delay. As set out above, I am satisfied that the conditions

for imposing a six month delay late filing penalty have been met in this case. Therefore, this ground of appeal is unsuccessful.

29. The Appellant argues that it acted in good faith throughout.

30. I have no reason to doubt that the Appellant acted in good faith and that its delay in filing was due to its mistaken understanding of its obligations. However, acting in good faith does not constitute a reasonable excuse for late filing. As was said in *Garnmoss v HMRC* [2012] UKFTT 315 (in a similar context):

> What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.

31. Therefore, this ground of appeal is unsuccessful.

32. Next, the Appellant argues that it did not gain from the late filing.

33. I accept that it is true that the Appellant did not gain from late filing, and that it is also true that HMRC did not suffer delayed payment of any tax as no tax was due under the Appellant's ATED return. Both of these points appear to be arguments supporting the Appellant's contention that its delay is at the less serious end of defaults but, unfortunately, I do not agree that they are arguments demonstrating that the Appellant has a reasonable excuse for its delay. In this case the Appellant's delay exceeded six months, and that delay is no different from other cases of delay lasting more than six months. In a penalty regime aimed at preventing future delay and where a penalty of £300 is imposed in all cases where there is a delay of six months, it is not relevant that the Appellant did not gain from the delay, and HMRC did not suffer delayed payment of tax. If there had been delayed payment of tax due under the Appellant's ATED return then (in addition to the late filing penalties) HMRC would have imposed late payment penalties and interest in respect of the tax due. Therefore, this ground of appeal is unsuccessful.

34. The Appellant's penultimate argument is that the initial late filing penalty of £100 was paid promptly.

35. Again, I accept that this is the case. However, as with the previous argument, it appears to be an argument relating to the seriousness of the Appellant's delay. The delay exceeded six months, and therefore HMRC have imposed the penalty that Parliament has decided would be appropriate for delay of this length. I am afraid that prompt payment of one late filing penalty does not provide a reasonable excuse for the Appellant's delay in filing its ATED return. Therefore, this ground of appeal is unsuccessful.

36. The Appellant's final argument is that HMRC did not need to chase the Appellant for the ATED return.

37. I agree that this was the case and that HMRC did not chase the Appellant for its ATED return. However, until the ATED return was filed, HMRC was unaware that there was a filing obligation and so, logically, could not have chased the Appellant. Even if HMRC had been aware of the Appellant's filing obligation, there is no duty on HMRC to chase taxpayers to file their returns. As with the previous two grounds of appeal, this argument tries to make the case that the Appellant's default was not serious. However, as noted above, the Appellant's delay exceeding six months is no more, and no less, serious than other cases of delay exceeding six months. Therefore, this ground of appeal is unsuccessful.

38. I can see that the arguments put forward are intended to demonstrate that the Appellant is not a person who deliberately avoids meeting its tax obligations. I do not doubt the Appellant's good standing. But the six months delay late filing penalty is not imposed to allocate blame, and a person's motivation for late filing is not relevant. The purpose of the penalty is to deter future late filing and so the penalties are larger when the delay is longer. Additional, and more severe, penalties are imposed upon those who HMRC consider to be deliberate defaulters. The Appellant has failed to demonstrate that it has a reasonable excuse for its delay and so the six months delay late filing penalty of £300 will remain in place.

Special circumstances

39. The Tribunal has the ability to reduce penalties imposed by HMRC in certain, very limited, circumstances but it can do so only if there are errors of law (as understood in a judicial review sense) in the way that HMRC have approached the question of whether there should be a reduction in the penalties imposed upon the Appellant because of special circumstances. I have considered whether there are flaws in the way in which HMRC, in their Amended Statement of Case, have approached the question of whether there are exceptional circumstances which would make it right for the penalties to be reduced. I have concluded that there are no flaws, and so I do not have jurisdiction to re-make this decision.

Conclusion

40. The appeal against the daily penalties totalling £900 is allowed. The appeal against the six months late filing penalty of £300 is dismissed.

Request for a full decision

41. A summary of the reasons for the decision was issued to the parties on 29 December 2020. On 14 January 2021, HMRC made an in-time request for full written findings of fact and reasons for the decision.

42. 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 27 JANUARY 2021