[2019] UKFTT 0709 (TC)

TC07481

CORPORATION TAX – late filing of return – tax-geared penalty on unpaid tax – para 18 of Schedule 18 to FA 1998 – penalty for the twin failure in return filing and tax payment – whether reasonable excuse – s 118 of TMA – reliance on accountants – insufficiency of funds – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/05349

BETWEEN

CARIS PROPERTIES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
DAVID WILLIAMS

Sitting in public at Taylor House, London on 9 August 2019

Colm Kelly, Counsel, instructed by Mrs Pragya Singh, director of the Appellant for the Appellant

John Kruyer, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. Caris Properties Limited ('the appellant') appeals against the penalty imposed by the respondents ('HMRC') under Schedule 18 to the Finance Act 1998 ('Sch 18') for the late filing of the Corporation Tax ('CT') return for the accounting period ending 30 September 2016.

2. While the late filing of the CT return gave rise to penalties imposable under paras 17 and 18 of Sch 18, the appeal concerns the tax-geared penalty under para 18 in the quantum of £34,870.58; the flat-rate penalty under para 17 is not under appeal.

Evidence

3. Mrs Pragya Singh, director of the appellant, lodged a witness statement and was cross-examined. We find Mrs Singh to be a credible witness, in that she was not being knowingly untruthful in her evidence. However, we do not find Mrs Singh a reliable witness, as we find certain aspects of her evidence as regards motive and reason for a course of action in the past to be a recount mingled with an element of hindsight.

Relevant legislation

4. The provisions relevant to this appeal under Sch 18 FA 1998 are the following:

(1) Paragraph 3 provides for the power for HMRC to serve a notice on a company for the delivery of a company tax return as may be reasonably required; the return must be delivered to HMRC not later than the filing date.

(2) Paragraph 14 provides for the filing date, and in the present appeal, where the accounting period was of twelve-month duration, being the last day of 'twelve months from the end of the period for which the return is made'.

(3) Paragraph 17 provides for flat-rate penalties to be payable: (a) £100 where the return is delivered three months after the filing date, (b) £200 in any other case; and (c) increased to £500 and £1,000 for a third successive failure.

(4) Paragraph 18 provides for a tax-related penalty to be imposed where a company required to deliver a CT return for an accounting period fails to do so –

(a) Within 18 months after the end of that period, or

(b) If the filing date is later than that, by the filing date.

(5) Sub-paragraph 18(2) provides for the quantum of the tax-geared penalty to be –

(a) 10% of the unpaid tax, if the return is delivered within two years after the end of the period for which the return is required, and

(b) 20% of the unpaid tax, in any other case.

(6) Sub-paragraph 18(3) defines 'unpaid tax' as 'the amount of tax payable by the company for the accounting period for which the return was required which remains unpaid on the date when the liability to the penalty arises under sub-para (1)'.

(7) The provision for a defence of 'reasonable excuse' in relation to a penalty under Sch 18 is referable to s 117 of FA 1998, which provides, *inter alia*, as follows:

> '(1) The provisions of Schedule 18 to this Act have effect in place of –

> (a) the provisions of Parts II and IV of the Taxes Management Act 1970 (returns, assessment and claims), so far as they relate to corporation tax,
>
> (b) certain related provisions of Part X of that Act (penalties), …
>
> (2) Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act.'

5. By virtue of s 117(1) FA 1998 therefore, Sch 18 to FA 1998 is to be construed as if Sch 18 were a schedule to TMA. Hence, the defence of 'reasonable excuse' in relation to a Sch 17 and 18 penalty is referable to the provision under s 118 TMA entitled 'Interpretation'. Sub-section 118(2) of TMA states as follows:

> 'For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.'

The Facts

Background

6. The appellant was incorporated on 2 September 2013, and its business is in property development. It specialises in high-end properties, typically houses with a sale value of £2m each. The business model is that the appellant purchases sites to develop the properties in question, and then sells the properties to home-owners, who are typically high net-worth individuals, often bankers.

7. The appellant has two shareholder-directors: Mrs Singh and Mr Neil Cooper. Mr Cooper is an architect by profession; he deals with the technical aspects in relation to the development of the company properties. Mrs Singh worked in Information Technology before becoming a property developer; she deals with the administrative and financial aspects of the business.

8. The appellant has no employees; third-party contractors are used on a project-by-project basis. In the period up to 2016, the appellant engaged the service of a self-employed book-keeper who assisted with book-keeping as and when required.

9. Jay Rajani Limited ('Rajani') acts as the accountant of the appellant. The principal of the firm is Mr Rajani, who is a chartered certified accountant (of ACCA).

10. The office address of Rajani is used as the registered office address of the appellant, since the appellant did not have its own office; both directors worked from home as required.

11. The appellant's registered office address is the correspondence address on HMRC's systems. During the relevant period, the registered office address of the appellant was at 246a Kenton Road, Harrow, and changed to 195a Kenton Road, Harrow on 7 April 2017.

The CT return for the accounting period ended 30 September 2016

12. The accounting period end ('APE') of the appellant is 30 September.

13. A notice to file the CT return was issued on 23 October 2016 for the accounting period ended 30 September 2016. The due date for filing the CT return was 30 September 2017, which was twelve months after the relevant APE.

14. The return was filed seven months after the due date on 1 May 2018.

15. In the accounting period to 30 September 2016, the appellant sold two properties, purchased two, and carried three it was developing and seeking to sell.

16. The two properties were sold off-plan and delivered a turnover figure of £3,716,178 for the APE. The sale proceeds were invested in the purchase of two further properties.

17. From the copy of 'Directors' Report and Unaudited Financial Statements' for the year ended 30 September 2016 filed with Companies House and included in the bundle, we note:

(1) The Directors' report was dated 15 May 2017.

(2) The turnover for 2016 was £3,716,178; (compared with £1,369,679 for 2015).

(3) The gross profit for 2016 was £1,755,445; (compared with £489,383 for 2015).

(4) Administrative expenses for 2016 was £11,916, of which £10,739 was for Accountancy and £220 for bank charges; (compared with £20,322 in 2015, of which £6,298 was for Accountancy, and £10,346 was for bank charges).

(5) The operating profit (being gross profit less expenses) was £1,743,529 in 2016; (compared with £448,312 for 2015).

(6) Interest payable was nil in 2016, (compared with £20,749 for 2015).

(7) Profit on ordinary activities before taxation was £1,743,529 for 2016; (compared with £448,312 for 2015).

18. The balance sheet of the Company at 30 September 2016 stated the total value of current assets at £4,272,031, comprising:

(1) Stocks at £3,369,214 (i.e. properties developed or being developed);

(2) Debtors at £69,107;

(3) Cash at bank and in hand at £833,710.

Penalty determination

19. On 18 May 2018, HMRC wrote to the appellant notifying the penalty determination made against the company in the sum of £34,870.58, being 10% of the corporation tax liability for APE 2016 ('the tax-geared penalty' or 'the para 18 penalty').

20. HMRC had also imposed a penalty of £200 ('the fixed penalty' or 'the para 17 penalty'), and an interest charge of £8,236.44 accrued on the outstanding tax liability of £348,705.80 from its due date of 1 July 2017 to 18 May 2018. The sum of £8,436.44, being the total of the para 17 penalty and the interest charge, had been settled.

Appeal and review

21. On 29 May 2018, Rajani responded by making an appeal against the penalty on the appellant's behalf, with the following reasons:

(1) ‘Our client experienced severe cash flow issues due to the downturn in the property market and consequently ran out of funds and also faced difficulty in raising finance.’

(2) ‘Our fees were not paid and as a result we held back the submission of the Corporation tax return.’

22. HMRC rejected the appeal, stating the reason for the decision as:

> ‘Your agent [Rajani] told us that you didn’t send your [CT] return in on time because their fees were not paid and as a result they held back the submission of the [CT] return. We … don’t agree that you have a reasonable excuse …’

23. On 9 July 2018, Mrs Singh wrote a long letter (two pages of dense text) on behalf of the appellant to request a review of the decision, and gave as her explanation a more nuanced version of the circumstances leading to the agent withholding the submission of the CT return.

(1) That when the accounts for APE 2016 were prepared in May 2017, ‘by which time the property market was in a sharp decline and the company was facing acute cashflow issues. We were aware that we might not have the cash or facilities to meet the corporation tax as it fell due.’

(2) The letter continued with an explanation for delaying the submission of the return:

> ‘Our accountant (agent) mentioned that if the [CT] return was not filed when the accounts were filed, in June 2017 [presumably this referred to filing accounts with Companies House], but delayed until the latest permitted filing date of 30th September 2017, HMRC would not pursue the tax due until then, which would give the company an extra three months to try and raise funds towards the corporation tax and seek a “time to pay” arrangement for the balance.’

(3) It then explained why the supposed CT filing did not happen:

> ‘The *cashflow pressures continued … we did not settle our accountant’s fees for the 2016 accounts*. They then withdrew from acting for us as they were entitled to do. We believed the corporation tax return had been filed at the due date, as previously discussed, but in fact our accountant had withdrawn from acting before the due date. …’ (italics added)

(4) The letter referred to communications with HMRC in the following terms:

> ‘We were expecting to have to negotiate a time to pay agreement for the tax when contacted in due course by HMRC but we were aware we were being charged interest on the outstanding balance.
>
> We now realise that reminders for the outstanding balance would have been sent to the registered office, as were the reminders for the outstanding return.
>
> These were not forwarded to us as our former accountant was not acting.’

(5) Mrs Singh emphasised that the original decision maker refusing the appeal did not have the full facts, and made the decision ‘on the basis that [the appellant] had an agent acting’ for it, ‘and that there was an intentional delay’. Mrs Singh continued:

> ‘In fact, we had no agent acting for us in the period, and the continuing default was due to our being unaware that the return had not already been filed. This was a failure of communication and information as at the due date, not a continuing reliance on another party to meet the Company’s compliance obligations in due course.’

24. On 26 July 2018, HMRC’s review conclusion decision refused the appellant’s appeal.

25. On 16 August 2018, the appellant appealed to the Tribunal on the basis that it had a reasonable excuse for the failure, and that the penalty should be cancelled.

Mrs Singh's witness statement

26. The two main aspects of Mrs Singh's evidence concern: (a) the appellant's reliance on its accountant, and (b) the cash flow difficulties experienced following the 2016 referendum on the UK's exit from the European Union ('Brexit'). We summarise Mrs Singh's witness statement which was dated 8 August 2019 under these two headings.

27. In relation to the appellant's reliance on its accountant, Rajani:

(1) It was stated that the appellant 'heavily relied on its accountant'; that 'neither of [the two directors] had any accounting or tax experience beyond that involved in administering the appellant's affairs', and 'relied on Mr Rajani' to prepare the appellant's accounts and deliver its CT returns to HMRC and Companies House.

(2) In April 2017, Rajani was instructed to begin preparing the appellant's accounts for APE 2016.

(3) In relation to the filing of the CT return, the statement at paragraph 17 states:

> 'Following the preparation of the appellant's accounts in May 2017, I had been informed that Jay Rajani Ltd would deliver the company's CT return. In the event, this did not happen *due to a dispute over an unpaid invoice for fees dating back some 12 months previously*. The appellant was unable to pay these fees because of the significant cash flow difficulties caused by Brexit.' (italics added)

(4) At paragraph 18 of the witness statement, Mrs Singh said:

> '… unbeknownst to the appellant, [Rajani] ceased to act. The appellant was not sent any letter or other communication informing it that [Rajani] had ceased to act. As a result, the appellant was unaware that [Rajani] would not deliver the appellant's CT return for APE 30 September 2016.'

(5) Paragraph 18 continues by remarking on the communications from the agent:

> 'In particular, there were several companies in respect of which [Rajani] handles their tax affairs and for which I continued to receive regular communications requesting information for the preparation of those companies' accounts and CT returns. Accordingly, in the absence of any explicit communication from [Rajani] regarding the appellant, I had no reason to assume that anything out of the ordinary had occurred or that the appellant's CT return would not have been delivered in the normal manner.'

(6) At paragraph 19 of the statement, it is stated the appellant's 2016 accounts were submitted to Companies House.

(7) Paragraph 19 then continues by concluding: 'It was at some point between June and September 2017 [Rajani] ceased to act for the appellant without informing me'.

28. In relation to the cash flow difficulties following the Brexit referendum:

(1) Speaking of the sale proceeds of £3.7m being invested to purchase two further properties in APE 2016, Mrs Singh stated:

> 'This was the only viable way of carrying on the appellant's business; banks and financial institutions were unwilling to lend to fund property developments of this sort. Prior to 2016, this way of doing business had not presented any difficulties for the appellant; the property market was sufficiently buoyant that

> the appellant was able to continue selling properties, using the proceeds to purchase and develop further properties and pay any tax due to HMRC.'

(2) Speaking of the effect of the Brexit referendum in June 2016, Mrs Singh stated:

> '… the high-end residential property market contracted. While it was possible to sell the two properties off-plan in 2016, it was no longer possible to find buyers for further properties. In the past, we would have had no particular difficulty finding buyers, which would have provided us with funds to pay the appellant's tax liabilities for APE … 2016'.

(3) As a result of Brexit, Mrs Singh said that there was a lack of purchasers and the appellant was unable to sell its properties in the same manner as previously. She stated:

> 'We therefore experienced immediate and significant cash flow difficulties. All of the appellant's cash on hand had to be invested in the properties which we had purchased and needed to develop to generate future revenue.'

29. Whilst not directly related to the appellant's taxation affairs, Mrs Singh's witness statement states the following in relation to her personal attributes and knowledge.

(1) Mrs Singh was also the director of several other companies whose tax affairs were handled by Rajani.

(2) In relation to compliance due dates, she stated:

> 'Personally, I was never aware of any particular filing deadline for the appellant's CT return. … I was always reminded by [Rajani] when a filing deadline for any given company was approaching and I then provided them with all relevant information to prepare accounts and CT returns.'

(3) She referred to the fact that since there were several companies of which she was a director, and for which she continued to receive regular communications requesting information for the accounts preparation, she 'had no reason to assume that anything out of the ordinary had occurred or that the appellant's CT return would not be delivered in the normal manner'.

(4) 'Neither I nor [Rajani] have any record of reminders having been sent by HMRC, either to the appellant's registered address, or to the home address of either director'.

(5) As to the timing when Mrs Singh first became aware of the omission, she stated it was when 'we requested that [Rajani] prepare the appellant's accounts for APE 30 September 2017. This request was made on 16 April 2018'.

Mrs Singh's oral evidence

30. When her evidence was led, Mrs Singh was asked when she stopped paying Rajani in relation to the disputed invoice, to which she replied: 'I was not certain; but I did not see it was a big problem.' She then referred to 'the number of companies' with which she was involved, and for which Rajani acted, which contributed to the uncertainty as to when she stopped paying the invoice that was in dispute.

31. Mrs Singh asserted that the appellant did not receive any communications from HMRC regarding the payment of corporation tax in relation to APE 2106; nor did she receive any reminders as to the CT return being outstanding. The Tribunal then put several questions to Mrs Singh, the questions and the replies thereto are summarised as follows.

(1) The Tribunal asked why Mrs Singh decided to delay the filing of the CT return when it could have been done in June 2017, she said that 'we had cash flow problems',

and the plan was to delay the filing of the CT return 'by three months' from June 2017 to September 2017, to file the return at the latest possible date. We then asked Mrs Singh to explain why the filing of the CT return should be linked to the availability of funds, since filing the CT return and paying the CT due are two distinct and separate processes. She explained that if the CT return was not filed, then HMRC would not be demanding for payment of the corporation tax due in July, and that if the return was filed in September at the latest possible time, that would give the appellant a further three months to raise money to pay the tax.

(2) The Tribunal then asked: 'If time had gone by and you had not received a demand for the tax, did it not occur to you to enquire into the matter?' She said that she expected to be contacted when she needed to pay the tax, but that no letters had been received. (It is unclear whether Mrs Singh expected to be contacted by Rajani, or by HMRC.)

(3) When asked why there was no follow-up on the matter of the outstanding tax payable, either by negotiating a time-to-pay agreement, or by raising the finance to meet the CT liability, which she knew stood at £348,703 as early as May 2017, and that she knew the tax liability was due on 30 September 2017, Mrs Singh's reply was:

> 'The TTP had honestly slipped my mind … I relied on Rajani. I should have double checked, but I didn't because he had always done what [was] needed to be done in the past. I didn't question him because we'd been in a business relationship for some 10 years. It slipped my mind why documents for Caris Properties hadn't arrived – I had some personal issues at the time.' [Mrs Singh went on to describe the problems with her son's medical condition detailed in subparagraph (6) below.]

(4) When asked how many other companies Mrs Singh was involved with at the time, she said there were three others, some of which she was co-owner, and some part-owner. She mentioned her husband's health-care company, of which she was a co-owner. She did not go into detail of the other two companies, one of which was also a property company like the appellant.

(5) As to the various aspects of the appellant's working relationship with Rajani:

> (a) When asked what the rationale was behind using the office address of Rajani as the registered office of the appellant? Mrs Singh said, 'He would ensure that all correspondence goes to him, and he would deal with them all.'
>
> (b) When asked whether it had been a reasonable working relationship between Rajani and Mrs Singh, and the default in question represented a 'slip' in the long working relationship, the reply was: 'Definitely'.
>
> (c) Given a reasonable working relationship with the agent, the Tribunal then asked Mrs Singh to state in her own words what she considered to be the reasonable excuse for the appellant's failure to file the CT return. Mrs Singh said that it was 'relying on our accountant'; that 'I should have double-checked', but that 'after 10 years of building a working relationship, I did not question him in this case'.

(6) Mrs Singh recalled the period from October 2017 to April 2018 as being 'incredibly stressful' due to her son's medical condition, which involved hospital appointments at Great Ormond Street, and Guy's and St Thomas'. When asked if the child (then aged 10 although the problems dated back to age 3) was missing school during the 6-month period, Mrs Singh said he would sometimes miss the morning, or he would go to school and then 'got called back', but that he was still attending school during that period.

(7) When asked about what role Mr Cooper played in the appellant, Mrs Singh said he is 'never concerned with' the compliance aspects of the business; that Mr Cooper's contribution to the appellant's business is to deal with the drawing and planning aspects of property development and liaise with building contractors; that he is not full-time dealing with the appellant's business; that both directors 'have other interests'.

The appellant's case

32. Mr Kelly submitted: (a) that the appellant had a reasonable excuse for failing to deliver its CT return by the filing date, and (b) that the failure was remedied without unreasonable delay after the point at which the excuse ceased.

33. In relation to the existence of a reasonable excuse, Mr Kelly averred that:

(1) The appellant had a genuine and reasonable belief that its accountant would file the return and it was not aware of the accountant 'had ceased to act'; it had no reason to assume the accountant would not deliver the return as 'he had positively stated'; and there was 'nothing unreasonable in the appellant assuming that he would in fact deliver the return'.

(2) Under the heading of 'Relying on accountant', it was submitted that 'there was nothing necessarily unreasonable in relying on an accountant where that reliance leads to failure to comply with an obligation': *Rowland*. The appellant is a small two-person company, whose directors did not have any experience of delivering CT returns, and who had previously relied on the same accountant without any issues of default or penalties arising.

(3) Under the heading of 'Insufficiency of funds', it was submitted that 'the fact of the accountant having ceased to act came about because of an insufficiency of funds which meant that the appellant was unable to pay outstanding fees'. There is no legislative exclusion of an insufficiency of funds from the scope of reasonable excuse defence in s 118(2) TMA. The Tribunal can and should take account of this insufficiency in finding that the appellant had a reasonable excuse.

(4) Should the Tribunal have any degree of hesitation to approach the fact of the insufficiency alone, then it is nevertheless appropriate for the Tribunal to consider the reason for the insufficiency, which was cash flow difficulties arising from the unforeseen market conditions following 'the surprise result of the Brexit referendum'. This was not a risk that could have been avoided by the exercise of foresight and due diligence on the part of the appellant.

(5) Consequently, neither the appellant's reliance on its accountant, nor the insufficiency of funds leading to the accountant ceasing to act, is sufficient to render its honest belief that the CT return would be delivered unreasonable.

34. In respect of the failure being remedied without unreasonable delay, it was submitted:

(1) Given that the reasonable excuse is based on the appellant's honest and reasonable lack of awareness that its CT return has not been delivered by its accountant, the question is therefore whether after this lack of awareness ceased, it acted without unreasonable delay in delivering the return.

(2) At the earliest, the appellant became aware of the failure on 16 April 2018, when it requested its accountant to prepare its 2017 accounts.

(3) The return was delivered on 1 May 2018, which meant the appellant 'clearly acted without unreasonable delay'.

HMRC's case

35. For the respondents, it was submitted that:

(1) The return was late, and the appellant's circumstances did not disclose that there was a reasonable excuse for its failure to file on time.

(2) While there is no statutory definition of a reasonable excuse, the insufficiency of funds is excluded from giving rise to a reasonable excuse.

(3) The appellant has 'the full responsibility' of being aware of the relevant legislation and complying with their tax obligations. 'These obligations cannot be transferred to a third party or other company.'

(4) The appellant failed to take actions of a reasonable person, because when the company became aware of the cash flow problems, it failed to approach HMRC to agree a time to pay arrangement, even though there is a helpline for businesses which anticipate needing time to pay.

(5) It would be a prejudice against companies which comply with their tax obligations in these circumstances, 'to allow Caris Properties to not face the consequences of failing to meet their obligations without a reasonable excuse'.

(6) HMRC would only send correspondence to the company's registered address and not to the directors individually. Companies House confirms that the appellant's registered address at the time is the address as held on HMRC's systems and at which the CT return would have been sent. This address was not updated until 7 April 2017. Furthermore, the appellant has confirmed that the return was received in time though not filed on time.

(7) HMRC submitted that the return was not filed without unreasonable delay, given the return was filed over 19 months after the relevant APE.

DISCUSSION

The facts in issue and the burden of proof

36. The respondents bear the burden to prove that the penalty, on the face of it, is imposable according to the terms of the relevant legislation. The appellant does not dispute that the CT return for APE 30 September 2016 was filed on 1 May 2018, which was more than 18 months after the end of the accounting period to which it relates. To that end, HMRC have met the burden of proof that there is a prime facie case for the penalty under para 18 of Sch 18 to FA1998 to be imposable.

37. As to the quantum of the penalty, there is no dispute either, since the penalty at 10% of the CT liability for APE 20 September 2016 was as self-assessed by the appellant. Secondly, the tax liability of £348,705.80 remained unpaid in its entirety at the penalty date. The facts in issue in relation to the imposition of the penalty in the sum of £34,870.58 are therefore proved, and the respondents have discharged their burden.

38. The burden is on the appellant to establish it has a reasonable excuse based on the facts relied on. The fact in issue in relation to the existence of a reasonable excuse as pleaded by the

appellant would appear to be: did the agent cease to act in relation to the filing of the CT return due to a non-payment of fee?

Case law on reasonable excuse

39. There is no statutory definition for a reasonable excuse. The line of authority on reasonable excuse which is applicable to this case includes the following:

(1) In *Garnmoss Ltd v HMRC* [2012] UKFTT 315 (TC), where there was a *bona fide* mistake made, it is stated at [12] that while the mistake 'was not a blameworthy one, the Act does not provide shelter for mistakes, only for reasonable excuse.'

(2) Similarly, in *Coales v HMRC* [2012] UKFTT 477 (TC), Judge Brannan stated at [32]: 'The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse.'

(3) The test for reasonable excuse in relation to a mistaken belief was set out by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 239:

> '… can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view, it cannot. … In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?'

(4) In similar terms, the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156 (TCC) sets out the correct test for reasonable excuse at [71]:

> '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 …'

(5) As to the issue whether a default was remedied without unreasonable delay, the guidance in *Perrin* is at [76] and [81]:

> '[76] … the concept of "unreasonable delay" is just as much an objective concept as that of "reasonable excuse", mainly because both concepts are explicitly based on the common underlying concept of "reasonableness". …'
>
> '[81] … having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time … In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.'

40. In summary, the correct legal test for deciding whether the facts in question gave rise to a reasonable excuse is the one as stated at [88] by the FTT in *Perrin v HMRC* [2014] UKFTT 0488 (TC), and approved by the Upper Tribunal: 'to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account'.

The evidence and the facts in issue

41. A professional firm such as Rajani undertaking compliance work often operates with a timetable checklist for each client, with the annual compliance tasks being carried out in the same month year on year. In the appellant's case, the pattern suggested by events happening in relation to APE 2016 and the accounts preparation for APE 2017 seems to be the following:

(1) In April, Rajani sends out the annual request of information to draw up the accounts for the APE ended in the previous September;

(2) In May, the accounts for the APE of September previous are ready for approval;

(3) In June, the CT return is filed, giving the appellant one month's notice for the CT liability that is due for payment;

(4) In June, the annual accounts are filed with Companies House;

(5) By 1 July, the CT liability is paid.

42. The peculiarity in relation to the filing routine for APE 2016 was that the CT return filing fell out of line. While the accounts were duly approved by Mrs Singh as the director on 15 May 2017, and filed with Companies House on 9 June 2017, the CT return was held back from filing at the juncture when it would normally have happened as a matter of course, and at the same time as the accounts were delivered to Companies House.

43. We are unable to make a conclusive finding of fact as to the true cause and timing for the decision to hold back the CT filing, given the inconsistencies in evidence as enumerated below.

(1) In May 2018, when Rajani appealed the penalty for the appellant, the stated reason was the non-payment of their fees which resulted in the agent holding back the filing.

(2) In July 2018, when Mrs Singh requested a review, she explained in writing (and in some detail) that the agent had mentioned (presumably in June 2017) that if the return was not filed in June 2017 but delayed to 30 September, this would give the appellant an extra three months to raise funds or seek a time-to-pay arrangement for the balance.

(3) In the July 2018 letter, the agent's withdrawal from acting was stated to have happened subsequent to the decision to delay filing the CT return (in June 2017), and was due to the *fees for preparing the 2016 accounts* not being settled, which the non-payment was due to continued 'cashflow pressures' (§23(3)).

(4) In her witness statement dated 8 August 2019, the version of events took on a nuanced tint (§§26-29) from the explanation given a year earlier in July 2018.

(a) The substance of the unpaid invoice changed to '*fees dating back some 12 month previously*' (§27(3)). In the context of paragraph 17 of the witness statement, 'some 12 months previously' is to be interpreted as referable to May 2017, fixing the timing of the alleged invoice to around May 2016, and therefore pre-dating the fees in relation to the preparation of the 2016 accounts.

(b) The 'dispute' aspect of the alleged fees was introduced in the witness statement as a reason for non-payment in addition to the cash flow difficulty stated earlier.

(c) The discussion with the agent to hold back the CT return filing as narrated in the July 2018 letter was noticeably absent in the witness statement.

(d) Instead, the witness statement gave an account from (i) Mrs Singh being informed (in May 2017) by the agent that the return would be delivered to (ii) a decision by the agent to cease to act.

(e) The intervening event referred to in July 2018 (ie 13 months previous to the witness statement) that there was a discussion which led to the ensuing decision to withhold filing was omitted.

(5) The timing of the accountant's decision to cease to act was stated to be after the accounts were filed with Companies House in June 2017.

(6) The witness statement emphasised the absence of communications from Rajani over this matter, while throughout the relevant period from September 2017 to April 2018, the statement testified to Rajani being in regular communications with Mrs Singh over the taxation affairs of the 'several companies' with which she was involved.

(7) On 9 August 2019 in oral evidence, when asked about the timing when she stopped paying the disputed invoice, Mrs Singh was uncertain, but said that 'I did not see it was a big problem'; that she was aware that Rajani had not had certain payments, given the several other companies for which Rajani rendered invoices to Mrs Singh.

44. We find the reason for the non-payment of the said invoice to be vague and imprecise.

(1) In terms of the underlying reason for the non-payment, we are left unclear as to whether it was due to an insufficiency of funds, or to a dispute over the substance of the invoice.

(2) We are left equally unclear as regards the substance of the alleged invoice, whether it was in relation to preparing accounts for APE 2016, or to a historical invoice rendered in May 2016.

(3) From the annual accounts included in the bundle, we note that in APE 2016 the appellant's accountancy fees amounted to £10,739, and represented 90% of the total administrative expenses of £11,916 for the year.

(4) In terms of the particulars of the said invoice that had caused the withdrawal of service, however, no copy of the alleged invoice was produced; no evidence was led in relation to the issues that cause the dispute; no descriptions were given of the services rendered for which the payment was sought; no details as regards the amount, or of the terms and timing for settlement of this alleged invoice.

(5) Mr Rajani, though present throughout the hearing, did not provide a witness statement or give oral evidence.

45. We are unable to make any findings of fact in relation to the substance of the alleged invoice, or the timing of the invoice being rendered, or the reason for its non-payment, or the course of event that led to the withdrawal of service in return submission.

46. We have particular difficulty over the alleged circumstances leading to what could be aptly described as a 'unilateral' withdrawal of service by Rajani.

(1) As Mrs Singh stated in her witness statement, 'regular' communications from Rajani in relation to the other companies with which she was involved carried on as normal.

(2) Nevertheless, Rajani was said to have withdrawn service in filing the CT return without any communication to the appellant, while in other quarters, business communications had continued as normal and without strain.

(3) Against this isolated incident of non-communication, we were told that there was a reasonable working relationship between Mrs Singh and Rajani for over 10 years.

(4) It was in the context of this long standing working relationship for the several corporate clients connected with the appellant via Mrs Singh that the Tribunal understands why a non-payment of a particular invoice was, in Mrs Singh's words: 'not a big problem'.

(5) It was not seen by Mrs Singh as a 'big problem', as we understand, since the appellant was not an insignificant client in terms of fee income to any accountant, and a client-agent relationship which had existed for over a decade was unlikely to result in services being withheld merely because of a single unpaid fee.

(6) Indeed, when the discovery was made in April 2018 that the CT return remained outstanding, there was no hint of hesitation from Rajani to render its service promptly to remedy the failure.

47. The routine practice of requesting information to prepare the accounts for APE 30 September 2017 could be assumed to happen in April 2018 (see §29(2)), but then Mrs Singh's witness statement stated an uncharacteristic happenstance as regards accounts preparation for APE 2017, in that the appellant initiated the process rather than waited to be asked by Rajani (§29(5)). The Tribunal is asked to give credence to this uncharacteristic happenstance in April 2018 over the accounts preparation for APE 2017 on the one hand, against the constant assertion that the appellant placed heavy reliance on its accountant for all aspects of its compliance as described at §29(2). Furthermore, this was not a case in which Rajani had ceased to act for the appellant altogether – but we are asked to give credence to a version of events wherein Rajani had withdrawn from acting over one single task of compliance, and the withdrawal was done unilaterally, without any forewarning to the appellant, while in other aspects of the appellant's tax affairs, and of the other companies with which Mrs Singh was involved, delivery of service from Rajani continued as expected. We are also asked to give credence to the fact that Rajani, having taken the unilateral decision to withdraw its service over one single task of compliance, continued to have 'normal' communications with Mrs Singh over all other matters, but had kept this unilateral decision not to act over the filing matter tightly under wraps from the appellant at all relevant times, and this was in the context of a good working agent-client relationship of over a decade long.

48. Did the agent cease to act in relation to the filing of the CT return due to a non-payment of fee without giving the appellant any notice? In the context of the ongoing working relationship between the agent and Mrs Singh for over a decade, covering not only the appellant but several other 'clients' related to Mrs Singh for which Rajani also acts as agent, this isolated incidence of cessation to act (and without giving notice) appears to us inherently unconvincing.

49. There was no clear evidence before us on which we could form a view. Such evidence as was presented to us was at times confused, unconvincing, and lacking in particularity. We are therefore unable to find that the appellant had, by reason of any such fee dispute as was described to us, a reasonable excuse for the late filing.

50. In any event, even taking the appellant's case at its highest, and assuming that Rajani indeed withdrew its services and thereby caused the failure to file the relevant return, that in our view was entirely a matter between Rajani and the appellant as its client, and the remedy would be in contract or in tort. It cannot be relevant to the construction of a reasonable excuse for the said failure for which the para 18 penalty was imposed. The same reasoning applies to the alleged honest belief held by Mrs Singh that Rajani would have filed the CT return by the due date of September 2017 without any further action from her. If Mrs Singh had indeed held such a belief, that was a matter between Rajani and the appellant, and is not relevant to our consideration of reasonable excuse.

Reliance on the accountant

51. In contrast to certain other provisions of a similar nature, s 118 TMA does not contain the statutory exclusion that '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'. Mr Kelly submitted that *Rowland v R&C Comrs* [2006] STC (SCD) 536 ('*Rowland*') is directly applicable, wherein the relevant provision under s 59C (9) TMA (now repealed) likewise did not preclude reliance on a third party from being a reasonable excuse for late payment of tax.

52. Mrs Rowland had relied on specialist accountants to prepare her tax return, in which a claim for relief of a film partnership loss was made, and reduced her tax liability to £861,250 from what it should have been at over £5.5m. Whilst the partnership loss was valid, the timing of the claim was not valid, with the result that there was a substantial underpayment of tax.

53. The special commissioner allowed Mrs Rowland's appeal against a surcharge in respect of the underpayment of tax, finding that Mrs Rowland did not have the necessary knowledge to appreciate that there was a default, and that it 'was sensible and reasonable for Mrs Rowland to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not possess personally' (at [20]).

54. We distinguish *Rowland* from the present case. Unlike the complex issues involved in quantifying Mrs Rowland's tax liability and establishing when a valid loss relief could be claimed, the filing of a CT return is a straightforward task. The accounts for APE 2016 were approved in May 2017 by Mrs Singh for the appellant, in good time for the CT return to be filed. The return filing event is routine, annual, and does not involve any specialist understanding of complex legislation as in *Rowland*.

55. As co-directors of the appellant, both Mrs Singh and Mr Cooper are highly experienced business persons, and the appellant represents only one of their several business interests. Furthermore, Mrs Singh is experienced in managing the compliance aspects, not only of the appellant's affairs, but it would seem, also of the other companies in which she has an interest, and for which she was responsible for settling the invoices on their behalf to Rajani.

56. In her long letter of 9 July 2018 to HMRC to request a review, it would appear that there was a conscious decision taken after a discussion with Rajani to hold back the submission of the CT return, which would otherwise have been done routinely in June together with the submission to Companies House.

57. Given that there was a conscious decision to withhold the filing of the CT return by a director of the appellant, as a responsible taxpayer, conscious of and intending to comply with the obligation, and having the same experience and attributes as Mrs Singh, would have followed up the matter in ensuring that the CT return that had been withheld from filing was released for filing.

58. In these circumstances, we do not consider that the appellant's reliance on the accountant gave rise to a reasonable excuse for the immediate failure in filing the CT return by its due date, or the continued failure to file more than six months after the filing due date.

Insufficiency of funds

59. In relation to insufficiency of funds, we consider in turn the three strands to this ground of appeal as advanced by the appellant.

(1) Rajani's outstanding fees were not paid, which then caused the withdrawal of service in filing the return;

(2) The decision to delay the CT return was to delay the CT payment to allow the appellant extra time to raise funds;

(3) The underlying cause for the insufficiency of funds was the impact on the housing market following the Brexit referendum result.

60. First, in relation to the alleged non-payment of fees which led to the alleged withdrawal of service without prior notice to the appellant, we have found the evidence in this respect to be unclear, lacking in particularity, and ultimately unconvincing. Given that we are unable to make any conclusive findings of fact as regards the circumstances behind the alleged withdrawal of service as discussed above, we are unable to establish whether there could have been a reasonable excuse arising from those circumstances due to an insufficiency of funds.

61. As to the second strand, Mrs Singh's explanation for delaying the return filing was to allow the appellant an extra 3 months to raise funds to meet its CT liability. There is a timing difference in the two compliance obligations, with the payment due date being three months before the filing due date.

62. The due date for the filing of a CT return is 12 months after the end of the accounting period, while the payment of any corporation tax is due 9 months and 1 day after the end of the accounting period. The appellant's CT liability for APE 30 September 2016 was due for payment by 1 July 2017, while the CT return was due for filing by 30 September 2017.

63. For the following reasons, we are unable to find a reasonable excuse in terms of causation between the filing default and the insufficiency of funds to make the CT payment.

(1) A delay in filing the CT return would have only delayed the *demand* for the CT payment, but would have made no difference to the due date of the CT liability, which remained payable as from 1 July 2017.

(2) The payment due date precedes the filing due date by three months; the two due dates operate independently; the delay of filing the CT return in no way postpones the payment of tax. The interest accruing on the tax payment runs from the due date; to delay filing the CT return makes no difference to the interest position.

(3) The appellant had a corporation tax liability of nearly £350,000 for the APE 2016, which was a significant sum, notwithstanding the appellant's turnover in property transactions was in terms of millions.

(4) What was a pressing matter in June 2017 in relation to raising funds to pay the corporation tax somehow dissipated in the course of the ensuing months. If the matter had stayed actively in Mrs Singh's mind, it would have reminded her that no CT payment demands have been received and queried whether the CT return was filed.

(5) By Mrs Singh's own admission, the delay of the CT filing was to give the appellant the extra three months to raise the funds to settle its CT liability, and to negotiate a time-to-pay agreement. By all account, Mrs Singh should have been actively aware of what was required to be done for the appellant between June and September 2017.

(6) The motion to arrange a TTP was active at the time the return filing was delayed. But no follow up action was taken to negotiate a TTP. As Mrs Singh said in evidence, 'TTP had honestly slipped my mind'.

(7) As stated in *Garnmoss*, the Act does not provide shelter for mistakes, only for reasonable excuse. The pressing matter of CT payment in June 2017 that led to a conscious decision to delay the return filing seemed to have gone out of Mrs Singh's awareness. It was a 'slip', as Mrs Singh confirmed in evidence. A slip is no difference to the *bona fide* mistake in *Garnmoss*, and did not give rise to a reasonable excuse.

64. Thirdly, the result of the Brexit referendum was put forward as the underlying cause for the insufficiency of funds. For the following reasons, we reject the relevance of this submission.

(1) The bank balance was stated on the balance sheet at year end 30 September 2016 at £833,710, which would have more than covered the CT liability for the year.

(2) It was the directors' decision to deploy the free proceeds from the sale of the two properties that gave rise to the CT liability by purchasing two more properties.

(3) Contrary to the directors' expectations, the properties carried by the appellant could not be sold in time to deliver funds to meet its CT liability. This was part and parcel of the risks faced by a business of its nature.

(4) Any adverse impact on the property market from the Brexit referendum result was part of the normal hazards of the trade in which the appellant is engaged.

(5) A prudent taxpayer, having proper regard for the obligation to meet payment of tax on time, would have retained part of the free proceeds to meet the tax liability.

65. In any event, the insufficiency of funds might have an impact on the appellant's ability to meet its payment obligation, but was removed in terms of causation to give rise to a reasonable excuse for the filing default in question.

Whether failure remedied without unreasonable delay

66. As a matter of statutory construction, the initial failure is to be reckoned from the due date for the filing of the CT return for APE 2016, namely from 30 September 2017.

67. As a matter of legal construction, where there was no reasonable excuse for the initial failure at 30 September 2017, it is otiose to consider whether the continued failure of 7 months was remedied without unreasonable delay.

68. As a matter of fact, the fixed penalty under para 17 imposed for the initial failure had been settled by the appellant, which can be construed as an implicit acceptance that there had been no reasonable excuse for the initial failure to file the return by 30 September 2017. Where there had been no reasonable excuse for the initial failure, there could have been no reasonable excuse for the continued failure.

69. The para 17 penalty notice would have alerted the appellant to the fact that the return remained outstanding, and would have served as a reminder to Mrs Singh, even if the matter had slipped her mind. Mrs Singh, however, said she had not seen any penalty notice because the appellant's correspondence was arranged to go to Rajani in order that the accountant could deal with all the correspondence.

70. There was no evidence that the correspondence for the appellant had not been delivered to the relevant address of Rajani as held on HMRC's records. Section 7 of the Interpretation Act 1978 allows the tribunal to deem the service of the correspondence as having been effected in the ordinary course of post. The fact that the para 17 penalty notice had not served its intended function as a reminder is not a matter for the Tribunal to investigate.

71. The penalty regime under Schedule 18 is designed to penalise progressively according to: (a) the length of delay in filing the CT return, and (b) the sum of 'unpaid tax' at the date when a para 18 penalty is imposable.

72. While the default in question concerned the filing of the CT return, that must not detract from the fact that the penalty under para 18 is predicated also on a failure to pay the underlying corporation tax. The tax-geared penalty under para 18 is designed to penalise not only a failure or delay in filing the CT return, but is pitched to the sum of 'unpaid tax' at the penalty date. In other words, for a para 18 penalty to be imposable, there must be this twin failure in both return filing and tax payment.

73. As discussed earlier, had Mrs Singh actively dealt with the pressing matter of meeting the appellant's CT liability in the interim period between June and September 2017, the matter of the outstanding return would have been kept alive in her awareness. Aside the penalty notice, we have regard to the fact that if Mrs Singh had taken care in ensuring the appellant's CT liability was met in full within 18 months after APE 30 September 2016 (i.e. by 31 March 2018), there would have been no para 18 penalty imposable on the appellant, even if there had been a failure to file the CT return for APE 2016 within 18 months of the year end.

DISPOSITION

74. For the reasons stated, the appeal is dismissed. The penalty in the sum of £34,870.58 is confirmed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 29 NOVEMBER 2019