[2018] UKFTT 15 (TC)

TC06299

Appeal number: TC/2012/10903

Income tax – late filing penalty and daily penalties for late filing of SA return – refund of tax due on return as subsequently filed – whether HMRC's failure to apply a special reduction flawed – necessarily so, as they did not consider the issue at all – however the facts of the case did not amount to "special circumstances" in any event, nor would they warrant a reduction – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WAYNE ASHINGTON **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
DAVID BATTEN

Sitting in public in Centre City Tower, Birmingham on 29 November 2017

David Parker of Parkers Consultancy Limited for the Appellant

Miss G Truelove, Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit an annual self-assessment return for the year 2010-11 on time.

2. The penalties that have been charged can be summarised as follows:

(1) a £100 late filing penalty under paragraph 3 of Schedule 55 imposed on 14 February 2012; and

(2) "Daily" penalties totalling £500 under paragraph 4 of Schedule 55 imposed on 19 June 2012.

3. The appellant does not appeal the initial £100 penalty, but appeals against the daily penalties totalling £500.

4. This appeal, as it involved daily penalties, had been stayed pending the outcome of *Donaldson v HMRC*, which was finally determined in favour of HMRC by the Court of Appeal in July 2016 (see [2016] STC 2511).

The facts

5. The appellant was within the self-assessment regime and was issued with a notice to file a self-assessment return for the year 2010-11 on 6 April 2011. On behalf of the appellant, Mr Parker questioned whether a notice to file a return was ever delivered to his client (without actually asserting that it was not), on the basis that HMRC's computer record of such a notice having been issued on 6 April 2011 could not properly be relied on. We have no reason to doubt that a notice was indeed issued to the appellant. We find that it was, and it was duly received. We also find that it was accompanied by a standard form flyer (headed "Avoid the new late filing and late payment penalties") which included the statement (under the heading "Penalties for filing late") "Three months late and you will be charged an automatic daily penalty of £10 per day, up to a maximum of £900."

6. The due date for delivery of a completed return was 31 October 2011 (in the case of a return in paper form) or 31 January 2012 (in the case of a return submitted online).

7. In the absence of a completed return in either format, HMRC issued a notice dated 14 February 2012 imposing a £100 penalty for late delivery of the return. That notice included notification that "if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding".

8. By letter dated 5 June 2012, HMRC notified the appellant that his 2010-11 return was now more than three months late, and that accordingly he was already liable for daily penalties of over £300.

9. The appellant approached Mr Parker for assistance. Mr Parker filed his tax return online on his behalf on 19 June 2012. The return showed a refund of tax of £2,543.88.

10. On 19 June 2012 HMRC issued a notice of penalty assessment to the appellant for £500 in respect of the daily penalties incurred for the period from 1 May 2012.

11. On 16 July 2012, Parkers wrote to HMRC on behalf of the appellant to appeal against the £500 of penalties. The grounds of appeal were that "there was no tax liability for the year."

12. By letter dated 27 July 2012, HMRC rejected the appeal and offered a statutory review of that decision.

13. A review was requested by an undated letter from Parkers accompanying a form SA634 dated 10 August 2012. The grounds of appeal set out in the letter (to which the form SA634 referred) were as follows:

> "There was no tax liability for 2010/11, a refund arose.
>
> Much has been made by ministers regarding morality in the press recently.
>
> We would ask where HMRC's morals are in charging a penalty, when no tax or NIC is due and a refund arises."

14. By letter dated 6 November 2012, HMRC's decision to charge the penalties was upheld following a statutory review. The letter stated that HMRC could not see any reasonable excuse for the late filing, and the amount of the penalties was set out in legislation. They referred to the "flyer" which had been issued with notices to file returns for 2010-11 (referred to above), informing taxpayers of changes to the penalty regime. They also referred to the allegation of unfairness, stating that the Tribunal "does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair."

15. It was said in HMRC's statement of case that "HMRC have considered that Mr Ashington owed no income tax and submit that there are not special circumstances which would merit a reduction of the penalties below the statutory amount and that the penalties are appropriate in the circumstances." There was no mention in any of HMRC's earlier correspondence, including their decision letter dated 18 July 2012 and their review conclusion letter dated 15 November 2012, that they had given any consideration to the question of whether a special reduction was appropriate. We find that HMRC did not consider the question of "special reduction" until after the appeal had been notified to the Tribunal.

The appeal

16. On 6 December 2012, the Tribunal received the appellant's notice of appeal dated 5 December 2012. The grounds of appeal in the form referred to the earlier letters.

17. At the hearing, Mr Parker did not seek to argue that the appellant had a reasonable excuse for the failure to file his return on time, or that there was any invalidity in the penalty notice issued to him. His real argument was that the penalty was out of all proportion to the "offence", especially bearing in mind that the appellant's tax return as filed showed that he had no tax liability for the year, indeed a refund of over £2,500 was due to him. In legal terms, we interpreted this as being an argument

that the penalties were wholly disproportionate and/or that the Tribunal should exercise its power to apply a special reduction to the penalties.

Discussion

18. Relevant statutory provisions are included as an Appendix to this decision.

19. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 Finance Act 2009 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and we consider the question of "special circumstances" below.

20. In relation to VAT default surcharges, the legislation similarly confers no general power on the Tribunal to set aside surcharges on grounds of proportionality, however in *Enersys Holdings UK Limited v HMRC* [2010] UKFTT 20 (TC) the Tribunal did so, applying the test from *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 to the effect that the surcharge in that case was "not merely harsh but plainly unfair". Whilst the penalties under appeal in this case are clearly harsh in the context of the late filing of a return which discloses no tax liability (indeed, gives rise to a refund), we do not consider them to be "plainly unfair". A specific change to the earlier regime of limiting the amount of any penalty to the amount of tax shown on the relevant return had been made by Parliament. The new regime applies equally to all taxpayers whose returns result in no tax liability or a refund, as well as to those whose returns disclose a tax liability (of whatever amount). The penalty amounts involved are clearly significant, but they do not potentially run into tens or hundreds of thousands of pounds for the very shortest period of default (as in *Enersys*). Even if the Tribunal has the power to set aside these penalties purely on proportionality grounds, therefore, we are satisfied that both the scheme as a whole and its application to the facts of this case give rise to penalties which do not offend against the principle of proportionality.

21. So far as "special reduction" is concerned, it is clear that no such reduction was allowed by HMRC. We have power to apply such a reduction, but by reason of paragraph 22 Schedule 55, we may only do so if we think "that HMRC's decision in respect of the application of paragraph 16 was flawed… when considered in the light of the principles applicable in proceedings for judicial review."

22. It is clear that this is a high hurdle for the appellant to overcome. However, in the present case we have found that HMRC did not in fact make any decision as to the application of paragraph 16 (the "special reduction" provision); they simply failed to turn their mind to it at all. In those circumstances, we consider their failure to consider the question of "special reduction" at all must necessarily mean that any implicit decision not to apply it must have been flawed, when considered in the light of the principles applicable in proceedings for judicial review. In this regard, and bearing in mind that there was no evidence before us that HMRC had considered the question of "special reduction" at any stage before the appeal was notified to the Tribunal, we adopt the reasoning set out in the decision of the Tribunal in *Algarve Granite Limited v HMRC* [2012] SFTD 1354.

23. It follows that the Tribunal has, under paragraph 22 of Schedule 55, the power to apply a special reduction to the penalties. The question is whether we should do so.

24. The only "special circumstances" put forward by the appellant in this case are that there was no underlying tax liability disclosed by the return which was submitted late, indeed it gave rise to a refund. The first question we must consider is whether this can amount in law to a "special circumstance".

25. In *Crabtree v Hinchcliffe (Inspector of Taxes)* [1972] AC 707, the House of Lords was considering the phrase "special circumstances" in the context of a capital gains tax appeal. The relevant statutory provision laid down a particular set of rules for valuing listed shares for capital gains tax purposes, but with an exception where "special circumstances" existed which meant that the normal rules did not give "a proper measure of market value". In that case, the taxpayer argued that confidential information known to the board of the relevant company meant that its listed share price was artificially high and this amounted to "special circumstances" allowing for a lower valuation. In rejecting the taxpayer's position, the House of Lords had to consider the meaning of the phrase "special circumstances", and Lord Reid (at p. 731) said this:

> ""Special" must mean unusual or uncommon - perhaps the nearest word to it in this context is "abnormal." I see no reason to exclude any kind of abnormality."

26. In *Collis v HMRC* [2011] UKFTT 588 (TC), the Tribunal addressed the question of whether the fact that the default penalised was a "first offence" was capable of amounting to "special circumstances" under parallel provisions contained in Schedule 24 Finance Act 2007. In finding that it could not, the Tribunal said this:

> "…if HMRC's decision is flawed, the tribunal itself has the power to rely on paragraph 11 to the extent that it thinks fit, including determining whether the fact that Mr Collis had not previously failed to return his benefits in kind is a special circumstance. We are satisfied that it is not. The scheme of the penalty provisions is that an inaccuracy of the nature provided for is to be penalised irrespective of the number of occasions on which such an inaccuracy has arisen. *To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves*." *[emphasis added]*

27. We respectfully agree. Parliament has chosen to lay down a scheme of penalties which (unlike the previous scheme which it replaced) does not limit the amount of the penalties to the tax which is payable on the basis of the return which is filed late. Where a taxpayer is penalised in accordance with those provisions, any argument that the absence of an underlying tax liability amounts to a "special circumstance" must necessarily fail, because there is nothing "special" about the circumstances – the provisions simply apply to penalise all taxpayers in those same circumstances.

28. We would add that even if, as a matter of law, the circumstances of this case were capable of being considered as "special", we would have reached the view that they are not. The appellant was either entirely ignorant of his obligation to file his return by a particular date, or he omitted to do so either through conscious choice or inadvertence. There was no suggestion that he had been prevented from doing so by

some external event. It may be (though there was no evidence before us on the point) that he had simply not realised the penalty regime had changed, and was assuming he could safely delay filing the return because he knew it would disclose no tax liability (indeed, it would give rise to a refund). Whichever of these circumstances applied in this particular case, we do not regard them as "special".

29. It follows that even though we consider the Tribunal has the power to apply a "special reduction" under paragraph 16 to the penalties under appeal, we do not consider it appropriate to do so, because we do not consider the matters raised by the appellant amount to "special circumstances" (nor would we consider it appropriate that any reduction should be applied even if the circumstances were regarded as "special").

Conclusion

30. We have found that the return in question was filed late. The penalties were imposed in accordance with the legislation. No "reasonable excuse" argument was raised by the appellant. Whilst HMRC did not consider the question of "special reduction" (and, therefore, the decision to impose the penalties without such consideration was necessarily flawed), there were no "special circumstances" in this case; and even if such circumstances were found to exist, they would not warrant any reduction in the penalties. It follows that the penalties must be confirmed.

31. The appeal is therefore DISMISSED.

Application for permission to appeal

32. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 10 JANUARY 2018

APPENDIX – RELEVANT STATUTORY PROVISIONS

1. The penalties at issue in this appeal are imposed by Schedule 55. The starting point is paragraph 3 of Schedule 55 which imposes a fixed £100 penalty if a self-assessment return is submitted late.

2. Paragraph 4 of Schedule 55 provides for daily penalties to accrue where a return is more than three months late as follows:

> 4—
>
> (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).

3. Paragraph 5 of Schedule 55 provides for further penalties to accrue when a return is more than 6 months late as follows:

> 5—
>
> (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.

4. Paragraph 16 of Schedule 55 gives HMRC power to reduce penalties owing to the presence of "special circumstances" as follows:

> 16—
>
> (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

5. Paragraph 20 of Schedule 55 gives a taxpayer a right of appeal to the Tribunal and paragraph 22 of Schedule 55 sets out the scope of the Tribunal's jurisdiction on such an appeal. In particular, the Tribunal has only a limited jurisdiction on the question of "special circumstances" as set out below:

22—

(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

6. Paragraph 23 of Schedule 55 contains a defence of "reasonable excuse" as follows:

23—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.