TC06807

Appeal number: TC/2017/09475

INCOME TAX – penalty for failure to make returns – director registered for self-assessment – whether required to make returns issued under s8 TMA – yes – whether return validly issued – yes – whether returns should have been withdrawn – no – whether reasonable excuse for late filing – no

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHELLE PERRY-SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 11 June 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 22 December 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 12 March 2018.

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DECISION

1. The appellant (Mrs Perry-Smith) is appealing against penalties that HMRC have imposed under Schedule 55 of the Finance Act 2009 ("Schedule 55") for a failure to submit annual self-assessment returns on time.

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

   (1) a £100 late filing penalty for the 2012/13 tax year under paragraph 3 of Schedule 55 imposed on 24 January 2017;

   (2) a £100 late filing penalty for the 2013/14 tax year under paragraph 3 of Schedule 55 imposed on 24 January 2017; and

   (3) a £100 late filing penalty for the 2014/15 tax year under paragraph 3 of Schedule 55 imposed on 24 January 2017

3. HMRC also imposed "daily penalties" for £480 for each of the 2013/14 and 2014/15 tax years but did not put forward a case for those penalties and asked that that aspect of the appeal be upheld.

Appellant's case

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

   (1) She registered for self-assessment in October 2016 in order to be able to obtain SA302s for a mortgage application. Her adviser expected that she would be required to complete a tax return for the previous tax year, 2015/16, as well as the tax year of registration.

   (2) As the registration for self-assessment stated that Mrs Perry-Smith had been a director since the 2012/13 tax year, HMRC decided that she needed to complete tax returns for the 2012/13, 2013/14 and 2014/15 tax year as well as the 2015/16 tax year.

   (3) Although HMRC state that they issued notices to file for these years, these were not received by Mrs Perry-Smith.

   (4) It took several attempts to obtain an authorisation code before Mrs Perry-Smith received a code to allow her advisers to be able to access her online account with HMRC.

   (5) Mrs Perry-Smith's advisers had filed her 2015/16 tax return in the interim but, as they were not aware that HMRC had issued notices to file for the earlier years, these were not submitted at the same time.

   (6) Mrs Perry-Smith received the penalty notices and provided these to her advisers. The advisers attempted to speak to HMRC about the notices over a period of several months.

(7) There is no obligation under s7 TMA 1970 for a director to complete a self-assessment return, as found in *Kadhem* [TC05929). HMRC's guidance and website are incorrect and misleading.

(8) Mrs Perry-Smith had no untaxed income for the relevant years as her income was taxed through PAYE. As she had no untaxed income and the company had made little profit, it would place a disproportionate burden on Mrs Perry-Smith to have to pay an adviser to complete the self-assessment returns and also to pay the penalties.

(9) It was acknowledged that HMRC had power under s8 TMA 1970 to require a taxpayer to complete a tax return but it was noted that HMRC also had discretionary powers to withdraw such requirement and it was considered that, but for their erroneous belief that directors had to complete returns, HMRC would undoubtedly have used such discretion in this case.

(10) The penalty should be no more than the £100 late filing penalty as the advisers had been in correspondence with HMRC since the penalty notices were issued but could not get a sensible answer from them. Accordingly, any further delay in filing was due to HMRC.

(11) Mrs Perry-Smith felt that she had been bullied into filing unnecessary returns.

HMRC's case

5. HMRC's case was, in summary:

(1) Mrs Perry-Smith submitted a SA1 self-assessment registration form to HMRC on 7 October 2016. This stated that she became a director on 26 November 2012 and the reason given on the SA1 for completing the SA1 was that she was a company director.

(2) Mrs Perry-Smith's advisers expected that she would have to complete a tax return for the earlier, 2015/16, tax year and should have been aware that, having given a commencement date as a director of October 2012 and having given that as the reason for completing the SA1, that HMRC would require tax returns for the earlier years on the same basis.

(3) HMRC issued the relevant tax returns on 14 October 2016, giving a deadline for filing of 3 months and seven days from the date of issue as they were issued outside the normal cycle for the relevant years.

(4) These returns were sent to the address on file, which has remained the same throughout this period and is the address on the Tribunal appeal. There is no record of the returns issued having been returned undelivered and so it is HMRC's contention that the returns are deemed to have been served within the ordinary course of postal delivery in line with s7 of the Interpretation Act 1978. HMRC noted that the penalty notices, sent to the same address, were received.

(5) s8 TMA 1970 provides that HMRC may require a person to make and deliver a return for a year of assessment. It does not specify which taxpayers are required to complete a tax return. The legal obligation to make a return is created

when the return is issued. Returns must be completed even if there is no tax owing or all tax owing has already been paid.

(6) As the returns were not received by the deadline of 21 January 2017, HMRC issued £100 late filing penalties for each year on 24 January 2017. The returns were received on 8 June 2017.

(7) The case of *Kadhem* was decided on its specific facts and, as a First Tier Tribunal case, does not create a precedent.

(8) With regard to the burden on Mrs Perry-Smith of completing the returns, the Upper Tribunal has found that the First Tier Tribunal does not have power to discharge or vary a fixed penalty because of unfairness or hardship.

6. HMRC submitted that Mrs Perry-Smith does not have a reasonable excuse for the late filing of the returns. They also considered whether there were special circumstances which would merit a reduction in the penalty and concluded that Mrs Perry-Smith's submission that she was not required to complete self-assessments as a director did not amount to special circumstances.

Discussion

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

8. I find that the tax return for the 2012/13, 2013/14, and 2014/15 tax years were submitted on or around 8 June 0217. They should have been submitted by 21 January 2017. Subject to considerations of "reasonable excuse" and "special circumstances" set out below, the penalties imposed are due and have been calculated correctly.

Proportionality

9. The appellant has argued that the cost of preparing the returns is disproportionate. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that the costs involved in making the return are 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, elsewhere in this decision, I have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *HMRC v Bosher*, [2013] UKUT 01479 (TCC), I do not consider that I have a separate power to consider the proportionality or otherwise of the penalties.

Were the returns incorrectly issued?

10. Mrs Perry-Smith submits that the penalties are incorrectly issued because she is not required by s7 TMA 1970 to register for self-assessment merely because she is a company director and so should not have any obligation to complete tax returns for periods before registering for self-assessment.

11. Mrs Perry-Smith states that she chose to register for self-assessment and so I consider that the provisions of s7 TMA 1970 are not relevant: this is not an appeal against a penalty for failure to register for self-assessment. I find that the case of

Kadhem referred to in Mrs Perry-Smith's submissions was decided on its specific facts and is not relevant to this case.

12. Once Mrs Perry-Smith registered with HMRC and stated that she had been a company director since 2012, HMRC issued her with tax returns under s8 TMA 1970. The provisions of s8 (as relevant) are that:

> 8(1) For the purpose of establishing the amounts in which a person is chargeable to income VAT … for a year of assessment – he may be required by Notice given to him by an officer of the Board—
>
> (a) To make and deliver to the officer … a return containing such information as may reasonably be required in pursuance of the Notice …

13. A taxpayer served with a return under s8 TMA 1970 therefore has a legal obligation to make the return by the date specified.

14. I note that Mrs Perry-Smith's submission is that she did not receive these returns. As the returns were not issued in the regular cycle there is marginally more evidence than usual on HMRC's systems as to the issue of the returns, with a specific comment having been made on the self-assessment notes on Mrs Perry-Smith's record as well as the more usual record of the date of issue on her record. The evidence provided also shows that the address for Mrs Perry-Smith on HMRC's records did not change throughout the period and is the same as that stated in her appeal to this Tribunal. I consider that it is more likely than not that, if the returns had not been delivered, they would have been returned undelivered to HMRC. HMRC have stated that no returns were returned to them. Mrs Perry-Smith has received other correspondence from HMRC, including the penalty notices. I note that it was stated that there was some difficulty receiving an authorisation code for the agent authorisation online. However, no particular evidence was put forward to indicate that there had been any specific problems affecting Mrs Perry-Smith's postal deliveries at the time that the returns were issued. Considering the evidence overall, I find that the returns were properly issued.

Should the returns have been withdrawn?

15. Mrs Perry-Smith further submitted that HMRC should have exercised their discretion (presumably under s8B TMA 1970, although no statutory provision was provided) to withdraw the returns.

16. For the tax years 2012/13 and 2013/14, s8B TMA 1970 required that the withdrawal be requested by the taxpayer within two years of the end of the relevant tax year or such longer period as HMRC may determine. A request to "quash" the returns was made in February 2017, more than two years after the end of each of these tax years.

17. For the 2014/15 tax year, s8B was amended by Finance Act 2016 s169 so that HMRC may withdraw the notice to file (in effect, withdraw the return) "whether at the

request of the person or otherwise". HMRC therefore have discretion to withdraw a notice to file on their own, without a request having been made by the taxpayer.

18. I note that HMRC in fact issued returns, rather than notices to file, for 2014/15 and earlier years but, as HMRC are treating the returns as being the notices to file for those years, I consider that the provisions of s8B must therefore be regarded in this case as being capable of being exercised Ito withdraw the returns.

19. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in the exercise of its discretion was flawed when considered in the light of the principles applicable in judicial review proceedings. Where HMRC's decision is thus flawed, it is open to this Tribunal to consider whether an alternative decision should have been made.

20. For 2012/13 and 2013/14, a request to withdraw the returns was made in February 2017, outside the two year withdrawal period. That period could only be extended in exceptional circumstances. HMRC have put forward no case as to why they did not consider whether there were any exceptional circumstances. As there appears to have been a complete failure to consider whether there were exceptional circumstances, HMRC must be regarded as having made a flawed decision in judicial review terms and so this Tribunal can consider whether an alternative decision (or, in this case, what decision) should have been made.

21. Looking at the evidence and circumstances, there does not appear to be any good reason why the discretion should be exercised to extend the two year withdrawal period. The arguments put forward to HMRC were that Mrs Perry-Smith should not be required to complete a tax return because she was a company tax director and that her advisers' "understanding" was that there was no tax liability in any case. The fact that Mrs Perry-Smith was a company director was not relevant to her obligations under s8, as already noted, and I do not consider that an adviser's unevidenced "understanding" as to whether a tax liability existed would be sufficient to constitute exceptional circumstances enabling the extension of the withdrawal period.

22. For 2014/15, under s8B, HMRC can unilaterally decide to withdraw a notice to file within two years of the end of the tax year to which it relates; that is, in this case, by 5 April 2017. It may withdraw the notice later but only in exceptional circumstances.

23. HMRC have put forward no case as to why they did not consider that it was appropriate to exercise their discretion in relation to this year. As there appears to have been a complete failure to consider the exercise of the discretion, HMRC must be regarded as having made a flawed decision in judicial review terms and so this Tribunal can consider whether an alternative decision (or, in this case, what decision) should have been made.

24. As with the earlier periods, looking at the evidence and circumstances, there does not appear to be any good reason why the discretion should be exercised to withdraw the return within the two year withdrawal period or to extend the withdrawal period to allow a later withdrawal. Again, in the absence of any detailed information from the

taxpayer, it was not possible to reasonably reach a conclusion that the notice should be withdrawn. The arguments put forward were that Mrs Perry-Smith should not be required to complete a tax return simply because she was a company tax director and that her advisers' "understanding" was that there was no tax liability in any case. As already noted, the fact that Mrs Perry-Smith was a company director was not relevant to her obligations under s8 and an adviser's unevidenced "understanding" as to whether a tax liability existed would not be sufficient to enable the exercise of a discretion in favour of withdrawing a notice to file under s8B TMA 1970.

25. Once the two year withdrawal period for 2014/15 had ended, I consider that,a gain, nothing exceptional occurred to allow for the extension of that that period. The return had been issued and nothing happened until the penalties were issued. There was a clear date for the return to be filed and Mrs Perry-Smith chose not to make the return, even after the penalty notices were issued, on the mistaken advice of her agent that she was not obliged to complete it.

26. Accordingly, although HMRC's failure to consider the exercise of their discretion to withdraw the returns was flawed in the judicial review sense, I find that it would not have been appropriate for the returns to have been withdrawn.

Is there a reasonable excuse?

27. It was not specifically argued that Mrs Perry-Smith had a reasonable excuse for the failure to file her returns on time, as the arguments put forward related to whether she was required to complete the returns at all. However, I have nevertheless considered the point as paragraph 23 of Schedule 55 states that a penalty does not arise where a person has a reasonable excuse for the failure to file which exists throughout the period of default. HMRC have also takenMrs Perry-Smith's submission as relating to reasonable excuse.

28. There is no statutory definition of "reasonable excuse" but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

> "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

29. The explanations given for the late filing of the returns in this case are that:

(1) The returns were not received when issued; and

(2) The advisers considered that Mrs Perry-Smith had no obligation under s7 TMA 1970 to complete a tax return.

30. No particular evidence was put forward to support the statement that Mrs Perry-Smith had not received the returns. As set out above, I find that the returns were posted to the correct address and were not returned undelivered. Post which is not returned

undelivered is, I find, more likely than not to have been delivered. Even if the returns were not received on time, Mrs Perry-Smith was aware in January 2017 that the returns had not been submitted on time as she had received the penalty notices. This was five months before the returns were eventually filed so that, even if this could have amounted to a reasonable excuse, it did not persist throughout the period of default and so cannot be a reasonable excuse.

31. The only other possible reasonable excuse is, therefore, that Mrs Perry-Smith relied on her advisers and their incorrect belief that no returns needed to be completed. As Mrs Perry-Smith's appeal was completed by her agent, it is not particularly surprising that this was not specifically so advanced.

32. Paragraph 23(2)(b) of Schedule 55 states that reliance on a third party is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. No evidence was put forward to show whether Mrs Perry-Smith took any such reasonable care – no information is given, for example, as to why she selected these particular advisers nor whether she took any steps to confirm the advice that they gave her, or in the alternative why it would not have been reasonable to take such further steps. I note that she had been in business for some years and therefore should not be regarded as having no experience of working with advisers.

33. Accordingly, I do not find that any reliance by Mrs Perry-Smith on her advisers would amount to a reasonable excuse in the particular circumstances of this case.

Conclusion

34. The appeal is upheld as to the "daily" penalties as HMRC put forward no case in respect of these. The appeal in relation to the three late filing penalties of £100 each is dismissed and those penalties are confirmed.

Application for permission to appeal

35. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 8 NOVEMBER 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 6 of Schedule 55 provides for further penalties to accrue when a return is more than 12 months late as follows:

> 6—
>
> (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 12 months beginning with the penalty date.
>
> (2) Where, by failing to make the return, P deliberately withholds information which would enable or assist HMRC to assess P's liability

to tax, the penalty under this paragraph is determined in accordance with sub-paragraphs (3) and (4).

(3) If the withholding of the information is deliberate and concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(3A) For the purposes of sub-paragraph (3)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 100%,

(b) for the withholding of category 2 information, 150%, and

(c) for the withholding of category 3 information, 200%.

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of—

(a) the relevant percentage of any liability to tax which would have been shown in the return in question, and

(b) £300.

(4A) For the purposes of sub-paragraph (4)(a), the relevant percentage is—

(a) for the withholding of category 1 information, 70%,

(b) for the withholding of category 2 information, 105%, and

(c) for the withholding of category 3 information, 140%.

(5) In any case not falling within sub-paragraph (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.

(6) Paragraph 6A explains the 3 categories of information.

5. 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.

6. 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.

7. 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.

1.