[2018] UKFTT 194 (TC)

TC06435

Appeal number: TC/2017/06958

PENALTIES – fixed and daily penalties for failing to file a self-assessment form on time – whether a mistake in good faith amounts to a reasonable excuse or special circumstances – no – whether the Tribunal is entitled to reduce the penalties on the grounds that they are excessive given the amount of tax at stake – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DOMINIC ROBERT MARTIN ABEL	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE TONY BEARE

The Tribunal determined the appeal on 29 March 2018 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 18 September 2017 (with attachments) and the Respondents' statement of case (with enclosures) acknowledged by the Tribunal on 18 November 2017

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DECISION

Background

1. This is an appeal against two penalties imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") in respect of the tax year of assessment ending 5 April 2016. The penalties in question have been imposed under paragraph 3 of Schedule 55 – a fixed penalty for the failure to file a self-assessment return in respect of the relevant tax year before the date when it was required to be filed (the "filing date") – and under paragraph 4 of Schedule 55 – a daily penalty for each day after the date falling three months and one day after the filing date that the self-assessment return remains unfiled.

2. In this case, the first of those penalties amounts to £100 and the second of those penalties amounts to £300. The Appellant has in fact already paid the first penalty but it is clear from the terms of both his appeal of 1 June 2017 and his notice of appeal to the Tribunal of 18 September 2017 that he is seeking to appeal against that penalty as well as the daily penalty.

The facts

3. The circumstances which led to the imposition of the relevant penalties may briefly be described as follows:

> (a) the Respondents allege that, on 6 April 2016, they issued to the Appellant a notice requiring the Appellant to file a self-assessment return in respect of the tax year of assessment ending 5 April 2016;
>
> (b) the Respondents allege that, on or around 7 February 2017, they issued a penalty notice to the Appellant, imposing the fixed penalty under paragraph 3 of Schedule 55;
>
> (c) the Respondents allege that, on 28 February 2017, they issued a statement to the Appellant showing that the amount of the fixed penalty remained outstanding;
>
> (d) the Appellant denies receiving any of the above communications but the Respondents have provided, as evidence that the relevant communications were sent to the Appellant at the Appellant's correct address, copies of their own computer records and of generic pro forma letters;
>
> (e) on 11 May 2017, the Respondents issued a letter to the Appellant reminding him that the fixed penalty remained outstanding;
>
> (f) upon receipt of that letter, the Appellant promptly paid the fixed penalty;
>
> (g) on 30 May 2017, the Appellant filed his self-assessment return in respect of the relevant tax year of assessment on line; and

(h) on or around 30 May 2017, the Respondents issued a penalty notice to the Appellant, imposing the daily penalty under paragraph 4 of Schedule 55.

5 Discussion

4. The Appellant has not denied that he received the penalty notice that was issued to him under paragraph 4 of Schedule 55 on or around 30 May 2017. Indeed, the fact that he appealed against that notice on 1 June 2017 indicates that he received that notice.

10 5. However, the Appellant has denied receiving the penalty notice issued under paragraph 3 of Schedule 55 on or around 7 February 2017, the earlier notice of 6 April 2016 requiring the filing of a self-assessment return in respect of the relevant tax year of assessment and the later statement of 28 February 2017.

6. The Respondents allege that, as those documents were sent to the Appellant at
15 his correct address and were not returned, they are deemed by Section 7 of the Interpretation Act 1978 to have been received by the Appellant. With respect to that submission by the Respondents, Section 7 of the Interpretation Act 1978 has the effect of deeming a document to have been received only once it is proved that the relevant document has been properly addressed, pre-paid and posted. So, before they can rely
20 on the relevant section to establish receipt by the Appellant of any of the above documents, it is incumbent on the Respondents to establish that they did indeed post the relevant document to the Appellant in an envelope bearing the correct address and postage. In that regard, it is unfortunate that the Respondents neither maintain copies of such documents on their files nor despatch such documents using a method that
25 gives rise to a record of posting.

7. Nevertheless, I am satisfied from the evidence that has been presented to me that, on the balance of probabilities, the documents were posted to the Appellant in the proper form. The Respondents have provided their records in relation to the Appellant and pro formas of the relevant penalty notice and notice to file. It is clear
30 from those records that the Respondents had the correct address for the Appellant. Moreover, it is noteworthy that the Appellant does not deny receiving any of the communications which were sent by the Respondents to the Appellant on and after 11 May 2017 and that, in his notice of appeal to the Tribunal dated 18 September 2017, the Appellant admitted that he had "overlooked" his tax return and "should have been
35 more organised". All of the above, taken together, leads me to conclude that, on the balance of probabilities, the relevant documents were sent by the Respondents and received by the Appellant.

8. It is then necessary for me to determine, pursuant to the decision of the Court of Appeal in *Donaldson v The Commissioners for Her Majesty's Revenue and Customs*
40 [2016] STC 2511 ("*Donaldson*"), whether:

(a) in relation to the penalty imposed under paragraph 4 of Schedule 55, the requirement in paragraph 4(1)(c) of Schedule 55 – the obligation to specify the date from which the daily penalty was payable – has been met; and

(b) in relation to both penalties – ie each of the penalty imposed under paragraph 3 of Schedule 55 and the penalty imposed under paragraph 4 of Schedule 55 – the requirement in paragraph 18(1)(c) of Schedule 55 – the obligation to state in the relevant penalty notice the period in respect of which the penalty is assessed – has been met, and, if the relevant penalty notice has not met that requirement, whether that failure is a matter of form and not substance such that the relevant penalty notice remains valid by virtue of Section 114(1) of the Taxes Management Act 1970.

9. As noted above, although the material enclosed with the statement of case did not include copies of the specific penalty notices that were sent to the Appellant, it did include pro formas of those notices.

10. Looking at those pro formas, the notice that was sent to the Appellant on or around 7 February 2017 informed the Appellant that, if his self-assessment return was more than 3 months late, the Appellant would have to pay £10 for every day until the self-assessment return was received, from 1 February for paper returns and from 1 May for on-line returns, subject to a maximum of 90 days. This is precisely the language that, in *Donaldson*, was held to mean that the Respondents had complied with the requirement in paragraph 4(1)(c) of Schedule 55.

11. Turning then to the requirement in paragraph 18(1)(c) of Schedule 55, the Court of Appeal in *Donaldson* made it clear that, in relation to a fixed penalty such as the one under paragraph 3 of Schedule 55, the relevant notice complies with the requirement in paragraph 18(1)(c) of Schedule 55 as long as it states the tax year of assessment to which the relevant fixed penalty relates. In this case, the pro forma of the notice that was sent to the Appellant on or around 7 February 2017 shows that the relevant notice did just that. It referred to the tax year of assessment to which the relevant default related. It therefore complied with the requirement in paragraph 18(1)(c) of Schedule 55.

12. The Court of Appeal in *Donaldson* went on to say that, in relation to a daily penalty under paragraph 4 of Schedule 55, the position is different. It held that, in relation to a daily penalty, the relevant notice needs to refer to the period over which the daily penalty has accrued and not simply the tax year of assessment to which the relevant default relates. In this case, the notice that was sent to the Appellant on or around 30 May 2017 did not set out the precise thirty day period in respect of which the penalty had been calculated. Therefore, like the penalty notice in *Donaldson*, it did not comply with the requirements in paragraph 18(1)(c) of Schedule 55. However, as was the case in *Donaldson*, I consider that there was sufficient information within the relevant notice for the Appellant to work out, without difficulty, the period in respect of which the penalty had been charged. Indeed, the fact that, in his request of 5 July 2017 for a review of the decision by the Respondents to impose the penalties, the Appellant said that "I think charging me £10 per day for a month[s] is excessive bearing in

mind its 35% more than my tax bill inc your £100 fine" shows that the Appellant understood perfectly well that the £300 penalty related to the period from 1 May 2017 to 30 May 2017. I therefore conclude that the notice in question fell within the ambit of Section 114 of the Taxes Management Act 1970 and was valid despite its failure to comply with paragraph 18(1)(c) of Schedule 55.

13. Given the above, I hold that the penalties in this case have been properly levied on the Appellant unless there is any provision in Schedule 55 which might apply to relieve the Appellant from his liability to the penalties in question.

14. There are two potentially applicable relieving provisions in Schedule 55 – paragraph 23, which provides that liability under the Schedule does not arise in relation to a failure to file a return if the taxpayer satisfies the Respondents, or, on appeal, the Tribunal, that there is a "reasonable excuse" for his failure, and paragraph 16, which provides that, if the Respondents think it right because of "special circumstances", they may reduce any penalty under the Schedule, the exercise of which discretion by the Respondents is open to challenge at the Tribunal if the decision is "flawed" in the light of the principles applicable in proceedings for judicial review (see paragraph 22 of Schedule 55).

15. As regards the first of the relieving provisions, paragraph 23 does not elaborate in detail on the meaning of the term "reasonable excuse" beyond stipulating that, in relation to any failure to file a return:

> (a) An insufficiency of funds is not a reasonable excuse unless attributable to events outside the relevant taxpayer's control;
>
> (b) Where the relevant taxpayer has relied on any other person to do anything, that is not a reasonable excuse unless the relevant taxpayer took reasonable care to avoid the failure; and
>
> (c) Where the relevant taxpayer has a reasonable excuse for the failure but the excuse has ceased, the relevant taxpayer is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceases.

16. None of the above is particularly enlightening in the present context.

17. However, it is clear from the decided cases in this area, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ("*Clean Car*"), that the test to be applied in determining whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

18. Moreover, as noted in the decision of Judge Hellier in *Garnmoss Limited trading as Parham Builders v The Commissioners of Customs and Excise* [2012] UKFTT 315 (TC) ("*Garnmoss*") the mere fact that a mistake has been made in good

faith and is not blameworthy does not, in and of itself, make that mistake a reasonable excuse. The legislation provides for relief in the case of reasonable excuses and not all mistakes satisfy the test outlined in paragraph 17 above.

19. As regards the second of the relieving provisions, there is no guidance in the legislation on what may constitute "special circumstances" but it is clear from the terms of paragraphs 16 and 22 of Schedule 55 that the decision as to whether any particular circumstances constitute "special circumstances" is entirely a matter for the Respondents to determine in their own discretion and that their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 K.B. 223* (*Wednesbury*"). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents' decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

20. Bearing the above description of the relieving provisions in mind, my views on the application of the relieving provisions to the circumstances of the Appellant in this case are as follows.

21. The Appellant has made various submissions in support of his case for being relieved from the penalties altogether and those may be summarised as follows:

(a) he did not receive any of the communications which the Respondents allege that they sent to him until the letter of 11 May 2017 and so he was not aware that he had to file a return;

(b) he was self-employed for only two weeks in the relevant tax year of assessment;

(c) he overlooked his return and should have been more organised; and

(d) he encountered various technical problems in completing his return.

22. Whilst I am sympathetic to the predicament of the Appellant in having to pay these penalties in addition to his taxes for the relevant tax year of assessment, I am afraid that I do not think that any of the reasons given in paragraph 21 above amounts to a reasonable excuse for the Appellant's failure to file his self-assessment return on time. The Appellant knew that he had been self-employed during the relevant tax year of assessment (albeit only for a short time) and therefore that the tax due in respect of his self-employment income would need to be collected through the submission of a self-assessment return.

23. Moreover, it is not as if this was the first tax year of assessment in which the Appellant was self-employed and in respect of which the Appellant was required to submit a self-assessment return. The Respondents' records show that the first tax year of assessment in respect of which the Appellant filed a self-assessment return was the tax year of assessment ending 5 April 1997 and that the Appellant had filed a self-assessment return in respect of four recent tax years of assessment - each of the tax year of assessment ending 5 April 2008, the tax year of assessment ending 5 April 2012, the tax year of assessment ending 5 April 2013 and the tax year of assessment ending 5 April 2014. Each of those self-assessment returns was filed on time. So the Appellant was well aware, or should have been well aware, of his obligations in that regard.

24. In addition, there is a slight inconsistency in the statement made by the Appellant in his notice of appeal of 1 June 2017 – to the effect that he was not aware until he received the Respondents' letter of 11 May 2017 that he was required to file a self-assessment return – and the statement made by the Appellant in his notice of appeal to the Tribunal of 18 September 2017 – to the effect that he had "overlooked" his tax return "and should have been more organised". There is a difference between not knowing that one has an obligation and forgetting that one has an obligation and the statements in the Appellant's notice of appeal to the Tribunal strongly suggests that the latter was the case.

25. I do not think that any of the reasons set out in paragraph 21 above meets the test outlined in the *Clean Car* case – ie was this something which a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do. On the contrary, it was incumbent on the Appellant to comply with his filing obligations, particularly as this was not the first tax year of assessment in which he had been self-employed.

26. As the Respondents have pointed out, the obligation with which this appeal is concerned – the obligation to file a self-assessment return – is not particularly complex to understand or onerous to fulfil and that has a direct impact on whether or not an excuse given for the failure to comply with it is reasonable.

27. Moreover, even though the Appellant did not have an ulterior motive in failing to file his self-assessment return, and simply made an honest mistake, that is not sufficient, in and of itself, to qualify as a reasonable excuse, as mentioned in the *Garnmoss* case mentioned above.

28. For similar reasons, even if it was up to me to determine the issue by myself, de novo, I do not think that any of the matters set out in paragraph 21 above amounts to "special circumstances". As noted above, I am not permitted to reach my own view on that issue in any event. I am merely permitted to determine whether the view reached by the Respondents was unreasonable in the sense set out in the *Wednesbury* case. In that regard, not only do I think that the view reached by the Respondents on this question was not unreasonable in that sense; I agree with it.

29. In addition to the arguments outlined in paragraph 21 above, the Appellant has stated that he considers the penalties in this case to be excessive given the amount of the penalties relative to the amount of tax which was payable in respect of the relevant tax year of assessment. So he has argued that, even if the penalties are upheld, they should be reduced on grounds of fairness.

30. This argument is not relevant to the question of whether either of the penalties should be due at all. Instead, the argument is relevant to the quite separate question of what the amount of the penalties should be.

31. It is apparent from the Upper Tribunal decision in *Revenue and Customs Commissioners v Hok Ltd* [2012] UKUT 363 (TCC) ("*Hok*"), which is binding on me, that this argument raises three distinct issues, as follows:

(a) first, I need to consider whether the terms of the legislation in Schedule 55 give me the jurisdiction to reduce the penalties on the grounds of fairness;

(b) secondly, if that is not the case, I need to consider whether the penalties might be reduced on the basis of the concept of proportionality, as it is understood in European Union law; and

(c) finally, if neither of the above is applicable, I need to consider whether the terms of the legislation are incompatible with the Appellant's rights under Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("A1P1").

32. I will address each of the above issues in turn.

33. Under paragraph 20 of Schedule 55, an appellant is entitled to appeal against a decision by the Respondents as to the amount of the penalty which is payable by the appellant (see paragraph 20(2)). In that case, the terms of Schedule 55 allow this Tribunal either to affirm the Respondents' decision or to substitute for the Respondents' decision another decision that the Respondents had power to make, provided that, as noted above, this Tribunal may substitute its own decision for the Respondents' decision as to whether or not there were "special circumstances" only if the Respondents' decision in relation to that issue was unreasonable in the sense outlined in the *Wednesbury* case (see paragraph 19 above).

34. It follows that, under the terms of the legislation, my powers in relation to the argument made by the Appellant in relation to fairness are either to affirm the decision of the Respondents or to substitute for that decision another decision which the Respondents had the power to make and that, in determining whether there are "special circumstances" which would justify a reduction in a penalty, my powers are limited to considering whether the Respondents have reached an unreasonable conclusion in the sense outlined in the *Wednesbury* case.

35. In the case of the penalties under paragraphs 3 and 4 of Schedule 55, other than in the case of "special circumstances", the Respondents had no power to levy a

penalty of an amount other than the amounts specified. They had the power to decide not to levy a penalty at all but, in the absence of "special circumstances", once they had made the decision to levy the penalty, the amount of that penalty was fixed – either by reference to a specified monetary amount (paragraph 3 of Schedule 55) or by reference to a formula (paragraph 4 of Schedule 55) - and the Respondents had no power to change the amount of the penalty.

36. I do not see how, in this case, the amount of the penalties relative to the amount of tax outstanding can be said to constitute "special circumstances". Moreover, as outlined in paragraph 19 above, I am not empowered to consider that question for myself de novo. I am merely entitled to consider whether the Respondents' view that the amount of the penalties relative to the amount of tax outstanding did not amount to "special circumstances" was unreasonable in the *Wednesbury* sense; I do not consider that to be the case.

37. In the absence of "special circumstances", the Respondents did not, in the case of either penalty, have the power to levy a penalty of a different amount. The amount of each penalty was fixed by the terms of the Schedule. It follows that, under the terms of the legislation, in the absence of "special circumstances", this Tribunal also does not have the power to change the amount of the penalty.

38. Turning then to the concept of proportionality, since the requirement to file a self-assessment return in relation to income tax and capital gains tax is a product only of United Kingdom law, the concept of proportionality as it is understood in European law does not arise. In that respect, although the legislation that was considered in *Hok* was not the same as the legislation in Schedule 55, it too was a product only of United Kingdom law and so the answer in relation to this point is the same as it was in *Hok*.

39. Finally, I do not think that the amount of the penalties in this case can properly be said to be incompatible with the Appellant's rights under A1P1. It is clear from the case law in this area that a state has a wide margin of appreciation in framing its taxation laws, pursuant to the second paragraph of A1P1 – see, for example, *Gladders v Prior (Inspector of Taxes*) [2003] STC (SCD) 245 and *James v United Kingdom* (1986) 8 EHRR 123. The imposition of fixed penalties of this amount as a means of encouraging the timely submission of tax returns is, in my view, a proportionate measure that falls within that wide margin of appreciation. Fixed penalties such as these are often issued automatically and potentially affect a large number of taxpayers. In those circumstances, it is unreasonable to expect the Respondents to exercise judgment before each fixed penalty is issued. Those potentially liable to the penalties know where they stand and, in any event, the reasonable excuse and "special circumstances" defences offer taxpayers protection against the penalties in appropriate cases.

40. It follows from the above that, in my view, the penalties in this case should not be reduced on the grounds that they are excessive relative to the amount of the tax that was payable in respect of the relevant tax year of assessment.

Conclusion

41. I therefore uphold the penalties that are the subject of this appeal and I dismiss the appeal in relation to those penalties.

42. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 10 April 2018