Neutral Citation Number: [2016] EWCA Civ 761

Case No: A3/2015/0266

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
FTC/98/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2016

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE KITCHIN
and
LORD JUSTICE HAMBLEN

- -

Between:

MR KEITH DONALDSON	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")	**Respondents**

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- -

Rebecca Murray (instructed by **Bar Pro Bono Unit**) for the **Appellant**
Richard Vallat (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 27/06/2016

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Approved Judgment

Master of the Rolls:

1. Schedule 55 of the Finance Act 2009 ("the Schedule") makes provision for the imposition by Her Majesty's Revenue and Customs ("HMRC") of penalties on taxpayers for the late filing of tax returns. The date for filing a return on paper (as opposed to online) is 31 October. If a person (P) fails to file an income tax return by the "penalty date" (the day after the "filing date" i.e. the date by which a return is required to be made or delivered to HMRC), para 3 of the Schedule provides that he is liable to a penalty of £100. Para 4 provides:

> "(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. Para 5 provides that P is liable to a penalty under that paragraph if (and only if) his failure continues after the end of the period of 6 months beginning with the penalty date. 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.

3. Para 18 provides:

> "(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed".

4. This appeal concerns the paper tax return filed by Mr Donaldson for 2010/11. He failed to file the return by 31 October 2011. On 18 December 2011 he was sent a computer generated reminder called an SA Reminder which stated that it was too late to file a paper return "without having to pay a £100 late filing penalty". It also stated that, if he failed to file his return by 31 January 2012, "a £10 daily penalty will be charged every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper tax returns".

5. He still did not file his return. On 6 January 2012, HMRC sent another computer generated reminder called an SA 326 D notice. This stated that he was liable for a penalty of £100 in accordance with para 3. Like the SA Reminder, it also stated that, if the tax return was more than 3 months late, "we will charge you a penalty of £10

for each day it remains outstanding. Daily penalties can be charged for a maximum of 90 days starting from 1 February".

6. Mr Donaldson filed his return on 1 May 2012. He was then sent a Notice of Penalty Assessment which informed him that he had incurred a total penalty of £1,200 comprising (i) £900 in daily penalties (pursuant to para 4); and (ii) £300 for filing the return more than 6 months after the due date (pursuant to para 5).

7. Mr Donaldson appealed to the First-tier Tribunal ("FTT") on the ground that he was not liable to pay a daily penalty. Having appealed, he took no further part in the appeal. The FTT on its own initiative considered possible arguments in his favour, including whether the conditions in para 4(1)(b) and (c) of the Schedule were satisfied. It held that HMRC had "decided" that a daily penalty should be payable and that the condition in para 4(1)(b) was satisfied. But it also held that HMRC had not given notice to Mr Donaldson specifying the date from which the penalty was payable, so that the condition in para 4(1)(c) had not been satisfied. Accordingly, the FTT allowed his appeal.

8. HMRC appealed to the Upper Tribunal ("UT"). Again Mr Donaldson was not represented and took no part in the appeal. He did not cross-appeal or serve a respondent's notice in order to argue that the condition in para 4(1)(b) had not been satisfied. The UT appointed an amicus curiae to ensure that "all relevant issues were fully ventilated". The UT itself identified as a relevant issue the question of whether the condition in para 4(1)(b) had been met. At para 5 of its decision, the UT stated that, because Mr Donaldson had not cross-appealed on the question of whether the condition in para 4(1)(b) had been met, it was not necessary or appropriate to determine this point. At para 38, the UT noted that HMRC's notice of penalty assessment failed to state the period in respect of which Mr Donaldson had been assessed as required by para 18(1)(c). It said, however, that "this point is not…before us and we shall not address it further".

9. The UT decided that the condition in para 4(1)(c) was met and on that ground allowed HMRC's appeal. Mr Donaldson applied to the UT for permission to appeal against the decision of the UT not only on the para 4(1)(c) point, but also on both the para 4(1)(b) point and on the para 18(1)(c) point. He now has permission to appeal on all three points.

Paragraph 4(1)(b)

10. The HMRC case is that it had taken a decision within the meaning of para 4(1) (b) either (i) by taking the high policy decision that it took in June 2010 that all Ps who were at least 3 months late in filing their returns would be liable to a daily penalty or (ii) by its computer, programmed in accordance with that decision, automatically issuing a penalty notice.

11. Ms Murray, who appears pro bono on behalf of Mr Donaldson, submits that neither of these amounts to a "decision" within the meaning of para 4(1)(b). She advances three reasons. First, the words "such a penalty" in para 4(1)(b) are a reference back to the opening words of para 4(1) so that sub-para (b) means "HMRC decide that a penalty under this paragraph should be payable by P". The condition is referring to a penalty decision taken by HMRC with reference to a particular P.

12. Secondly, Parliament intended that HMRC should exercise its judgment with regard to a particular P in the light of the circumstances applicable to him, so as to decide whether he "should" be liable to a penalty. Thus, the HMRC must decide whether P is liable to a daily penalty and, if so, the date from which it should begin to run, which date must be specified in the notice.

13. Thirdly, the structure of paragraph 4(1) indicates that the three conditions must be successively met, in chronological order, so that the decision in (b) must be taken only *after* P has failed to submit his return for the relevant period. The policy decision relied on by HMRC was taken years earlier and therefore cannot satisfy condition (b).

14. I start by saying that I agree with the observation made at para 43 of the decision of the UT:

> "We do not think it could have been within the contemplation of the draftsman that HMRC should be required to make a decision on a taxpayer-by-taxpayer basis, since he must have been aware that it would be impractical to exercise a discretion (meaning a discretion exercised in respect of each taxpayer individually, rather than in relation to defaulting taxpayers as a body) in that way. Rather, we think, this provision too contemplates what HMRC have in fact done, that is decide in advance that all taxpayers who default for more than three months should suffer daily penalties. In other words, what was contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers who default for the requisite period, or none; and if that is so the purpose of the notice is to inform taxpayers who are in danger of incurring daily penalties that HMRC have decided to impose them.

15. It seems to me that it is inherently unlikely that Parliament intended that HMRC should be required to make a decision by exercising a discretion on an individual taxpayer-by-taxpayer basis. Parliament has addressed the issue of the individual circumstances of P by providing at para 23 that:

> "(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."

16. With these considerations in mind, I can now deal with Ms Murray's three reasons. As regards her first reason, I do not consider that the words "such a penalty" shed any light on whether or not a decision can be a generic decision applicable to all taxpayers where the condition in para 4(1)(a) is satisfied, or whether it can only be an individual decision made by reference to the particular circumstances of P. In my view, Ms Murray places on the words "such a penalty" a weight that they cannot bear. At most, they are consistent with a decision under para 4(1)(b) being an individual decision taken having regard to the circumstances of the particular taxpayer. As a matter of language, however, they do not compel such an interpretation which, for the reasons I have given, it is inherently unlikely that Parliament intended.

17. The second reason adds nothing to the first. As for the third reason I accept the submission of Mr Vallat that the order in which the three conditions are set out does not show that Parliament intended that they should be chronological. Other than the order in which the three conditions are set out, there is no support for this submission. There are no words such as "then" or "after" to indicate a specific sequence; and there is nothing in the structure of para 4(1)(b) to support it either. The UT said at para 42 that, although at first reading para 4(1) suggests a chronological sequence, closer examination shows that the draftsman had gone no further than to make the three requirements cumulative. I agree.

18. In my judgment, a generic policy decision of the kind taken by HMRC in June 2010 is a decision which satisfies the requirement of para 4(1)(b). I do not, therefore, need to deal with Mr Vallat's alternative submission that para 4(1)(b) is satisfied by HMRC's computer, programmed in accordance with that policy decision, automatically issuing a penalty notice. I must confess to having considerable doubts as to whether it is correct.

Paragraph 4(1)(c)

19. Ms Murray submits that neither the SA Reminder document nor the SA 326D document is a "notice" within the meaning of para 4(1)(c) First, she relies on the chronological point that the SA Reminder was sent to Mr Donaldson long before the condition in para 4(1)(a) was met. I have already rejected this argument and say no more about it.

20. Secondly, Ms Murray submits that the requirement to give notice specifying the date from which the penalty is payable must be understood in the light of the discretion given to HMRC to specify the date. Having exercised that discretion as respects the particular P, she submits that HMRC must then notify him as to how that discretion has been exercised. The two documents relied on by HMRC merely inform the recipient that he *might* be liable to a penalty and identify the earliest date from which the penalty *might* run. The language of para 4(1)(c) does not permit the giving of a conditional or contingent notice. It requires notice to be given to P that a penalty *is* payable by him. No such notice can be given unless and until P's failure to submit a return has continued beyond the three month period.

21. I cannot accept these submissions. First, to the extent that they depend on establishing the existence of a discretion, I have already rejected them. Secondly, the notices did not "merely" inform Mr Donaldson that he "might" be liable to a penalty. They both stated in terms that he *would* be liable to a £10 daily penalty for every day after 31 January 2012 that the return was not filed: "a £10 daily penalty will be charged" (SA Reminder); and "if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding" (SA 326 Notice). Thirdly, I reject the submission that para 4(1)(c) does not permit a notice to be given until P becomes liable for a penalty i.e. in advance of a failure to file the return after the end of the three month period. There is nothing in the language of sub-para (c) which restricts the timing of the giving of a notice in this way. Ms Murray has not suggested any reason why Parliament would have intended to do this. All that HMRC is required to do is to inform P that it has decided that, if he continues to fail to file his return after the end of the three month period, he will be liable for a daily penalty of £10 for each day that the failure continues during the following 90 day period. Sub-para (c) requires notice to be given specifying the date from which penalty "is" payable. That can be done in advance of any default by P. It is a fair and sensible provision.

22. These reasons for rejecting Ms Murray's submissions are not, in substance, different from those given by the UT.

Paragraph 18(1)(c)

23. Ms Murray submits that the notice of the penalty assessment given by HMRC to Mr Donaldson did not state "the period in respect of which the penalty is assessed" as required by para 18(1)(c). It failed to *state* any period at all. The notice should have stated both the *number of days* in respect of which the penalty was assessed and the *start and end dates* of the period. The notice enabled Mr Donaldson to work out the number of days (90), but it did not *state* that number, nor did it *state* the period.

24. Mr Vallat's primary submission is that the "period in respect of which the penalty is assessed" is the tax year to which the assessment relates (in this case 2011/12). This was stated in the notice. He points out that para 18 applies for the assessment of all penalties under the Schedule. There are no introductory words such as "where appropriate" which might suggest that a period need only be specified for some penalties. In some instances (for example, penalties payable pursuant to paras 3 and 8), the only possible "period in respect of which the penalty relates" is the tax year or other period to which the penalty relates.

25. I do not accept Mr Vallat's submission. It is true that in some contexts the phrase "period in respect of which the penalty is assessed" is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the period over which the penalty has been incurred. It would have been surprising if Parliament had not intended that HMRC should notify P how a daily penalty has been calculated i.e. over what period he has incurred the penalty. He needs that information to enable him to decide whether to challenge the assessment of the penalty.

26. The next question is whether the notice of assessment in this case did state the period in respect of which the daily penalty was assessed. It undoubtedly did not state the

start or the end dates of the period. It stated that Mr Donaldson was liable for the maximum penalty of £900 calculated at the rate of £10 per day for a maximum of 90 days. It also referred him to para 4 of the Schedule. In my view, this was not sufficient to satisfy the requirements of para 18(1)(c). The notice did not identify the three month period. Referring him to para 4 of the Schedule (as the notice did) did not enable him to work out (still less by doing so did the notice state) to which three month period it was referring. As I have said at para 8 above, this seems to have been the view of the UT. The notice should have specified the three month period, at least by stating when it started. It should not be a cause for surprise that Parliament intended that the taxpayer should be told not only the amount of the daily penalty, but how it has been calculated i.e. the start and end date of the three month period.

27. It is, therefore, necessary to consider Mr Vallat's alternative argument that the failure to state the period over which the penalty was incurred does not of itself invalidate the assessment because, despite the defect, the notice was in substance and effect in conformity with para 18 or accorded to its intent and meaning within section 114(1) of the Taxes Management Act 1970 ("TMA") Section 114(1) of TMA provides:

> "An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

28. Ms Murray submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. In my view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice "affected by reason of a mistake, defect or *omission* therein" (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions.

29. In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty.

> He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice. I do not, therefore, need to consider the further argument advanced by Mr Vallat based on section 114(2) of TMA.

Conclusion

30. For all these reasons, I would dismiss this appeal.

Lord Justice Kitchin:

31. I agree.

Lord Justice Hamblen:

32. I also agree.