[2017] UKFTT 631 (TC)

TC06067

Appeal number: TC/2017/00308

HYDROCARBON OIL – fixed penalty – late submission of RDCO return – onus on HMRC to prove default – absence of any evidence from HMRC in support of their statement of case - appeal allowed – consideration as to wasted costs - sections 9, Finance Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOLDEN GATE FLEET LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER

The Tribunal determined the appeal on 31 July 2017 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 1 February 2017 (with enclosures), and HMRC's Statement of Case acknowledged by the Tribunal on 31 March 2017.

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DECISION

1. This is an appeal against £250 fixed penalty for the late submission of an HO5 Registered Dealer in Control Oils (RDCO) Return for the period 31 August 2016. The return was due no later than 21 September 2016. HMRC allege that the return was not received until 22 September 2016. The penalty was issued pursuant to section 9 Finance Act 1994.

2. The Appellant's notice of appeal was received by the Tribunal on 1 February 2017. The appeal was assigned to the default paper category. HMRC's Statement of Case was received on 31 March 2017. The Appellant was invited to file a reply, but did not do so.

3. Although the notice of appeal was filed out of time, the Appellant says that this was because its director was out of the country, and no one else in the business was authorised to pursue the appeal his absence. HMRC confirmed in their Statement of Case that they did not object to the late appeal. I therefore give consent to the late appeal, and extend the period for filing the notice of appeal to 1 February 2017.

4. Enclosed with the Appellant's notice of appeal was a copy of a letter from HMRC dated 3 October 2016 headed "Registered Dealer in Controlled Oils HO5 Pre-Penalty Notification". The letter states that the Appellant was under an obligation to send HMRC RDCO returns which must reach HMRC by the 21st day of the month following the accounting period to which it relates, that the return for the period ended 31 August 2016 was not received until 22 September 2016. The letter continues, that as warnings about previous late returns had been given to the Appellant, a penalty of £250 was due pursuant to s9 Finance Act 1994. The letter invites the Appellant to send HMRC any evidence or reasonable arguments that could change this decision.

5. Also enclosed with the Appellant's notice of appeal was what appears to be an e-mail to HMRC stating that the RDCO return had been posted to HMRC on 20 September 2016 using Royal Mail's First Class service, and that a copy of the proof of posting had been sent to HMRC.

6. On 3 January 2017 HMRC wrote to the Appellant confirming the penalty.

7. The onus of proof in penalty appeals lies on HMRC to show that the requirements for levying a penalty have been met. It is clear from the decision of the Upper Tribunal in *Burgess and Brimheath Limited v HMRC* [2015] UKUT 0578 (TCC) that HMRC must prove their case even if the Appellant has not taken the point. If HMRC meet this burden of proof, the burden shifts to the Appellant to show that they had a reasonable excuse for their default.

8. HMRC submitted a twelve page closely argued Statement of Case. Normally in default paper cases, HMRC's Statement of Case is accompanied by copies of relevant documents evidencing the facts and circumstances necessary to prove the underlying

default and to counter any argument that might be raised that the appellant had a reasonable excuse for its default.

9. However in this case, the Statement of Case was not accompanied by any evidence to support HMRC's contentions. It is important to note that a Statement of Case is not evidence, rather it is a pleading, setting out the HMRC's case. Where the onus of proof falls upon HMRC (as it does in this case), for HMRC to succeed (absent admissions from the appellant), they must prove their case with appropriate evidence.

10. As HMRC have not adduced any evidence to show that the return was received late, and the Appellant has not admitted this fact, it inevitably must follow that the appeal succeeds. The penalties are therefore not chargeable.

11. Indeed there is evidence that the return was received by the due date, notwithstanding HMRC's submissions to the contrary in their Statement of Case. The Appellant's case is that it posted the return by the Royal Mail First Class post on 20 September and obtained proof of posting. This was the day before the return was due, and HMRC's Statement of Case admits that HMRC had sight of the proof of posting showing that the return was posted on 20 September 2016 at 12:38pm. Section 7, Interpretation Act 1978 provides that a pre-paid correctly addressed letter is presumed to be received by the recipient in the ordinary course of post. As Royal Mail First Class post is a next day delivery service, the presumption in this case is that the return would be received by HMRC on 21 September, the due date.

12. This presumption can be rebutted. But as HMRC submitted no evidence with their Statement of Case, the presumption stands. I therefore find that the return was received by HMRC on 21 September 2016, being the due date.

13. For completeness, I would note that even if the return had been received late, I would have found that the Appellant had a reasonable excuse for the purposes of section 10, Finance Act 1994. First Class post is a next day service. Accordingly, posting the return by First Class post on the day before the return is due (assuming both dates are weekdays), should be sufficient to ensure receipt by HMRC on the due date. In this case the Appellant apparently obtained proof of posting, and so would be able to prove that it posted the return in sufficient time for it to be received by HMRC in the normal course of post. So even if the return had actually been received after the due date, the Appellant would have had a reasonable excuse for the late receipt, as the default in filing the return by the due date would have been due to the failure of Royal Mail meeting its service standard, not any failure by the Appellant.

Wasted costs

14. I have considered whether this is an appropriate case in which to make a wasted costs order against HMRC, in the light of their failure to adduce any evidence in support of their case. If this appeal had proceeded by way of an oral hearing, it is likely that I would have sought representations from the parties as to whether to make such an order. However, given that this appeal proceeded by way of consideration on the papers, the costs incurred by the Appellant (who is self-represented) are likely to

be modest – and the time and costs that would be incurred in allowing for further representations on behalf of the parties and reaching a decision on a wasted costs order would be disproportionate to the costs likely to have been incurred by the Appellant. I have therefore decided not to give further consideration to a wasted costs order.

Conclusion

15. I allow the appeal.

16. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 15 AUGUST 2017