NCN: [2021] UKFTT 0281 (TC)

TC08224

CORPORATION TAX – Late submission penalty – tax geared penalty – reasonable excuse

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06214

BETWEEN

BEALS ESTATE AGENTS LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
ANN CHRISTIAN

The hearing took place on 21 June 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because it was appropriate and more convenient during a time of restrictions on travel and social interaction to hold a virtual hearing.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Anthony Beal, director of the Appellant, for the Appellant

Mr Thomas Evans, presenting officer, for the Respondents

DECISION

INTRODUCTION

1. This case is an appeal against a tax-geared penalty imposed upon Beals Estate Agents Limited ("**BEAL**") for late submission of its corporation tax return for the period ended 30 March 2016.

EVIDENCE

2. We heard evidence from Mr Anthony Beal, director of BEAL. We found him to be a truthful and credible witness. We also had before us a bundle of documentary evidence prepared by HMRC.

LAW

3. Following the receipt of a notice from HMRC to deliver a return, a company must, under paragraph 3 of Schedule 18 to Finance Act 1998 ("**Sch 18**"), submit a company tax return no later than the filing date.

4. The filing date of a return is, pursuant to paragraph 14 of Sch 18 (to the extent relevant to this appeal), twelve months from the end of the period for which the return is made.

5. A company that fails to deliver its company tax return within 18 months after the end of its accounting period or by the filing date (if the filing date is later) is liable to a tax-related penalty under paragraph 18 of Sch 18.

6. Paragraph 18(2) of Sch 18 states that:

> "The penalty is:
>
> (a) 10% of the unpaid tax, if the return is delivered within two years after the end of the period for which the return is required, and
>
> (b) 20% of the unpaid tax, in any other case."

7. Pursuant to paragraph 18(3) of Sch 18, the unpaid tax means the amount of tax payable by the company for the relevant period that remains unpaid on the date on which the tax-related penalty arises.

8. Section 118(2) of the Taxes Management Act 1970 (which applies to the submission of company tax returns by virtue of section 117 of Finance Act 1998) provides:

> "For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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."

FACTS

9. The following facts in this case were agreed and uncontroversial:

(1) BEAL's accounting period ended on 30 March 2016 (having been shortened from its earlier end date of 31 March 2016) by means of a notification to Companies House).

(2) HMRC issued a notice to file a company tax return on 17 April 2016. This notice referred to the period ending 31 March 2016.

(3) On 30 December 2016, BEAL made a corporation tax payment of £124,224.82 in respect of the period ending 30 March 2016.

(4) The original filing date for the period was 30 March 2017.

(5) The filing date was extended by HMRC to 20 December 2017.

(6) The company tax return was submitted on 25 April 2018 showing a tax liability of £251,057.40.

(7) BEAL subsequently paid the remaining tax outstanding for that period, being £126,832.58.

(8) The penalty charged was 20% of £126,832.58, ie £25,366.52

10. The remaining facts found are set out in the relevant sections of the discussion below.

PARTIES ARGUMENTS

Taxpayer's arguments

11. Mr Beal submitted, on behalf of BEAL, that:

(1) the responsibility for preparing and submitting the company tax returns for BEAL, and a number of other group entities, fell to their in-house accountant, who had had that responsibility for a number of years without any prior issues;

(2) that accountant believed that he had submitted the company tax return for the period ended 30 March 2016 on 29 March 2017;

(3) no letters from HMRC relating to the relevant period were received by BEAL, ie it did not receive letters relating to the warning that a determination would be issued or any of the fixed or tax-related penalties. In Mr Beal's view, any such letter should be sent by recorded post, so that there could be no dispute about whether something had been sent. He also considered that it would have been more effective for HMRC to follow up with the directors of the company, which, he submitted, would have resulted in prompt action, as eventually happened when he became aware of the problem;

(4) the first anyone at BEAL knew of the late submitted tax return and non-payment of tax was a visit from HMRC at the BEAL offices at some point in April 2018;

(5) once BEAL were aware of the late filing and late payment, both issues were rectified very quickly by the submission of the tax return and payment of all outstanding tax.

12. Mr Beal considered that BEAL did have a reasonable excuse for the non-compliance, specifically, they had appointed an internal accountant and the previous long period of compliance established by this accountant shows that this was an appropriate and diligent system to have in place.

13. Mr Beal submitted that the in-house accountant, who had subsequently suffered a major stroke, had had a deterioration in the quality of his work, including a number of fundamental mistakes, which were completely out of kilter with his previous work. Following his major stroke, his doctor had suggested that he may have suffered a series of mini-strokes which led to loss of memory and had other effects on his brain function that would have affected his work.

14. Mr Beal submitted that these issues did not come to light until after the major stroke in 2019. At that point the group of companies, with the help of both internal book-keepers and external advisers, uncovered a number of errors, including substantial overpayments of tax in

other companies and periods. Following this experience, the company has changed its procedures and now has in place a two step process for submission of its returns and payments of tax.

15. Mr Beal submitted that this series of genuine mistakes made by their previously competent accountant would amount to a reasonable excuse and that the directors had met an appropriate level of prudence with regards to their corporation tax self-assessment obligations.

16. Finally, Mr Beal submitted that the level of penalty was totally disproportionate for a first offence of non-compliance.

HMRC arguments

17. HMRC submitted, in summary, that:

(1) BEAL had an obligation to ensure that it submitted its return on or by the filing date but it did not do so and the conditions for issuing a penalty had been met;

(2) BEAL did not have a reasonable excuse for the failure, specifically:

(a) A reasonable taxpayer would have sought confirmation that it had been submitted successfully and no evidence of any technical difficulties has been put forward;

(b) A simple excuse of mistake is not enough;

(c) There is a discrepancy in the appellant's arguments because if it believed it had submitted the full tax return on time, there is no reason given for why the full amount of tax was not paid on time;

(d) The appellant was contacted at least three times before the tax return was submitted on 25 April 2018 and therefore they had been made aware of the problem; and

(e) No evidence has been submitted on the accountant's ill-health at the time of the failure or during the period up to 25 April 2018; nor of the statements made by the doctor at the time of the stroke in 2019;

(3) The payment on 30 December 2016 of approximately half of the tax due did not discharge the taxpayer's obligation to submit the return for the period; and

(4) The amount of the late filing penalty arises from the application of the legislation, ie 20% of the tax unpaid.

DISCUSSION

18. We must determine two matters:

(1) Whether the statutory requirements for the assessment of the penalty have been met; and

(2) If they were, whether BEAL had a reasonable excuse for the failure to submit its return on time.

Statutory requirements for assessment of the penalty

19. It was not in dispute that the company tax return for the period ended 30 March 2016 was filed late. For completeness, we set out the way in which the law set out above applies to BEAL's factual matrix:

(1) The initial filing date for the tax return was 30 March 2017;

(2) The filing date was deferred by HMRC until 20 December 2017;

(3) Since the return was not submitted until 25 April 2018, it was submitted after the filing date;

(4) The trigger for a tax-related penalty in paragraph 18(1) of Sch 18 has been met in this case because the return remained outstanding past:

(a) The end of 18 months after the end of the period (which would have been 30 September 2017); and

(b) 20 December 2017 – the later filing date, which was later than 30 September 2017 and therefore the relevant trigger point.

(5) The trigger for a 20% penalty under paragraph 18(2) of Sch 18 has also been met because the tax return remained outstanding for over two years after the end of the period for which the return was required. This two year period would have expired on 30 March 2018 and the return was outstanding at that point.

20. We therefore find that the statutory conditions for the penalties to arise have been met.

21. We must now turn to section 100(3) of the Taxes Management Act 1970 which provides that where HMRC has made a determination of a penalty (including a penalty under Schedule 18), a notice of determination of a penalty shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

22. BEAL do not argue that the penalty that is under appeal was not received. The very fact of making this appeal would support the conclusion that the penalty notice was received. BEAL also do not argue that any of the other elements of the determination notice have not been met.

23. On that basis, we find that the penalty, set at 20% was correctly imposed and assessed.

Reasonable Excuse

24. We must therefore now turn to the question of whether BEAL has a reasonable excuse for its failure.

25. As set out in Upper Tribunal, in *Christine Perrin v HMRC* [2018] UKUT 0156, we must take a three-step approach to considering whether BEAL has a reasonable excuse:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;

(2) Second, decide which of those facts are proven; and

(3) Third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?".

26. The taxpayer's submissions on the facts that give rise to a reasonable excuse are:

(1) The accountant genuinely believed that the return had been filed on 29 March 2017;

(2) BEAL did not receive any of the letters sent by HMRC between the 31 March 2017 and the date the return was actually filed and were not aware of the failure until the visit of the tax collector in April 2018;

(3) The mistake by the accountant in failing to submit is believed to have been caused by a series of undetected mini-strokes;

(4) The accountant made a series of other mistakes over a similar period which were not detected until much later.

27. Having established those assertions, we must decide whether those facts are proven.

28. As noted above, Mr Beal argues that BEAL did not receive any penalty notices and were not aware of any issue until at least mid-April 2018 when they received a visit from a member of HMRC staff.

29. There was no corroborating evidence from HMRC about the visit of any HMRC staff to the offices of BEAL. However, I accept the evidence of Mr Beal that this visit took place in mid-April 2018 and was the event that gave rise both to Mr Beal's awareness of the non-filing of the tax return and the actual filing of the return within 7 to 10 days.

30. Turning to the question of whether letters were sent by HMRC to BEAL during the period between the initial filing date of 30 March 2017 and that visit. HMRC submit, and included evidence of their computer systems, that HMRC sent:

(1) A determination warning letter to BEAL on 1 December 2017 which warned BEAL that, in the absence of the tax return by the new filing date of 20 December 2017, HMRC would issue its own determination of the corporation tax due for the relevant period;

(2) A 10% tax related penalty notice on 22 December 2017, which was set at a much lower level based on HMRC's determination of the amount of tax due; and

(3) A 20% tax-related penalty notice on 18 April 2018, again set at a lower level based on HMRC's determination.

31. At the hearing, following a request from this Tribunal, Mr Evans submitted that its records showed that the first fixed penalty of £100 was issued on 19 April 2017 and the second fixed penalty of £200 was issued on 18 July 2017.

32. As noted above, Mr Beal submitted that no letters relating to the late filing of the tax return were received by BEAL. On being questioned about the postal arrangements of BEAL, Mr Beal stated that the organisation receives approximately 200 letters a day and that anything from Companies House or HMRC would be handed only to the in-house accountant. Mr Beal also asserted that the accountant had been adamant he hadn't received any of these letters. However, Mr Beal also conceded that the accountant's assertion could not be said to be 100% reliable given the other errors that were uncovered.

33. Before considering the evidence and assertions heard, we considered the decision of the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC), in which the Upper Tribunal stated, at [49] to [54]:

> "49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.
>
> 50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> > "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also

admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."

51. The FTT also made the following observations at [14] to [16] with which we would agree:

"14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.

15.We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.

16. Evidence of system might establish the propositions advanced by [HMRCs Presenting Officer]; but there is no such evidence before us."

52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be

"anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file…". The FTT declined to infer that the production of a "Return Summary" sheet showing "Return Issue date" with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision.

53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:

"…. a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn."

54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an "absence of cogent and/or reliable evidence of system", finding that the documentary evidence produced was "no more than equivocal"."

34. In support of their assertion that the letters were served or sent, HMRC also pointed us to section 7 of the Interpretation Act 1978, which provides:

Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter

> containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

35. We are in the position that neither side has unequivocal evidence to support their assertions. We must therefore weigh each of the sets of hearsay evidence and assertions to come to our conclusion.

36. As noted above, we accept that Mr Beal himself did not know about the issue of the late filed return or unpaid tax until the visit from HMRC in April 2018 and that both errors were rectified shortly afterwards. However, that is not the question for us to decide and accepting that fact is not the same as finding that BEAL did not receive the letters.

37. The accountant's original hand-written appeal to HMRC against the penalty asserted that he genuinely believed the return had been submitted. Clearly that was not a signed witness statement and the accountant was not present at the hearing to give evidence or be cross-examined.

38. We find that, on the balance of probabilities, the letters recorded in HMRC's computer systems were sent out to BEAL and were received by their accountant, but not actioned.

39. When questioned by HMRC, Mr Beal accepted that BEAL had not received a submission receipt via email from HMRC in relation to the 2016 tax return on or around 29 March 2017. He stated that they had checked the email records and found submission receipts for other group companies' returns that were submitted on the same day, but not for BEAL.

40. On the other assertions made by Mr Beal, no evidence at all was submitted of his accountant's medical issues around the time of the apparent first attempted submission of the return or the period running up to the final submission of the return; nor of the other mistakes caused by the accountant (to the extent those would have been relevant even if they had been proven).

41. Having considered what facts are proven, we must then decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?".

42. We consider that it was not objectively reasonable for the accountant to have believed that he had complied with his obligations to submit the tax return without checking that a submission receipt had been received from HMRC. It was also not objectively reasonable for him not to act upon any of the earlier letters received from HMRC in relation to the late filing and penalties over the following period of over a year. We also consider that it was not objectively reasonable for the directors of BEAL to leave all its tax compliance obligations to one person without a check or balance in place to give the directors confirmation that the compliance had occurred (something which BEAL have since rectified).

43. Therefore, we find that BEAL did not have a reasonable excuse for the failure.

Proportionality

44. We note that BEAL submitted that the amount of the penalty is disproportionate. This Tribunal is a creature of statute and must take the limits of its jurisdiction from the statute that has created it.

45. The penalty under paragraph 18(2) of Schedule 18 is set at "20% of the unpaid tax". There is no discretion in the section, eg there is nothing which says "up to 20%" or requires HMRC to consider the amount that should be imposed.

46. The limits of what this Tribunal can decide in the context of an appeal against a penalty are set out in section 100B of TMA 1970. Where the penalty is "required to be of a particular amount", this Tribunal may:

(1) set it aside if no penalty has in fact been incurred;

(2) confirm it if the amount determined appears correct; or

(3) increase or decrease it to the correct amount if the amount determined appears incorrect.

47. There is no dispute in this case that the 20% penalty has been calculated correctly by reference to the outstanding tax.

48. However, this Tribunal is said to have the power to consider proportionality of penalties in some circumstances. The meaning of 'proportionality' in the context of penalties was explained in *International Transport Roth* [2002] EWCA Civ 158; a penalty can be disproportionate if it is 'not merely harsh but plainly unfair'. 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).

49. These cases indicate that a penalty regime as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate in its particular circumstances, without the entire scheme of the legislation being disproportionate.

50. None of these cases dealt with penalties for late filing of corporation tax returns. However, *Total* and *Trinity* Mirror both deal with the VAT default surcharge regime which applies a penalty of a fixed percentage of unpaid VAT, which increases dependent on the seriousness of the failure.

51. In those cases, the Upper Tribunal found that the default surcharge regime was not in general disproportionate to the seriousness of the failure of the taxpayer. The objective of the default surcharge is to penalise late returns and late paid VAT and a financial penalty, based on a modest percentage of the amount of VAT unpaid by the due date, could not be regarded as going beyond these objectives.

52. However, the UT also noted that there could be exceptional circumstances in which a particular surcharge could be so high as to be disproportionate, noting that there is no maximum penalty under that regime.

53. The late filing penalty regime in schedule 55 to Finance Act 2009 was considered in *Barry Edwards* [2019] UKUT 131 (TCC), where the Upper Tribunal found the regime as a whole to be proportionate, finding (paragraph 85):

> "The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear."

54. Given that the late filing penalty regime for corporation tax calculates the penalty by reference to the amount of tax unpaid and the seriousness of the penalties increases with the length of time that the failure continues, we do not find that the regime as a whole is disproportionate. We also do not find that there is anything particular or exceptional to the circumstances of BEAL that render the penalty 'plainly unfair'.

55. Therefore, we dismiss BEAL's arguments regarding the proportionality of the penalty.

DECISION

56. For the reasons set out above, we uphold the penalty for late filing of the corporation tax return.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

RELEASE DATE: 06 AUGUST 2021