Neutral Citation: [2024] UKFTT 00844 (TC)

Case Number: TC09293

FIRST-TIER TRIBUNAL
TAX CHAMBER

LONDON

Appeal reference: TC/2021/02611
TC/2020/03738
TC/2020/01454
TC/2020/03721

INFORMATION NOTICES – penalties – reliance on an adviser – whether reasonable excuse – no – whether penalties should be mitigated due to reliance on adviser – no – whether failure to comply non-serious meriting mitigation of penalties – no – appeal dismissed

Heard on: 9-10 January 2024
Judgment date: 16 September 2024

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

DAVID HILL
DAVID MCCRACKEN

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Michael Firth, of counsel, instructed by The Independent Tax & Forensic Services LLP

For the Respondents: Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

Introduction

1. These are appeals against penalties (detailed below) imposed for failures to comply with Schedule 36 Information Notices issued to the appellants by HMRC. The background to the issue of the Information Notices is helpfully set out by Judge Vos in his decision in respect of an appeal against the Information Notices by other appellants ([2021] UKFTT 80 (TC)). In a separate decision ([2021] UKFTT 66 (TC)), Mr McCracken and Mr Hill were refused permission to appeal their Information Notices out of time.

2. The appellants are representative of a number of other appellants in a similar position and their appeals were heard together in order to provide some indication for the parties to consider the other penalty appeals. The appellants and appeals are not otherwise connected. As the appeals were heard together, the decision covers both appeals in order to minimise duplication of material.

Background

Information Notices

3. Mr Hill was the scheme administrator of the Molten Metal 2012 Pension Scheme, and his Information Notice was issued to him on 20 January 2018.

4. Mr McCracken was the scheme administrator of the DMI Pension Scheme, and his Information Notice was issued to him on 22 January 2018.

5. At the time, Liddell Dunbar Ltd (LD) operated the schemes on behalf of the scheme administrators as a practitioner. Following receipt of the Information Notices, LD engaged Independent Tax (IT) to advise LD in respect of the Information Notices and to correspond with HMRC on behalf of the appellants and other individual scheme administrators of pension schemes where LD were the practitioner acting for the scheme administrator.

6. A review was requested of the Information Notices. A review conclusion letter was issued on 22 October 2018, copied to each of the appellants; this varied some of the content of the Information Notices but otherwise upheld them. On 12 November 2018 LD advised the appellants that they had discussed the review conclusion letter with IT and that IT's view was that, as the pension scheme had been wound up, there "should be no need to respond" to provide the information requested by the varied Information Notices.

7. On 21 November 2018 IT made the same point in a letter to HMRC, informing them that the relevant pension schemes had been wound up and so there could be no liability to produce information or documents. HMRC replied on 26 November 2018, advising that the Information Notices had been issued to the individual scheme administrators and not to the pension schemes, and that the individuals remained liable to comply with the Information Notices. Neither of these letters was copied to the appellants.

Initial penalties

8. In December 2018, HMRC issued the appellants with penalties of £300 each for failure to comply with the Information Notices.

9. On 17 December 2018 LD wrote to the appellants, advising them that no action was required in respect of the penalty letters as HMRC had been advised that the pension schemes had been wound up and that IT would "be taking up" the issuing of the penalties with HMRC.

10. On 19 December 2018, IT wrote to HMRC. The letter was not copied to the appellants. The letter included a request to appeal the penalties on the basis that (inter alia) these pension

schemes no longer existed as they had been wound up and so there was no tax position to check. The letter stated that appeals had been made to the Tribunal in respect of Information Notices issued to pension schemes which had not been wound up. IT referred to the legislation set out in HMRC's letter of 26 November 2018 and stated that the individuals were not obliged to deal with information notices wrongly issued to them as the administrator of a wound up scheme.

First tranche of daily penalties

11. On 19 February 2019, HMRC issued the first tranche of daily penalties of £2,040 (at £30 per day) to each of the appellants. The penalty letters included the statement that, if the appellants did not agree that the penalties were due, they should appeal to HMRC.

12. Mr Hill forwarded this to LD who replied that the stance remained the same, and not to pay the penalty. They advised that IT were still in communication with HMRC.

13. On 21 March 2019 HMRC wrote to IT, copying the letter to the appellants, confirming that the penalties had been issued to the individuals and not to the pension schemes because the Information Notice had been issued to the individuals, not the pension schemes. The letter stated that, as no appeal had been made to the Tribunal against the Information Notices (at that time), the Information Notices were treated as settled and that further penalties would arise if the failure to comply with the Notices continued.

14. LD emailed the appellants in late March/early April 2019 (the dates varied slightly between the appellants, but the email was the same) and described the letter from HMRC as alarming and unreasonable.

Second tranche of daily penalties

15. On 4 July 2019 HMRC issued a second tranche of daily penalties of £8,040 (at £60 per day) to each of the appellants. The penalty letters included the statement that, if the appellants did not agree that the penalties were due, they should appeal to HMRC.

16. On 26 July 2019 LD wrote to the appellants. This email was not apparently initially received by Mr McCracken, but it was resent to him on 8 August 2019. This letter advises that IT would be appealing the new penalties to HMRC.

17. The letter also set out a briefing drafted by IT for the scheme administrators. The briefing stated that there were two categories of scheme administrators involved; the first, whose schemes had not been wound up at the start of proceedings, "were all listed for Tribunal" and most of those had now been wound up. The second, including the appellants, were described as being in a technical argument in relation to the pension schemes as IT considered that any obligations had ceased on winding up. The IT briefing stated that although HMRC were prepared to accept late appeals from individuals, IT considered that this would validate HMRC's arguments that the Information Notices had been validly issued if such appeals were submitted.

18. IT wrote to HMRC on 1 August 2019 appealing the latest penalties, repeating the arguments made in December 2018, particularly their view that the obligations of a scheme administrator ceased on winding up of a pension scheme. This letter was not copied to the appellants.

19. On 16 September 2019 HMRC wrote to IT, with the letter being copied to the appellants, advising that the review conclusions in October 2018 were treated as settled as no appeal had been made to the Tribunal and the Information Notices therefore needed to be compiled with. The letter confirmed that the penalties remained in place. HMRC advised that the second tranche of daily penalties had been issued as no appeal had been received.

20. On 26 September 2019, LD wrote to the appellants with a briefing note from IT in response to HMRC's letter of 16 September 2019. This email provided a summary of the information in the email of 26 July 2019, that there were two groups of schemes, distinguishing between the pension schemes which were wound up before the Information Notices were issued and the pension schemes which had not been wound up before the Information Notices were issued. The email confirmed again that the Information Notices in the latter group had been appealed to the Tribunal. The email states that IT had not changed their opinion on the issues and that they were seeking a meeting to discuss the matters with HMRC.

21. On 9 October 2019, LD sent a further email with a briefing note from IT which confirmed that they were seeking a meeting with HMRC and that HMRC had confirmed that they would review the letter sent on 16 September 2019. On 29 October 2019, LD wrote to the appellants again, advising that HMRC had acknowledged an application for ADR and asked for a meeting to discuss the matter in more detail.

Third tranche of daily penalties

22. On 16 December 2019, HMRC issued a third tranche of penalties of £9,720 to Mr Hill (at £60 per day).

23. On 18 December 2019, HMRC issued a third tranche of penalties of £10,020 to Mr McCracken (at £60 per day).

24. On 20 December 2019, IT wrote directly to Mr McCracken. It seems likely that they also wrote to Mr Hill in a similar form, although only the email to Mr McCracken was provided in the bundle and Mr Hill did not specifically refer to receipt of such an email. This email advised that HMRC had rejected the application for ADR and that IT proposed now appealing the Information Notice to the Tribunal.

25. On 14 January 2020, IT wrote to HMRC to appeal the penalty issued to Mr Hill on 16 December 2019. The grounds of appeal were the same as those in earlier appeals.

26. On 16 January 2020, IT similarly appealed the penalty issued to Mr McCracken on 18 December 2018.

27. On 27 January 2020. IT wrote again to Mr McCracken. This email confirmed that IT was now communicating directly with the scheme administrators involved as LD had gone into liquidation. They confirmed that the penalties had been appealed to HMRC, and that the Tribunal appeals had also been submitted. They proposed that a sample of cases be progressed to minimise costs.

28. On 6 February 2020, HMRC rejected the appeals on the basis that HMRC considered that there was no reasonable excuse for the failures to comply with the varied Information Notices.

29. On 21 February 2020, IT wrote to the appellants. This repeated the information in the email to Mr McCracken sent on 27 January 2020, noting that not all of the scheme administrators had received the previous update. The letter also asked for some information regarding LD's actions regarding the appointment of the individuals as the scheme administrators of their schemes.

30. On 6 March 2020 IT requested a review of HMRC's rejection of the appeal against the penalties. HMRC wrote to the appellants on 20 May 2020 to confirm that a review would take place. On 25 September 2020, HMRC's review conclusion letter upheld the penalties on the basis that there was no reasonable excuse for the failure to comply with the Information Notices.

31. On 9 April 2020, the penalties issued in December 2018, February 2019 and July 2019 were appealed to the Tribunal. It has been separately decided that these penalties were validly appealed to HMRC and the Tribunal.

32. On 1 October 2020, IT wrote to the appellants advising that they intended to appeal HMRC's review conclusion letter on the penalties to the Tribunal.

33. On 23 October 2020, the penalties issued in December 2019 were appealed to the Tribunal.

Submissions

34. Summary submissions are set out below; more detail is set out where necessary in the discussion later in this decision.

Summary submissions on behalf of appellants

35. The appellants were consistently advised that no action was needed, as their pension schemes had been wound up and that IT were dealing with HMRC on their behalf. LD sent through updates prepared by IT, and the appellants had no reason to doubt the expertise of IT. The appellants had received letters from HMRC which confirmed that technical arguments were being advanced on their behalf. It was a complex situation and the appellants were concerned about the safety of their pension savings.

36. Following the Upper Tribunal approach set out in *Perrin* ([2018] UKUT 156), it was contended that it was objectively reasonable for the appellant to believe that there was no obligation to comply with the information notice and that appealing would validate HMRC's arguments. The appellants were not tax experts and were not in a position to challenge advice being given to them on the tax effect of winding up their pension schemes; it was contended that they were acting reasonable in following the advice that they were paying for.

37. It was contended that the issue of further penalties only confirmed that HMRC disagreed with IT's view, which was already known. It did not demonstrate that IT were acting unreasonably or were wrong.

38. Further, it was contended that if these factors did not amount to a reasonable excuse, they supported substantial mitigation. It was submitted that, if the reasonable excuse initially existed and subsequently ceased, the penalty should be reduced to zero for the days on which there was a reasonable excuse. In addition, the appellants had engaged with HMRC via their adviser; this was not a question of ignoring HMRC. In addition, the failure to comply with the Information Notice was not done with the intention of blocking HMRC from discovering liabilities. If this was, as the penalties suggested, one of the most serious cases it would leave no room to penalise serious cases; if all are "most serious" then none are truly serious.

Summary submissions on behalf of HMRC

39. HMRC contended that the appellants needed to establish a reasonable excuse for failing to comply with the Information Notice on 21 November 2018, and that the excuses needed to continue throughout the whole period until the failure was rectified without undue delay. HMRC contends that the failure ended when the appeal was submitted in January 2020.

40. HMRC contended that the appellants were relying on LD, a scheme practitioner, who were not competent to provide advice. LD had sought advice from IT; there was little or no direct contact between the appellants and IT until LD disappeared in December 2019. HMRC submitted that the evidence was that LD had not provided any detailed information until August 2019, when they sent summary information from IT. They did not pass on HMRC responses to correspondence; the appellants only received these when they were sent directly.

41. HMRC contended that, notwithstanding the quality of advice received, the appellants had chosen to ignore the legal requirement to appeal to the Tribunal and that this could not be a reasonable course of action. They contended that the appellants had not had any detailed advice, that LD's emails had not provided any explanation as to why there was a disagreement with HMRC as to the approach. HMRC submitted that a reasonable taxpayer would have asked for more information, to make themselves aware of what was being said to HMRC on their behalf. Even if they did not understand, they would have seen the information. It was not reasonable to ask no questions or to fail to seek any clarification about matters. The information that IT were arguing that obligations ceased on the winding up of the pension scheme was not provided until July 2019, after the third set of penalties were issued.

42. HMRC submitted that, in November 2018, the appellants had no information about the proposed legal arguments being put forward on their behalf. They could not therefore have had a reasonable excuse based on any such legal arguments. HMRC contended that, in order for there to be a reasonable excuse of reliance on an adviser, the appellants would have needed to see the advice being given and to consider whether it was reasonable to rely on it.

43. HMRC contended, in summary, that the legislation did not support a reduction in quantum on the basis of a reasonable excuse which was not remedied without unreasonable delay, and that the quantum of the penalties was appropriate given the continuing failures.

Discussion

44. I considered the oral evidence and the documentary evidence to which I was referred. All findings of fact were made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not. The following is not intended to address every point of evidence or resolve every contention made by the parties. I have made the findings necessary to resolve the legal dispute before me. Where findings have not been made, or are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

45. In particular, Mr Brothers of IT and Officer Fulwood of HMRC each gave evidence in the hearing. Given the conclusions below, I have not set out their evidence in any detail as I did not consider that it was of any particular assistance in determining whether the appellants had a reasonable excuse for their failure to comply with the Information Notices. Mr Brothers' evidence is included where relevant with regard to the quantum of the penalties.

Reasonable excuse

46. Para 45 of Schedule 36 Finance Act 2008 provides that:

> "45(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.
>
> 45(2) For the purposes of this paragraph–
>
> (a)an insufficiency of funds is not a reasonable excuse unless attributable to events outside the person's control,
>
> (b)where the person relies on any other person to do anything, that is not a reasonable excuse unless the first person took reasonable care to avoid the failure or obstruction, and
>
> (c)where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to

> have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased."

47. The approach to be taken to the question of whether a person has a reasonable excuse was set out by the Upper Tribunal in *Perrin* (at [70]-[74]):

> (1) establish the facts being asserted as providing a reasonable excuse;
>
> (2) decide whether these facts are proven;
>
> (3) assess whether the proven facts are sufficient to amount to a reasonable excuse, viewed objectively

48. Further, the Upper Tribunal noted (at [71]) that

> "In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times".

49. The reasonable excuse being put forward for the failure to comply with the Information Notices is (in summary) that of reliance on an adviser. The appellants each contended that they were consistently advised by their adviser that no action was needed as their pension schemes had been wound up. This was a complex area of law, which they did not have technical expertise to deal with, and they were concerned about the safety of their pension savings.

50. There were various submissions made about the technical accuracy or otherwise of the approach taken by IT and HMRC in the discussions between them about the validity of the Information Notices. The Tribunal concluded that the same Information Notices issued to other scheme administrators which were appealed in time were held to be valid, albeit with some amendments as to the requests made (see *Hargreaves & Ors* [2021] UKFTT 80 (TC)).

51. I have not reproduced those submissions because I did not consider that they provided any particular assistance to the question of whether or not the appellants had taken reasonable care in relying on the advice that they were given; neither appellant had any technical tax expertise and so would not have been in a position to consider whether or not the technical arguments being made were correct. However, that lack of technical expertise does not automatically mean that they had a reasonable excuse in their reliance on an adviser; it is a factor which I have taken into account but is not conclusive of a reasonable excuse.

Relevant facts, and whether proven

52. There was no particular dispute as to the facts asserted as supporting these contentions, which are summarised in the background above. The dispute between the parties was generally as to whether the facts amounted to a reasonable excuse.

Whether the facts are sufficient to amount to a reasonable excuse, viewed objectively

53. Mr McCracken's evidence was that, having engaged an adviser, he did not consider that the adviser would say anything incorrect and that he had to trust the process. Mr Hill's evidence was similar, that he had to rely on experts as he was not an expert and just did what he was told to do by the adviser.

54. Whilst a taxpayer is not required to second-guess their adviser, or to obtain multiple opinions, it is clear that they are required to take reasonable care in relying on their adviser. There was no evidence in this case that the appellants took such reasonable care: they took at face value what LD were saying in their emails throughout 2018 and 2019 and did not ask

(for example) for copies of the correspondence being sent to HMRC on their behalf. Whilst they might not have thought that they would understand the technical arguments, I consider that in the circumstances of these appeals a reasonable and prudent taxpayer would have wanted to check (at least) what was contained in the correspondence sent to them and that the facts being conveyed to HMRC on their behalf were accurate. This is particularly because most of the emails from LD are very short and lack detail.

55. Firstly, neither appellant appears to have read the Information Notice on receipt in any detail. The information requested in the Information Notices included questions which clearly related to the individuals receiving the Notices, rather than the related pension scheme. In particular, there were various requests for information relating to the circumstances in which the individual had become a scheme administrator. This is not a point requiring expertise in complex tax matters to understand: the questions make it clear that HMRC believed that the individual to whom the letter was addressed was the scheme administrator.

56. At the time the Notices were issued, in January 2018, neither of the appellants realised that they had been made the scheme administrator of their respective pension schemes (apparently by LD acting unilaterally) in 2017. Despite this, Mr McCracken did not ask LD why he was described as the scheme administrator in the Information Notice until several months later, in October 2018. Mr Hill does not appear to have ever asked the question, and in his first witness statement (dated September 2020) denied having ever been the scheme administrator. This was corrected in his second witness statement. I conclude from this that neither Mr McCracken nor Mr Hill read the Information Notice that they received in any detail on receipt nor for some months (in the case of Mr McCracken) or longer (in the case of Mr Hill) during which they were receiving correspondence from LD regarding the Information Notices.

57. There were also some particular points raised by the advice which was conveyed which I consider that a reasonable and prudent taxpayer would have queried:

(1) The first communication, in February 2018, stated that IT had advised that HMRC had no legal right to request the information although no further details as to why they advised this were provided or requested.

(2) Following the review, in November 2018, LD stated that IT's view was that, as the schemes had been wound up, there should be no need to respond to the review conclusion letter, which had varied rather than quashed the Information Notice request.

58. No explanation was given to the appellants as to why the initial argument that there was no legal right to request the information was apparently not being pursued further (although IT continued to refer to it in their unchanging summary of their position in correspondence with HMRC). No explanation was given as to how the winding up of the scheme, after the issue of an information notice to an individual, might remove a requirement on the individual to comply with that Information Notice.

59. Neither Mr Hill nor Mr McCracken asked why the basis of the advice had apparently changed, nor why a letter addressed to them was not a personal obligation rather than a scheme obligation. Whilst I appreciate that neither has tax expertise, I do not consider that this means that they should take short statements as to the arguments apparently being made on their behalf entirely without question.

60. The appellants were subsequently advised that Information Notices had been appealed where the pension scheme in question had not been wound up at the time that the Information Notice was issued:

(1) In July 2019, an email from LD set out an "outline of the current position". This email stated that there were two groups of schemes and states that "schemes which were still active (not yet wound up) at the start of these proceedings" had been appealed to the Tribunal and also that "the majority of the schemes are now wound up". The letter went on to say that "the obligations cease at the time of winding up" in respect of the Information Notice and that "We have emailed [HMRC] to suggest a 6 month stay of Tribunal proceedings while we have the technical debate with [HMRC] on the wound up cases. This would allow us clarify which cases should correctly be heard at Tribunal".

(2) this "two groups" point was repeated, more succinctly, by LD in an email in September 2019.

61. Neither appellant queried why there had been no appeal in their case given that their respective pension schemes had not yet been wound up when the Information Notices were issued. In the hearing, Mr McCracken accepted that he could have checked the information but did not do so, and that it was his mistake not to realise that the Information Notice had been issued before his pension scheme had been wound up, although he noted that this correspondence did not arise until after the scheme had been wound up. Mr Hill's evidence was similar, that he could have checked whether his scheme had been wound up when the Information Notice was sent. I consider that a reasonable and prudent taxpayer would, on receiving this correspondence, check the winding up date of their pension scheme to make sure that it was being dealt with in the appropriate group.

62. The advice received by the appellants was also less than clear about what was being done, or what options were available; for example, some of the correspondence in early 2019 does not clearly distinguish between appealing against the Information Notices and appealing against the penalties. I consider that a reasonable and prudent taxpayer would have asked questions to clarify what the advice related to. The appellants also did not question the advice that appealing would potentially validate HMRC's arguments with regard to the Information Notices: it is difficult to see what the purpose of this Tribunal would be if that advice was accurate, and I consider that a reasonable and prudent taxpayer would have asked for more information about that advice.

63. Although Mr McCracken emailed LD on some occasions, his emails generally asked whether the advice provided to him (which, as noted, was rather limited) remained the same when HMRC had written directly to him. He did not ask any questions about the advice, or ask for any further explanations, even when LD set out the circumstances in which he had become the scheme administrator for the pension scheme without his knowledge. It was not until December 2019 that he asked any detailed questions. These were about the advice given on the original changes to his pensions scheme some time before the Information Notice was issued and not the advice regarding the Information Notice or the penalties.

64. Mr Hill appears to have asked no detailed questions of LD or IT. He stated in the hearing that he would have telephoned LD, to ask what to do. There was no indication that he asked any questions about what he was told to do.

65. In summary, I conclude from the evidence before me that neither of these appellants took objectively appropriate steps to consider whether it was reasonable to rely on the advisers and the advice provided. They were effectively relying on short emails from LD which largely lacked any particular detail as to what was being said to HMRC on their behalf and did not check the information which was provided to them and some of which was, or would have appeared to be, incorrect.

66. Accordingly, I find that neither of the appellants reasonable care to check that they could rely on the advice being provided in circumstances where I consider that a reasonable and prudent taxpayer would have asked questions given the information being provided to them. Their actions were not those of objectively reasonable reliance on advice; it was closer to reliance on an unchecked assumption that they were being appropriately advised. The appellants stated that they were worried about the risk to their pensions and so relied on the advisers; I consider that in such circumstances a reasonable and prudent taxpayer would have asked questions in order to ensure that the perceived risk was being properly managed.

Penalty mitigation

67. Para 47 of Schedule 36 provides that

> "A person may appeal against any of the following decisions of an officer of Revenue and Customs—
>
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
>
> (b) a decision as to the amount of such a penalty."

68. In the alternative, if the penalties were not removed as a result of there being a reasonable excuse, it was argued for the appellants that the amount of the daily penalties was excessive.

Daily penalties - reasonable excuse

69. Firstly, it was argued that there was a reasonable excuse for at least part of the period and that this should mean that the daily penalties should be zero for the days on which there was a reasonable excuse.

70. I do not agree that there was a reasonable excuse for any part of the period in question: as set out above, neither appellant checked the contents of the Information Notice on receipt, and Mr Hill appears not to have checked it at all. Neither asked any questions as to why the winding up of their pension scheme after the Information Notice meant that an Information Notice issued to them personally might not need to be complied with. Their reliance on advisers was not objectively reasonable even prior to the issue of the penalties.

71. In any case, the legislation makes it clear that a reasonable excuse will only exist where it is remedied without unreasonable delay once the excuse ceased. Para 45(2)(c) of Schedule 36 FA 2008 states that:

> "where the person had a reasonable excuse for the failure or obstruction but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied, or the obstruction stops, without unreasonable delay after the excuse ceased"

72. Even if there had been a reasonable excuse on any of the days for which daily penalties were charged, I do not consider the legislation provides any scope for concluding that daily penalties should be set to zero for days in which a reasonable excuse existed where that reasonable excuse was not remedied without unreasonable delay. Either the penalty is not chargeable because there is a reasonable excuse, or, if there is no reasonable excuse or the reasonable excuse is not remedied in time, a penalty will be chargeable. There may be reasons for mitigating the quantum of a daily penalty but the existence of a reasonable excuse at the time which subsequently ceased without the failure being remedied without unreasonable delay is not one of them.

73. It was contended that this would mean that one day of undue delay would result in substantial daily penalties for a period of reasonable excuse and that this cannot have been

Parliament's intention. I do not agree that this is the case; the same applies across other similar time-based penalties.

74. There were also submissions made that the penalties were somehow excessive because the HMRC officer imposing the penalties had not considered whether there was a reasonable excuse for the failure; the legislation (para 45(1) of Schedule 36, set out above) is clear that the onus is on the person liable to satisfy HMRC (or the Tribunal on appeal) that there is a reasonable excuse - it does not require HMRC to look to see whether there might be a reasonable excuse before imposing the penalty.

Daily penalties - quantum

75. For both appellants, the first tranche of penalties were charged at £30 per day. The second and third tranches of penalties were charged at £60 per day.

76. Para 40(2) of Schedule 36 provides that a person is liable to daily penalties "not exceeding £60" where the failure to company with an information continues after the initial penalty of £300 has been charged.

77. For the appellants, the quantum was argued to be excessive because the non-compliance was not "at the serious end of the spectrum" and, further, HMRC had applied different penalty levels (£30 per day for the first tranche of daily penalties; £60 per day for the subsequent tranches) without any increase in seriousness in the non-compliance, and the advisers were continuing to engage with HMRC. It was suggested that daily penalties of £10 per day would be more appropriate.

78. The non-compliance was described, on behalf of the appellants" as being not a "most serious" case as there was no flagrant disregard of the notices; the appellants were following professional advice, even if that advice was incorrect. Further, the Information Notices were eventually complied with but HMRC had taken no further action after receiving the information. It was therefore contended that this was not a situation where the non-compliance was attempting to hide substantial tax liabilities. It was contended that the amount of the penalties here leaves no scope for penalise more serious cases.

79. I do not consider that this argument is sustainable; there is provision in Schedule 36 (paragraph 49A, introduced with effect from April 2012) for HMRC to apply to the Tribunal for daily penalties to be imposed of up to £1,000 per day for failure to comply with information notices. Whilst £60 per day may, therefore, be the maximum that HMRC can impose without application to the Tribunal, it is not correct to say that there is no scope to charge higher penalties in more serious cases.

80. HMRC contended that the penalty legislation in this context provides the Tribunal with a supervisory jurisdiction, rather than a full appellate jurisdiction.

81. Schedule 36 provides that:

> "47(1) A person may appeal against any of the following decisions of an officer of Revenue and Customs–
>
> (a) a decision that a penalty is payable by that person under paragraph 39, 40 or 40A, or
>
> (b) a decision as to the amount of such a penalty.
>
> 47(2) But sub-paragraph (1)(b) does not give a right of appeal against the amount of an increased daily penalty payable as a result of paragraph 49A.
>
> …

> 48(3) On an appeal under paragraph 47(1)(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.
>
> 48(4) On an appeal under paragraph 47(1)(b) that is notified to the tribunal, the tribunal may–
>
> (a) confirm the decision, or
>
> (b) substitute for the decision another decision that the officer of Revenue and Customs had power to make."

82. Given the wording of paragraph 48(4), and in particular the lack of any reference to the need for HMRC's decision as to the amount of the penalty to be flawed when viewed according to judicial review principles, I do not agree with HMRC's contention that the Tribunal jurisdiction is supervisory. I consider that the legislation allows the Tribunal to substitute its own decision where it considers it appropriate, not only where HMRC's decision is flawed in a judicial review sense. That is a full appellate jurisdiction and not a supervisory jurisdiction.

83. On balance, considering the evidence before me, I do not consider that the quantum of the daily penalties should be changed. The correspondence between IT and HMRC makes it clear that the same arguments were being repeated over a period of months without change despite the review conclusion letter (for example, in a letter dated 1 August 2019, IT state that "our contentions have not changed since our letter dated 19 December 2018"). The Notice of Appeal for each of these appeals lists the same arguments as those set out in the IT letters of 19 December 2018 and 1 August 2019.

84. The first tranche of penalties, at 50% of the maximum amount, I consider is appropriate given the initial period of continuing failure at that point. Although IT were in correspondence with HMRC, there was no good explanation given for the failure to appeal the review conclusion letter to HMRC: the letter of 19 December 2018 from IT to HMRC states their view that the Notices were wrongly issued to the individuals but does not give any reason why the individuals cannot appeal the Notices.

85. Mr Brothers' evidence was that they did not advise that an appeal should be submitted until after the third set of daily penalties because they were "eternal optimists" and hoped that HMRC would be persuaded to set aside the Information Notices although the review conclusion letter in October 2018 had made it clear that HMRC did not agree with their position and that any further dispute needed to be by way of appeal to this Tribunal. Even if it was believed that the pension scheme was not in a position to appeal, there was no good explanation provided as to why an appeal could not have been brought by the individuals on the basis that the Information Notices were invalidly issued to them. The indication that an appeal might have validated HMRC's arguments as to the validity of the appeals suggests that the advisers believed that this Tribunal might be bound by such actions rather than statute, which is so absurd that I do not consider that it can be an accurate reflection of their position. I prefer Mr Brothers' evidence in the hearing that they were being optimistic and hoped to persuade HMRC to reverse course without appealing.

86. Mr Brothers' evidence in the hearing was that the appeals were eventually brought after the third tranche of daily penalties because they considered that the situation "couldn't go on forever". This was a year after the initial penalty was issued and, as noted above, nothing had changed in the interim. Given this, it seems that, had the penalties been lower, it may have taken even longer for relevant action to be taken.

87. The purpose of the penalty regime is at least in part to ensure that there are consequences to continued failures to comply (or appeal); misplaced optimism that repeating

the same argument over the course of a year and after a first penalty and daily penalties will change HMRC's view does not mean that the ongoing failure to comply with the Information Notices did not merit the maximum penalty which can be imposed without reference to the Tribunal in the second and third tranches.

Conclusion

88. For the reasons set out above, I find that neither appellant had a reasonable excuse for the failure to comply with the Information Notices and that the penalties are upheld in full.

Right to apply for permission to appeal

89. 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: 16th SEPTMBER 2024