



TC06547

Appeal number: TC/2018/00192

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed - no – no evidence that a valid notice to file under section 8(1) TMA 1970 had been given to the taxpayer by an “officer of the Board” – impact of digital communication – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CRAIG SHAW

Appellant

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 20 June 2018 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 8 January 2018 (with enclosures) and HMRC’s Statement of Case (with enclosures) prepared by the respondents on 7 March 2018 and various correspondence between the parties.

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DECISION

Background

1. This is an appeal against the following penalties visited on the appellant by the respondents (or “HMRC”) under Schedule 55 Finance Act 2009 for the late filing of an individual tax return for the tax year 2015-2016.

- (1) A daily penalty of £900 (“**daily penalty**”).
- (2) A 6 month late filing penalty of £300 (“**6 month penalty**”).

Evidence and findings of fact

2. From the papers before me I find the following relevant facts:

- (1) The appellant has completed a self-assessment tax return for a number of years online every year since 2007-2008.
- (2) The appellant opted in to HMRC’s self-assessment digital service on 21 July 2016.
- (3) The respondents’ computer records suggest that a “notice to file” was issued to the appellant on 6 April 2016 to his online tax account secure mail box. I deal with this and the other evidence that HMRC have adduced to justify that a valid notice to file was served on the appellant at [6-7] below.
- (4) The filing date for a tax return for the tax year ending 5 April 2016 is 31 October 2016 for a non-electronic return, and 31 January 2017 for an electronic return.
- (5) The appellant’s electronic return for the year 2015-2016 was received by HMRC on 6 November 2017 and was processed on 7 November 2017.
- (6) As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 16 February 2017 for a late filing penalty of £100. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on 15 August 2017 for the daily penalty.
- (7) As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on 15 August 2017 for the 6 month penalty.
- (8) The appellant paid £146 on 4 January 2017. This was allocated first to the daily penalty of £100, and is the reason why this appeal does not relate to that daily penalty.

Legislation

3. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970 (“TMA 1970”), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 (“Schedule 55”) and references below to paragraphs are to paragraphs in that Schedule.

(3) Penalties are calculated on the following basis:

(a) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(b) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4 HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

Late appeal

4. The notice of appeal includes an application for this appeal to be made out of time. HMRC say they do not oppose that application. I have jurisdiction to grant the appellant permission to make the appeal out of time. I take the view that the appellant should be permitted to appeal out of time. Any lateness is neither serious nor significant and any prejudice to the appellant far outweighs any prejudice to HMRC.

The Law

5. The law which is relevant to the validity of the assessment and notification of the penalties as follows:

(1) The burden of establishing that the appellant is prima facie liable to the penalties which must be assessed and notified in accordance with the law lies

with HMRC. It is for them to prove each and every factual matter said to justify the imposition of the penalties on this particular taxpayer.

(2) The standard of proof is the civil standard of proof namely the balance of probabilities or more likely than not.

(3) The penalties in this case have been assessed and notified on and to the appellant under Schedule 55.

(4) To come within the Schedule 55 penalty regime, a taxpayer must have failed to make or deliver a return, or to deliver any other document, specified in the "Table below" on or before the relevant filing date (paragraph 1(1) of Schedule 55).

(5) The item in the "Table below" which is relevant in this case is item 1 which relates to income tax. The relevant return is a "Return under section 8(1)(a) of TMA 1970 (emphasis added).

(6) Section 8(1)(a) TMA 1970 states as follows:

"(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –

(a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice....." (emphasis added).

(7) When considering the validity of a penalty assessment and notification I need to consider whether a notice to file under section 8(1)(a) TMA 1970 has been lawfully given to the appellant by an officer of the Board (see *Barry Lennon v HMRC* [2018] UKFTT 0220) at [21-40].

(8) If no valid notice to file has been lawfully given then there can be no failure to make or deliver a return etc "under" section 8(1)(a) of TMA 1970 as is required by Schedule 55.

(9) If no valid notice to file has been lawfully given, then any return submitted by a taxpayer is a voluntary return. It has been held in the cases of *Wood (DJ Wood v HMRC* [2018] UKFTT 0074) and *Patel (Shiva Patel and Ushma Patel v HMRC* [2018] UKFTT 0185) that where a voluntary return has been submitted but there has been no notice to file given to a taxpayer, there is no valid notice under section 8(1)(a). And so penalties (*Wood*) and the opening of an enquiry and its closure by a closure notice (*Patel*) were not valid.

(10) If no return has been given under section 8(1)(a) TMA 1970 in accordance with its terms, the provisions of section 1 TMA 1970, and sections 5 and 9 of the Commissioners for Revenue and Customs Act 2005 cannot save the invalid notice.

(11) The phrase “given to him by an officer of the Board” means what it says. I would expect any such notice to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words there must be evidence that the named officer has signed the notice or it must be otherwise made clear that he is "giving" it.

(12) Under paragraph 4 of Schedule 55, daily penalties for late filing can only be imposed on a taxpayer if "HMRC" have decided to impose the penalty and given notice to a taxpayer specifying the date from which the penalty is payable.

(13) In *Donaldson (Donaldson v HMRC [2016] EWCA Civ 761)* HMRC’s case was that there was no requirement for an officer of the Board to make that decision.

(14) The provisions of paragraph 4 which identify “HMRC” are to be contrasted with those of section 100 TMA 1970 which permit an "officer of the Board” to make a penalty determination. This is a decision by a real “flesh and blood” officer, and not by HMRC as a collective body. Nor is it a computerised decision.

(15) The provisions of section 8 TMA 1970 are more akin to section 100 TMA 1970 than to paragraph 4 of Schedule 55. In my view a particular officer must be identified in the notice as the person giving the notice to file under section 8 TMA 1970.

(16) As can be seen from [2(2)] above, the appellant had opted into HMRC’s self-assessment digital service on 18 January 2016. A taxpayer, once enrolled into this online service may file forms and returns online and see an overall picture of their tax, including payments they have made and amounts they owe. Where a taxpayer has opted for paperless contact HMRC will deliver the relevant document or notice to file a return digitally to their secure mailbox in their online account and at the same time an e-mail will be sent to the email address the customer provided to advise the customer to check their mailbox for new messages.

(17) But there is nothing that I have come across either in the Statement of Case nor in the legislation which changes the legal requirement that a notice to file under section 8(1)(a) TMA must be given by an officer of the Board.

(18) Indeed, the evidence that HMRC have adduced as set out at [6] below includes a generic copy of a notice to file comprising a pro forma letter dated 20 April 2016. It seems to me that they, too, recognise that notwithstanding digital notification, the form of a notice to file is identical to the form that would be sent to a taxpayer who has not opted for digital notification, and was therefore to be notified by post.

Discussion

6. In this case HMRC have provided the following evidence that a valid notice to file was issued to the appellant on 6 April 2016.

(1) an extract from HMRC's computer records entitled "Return Summary" which purports to indicate that a notice to file for the tax year 2015/2016 was issued on 6 April 2016.

(2) a largely illegible extract from HMRC's digital records purporting to indicate that a notice to file and an email alert was sent to the appellant digitally at his secure mailbox in his online account

(3) a generic copy of a notice to file comprising a letter (pro forma) dated 6 April 2016 but with no addressee or signature (or indeed signature block).

7. From these documents which HMRC I believe are suggesting are matters of primary fact, I am implicitly (HMRC have not explicitly asked me to do so in their Statement of Case) being asked to infer that (or make a secondary finding of fact that) a section 8(1)(a) notice was given to this particular appellant by an officer of the Board. In order to make that inference, it is my view that I must decide whether it was more likely than not that such a notice was so given. For the following reasons, I cannot draw that inference.

(1) As mentioned above, there is no signature block on the pro forma letter. It is therefore not at all clear whether this pro forma letter would have been signed by a particular officer or whether it would have been signed by HMRC (or indeed whether it would have been signed at all).

(2) There is nothing in the Statement of Case which suggests that the notice to file was given by an officer. It simply says that a notice to file was issued. It doesn't say by whom. There is nothing asking me to find that, as a fact, it was given by an officer of the Board.

(3) Similarly, there is nothing in the computer printouts which indicates whether an officer, and if so which officer, gave the notice to file to the appellant. Nor any indication of how, if an officer had given such a notice, that is then reflected in the return summary.

(4) The wording in the pro forma letter is in the third person. In other words, the first sentence starts "we are sending you this letter...", and later on "you must make sure that we receive your tax return by" and "if we don't receive your tax return by the deadline...". Although such a letter (which is on HMRC letterhead (obviously)) could be signed by an officer of the Board on behalf of HMRC, there is nothing to suggest that this is the case.

(5) It is interesting to note that, although not referred to by HMRC in this context, the bundle of documents contains copies of two letters which have been sent to the appellant by HMRC.

(6) The first of these (largely illegible) is a copy of a letter to the appellant dated 30 October 2017 from Debt Management and Banking. That purports to come from Mrs C Graham of HMRC. Because the quality of that copy is so

poor, HMRC have included a pro forma letter in the bundle. The signature block says “yours faithfully..... Officer of Revenue & Customs”. Mrs Graham is not identified as the officer in the signature block and no signature appears on either the copy letter or (obviously) the pro forma letter.

(7) The second copy letter is from HMRC Pay As You Earn and Self-Assessment. It is dated 11 December 2017. It has a signature block which identifies the specific HMRC officer. She is identified as Miss P Mackinley, Administrative Officer. It is not signed.

(8) This letter is written in a blend of first and third person.

(9) So it seems that HMRC are perfectly capable of providing evidence of letters executed by either an unidentified officer or an identified officer. But they have not done this in the case of the purported notice to file. HMRC might say that because two of the three letters clearly show that they were going to be signed (or were signed even though the copies are not) by either a named or unnamed HMRC officer the same must have been the case (or it is more likely than not that it was the case) for the purported notice to file. But I'm afraid that even if I had been asked by HMRC to find this (which I haven't) simply including two letters in the bundle where an officer is identified as the signatory, with a suggestion that a third letter must therefore also have had an officer as the signatory, is taking the process of induction (or the presumption of regularity) too far.

8. I am being asked to speculate by HMRC that a notice to file was given to this appellant by an officer of the Board. I am not prepared to so speculate. I cannot draw an inference that this was the case from the evidence that has been presented to me.

9. I find that no valid notice to file under section 8(1)(a) TMA 1970 was given to the appellant by an officer of the Board. The fact that the appellant had opted into HMRC's digital service makes no difference to my analysis. The provisions of section 8(1)(a) TMA 1970 apply to a notice to file whether it is given in person, via the post or digitally. As I say, I think HMRC accept that.

10. The appellant has not failed to deliver a return under section 8(1) TMA 1970 and so Schedule 55 is not engaged. The penalties were invalidly assessed.

11. In these circumstances there is no need for me to consider reasonable excuse, special circumstances or proportionality.

Decision

12. In light of the above I allow this appeal.

Appeal rights

13. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

RELEASE DATE: 21 JUNE 2018