[2019] UKFTT 414 (TC)

TC07229

Appeal number: TC/2019/01007

INCOME TAX – penalty for failure to make Company Tax Return- whether reasonable excuse- whether return submitted without unreasonable delay after excuse ceased - application for costs

FIRST-TIER TRIBUNAL
TAX CHAMBER

BMS MOODY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 21 June 2019 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 15 February 2019 (with enclosures), HMRC's Statement of Case (with enclosures) prepared on 29 March 2019 and the Appellant's Reply dated 16 May 2019.

DECISION

1. The appellant is appealing against a flat-rate penalty for the failure to deliver a Company Tax ("CT") return imposed by HMRC under Paragraph 17 of Schedule 18 Finance Act 1998 ("Schedule 18") for the accounting period ending 28 February 2017.

2. Paragraph 3 of Schedule 18 requires a company to submit a CT return by the filing date set out in paragraph 14 of Schedule 18. In this case, the filing date was 28 February 2018.

3. Under the Income and Corporation Taxes (Electronic Communications) Regulations 2003, as amended, companies must submit their CT returns online and in a specified format.

4. If the CT return is not submitted on time, a flat-rate penalty is charged under paragraph 17 of Schedule 18. Under paragraph 17(2)(a) the penalty is £100 if the return is delivered within three months after the filing date. Paragraph 17(3) increases the penalty to £500 where a company submits a late return for the third successive year.

5. Under section 118(2) Taxes Management Act 1970 (TMA), a taxpayer is deemed not to have failed to have done something by a deadline, so that no penalty is chargeable, if it has a "reasonable excuse" for the failure to do it (in this case to submit the return). Section 118(2) continues "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".

6. The penalty that has been charged is £500 under paragraph 17(3) of Schedule 18 which was imposed on 16 March 2018.

7. The appellant's grounds for appealing against the penalty can be summarised as follows:

   (1) It argues that there was a "reasonable excuse" for any failure to submit the return on time in that it's accountant's software failed as it was submitting the return.

   (2) HMRC's delay of over seven months between the appeal to HMRC and their decision was unreasonable.

Findings of fact

8. There is no dispute as to whether HMRC sent BMS Moody Ltd (BMSM) a notice to file a CT return for the accounting period ending 28 February 2017.

9. The deadline for submitting the return was 28 February 2018, but the return was not submitted until 31 May 2018.

10. BMSM's accountants, SCC Accountants Limited (SCC) appealed against the penalty on 12 April 2018. HMRC responded on 11 May 2018 to say they could not consider the appeal until the CT return had been submitted. As noted, this was not done until 31 May. HMRC did not reply substantively until 31 December 2018, rejecting the appeal. A delay in responding, even if lengthy is not, in itself, a reasonable excuse and it is not otherwise a defence to the charging of the penalty.

11. HMRC's brief reasons for rejecting the appeal were:

> "This is the third consecutive return to be filed late. Each return was submitted three months late on 31 May. I do not consider the grounds for appeal to be reasonable excuse (sic) which continued throughout the whole period your return was overdue."

12. Whilst it does seem a remarkable coincidence that all three returns were submitted late on 31 May in the relevant years, I have no evidence as to why the earlier returns were late and I have considered only the circumstances of the CT return which is the subject of the present appeal.

13. SCC requested a review of HMRC's decision on 2 January 2019. HMRC's review conclusion letter of 18 January 2019 upheld the original decision on the basis that there was no evidence that the software problems occurred before the filing deadline and even if there was a reasonable excuse it did not continue throughout the period of he default. SCC appealed to the tribunal on 15 February 2019.

14. The burden of proving that the Appellant had a reasonable excuse is on the Appellant and the standard of proof is the normal civil standard of the balance of probabilities.

15. SCC's appeal letter of 12 April 2018 explained that they would have submitted BMSM's CT return on time, but the accountancy software, IRIS, which they had used for many years suddenly failed on 28 February 2018. As evidence, SCC had produced a screenshot from the IRIS website. There were two versions in my bundle. One, which appeared to have been sent to HMRC was printed on 26 March 2018 and the other appears to have been printed on 28 February 2018. HMRC's review letter suggested that the screenshot shows that problems with the software only occurred on 26 March 2018, after the filing failure. This is clearly not the case. The printout from 28 February stated, in a section headed "IMPORTANT ANNOUNCEMENTS":

> "Authentication problems when filing Returns online

> Some customers are currently experiencing "authentication problems" when trying to submit tax returns online. We are currently investigating what might be the cause of this and we have asked HMRC to check their systems to see if there are any issues.
>
> We apologise for any inconvenience this is causing and we will update this notice as soon as we have any further information."

16. The screenshot which was dated 26 March 2018 (the date of printing) included identical wording, except that it was now in a section of the screen headed "HINTS AND TIPS", the subheading stated "Authentication problems when filing Returns online-28/02/18" and it asked users of the software to check that they had the latest version of the software and, if not, to upgrade it.

17. Both versions of the screenshots indicate that only "some customers" were having problems filing, but I accept that SCC were one of those customers and that the problems occurred on 28 February 2018.

18. As further evidence, I had a copy of an email from SCC to IRIS's renewal department dated 1 March 2018 which stated:

> " I note that my renewal date its 2 April 2018….
>
> Unfortunately, for the first time I think, IRIS completely failed yesterday. The month end deadlines were missed…
>
> I have used IRIS for nearly 20 years, but I cannot remember issues like I had in January with the personal tax return errors, and now the inability to submit company tax returns to HMRC.
>
> …this means my time with IRIS has come to an end. I am sure you can accept that this is a reasonable notice period in the circumstances.
>
> …I hope that my move over to new software can be done in an efficient manner."

19. Although this was not attached to the appeal letter of 12 April 2018, I infer that this was the "enclosed email" referred to which showed "we have taken this matter seriously enough that we are no longer using IRIS".

20. Having carefully considered the above, I find that SCC suffered a software failure on 28 February 2018 which prevented them submitting the Appellant's CT return on time.

21. There is no evidence to suggest that SCC contacted HMRC to explain the problems they were having or what steps they were taking to deal with it. HMRC say in their Statement of Case that they have no record that SCC contacted them to say it was having problems with its software and that there were no records of unsuccessful attempts to submit the CT return (though this would presumably be because the software failed). Nor had there been any contact to check whether the CT return had been received.

22. SCC's letter accompanying the Notice of Appeal dated 15 February 2019, states that, following the decision to terminate the contract with IRIS in March, new software (TaxCalc) was purchased "ready to move clients across over the coming weeks". The letter continues:

> "A letter of appeal was submitted to HMRC on 12 April 2018, and it was still hoped at that point the older software would be able to submit the relevant data for this client. Having corresponded with IRIS…and made various attempts to use the software, by early May we accepted that the client would have to be moved across to the new software. This was done towards the end of May, and the Return was then submitted before the end of that month."

23. This letter does not indicate when SCC obtained the new software, but the original appeal letter of 12 April 2018 states:

> "We are in the process of filing the outstanding accounts and tax information using our new accountancy software TaxCalc."

24. From the comments set out in paragraphs 19 and 23 above I conclude that SCC must have purchased the new TaxCalc software in March/early April and that it was functioning and they were using it by 12 April at the latest.

Discussion

25. Whether a person has a reasonable excuse depends on all the circumstances of the case.

26. The classic statement of the test for reasonable excuse is that set out by Judge Medd in *The Clean Car Company Limited* LON/90/138X:

> "…it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

27. HMRC's website gives examples of events which are *capable* of constituting a reasonable excuse (emphasis added) and these include "your computer or software failed just before or while you were preparing your online return".

28. I have found that SCC's software failed as they were submitting the Appellant's return.

    (1) HMRC argue that "a prudent company would have filed its CT return several days before the deadline to insure if there were any computer software problems then there would be time to get them sorted out". That might be the case in an ideal world, but a taxpayer and its agent are not, in my view, required to anticipate that software which has operated

> reliably for 20 years might suddenly fail. In any event, the statutory deadline is not a few days before the filing date; it is the filing date. If a taxpayer would have submitted its return on time, but for the occurrence of an event which constitutes a reasonable excuse, that event is not any the less a reasonable excuse because the taxpayer was filing at the last minute.

29. In the present case, SCC's software failed unexpectedly on the filing date, 28 February 2018, and I find that, on the balance of probabilities, the Appellant's CT return would have been filed on time but for that failure.

30. Having taken account of all the circumstances of this case, I conclude that BMSM had a reasonable excuse, as at 28 February 2018, for the failure to submit its CT return for the accounting period ending 28 February 2017 on time.

31. The next question is whether the excuse ceased and whether the return was submitted within a reasonable period of the cessation of the excuse.

32. Although not bearing directly on this question, I would have expected a taxpayer or accountant in this situation to contact HMRC at the earliest opportunity to explain the problems and to discuss how they were to be dealt with and within what timeframe. At the very least, it would show a responsible attitude, that the taxpayer was trying to comply with their obligations and would provide contemporaneous evidence of the circumstances.

33. SCC did not contact HMRC until they made the appeal on 12 April 2018, some six weeks later.

34. SCC's 15 February 2019 letter indicates that they continued to try and submit the Appellant's return using the IRIS software until early May when they concluded that BMSM would have to be transferred to the new software which they did not do for another few weeks "toward the end of May", submitting the return on 31 May.

35. It does not seem credible that SCC would continue in its attempts to use the old software for two months following the sudden failure on 28 February 2018 and the continuing failure referred to in the grounds of appeal: "… the IRIS software still does not work to our satisfaction. Therefore, technically, the exact same reasonable excuse still holds true today [15 February 2019]."

36. It is also inconsistent with the appeal letter of 12 April 2018 and the email to IRIS of 1 March 2018. The email of 1 March gave notice to IRIS terminating SCC's contract with the company on 2 April 2018. Their licence to use that software expired on that date, nearly two months before the return was submitted, so if SCC was still trying to submit BMSM's return using the IRIS software until early May, on the face of it, they would be in breach of the contract/licence agreement. Even if IRIS had given permission for the continued use, it is unclear why SCC would persist in attempting to use the old software, which continued to be

problematic, when the TaxCalc software was available and in use by 12 April 2018, when SCC stated "We are in the process of filing outstanding accounts and tax information using our new accountancy software TaxCalc." If they were using this for other clients, why not the Appellant?

37. Taking all of the evidence into account, I have concluded that the failure of the IRIS software ceased to be a reasonable excuse once the new TaxCalc software was up and running and I infer that this must have been by early April 2018.

38. The Appellant's CT return was not submitted for a further seven to eight weeks. There is no evidence or explanation as to why it took so long. If, at the time of the appeal, they anticipated that it was going to take nearly two months to submit the Appellant's return, it would have been reasonable for them to say so. In my view, there was an "unreasonable delay" in submitting the return after the excuse ceased.

39. Accordingly, the defence provided by section 118(2) TMA does not apply. Although the Appellant originally had a reasonable excuse, it did not submit its return without unreasonable delay after the excuse had ceased, so the failure to file is not saved by the original reasonable excuse and the penalties are chargeable.

40. The Appellant also asserts that HMRC acted unreasonably in taking seven months to respond to the initial appeal against the penalty. It claims £500 in costs.

41. The First Tier Tribunal has a limited power to award costs. Rule 10 of The Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") provides, so far as relevant:

> **"10.— Orders for costs**
> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—
> (a) …;
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; [...][2]
> (c) …
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.
> (3) A person making an application for an order under paragraph (1) must—
> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
> (b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such costs or expenses if it decides to do so."

42. In *Stomgrove Limited* [2014] TC 03307, the First Tier Tribunal, following the Upper Tribunal case of *Catana v Revenue and Customs Commissioners* [2012] BTC 1625, held that this Tribunal cannot award costs under Rule 10 in respect of matters arising before the lodging of the Notice of Appeal. Judge Herrington said:

"The question as to whether the power in s 29(1) TCEA extends to costs incurred prior to proceedings being commenced in the FTT was considered by Judge Bishopp in the Upper Tribunal in *Catana v HMRC* where he noted at [7]:
"…the tribunal may only make an order in respect of costs "of and incidental to" the proceedings. There is no power to make an order in respect of anything else,and particularly, in the context of this case, in respect of the investigation into Mr Catana's tax affairs which proceeded the proceedings."
26.
He agreed, at [8], with the following observation of Judge Berner at [11] in *Bulkliner Intermodal Ltd v HMRC* [2010] UKFTT 395 (TC) that:

> "…one thing that has not changed is that the Tribunal's jurisdiction continues to be limited to considering actions of a party in the course of the "proceedings", that is to say proceedings before the Tribunal whilst it has jurisdiction over the appeal. It is not possible under the 2009 Rules, any more than it was under the Special Commissioners' regulations, for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, at some earlier stage in the history of the tax affairs of the taxpayer, …

27.
Consequently, Judge Bishopp concluded at [10]:
"…It follows that so much of Mr Catana's application as respects any costs he incurred before the proceedings before the First-tier Tribunal were brought cannot succeed, irrespective of its underlying merits which, consequently, I shall not explore."
…
I am bound by *Catana* as it is an Upper Tribunal decision and I should follow it. I should therefore proceed on the basis that the FTT has no power to award costs in respect of matters which preceded the proceedings, that is prior to the lodging of the notice of appeal."

43. In order for the Tribunal to have jurisdiction to award costs in this case, the Appellant must show that HMRC acted unreasonably in "bringing, defending or conducting the proceedings". The alleged unreasonable behaviour, the seven month delay in responding to the appeal letter to HMRC, clearly took place before the commencement of the proceedings. Accordingly, I am precluded by the reasoning in *Catana* from awarding costs in this case and I do not need to decide whether or not HMRC's behaviour was unreasonable.

44. Further, Rule 10(3)(b) requires the claimant to deliver a schedule of the costs or expenses expenses so that the Tribunal may conduct a summary assessment of them.

45. I have not been provided with any such schedule. The claim appears to be for a round sum by way of "recompense for the cost of making this appeal to the Tribunal" . It does not seem to relate to any specific costs or expenses.

46. I conclude that I do not have jurisdiction to award costs in this case.

Conclusion

47. For the reasons set out above I have concluded that although the Appellant had a reasonable excuse for failing to submit its CT return on time, it did not submit the return within a reasonable time of the excuse ceasing.

48. Accordingly, I affirm HMRC's decision and dismiss the appeal.

49. This Tribunal has no jurisdiction to award costs for matters occurring before the proceedings commenced and I make no order for costs.

Application for permission to appeal

50. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE
RELEASE DATE: 25 June 2019