[2015] UKFTT 0244 (TC)

TC04437

Appeal number: TC/2015/00211

CORPORATION TAX – penalty – whether failure to take reasonable care – yes - whether special circumstances – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARETH VALE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
MR HENRY RUSSELL OBE

Sitting in public at Priory Courts, Birmingham on 1 April 2015

There was no appearance by or on behalf of for the Appellant

Anne Rees, officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against the decision of HMRC to impose a penalty of £ 1522.61 on the Company under Schedule 24 Finance Act 2007. The penalty was imposed because the Company had claimed group relief for a number of years from a company which was not a member of the same group of companies.

Hearing in absence of the Appellant

2. The tribunal received a letter from the Appellant ("the Company") shortly before the hearing to explain that its owner and director, Mr Gareth Vale, would not be attending the hearing of the appeal due to his long term medical situation. Mr Vale requested the tribunal to proceed with the hearing in his absence. We considered rules 33 and 2 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") and found that, as the Company had received prior notification of the hearing and had provided HMRC and the tribunal with its arguments and sufficient evidence in order for the case to be determined promptly in Mr Vale's absence, it was in the interests of justice to proceed.

Application to appeal out of time

3. The Company had appealed against assessments made by HMRC under paragraph 76 Schedule 18 Finance Act 1998 following an enquiry. On 8 July 2014 HMRC wrote to explain the proposed penalty charge. The assessment and penalty decision was reviewed by HMRC and confirmed by the review officer to be correct on 17 October 2014. On 20 November 2014 Mr Vale wrote to HMRC to notify the Company's withdrawal of its appeal in respect of the assessments, but to continue with its appeal in respect of the penalty. Mr Vale was informed by HMRC and HMCTS that a fresh appeal would have to be lodged in respect the penalty if the Company wished to dispute it, but that HMRC would not oppose the application for permission to appeal out of time. On 12 January 2015 the Company lodged its appeal in respect of the penalty.

4. We considered the circumstances in which the appeal notice had been given and the overriding objective in rule 2 of the Tribunal Rules, and gave permission for the Company to appeal out of time.

The Facts

5. The Company was set up in 2004 to provide accountancy services. Mr Vale is a chartered certified accountant and the director of the Company. Mr Vale also operated a book-keeping business through PH Financial Management Limited. Mr Vale and his wife each own 50% of the shares in PH Financial Management Limited. Mr Vale would have chosen to share the ownership of the Company with his wife in the same way but, due to professional restrictions imposed by the accounting professional body

on accountancy businesses, he owns the entire share capital of the Company as his wife is not an accountant.

6. Mr Vale's wife runs a hairdressing business and this is operated through Reds Hair Studio (1) Ltd. Mr and Mrs Vale each own shares in Reds Hair Studio (1) Ltd but no shares are owned by the Company. As noted in paragraph 5, Reds Hair Studio (1) Ltd does not own any shares in the Company.

7. In 2006 Mr Vale contacted HMRC to discuss the ownership of his companies. Mr Vale explained that his wife was not a shareholder in the Company as she is not an accountant. Mr Vale understood from the conversation that HMRC had agreed to apply a concessionary treatment set out in its technical guidance so that he and his wife "were connected and as such would be treated as effectively 1 person". The Company has not identified the concession or technical guidance referred to or its relevance to group relief. Neither the Company nor HMRC have a record of this conversation.

8. In 2007 the Company sought to claim group relief from Reds Hair Studio (1) Ltd for the accounting period ended 30 April 2006. Reds Hair Studio (1) Ltd's relevant accounting period ended on 30 November 2005 and the Company wrote to HMRC on 30 August 2007 to ask for assistance in processing amendments to the returns. The letter to HMRC did not refer to group relief but explained that the "problem we did encounter while entering the details into your online software for the first period was that the software would not allow us to split the "Associated Companies" between the 2004 and 2005 tax years. At the 1 April 2004 the company had no associated companies but as at the 1 July 2005 we acquired two associated companies." Mrs J H Smith, an officer of HMRC, responded by letter dated 14 September 2007 that she had "made the manual amendments where required to the returns for the periods ended 30 November 2005 and 30 April 2006."

9. The Company claimed group relief from Reds Hair Studio (1) Ltd for the subsequent accounting periods ended 30 April 2007 to 30 April 2012. Each claim was made by manual amendment to the returns by HMRC.

10. In 2014 HMRC checked the Company's return for the period ended 30 April 2012 under paragraph 24(1) Schedule 18 Finance Act 1998. In a letter dated 22 January 2014 HMRC explained that the officer would be looking at the claim for group relief as two companies concerned were not grouped for corporation tax purposes. The Company and HMRC exchanged letters and agreed by 27 February 2014 the HMRC amendment to remove the group relief from the return for the period ended 30 April 2012.

11. On 4 March 2014 HMRC wrote to advise that the officer had found that the Company had made similar claims for group relief for the accounting periods ended 30 November to 30 April 2011 inclusive. The Company was notified that HMRC considered this to be a deliberate error because the Company is a professionally qualified firm of accountants and the error was sustained over eight years. However,

following correspondence with the Company, HMRC decided that the inaccuracy had arisen because of a failure to take reasonable care rather than deliberate action. The officer wrote on 2 July 2014 to advise that the penalty would be imposed on the basis of that the Company "is an accountancy firm and as such it is my opinion that it failed to take reasonable care when it claimed group relief…"

12. HMRC made assessments for the period ended 30 April 2009 – 2011 and imposed the penalty the subject of this appeal on 8 July 2014. HMRC was time barred in relation to the period ended 30 April 2008. The penalty was calculated at the rate of 15.75% as it was reduced for the quality of the prompted disclosure. HMRC did not consider that there were special circumstances that would justify a further reduction of the penalty.

13. The Company ceased trading as of 30 April 2014 but Mr Vale confirmed in his letter of 6 January 2014 that an insolvency practitioner has not yet nor will be appointed.

Relevant Law

14. Paragraph 1 of Schedule 24 Finance Act 2007 provides that a penalty is payable where a person gives HMRC a document, such as the corporation tax returns in this case, which contains an inaccuracy which leads to an understatement of the liability to tax. The amount of the penalty depends on the degree of culpability. For this purpose paragraph 3 of Schedule 24 Finance Act 2007 provides that inaccuracy in a document is either "careless" if the inaccuracy is due to failure by the taxpayer to take reasonable care, or "deliberate but not concealed", or "deliberate and concealed".

15. The standard amount of the penalty for corporation tax under paragraph 4 of Schedule 24 Finance Act 2007 is 30% of the potential lost revenue for careless action, 70% of the potential lost revenue for deliberate but not concealed action and 100% for deliberate and concealed action. The potential lost revenue is the additional amount due or payable as a result of correcting the inaccuracy, which in this case is the benefit of the group relief claim in calculating the corporation tax due.

16. Paragraphs 9 and 10 of Schedule 24 Finance Act 2007 provide for reductions in the penalty to reflect the quality of the disclosure. The reductions depend upon whether the disclosure was unprompted and on the quality of the disclosure. The quality of the disclosure includes the timing, nature and extent of the way in which the taxpayer (i) told HMRC about the inaccuracy: (ii) gave HMRC reasonable help in quantifying the inaccuracy; and (iii) allowed HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. In the case of a penalty for careless action where the disclosure was prompted these reductions cannot reduce the standard amount of the penalty below 15 %. Paragraph 11 of Schedule 24 Finance Act 2007 then provides that HMRC may reduce the penalty if they think it right because of special circumstances.

17. The main provisions for group relief are now set out in sections 130, 131, 151 and 152 Corporation Taxes Act 2010. The provisions were previously set out in sections

402 and 413 Income and Corporation Taxes Act 1988 ("ICTA"). The provisions state that a company may make a claim for group relief for an accounting period if the group condition is met. The group condition is that the surrendering company and the claimant company are members of the same group of companies. Two companies are members of the same group of companies if one is the 75% subsidiary of the other or both are 75% subsidiaries of a third company. A company is a 75% of another if at least 75% of its ordinary share capital is owned directly or indirectly by that other company.

18. The provisions relating to associated companies are set out in section 25 Corporation Taxes Act 2010 and were previously set out in section 13 ICTA 1988. These provide that a company is associated with another if one has control of the other or both are under the control of the same person or persons. At the time of the assessments and penalty the subject of this appeal, the fact that companies were associated was relevant to the issue of whether the small companies rate of corporation tax was payable.

Submissions by the parties

19. The Company claims that the fact that HMRC had confirmed on a call in 2006 that it would be allow a concessionary treatment for the ownership structure led Mr Vale to believe that group relief would be allowed between the Company and Reds Hair Studio (1) Ltd. This was compounded by the fact that HMRC had made manual amendments to its tax returns to include group relief from Reds Hair Studio (1) Ltd.

20. The Company claims that it made the amendment to remove the group relief claim for the period ended 30 April 2012 before the end of the 12 month amendment period and so a penalty should not have been levied.

21. The Company claims that it could have changed the structure of the companies at any time and that HMRC has suffered no loss as the losses will now be offset at a later date. The Company also referred to guidance on share ownership which explains when shares can be treated as owned for the purposes of the various group company tests.

22. HMRC submit that under corporation tax self-assessment HMRC operate a "process now check later" procedure. Manual amendments to tax returns are made on this basis. Under part IV paragraph 24 Finance Act 1998 HMRC have 12 months to enquire into a corporation tax return, if they give notice that they intend to do so, to check that the tax on the company's return is correct. Even if the tax return is not subject to enquiry, it is not confirmation that a company's tax return is correct.

23. HMRC accept that the companies are associated for corporation tax purposes but the conditions for group relief are different. The companies do not satisfy the conditions for group relief because neither of the companies concerned owns shares in the other company and they are not owned by a third company.

24. The Company's business is that of a chartered certified accountant and it should be fully aware of the conditions for group relief or have the understanding to find out about it. In the circumstances HMRC consider that the penalty has been generously abated under the provisions of paragraphs 9 and 10 Schedule 24 Finance Act 2007. HMRC do not consider that there are any uncommon or special circumstances to warrant a further reduction of the penalty.

Discussion

25. The question for the tribunal is whether the errors in the Company's tax returns were because it failed to take reasonable care. In determining whether the Company took reasonable care we considered whether what it did was reasonable for a responsible taxpayer intending to comply with its tax obligations, but being in the situation and having the attributes of the taxpayer. In this respect we took account of the knowledge and experience that the Company had as an accountancy business. We noted from the correspondence that Mr Vale was familiar with the different definitions of a group relevant for company law and accounting standards.

26. Mr Vale, on behalf of the Company, believed that HMRC had accepted that the companies were a group for corporation tax purposes but this was, he described, perhaps naive. We found that the lack of judgment was careless rather than naïve given the Company's business. The correspondence in 2007 appears to be about associated company status. Similarly, the conversation with HMRC in 2006 related to Mrs Vale's ownership of shares, as opposed to one of the companies owning shares in another, and is therefore relevant to associated company status and difficult to reconcile with any concession relating to group relief. The Company also provided us with published guidance on share ownership in support of its case. One of these explains the close company test and the other when shares held by one company in another company can be treated as owned for the purposes of the various group company tests. The documents are not relevant in the circumstances of the Company's claim for group relief given the ownership of its shares.

27. The Company considers that there was no lost revenue as the company structure could have been changed, management charges raised or losses carried forward in Reds Hair Studio (1) Ltd and used in the future. The lost revenue is calculated under paragraph 5 Schedule 24 Finance Act 2007 as the tax that is payable by the Company as a result of correcting the inaccuracy. In the Company's circumstances this is the tax payable in the absence of the group relief claims and not what it could have been with planning.

28. The Company considers that HMRC has not acted fairly. We found that HMRC applied the legislation fairly in relation to the imposition of the penalty. It is the Company's responsibility to complete and deliver accurate returns. The basis of the penalty proposed was changed from being for a deliberate action to careless action in the light of the Company's correspondence with HMRC. When calculating the penalty, HMRC applied reductions totalling 95% to reflect the Company's response, help and provision of information access once the enquiry began in January 2014. HMRC considered whether there were any special circumstances, and the conclusion

that were none was reasonable in the circumstances. We consider that the penalty imposed is fair given the misunderstanding on Mr Vale's part on the one hand and the Company's accounting experience on the other hand.

Decision

29. For the reasons set out above we dismiss the appeal.

30. 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.

VICTORIA NICHOLL

TRIBUNAL JUDGE
RELEASE DATE: 20 May 2015