

So who's to blame?

Jack Prytherch examines the issues around a failure to file returns by third parties and the imposition of 'deliberate' penalties

In *H Dhaliwal v HMRC* [2020] UKFTT 463 (TC), the First-tier Tribunal (Tax Chamber) held that, when determining whether there was deliberate behaviour for penalties where a taxpayer has delegated the filing of tax returns to another person, HMRC must show that the other person has deliberately failed to file the return. The decision has important implications for agents who regularly file returns on behalf of clients.

Background

The appeal concerned various penalty assessments raised by HMRC against the appellant, Mrs H. Dhaliwal, relating to her failure to submit tax returns on time for the tax years 2010/11 and 2012/13. This included penalties under Schedule 55 to the Finance Act 2009 (Schedule 55) for the deliberate withholding of information from HMRC by failing to make the returns.

Schedule 55 provides for different levels of penalty to be imposed depending on the behaviour of the taxpayer – namely, whether the withholding of information was:

- deliberate and concealed (where the taxpayer deliberately withholds the information and makes arrangements to conceal the fact that the information has been withheld);
- deliberate but not concealed (where the taxpayer deliberately withholds the information but does not make arrangements to conceal the fact that the information has been withheld); or
- not deliberate (for example, careless).

Under Schedule 55, penalties do not arise if the taxpayer can show that it had a reasonable excuse for failing to make the return. The concept of 'reasonable excuse' is expressly stated to not include (among other things) where the taxpayer relied on any other person to do anything (unless the taxpayer took reasonable care to avoid the failure). However, the burden of proof is on HMRC to show that the taxpayer deliberately withheld information by failing to make a return.

The appellant managed restaurants across a number of cities in the UK and spent a considerable amount of time travelling between them. The restaurants formed part of the family business and were owned by a company (of which she and her husband were the directors). The business was sold to a venture capital business in 2013 and both the appellant and her husband, having initially been retained by the new owners, were subsequently made redundant.

During the same period, the appellant had primary care responsibilities for looking after her father and her parents-in-law, all of whom had been seriously ill.

The appeal

It was not disputed that the appellant had failed to file tax returns on time and made late payments. The only questions for the Tribunal were therefore whether:

- the appellant had deliberately withheld information from HMRC; and/or
- the appellant had a reasonable excuse.

The appellant argued that, throughout the relevant period, the behaviour that led to the failure to make the returns was not deliberate, and that the pressure of her work and family illnesses meant that she had left tax compliance and other such financial matters to her husband (and ultimately their accountant). She claimed that she was unaware that her husband had not filed the returns and that she did know why they were not filed. She also contended that the pressures of work and family issues amounted to a reasonable excuse for the failure to file the returns.

HMRC, on the other hand, pointed out that all other tax returns for the periods before, between and after the two years in question had been filed on time and that the liability for each of those periods was substantially

lower than those two years. They argued, therefore, that the appellant was aware of, and able to comply with, her obligations and deliberately failed to file the relevant returns on time.

HMRC further argued that the fact that the appellant delegated responsibility for filing her returns to her husband was irrelevant – the responsibility to file them ultimately lay with her and she had not shown any reasonable excuse for not doing so.

Decision

Surprisingly, neither party referred to any case law concerning what amounts to deliberate behaviour for penalty purposes. The meaning of the term ‘deliberate’ was, for example, considered in *Auxilium Project Management v HMRC* [2016] UKFTT 249, where the Tribunal held that a deliberate error (in that case under Schedule 24 to the Finance Act 2007) occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely on it as an accurate document. This is a subjective test and the courts will consider what the taxpayer’s knowledge and intentions were at the time of the error.

In this case, in the absence of any representations, the Tribunal adopted the stance that, for deliberate behaviour to occur, there must be a ‘conscious act’ on the part of the relevant person to undertake that behaviour. The Tribunal ultimately accepted the appellant’s submissions that she left tax matters to her husband, was unaware of the failure to file, and therefore did not herself deliberately withhold information by failing to file returns.

The Tribunal addressed HMRC’s argument that the taxpayer was still ultimately responsible for her own tax affairs as follows: “Although we note that the responsibility to file returns remains with a taxpayer where the taxpayer has delegated such filing to another person, we consider that in order for HMRC to satisfy the burden of proof upon them to show that the failure to file was deliberate, it would be necessary to show that such other person had deliberately failed to file the return if the appellant was unaware of the failure to file.”

In this case, although the appellant had left tax compliance matters to her husband, the tax returns in question were in practice dealt with by an agent (their accountant). No submissions were made by HMRC as to specifically who, other than the appellant, may have acted deliberately. The Tribunal determined that the mere fact that the returns were filed late and the amount of tax due was substantially higher than normal was not sufficient to evidence that there was, on the balance of probabilities, the necessary deliberate behaviour on the part of another unspecified person which could be attributed to the appellant.

On that basis, HMRC had not discharged the burden of proof to show that the appellant acted deliberately. However, the Tribunal did not accept that the appellant had a reasonable excuse on the facts, meaning that a penalty (albeit for a lower amount) should still be imposed.

Comment

The case has important implication for tax advisors and accountants who regularly file returns on behalf of clients. It shows that not only is the burden of proof on HMRC to demonstrate that there was deliberate behaviour involved but also that, where the taxpayer has entirely delegated responsibility for the filing of their tax returns to an advisor (likely to have to be proved on a case-by-case basis), the advisor (and not just the taxpayer) acted deliberately.

Where HMRC cannot prove this, the penalty must instead be assessed based on careless behaviour (and, ultimately, taxpayers may be able to show that they had a reasonable excuse depending on the facts).

Jack Prytherch is a senior associate in Bird & Bird’s tax disputes and investigations team. Contact him on +44 (0)20 7415 6000 or email jack.prytherch@twobirds.com