[2019] UKFTT 132 (TC)

TC06998

Appeal number: TC/2018/07855

CGT - penalty for careless inaccuracy – no special circumstances – penalty proportionate - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KW DAY	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MS ELIZABETH BRIDGE

Sitting in public at Exeter on 29 January 2019

The Appellant in person

Mr Stuart Macleod, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This case concerns a penalty of £919.32 which has been assessed on the appellant under the provisions of Schedule 24 Finance Act 2007. HMRC contend that the appellant had failed to declare, in his tax return for the tax year 2012/2013, the disposal of his 50% share in the sale proceeds of land at Riding Cross, Chittlehampton, Devon which was sold on 23 January 2013 for £200,000.

2. It is HMRC's case that this failure is a careless inaccuracy, hence the penalty.

3. The appellant says that he was not careless. For the reasons given later in this decision, we disagree. We find that the appellant was careless and so we dismiss his appeal.

4. HMRC have also visited an interest charge of £764.33 p on the appellant for late payment of tax. The appellant has appealed against this interest charge. We deal with this aspect of the appeal at 99 below.

Schedule 24 Finance Act 2007

5. The provisions of Schedule 24 of the Finance Act 2007 that are relevant in this case are as follows:

(1) The respondents may assess a taxpayer for a penalty if a tax return contains a careless inaccuracy (paragraphs 1 and 13).

(2) An inaccuracy is careless if it is due to failure by the taxpayer to take reasonable care (paragraph 3(1)).

(3) The penalty for a careless error is capped at 30% of the potential lost revenue (paragraph 4).

(4) This can be mitigated to zero if a taxpayer makes unprompted disclosure or to 15% for prompted disclosure (paragraphs 9 and 10).

(5) The respondents may reduce the penalty for special circumstances (paragraph 11) and may also suspend the penalty (paragraph 14).

(6) A taxpayer may appeal against a penalty assessment (paragraph 15).

(7) A taxpayer is liable to a penalty even if the return is submitted by an agent (paragraph 18(1)).

(8) But he is not so liable if he can show that the inaccuracy arises because of an act or omission of his agent and he took reasonable care to avoid that inaccuracy (paragraph 18(3)).

Evidence and findings of fact

6. The appellant gave oral evidence. We were also provided with a bundle of documents. From this evidence we find the following facts.

(1) Mr Day has traded as a farmer for a number of years. He has done so as a sole trader. Although Mrs Day has been involved in running the farm, she has not taken either a salary or profits from it. She is, and has for a considerable time, been employed by a charity based in Exeter.

(2) The appellant and his wife jointly owned land at Coombe Farm, Devon. They owned this land in equal shares. This land included a plot of land on the eastern side of Riding Cross which was sold on 23 January 2013 for £200,000 (the "**Land**").

(3) Mr Day was, around that time, diversifying his farming activities. He was interested in purchasing a holiday cottage (Lyle House Cottage (the "**cottage**")) and when it came up for sale (it was close to one of his fields) and knowing that some of his neighbours had an interest in the Land, he contacted them to enquire further into their interest. Following that he put the Land up for sale through sealed bids. He had to pay £230,000 for the cottage. He was offered £200,000 for the land. He managed to find finance for the £30,000 difference.

(4) The appellant took no professional advice about the tax consequences of the sale of the Land, but he undertook some online research. He did not remember which sites he had visited. He could provide us with no printed copies of any research he had read nor any reference matter printed at the time. From his research he understood that he and Mrs Day were entitled to business asset rollover relief (under section 152 Taxation of Chargeable Gains Act 1992). He considered that this allowed them to effectively "transfer" the sale proceeds from the Land and any gains arising from that sale, into the cottage, and so no tax would be payable on the sale of the Land. This was convenient for them since at that time Mr Day was converting a barn on the farm into holiday accommodation and the cottage would fit neatly into this new business venture.

(5) If Mr Day had thought that he would not have got business asset rollover relief, he would not have carried on with the project and would not have sold the Land.

(6) Mr Day understood from his research, that he did not need to report the sale of the Land in his tax return and that relief was available even if the cottage was let out, provided that letting was for only a "short time".

(7) In fact, when Mr Day acquired the cottage it was vacant and shortly after he acquired the cottage, he let it out on a six month tenancy. He subsequently let it out on two further six month tenancies.

(8) The appellant did not notify HMRC about the sale of the Land. HMRC requested information about the sale of the Land on 13 May 2015. Following

receipt of that letter, the appellant contacted HMRC, by telephone on 28 May 2015. In that conversation, he explained that he was intending to roll the gain over using business asset rollover relief. He was told by Officer Campbell with whom he had the conversation that the claim should have been included in his tax return and that he needed to complete a claim form. On 18 June 2015 HMRC sent the relevant claim form to the appellant who formally made a claim for relief on 20 July 2015.

(9) HMRC investigated the claim and there then followed communications between the parties. On 11 November 2015 Officer Campbell wrote to the appellant asking for further information in order to enable him to deal with the claim for relief. That information was not supplied but HMRC did not contact the appellant again until 20 October 2016.

(10) Following that renewed contact, the appellant submitted further information to HMRC, and on 14 February 2017 HMRC wrote to him telling him that he did not qualify for the relief.

(11) On 31 March 2017 HMRC issued a discovery assessment for the tax due of £13,723.64.

(12) The appellant had written to HMRC around that time asking that if the cottage was not a qualifying asset for rollover, were there other reliefs that he could utilise such as entrepreneurs relief. He provided further information about the claim for entrepreneurs relief in May 2017. HMRC, on 1 November 2017, told the appellant that he did not qualify for entrepreneurs relief. However, following further communications, HMRC reconsidered its position and accepted, on a without prejudice basis, to accept the claim for entrepreneurs relief and so revised the tax assessment to £6,128.80.

(13) On 19 April 2018 HMRC wrote to the appellant explaining that they intended to charge the appellant a penalty of £919.32. On 13 August 2018 HMRC sent a notice of amended assessment to the appellant for the revised amount. They also charged late payment interest. On 28 August 2018 the appellant appealed against the interest and penalty assessments. He sought a statutory review. In the review conclusion letter dated 25 October 2018, HMRC explained to the appellant that it had completed their review and concluded that the original decisions regarding the penalty would not be changed. The appellant appealed to the tribunal on 18 November 2018.

Relevant case law

Reasonable care

7. In the First-tier Tribunal case of *Mr J R Hanson v HMRC* [2012] UKFTT 314, Judge Cannan set out what he considered the test for carelessness (or failing to take reasonable care.). We set it out below.

"19 In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under *section 29 Taxes Management Act 1970*. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer. The test was described by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT 206 at [22], cited with approval by the Upper Tribunal in *Colin Moore v Revenue and Customs Commissioners* [2011] UKUT 239 (TCC):

> "*The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.*""

8. Although Judge Cannan's view is not binding on us, we agree with it and adopt it as the test which is to be applied in the case of Mr Day.

Special circumstances

9. There have been a number of cases on special circumstances from which we derive the following principles (see Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs [2015] UKFTT 0095 and the cases cited therein):

(1) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (Crabtree v Hinchcliffe [1971], 3 All ER 967) or "something out of the ordinary run of events" (Clarks of Hove Ltd v Bakers Union [1979], 1 All ER 152).

(2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

(5) The tribunal should assess any decision (or failure to make one) in light of the principles applicable to judicial review.

(6) Failure to have considered the exercise of its discretion to reduce a penalty by virtue of special circumstances, in the first place, or failure to give reasons as to why, (if HMRC has made a decision), special circumstances do not apply, can render the "decision" flawed.

(7) We can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that HMRC would have come to the same

decision on the evidence before him (as per Lord Justice Neill in John Dee) *John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941.

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."

I cannot equate a finding "that it is most likely" with a finding of inevitability.

On this narrow ground I would dismiss the appeal."

(8) In deciding whether HMRC's decision was unreasonable, the tribunal should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(9) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(10) Having undertaken that assessment:

> (a) if the tribunal considers the decision is flawed, it may itself consider whether there are special circumstances which could justify substituting

it's decision for that of HMRC unless it considers that HMRC would inevitably have come to the same decision on the evidence before them.

(b) if the tribunal considers that HMRC have properly exercised its discretion in relation to special circumstances, it cannot substitute its own decision for that of HMRC when considering by what amount, if any, it should reduce a penalty.

Proportionality

10. In relation to the doctrine of proportionality and its application to the issues in this case, we have considered the following cases:

(1) *Paraskevas Louloudakis v Elliniko Dimosio* (Case C-262/99) [2001] ECR I-5547 ("*Louloudakis*")

(2) *International Transport Roth GmbH v Secretary of State for the Home Dept* [2003] QB 728 ("*Roth*")

(3) *James v UK* (Application 8793/79) (1986) 8 EHRR 123 ("*James*")

(4) *Wilson v SoS for Trade and Industry* [2003] UKHL 40 [2004] 1AC816 ("*Wilson*")

(5) *R(on the application of Lumsden and others) (Appellants) v Legal Services Board (Respondent)* [2015] UKSC 41 ("*Lumsden"*)

11. A summary of the principles relating to proportionality are set out below:

(1) Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method (Lumsden at [33])

(2) As is the case for other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context (Lumsden at [23].

(3) In the context of its application to penalties, the principle of proportionality is that:

(a) penalties may not go beyond what is strictly necessary for the objective pursued; and

(b) a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (Louloudakis at [67]).

(4) In deciding whether the measures or their application is appropriate and not disproportionate, the court must exercise a value judgment by reference to the circumstances prevailing when the issue is to be decided. It is the current effect and impact of the legislation which matters, not the position when the legislation was enacted or came into force (Wilson at [62]).

(5) The margin of appreciation given to law makers in implementing social and economic policy should be a wide one and the courts will respect the law makers judgment as to what is in the public interest unless that judgment is manifestly "without reasonable foundation" (James at [46]) or "not merely harsh but plainly unfair" (Roth at [26]).

Burden and standard of proof

12. The burden of establishing that the appellant is prima facie liable for the penalty which has been properly notified and assessed lies with HMRC.

13. The burden of establishing that he should not be liable for such penalty because, amongst other reasons, he has taken reasonable care or that the penalty is disproportionate, lies with the appellant.

14. In each case the standard of proof is the balance of probabilities.

Submissions

15. The appellant submits as follows:

(1) He carried out the same level of due diligence into the tax consequences of selling the Land and buying the cottage as he has applied to all his other business dealings both large and small.

(2) He has not been careless. He made an informed decision based on the information that he ascertained by his research.

(3) It is HMRC who have been careless if not negligent and incompetent. His case has been mishandled from the start. Two different officers have come to incorrect conclusions without taking all the facts into account.

(4) His case has not been handled in a fair and professional way. There have been numerous mistakes by HMRC and a botched review of only part of the case.

16. HMRC submit as follows:

(1) The appellant sold the Land for £200,000 and he knew there were tax consequences of that sale.

(2) However he failed to contact HMRC, failed to properly consider HMRC’s guidance, failed to involve an appropriately qualified tax adviser.

(3) He should have realised from his research that he needed to report the sale in his tax return if he was to obtain the relief. This is clear from HMRC's published guidance.

(4) He should also have realised from his research that the relief had to be claimed and was not given automatically. He did not make the claim until July 2015.

(5) Not only should the appellant have reported the sale, and claimed the relief, he rolled the gain over into a non-qualifying asset.

(6) A reasonable and prudent taxpayer in the appellant's circumstances who sold a plot of land used in his farming business and who intended to use the proceeds to buy a new asset and roll over the gain should have sought advice from an appropriately qualified individual or firm and it was careless not to have done so.

Reasonable care

17. We start off by saying that the allegations of incompetence by HMRC made by Mr Day do not appear to us to be relevant to the reasons why he failed to include the sale of the Land in his tax return and submitted it on the basis that he was entitled to claim rollover relief when he bought the cottage which he let out for more than a short time and which was not used in his trade.

18. These allegations should more properly be dealt with by way of a complaint to HMRC (which the appellant has done) and do not impact on his original failings. The sale of the Land took place in January 2013. The investigation into his tax affairs did not start until May 2015. HMRC's behaviour during that investigation could have had no impact on his failure to report the sale or erroneous belief that the gain could be rolled over into a non-qualifying asset.

19. We also wish to re-emphasise that we accept the appellant's testimony of what he did. We understand entirely why he feels that being characterised as careless is an unfair and unwarranted criticism. He accepts that he has made a mistake but not that he has been careless.

20. But, as Ms Bridge pointed out at the hearing, the concept of carelessness for tax purposes has a specific and perhaps to the appellant a less palatable connotation than when used in general parlance.

21. Simply because the appellant has made a mistake does not mean that he has also been careful. We must examine the appellant's actions against the objective test set out at [7] above.

22. The question that we ask ourselves is what a reasonable taxpayer in the appellant's position, exercising reasonable diligence in the completion and submission of his 2013 return would have done.

23. This is an objective test but applied to the appellant's particular circumstances. Unfortunately for the appellant we do not think that he has passed this test. We think that he has been careless as that concept is used for tax purposes. We say this for the following reasons:

(1) Firstly, the appellant's research was either inadequate or he failed to understand what was simply explained in HMRC's guidance. The appellant was unable to describe, precisely, what research he had carried out before he undertook the project. This is hardly surprising given that it was six years or so ago. His evidence was that he would have researched online and that he thinks he would have looked at HMRC's published guidance as well as website articles written and submitted by tax advisers. In our view, if he had read HMRC's guidance properly, it would have been abundantly clear to him that a claim for business asset rollover relief requires the reporting of the sale in a tax return. This is not a complicated instruction. He failed to comply with it. He cannot explain why. If he did not in fact consider HMRC's guidance, then, for the reasons given below, he should have done. Furthermore, the guidance (and we suspect the other website articles he perused) make it clear that the replacement assets must be used in a trading business. The appellant's evidence was that he thought that he could let the cottage out for a short time. And yet, in spite of this, he let the cottage out for three periods of six months as an investment and not as part of a trading business. So the appellant failed to take into account the very information that he told us that he had researched.

(2) Secondly, the appellant's evidence is that if he had even suspected that business asset rollover relief had not been available he would not have sold the field. So obtaining business asset roll over relief was of fundamental importance to him. Business asset roll over relief is a highly technical relief. If obtaining it was of such importance to the appellant, it is our view that a reasonably diligent taxpayer would have done more than just his own research. Having done some preliminary research, he would have taken advice from an appropriately qualified person who provides specialist tax advice to agricultural clients. Alternatively he could have contacted HMRC and could have written to them asking their view and seeking a ruling which would have given him complete certainty (something a tax advisor may well have advised him to do). The appellant did not do any of this. We appreciate that this might have involved expense. But in our view the appellant should have incurred any such expense in order to ensure that the relief which he claims was so important to him and which, had he not obtained it, would have derailed the project, was properly claimable.

(3) Finally, the appellant says that his research showed that he could let the cottage out for a short time. He let it for three six-month periods the first of which started shortly after he acquired the cottage. Eighteen

> months cannot be said, by any stretch of the imagination, to be a short time. We are not clear from the papers before us of the date on which the appellant submitted his 2013 tax return but even if he did so at the last minute, in January 2014, one if not two of those six-month periods would already have started if not completed. Furthermore, by the time he submitted his claim for business asset roll over relief in July 2015, all three periods would have expired. It seems to us that the reasonable taxpayer who had discovered that he could only obtain business asset rollover relief if the replacement asset was let out only for a short time should not have claimed it since it would have been clear to him that eighteen months letting as an investment disqualified the claim.

24. And so we take the view that the appellant has failed to take reasonable care when completing his tax return. He failed to report the sale of the Land on the return and he submitted it on the basis that business asset roll over relief was available (and so there was no tax to pay) when it was not (given that the cottage was let out for eighteen months and not used in his trade).

Special circumstances

25. HMRC indicate in their review letter that they have taken into account special circumstances but a simple statement to that effect does not, in my view, render the decision lawful. We have seen nothing (apart from that bold statement) setting out what HMRC have taken into account when coming to their decision that special circumstances do not apply, and in light of this, and of any reasons for that decision, it is our view that HMRC's decision regarding special circumstances is flawed. See [9(6)] above.

26. That means, in accordance with the principles set out at [9(10)] above, we must consider whether there are special circumstances which apply. We do not believe there are. As is mentioned at [9(1)] to comprise special circumstances, they must be exceptional, abnormal or unusual or there must be something out of the ordinary run of events as regards the taxpayer's situation. None of the appellants circumstances fall into either category.

27. And so we find that HMRC have not reached a flawed decision as regarding the application of special circumstances to the appellant’s situation.

Proportionality

28. Although not argued by the appellant, it is our view that the penalties are proportionate. In light of the principles set out at [11] above, and in view of the justification for the imposition of penalties (namely that it is essential for the proper function of a self-assessed tax regime that the taxpayer provides timely and accurate information), we consider that penalty for careless filing does not go beyond what is strictly necessary for the objective pursued. The penalty is far from being not merely harsh, but plainly unfair. Furthermore the appellant has been given the maximum discount for a prompted disclosure which reflects the assistance he has given HMRC.

Interest

29. The appellant appeals against the imposition of interest. Unfortunately for him, and we think he recognises this, HMRC's decision to impose interest is not appealable. Interest is statutory so where additional tax is due, interest will apply.

30. It has been made clear to the appellant by HMRC that the appellant can dispute the interest charge but can only to HMRC's Interest Review Unit who would determine the position.

31. The appellant explained at the hearing that he had not taken up this opportunity pending the outcome of his appeal. It is not for us to advise the appellant, but it might now be worth him taking the matter up with HMRC and HMRC's Interest Review Unit.

Decision

32. In light of the above we dismiss this appeal.

Appeal rights

33. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 26 FEBRUARY 2019