[2012] UKFTT 185 (TC)

TC01880

Appeal number: TC/2011/07949

Income tax – self assessment – whether Notice to File had been delivered – on the facts, no – whether the Interpretation Act s 7 deems the Notice to have been delivered – no - appeal allowed and penalty set aside

FIRST-TIER TRIBUNAL
TAX

JAMES HART **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 13 February 2012 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 2 October 2011, HMRC's Statement of Case submitted on 15 November 2011 and the Appellant's Reply dated 6 December 2011.

DECISION

1. This is Mr Hart's appeal against a £100 penalty for late filing of his 2009-10 self assessment ("SA") tax return. The Tribunal decided to allow the appeal.

2. The issues in the case were:

(1) whether the Notice to File for the 2009-10 tax year had been delivered to Mr Hart, and if not,

(2) whether the Notice was deemed to have been delivered under the Interpretation Act, s7; and if so

(3) whether Mr Hart had a reasonable excuse for its late submission to HMRC.

The legislation

3. Taxes Management Act ("TMA") s 8(1)(a) states that if a person is sent a Self Assessment ("SA") return, he is required to "make and deliver" this return to HMRC.

4. TMA s 8(1G) states that where a return is issued to a taxpayer after 31 October following the end of the tax year in question, the return must be delivered to HMRC "during the period of three months beginning with the date of the notice."

5. TMA s 93(2) says:

> **Failure to make return for income tax and capital gains tax**
>
> (1) This section applies where—
>
> (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act to deliver any return, and
>
> (b) he fails to comply with the notice.
>
> (2) The taxpayer shall be liable to a penalty which shall be £100.

6. TMA s 100 states that the taxpayer may appeal the penalty; TMA s 93(8) sets out the powers of the Tribunal.

7. TMA s 115(2) states that "any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post."

8. The Interpretation Act 1978, s 7 is as follows:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

The facts

9. In April 2009, Mr Hart left his employment and was paid what he describes as a "redundancy/compensation" payment.

10. By letter dated 8 April 2009, Capita (who managed the payroll) wrote to Mr Hart, saying that they had deducted tax at 20% from the excess over £30,000. They then said:

> "Capita deduct tax at the lowest rate, 20%, and issue a Tax Certificate to the Inland Revenue detailing your gross payment and tax deducted to date. Should you be liable for a further tax deduction, this would be calculated and collected by the Inland Revenue."

11. On 8 January 2011, Mr Hart called HMRC's Manchester contact centre because he had not received any communication from HMRC.

12. By letter dated 26 January 2011, Mr Hart wrote to HMRC, enclosing the letter from Capita, and concluding "please advise if I have a further tax liability."

13. By letter dated 7 March 2011, HMRC wrote back, saying that Mr Hart would be liable to pay tax at 40% on part of his income for 2009-10. The letter says "I've arranged for a Tax Return to be sent to you and you should receive this within the next week or two."

14. This letter was correctly addressed and reached Mr Hart. The first three digits of his postcode are "PA6".

15. On 9 March 2011, HMRC issued an SA250 or "welcome" letter, telling Mr Hart he needed to complete a tax return. This was addressed to Mr Hart at the same address, but with a post code beginning "P16" instead of "PA6".

16. On 10 March 2011, HMRC say that they issued a Notice to File to Mr Hart. HMRC do not retain copies of these Notices but have an electronic record. On the balance of probabilities I accept that this Notice to File was sent out.

17. Mr Hart says he did not receive this Notice. This is the key issue in dispute and I discuss it below.

18. The filing date for the SA return was 17 June 2011.

19. Around 5 July 2011, HMRC issued Mr Hart with a penalty notice for not filing his SA return by the due date.

20. On 11 July 2011, Mr Hart filed his return online.

Mr Hart's submissions

21. Mr Hart says that he never received the Notice to File. He says that this may have been because his road and one in a neighbouring village have the same name, so that post meant for residents in his road has frequently been mis-delivered.

22. He submitted supporting evidence in the form of emails from neighbours to a local councillor, and from that councillor to the "Principal Street Naming Officer, Department of Planning and Transport" about other post which had gone astray.

23. The Principal Street Naming Officer replied to the councillor, saying that although the two streets have the same name,

> "they have separate postcodes from each other. That should distinguish them. The problem arises when/if...an incorrect post code is used by the sender."

24. Mr Hart also says that he took the initiative to contact HMRC and tell them about the extra liability, and that:

> "the only reason payment was not made by the due date is because HMRC failed to provide me with that date. As soon as I became aware of dates I made all endeavours to remedy the situation and paid my taxes in full."

HMRC's submissions

25. HMRC say that the address used for the Notice to File "was the same as used for the issuing of HMRC's letter SA250 dated 9 March 2011 and [the letter from Capita]. Mr Hart is in receipt of both those letters."

26. In reliance on the email from the Principal Street Naming Officer they say:

> "by particular reference to the postal code, Royal Mail should be able to distinguish between the two...roads. On the balance of probability HMRC take the view that the notice to file would have been delivered to Mr Hart."

27. They also say that:

> "pursuant to Section 115 Taxes Management Act 1970 the Return is deemed to be validly sent. As undelivered correspondence is recorded by HMRC and as there is no record to show any mail was returned undelivered, Mr Hart's return is deemed to have been served within the ordinary course of postal delivery as defined by Section 7 of the Interpretation Act 1978."

28. Since Mr Hart would have become aware in April 2009 that he needed to complete a tax return:

> "HMRC therefore believe that he had ample time to make contact with HMRC earlier than he did and that he has demonstrated sufficient knowledge to indicate that he could have ascertained the date on which his return would most likely need to be filed sooner."

29. Finally, they say that "completion and delivery of the Individual tax return was entirely within Mr Hart's control and nothing unexpected prevent him from doing so by the filing date." As a result, they say he has no reasonable excuse.

Discussion

30. TMA s 93 is clear. The £100 penalty only applies if the taxpayer "has been required by a notice" to file a return, and has failed to comply with that notice. If the Notice to File was not delivered there can be no penalty.

31. HMRC assert that Mr Hart did receive the Notice. They rely on the address to which they say it was sent, and on the email from the Principal Street Naming Officer.

32. Mr Hart insists he did not receive the return. The evidence in his favour is that:

(1) There were two roads with the same name, in neighbouring villages, and independent third party evidence supports the fact that these two identical names sometimes caused post to be mis-delivered.

(2) As a question of fact (although not remarked upon by either party) an incorrect postcode was used for the "welcome letter" and may thus also have been used for the Notice to File.

(3) The email from the Principal Street Naming Officer says that normally the postal service will correctly distinguish between the two roads, but that using the wrong post code is one reason why the post is sometimes incorrectly delivered.

33. Based on this evidence, I find that on the balance of probabilities the Notice was not delivered to Mr Hart.

34. In addition, I find Mr Hart to be a wholly credible witness. He initiated contact with HMRC, although he had been told that HMRC had been contacted directly by Capita and that any extra tax would consequently be "calculated and collected by the Inland Revenue." Once he was aware (via the Penalty Notice) that the filing deadline had apparently passed, he organised the filing of an online return for 2009-10. I find it unlikely that he would have received the Notice to File and then failed to submit the return.

Deemed delivery

35. HMRC say the Return is deemed to be delivered under Interpretation Act s 7.

36. There are two reasons why the deeming provisions of that Act do not apply in this case.

37. First, the Notice is only deemed to be delivered by virtue of that section if it is "properly" addressed. I find that it is more likely than not that the incorrect postcode was used by HMRC and thus that the Notice was not properly addressed.

38. Secondly, there is also no deemed delivery if "the contrary is proved".

39. The meaning of this phrase was recently confirmed in *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 (Ch), in reliance on the Court of Appeal authorities of *Chiswell v Griffon* [1975] 2 All ER 665 and *R v County of London Quarter Sessions Appeal Committee, ex p Rossi* [1965] 1 All ER 670.

40. At [26] of *Calladine-Smith* Morgan J said:

> "if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact."

41. At [33] of that judgment, Morgan J reaffirms this analysis in the light of the Court of Appeal authorities, saying:

> "my interpretation of Section 7 when it uses the phrase 'unless the contrary is proved' is that this requires a court to make findings of fact on the balance of probabilities on all of the evidence before it."

42. Having considered all the evidence in this case, I have found as a fact that the Notice was not delivered. The deeming provision in the Interpretation Act is thus rebutted.

Reasonable excuse

43. There is no need to consider reasonable excuse, which applies only where the Notice was delivered, or is deemed to have been delivered, and the taxpayer is then late in filing his return.

Other

44. HMRC also argue that Mr Hart "has demonstrated sufficient knowledge to indicate that he could have ascertained the date on which his return would most likely need to be filed sooner". Even if a taxpayer did possess the degree of prescience ascribed to Mr Hart, a penalty cannot be charged unless a Notice to File has been delivered, or been deemed to be delivered, to the taxpayer.

45. Furthermore, since the filing date for a return issued after 31st October 2010 is set by TMA s 8(1G) as "the last day of the period of three months beginning with the day on which the notice is given" Mr Hart could not reasonably have been expected to deduce the due date for submission of his SA return until he received the Notice.

Decision

46. On the basis of the foregoing, I allow the appeal and set aside the penalty.

47. 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.

48. 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 Redston

TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 12 March 2012