



TC06601

Appeal number: TC/2018/01229

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed - no initially but yes subsequently - appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JACQUELINE HAIGH

Appellant

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 2 July 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 2 February 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 22 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 under Schedule 55 Finance Act 2009 for the late filing of an individual tax return for the tax year 2015-2016.

- (1) A late filing penalty of £100 ("**late filing penalty**").
- (2) A daily penalty of £430 ("**daily penalty**").

Evidence and findings of fact

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

- (1) The respondents' (or "**HMRC**") computer records suggest that a "notice to file" was issued to the appellant on 6 April 2016 at her home address at Grubenstrasse 18A Switzerland (the "**first Notice to File**"). I deal with this and the other evidence that HMRC have adduced to justify that the first Notice to File is a valid notice to file and was served on the appellant at [5-8] below.
- (2) 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.
- (3) A paper return was signed by the appellant's husband and was received by HMRC on 27 October 2016.
- (4) By letter dated 1 December 2016, HMRC rejected this return (the "**second Notice to File**") since they did not accept that the appellant's husband had authority to sign it on behalf of the appellant. The second Notice to File comprised a letter addressed to the appellant at 39 Glenart Avenue, Blackrock, Dublin which was sent by J Vincent - Assistant Officer and included a scan of the paper tax return that had been submitted by the appellant but signed by her husband.
- (5) The appellant's paper return for the tax year 2015-2016 was received by HMRC on 15 March 2017 and was processed on 18 August 2017.
- (6) As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 21 February 2017 for the late filing penalty. As the return had still not been received 3 months after the penalty date, HMRC issued a notice of daily penalty assessment on or around 29 August 2017 for the daily penalty (43 days at £10 per day).

The Law

Obligation to file a return and penalties

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

- (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 on time (i.e. the late filing penalty) - £100 (paragraph 3).
 - (b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).
- (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).

Assessment and notification of the penalties

4. 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 paragraph 18 of 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.

Discussion

First Notice to File

5. In this case HMRC have provided the following evidence that the first Notice to File is a valid notice to file and 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) an extract from HMRC's computer records indicating that the appellant's address was Grubenstrasse 18A, Switzerland; and

(3) a pro forma copy of the front page of a tax return.

6. 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.

7. It is not possible to identify from these documents the Officer of the Board who had purportedly given the first Notice to File to the appellant. There is not even a covering letter (let alone a letter with a named Officer identified in the signature block) with the papers before me. The copies of the electronic records and a pro forma copy of the front page of a tax return go nowhere near providing adequate evidence that a named officer of the Board gave the first Notice to File to the appellant.

8. Under these circumstances therefore, I find that the first Notice to File was not a valid notice to file under section 8(1)(a) TMA 1970.

The second Notice to File

9. However, HMRC have provided a copy of the second Notice to File which, as indicated above, comprises a copy of the letter (unsigned) dated 1 December 2016, with a signature block of J Vincent Assistant Officer. The letter also contains the following sentence.

“Please also re-sign the scanned copy of the tax return. We won’t be able to accept it without an original signature”.

10. Although no copy of that scanned copy is with the papers, I am prepared to draw the inference that the letter of 1 December 2016 did have enclosed with it a copy of the 2015/2016 tax return which had been signed by the appellant’s husband.

11. This letter was addressed to the appellant at her address at 39 Glenart Avenue. In her grounds of Appeal, the appellant indicates that she had left her previous permanent address on 30 January 2017. That previous permanent address was 39 Glenart Avenue. She did not move into the address identified on the Notice of Appeal (83 Anglesey Road, Dublin) until May 2017.

12. The appellant has made no suggestion that she did not receive the letter of 1 December 2016 (i.e. the second Notice to File) and I find as a fact that it was properly delivered to her in accordance with section 115 TMA 1970 and received by her in the ordinary course of post pursuant to section 7 of the Interpretation Act 1978.

13. The second Notice to File also includes the following statement:

“Please let me have your completed tax return with any missing information and any supplementary pages”. We should normally receive this by 31 October 2016. If, however, we receive it by 22 December 2016 we’ll not charge you a late filing penalty. If we don’t receive your tax return by this date or it is still not acceptable, we will charge you a £100 penalty.

14. I find as a matter of fact that the second Notice to File was a valid notice to file under section 8(1)(a) TMA 1970.

Consequences

15. As far as the daily penalties are concerned, I allow the taxpayer’s appeal. In order for the daily penalties to be validly given, the penalty notice must specify the start date from which the penalties run.

16. HMRC’s Statement of Case indicates that the notice of daily penalty assessment was given on or around 29 August 2017 for £430 calculated at £10 per day for 43 days. The evidence supporting this comprises a pro forma notice of penalty assessment which gives no clue as to the start date identified in the actual penalty notice sent to the appellant.

17. But I have no hesitation in saying that I find it inconceivable that the date would have started some 3 months after the due filing date generated by the second Notice to File. It was based on the first Notice to File.

18. Since the start date for the daily penalties is bound to be wrong, improper notice has been given (under paragraph 4 of Schedule 55) and so I find that the appellant's appeal in respect of the daily penalties is allowed.

19. However, as far as the late filing penalty is concerned, there is no such statutory start date specification.

20. Under section 8(1G) TMA 1970, where a notice to file a return is given after 31 October in "Year 2" (in this case after 31 October 2016) the due filing date is 3 months after the date of the notice. HMRC's records show that the tax return in satisfactory form was received by them on 15 March 2017. This is more than 3 months after the date of the second Notice to File. As a matter of fact I find that the appellant's paper return was not received by HMRC until 15 March 2017. Its due date was 3 months after the date of the second Notice to File and so it was de facto, late.

21. This is the case notwithstanding that (as things turned out) the late filing penalty notice (issued on or around 21 February 2017) predates the due filing date (on or around 1 March 2017). The fact of the matter is that the 2015/2016 return was late so a late filing penalty is due. Notification and assessment must be in accordance with paragraph 18 of Schedule 55. The pro forma late filing penalty notice evidenced by HMRC indicates that the period being assessed is the tax year ending 5 April 2016. This conforms with paragraph 18.

22. I therefore need to consider whether the appellant had a reasonable excuse for such late filing or whether there are special circumstances or whether the penalty is disproportionate.

23. As regards reasonable excuse, the appellant has given me no reasons as to why she was not able to submit the return within the 3 month period commencing on 1 December 2016. Indeed the second Notice to File contains within it a statement that if the appellant files a return on or before 22 December 2016 no late filing penalty would be assessed (see [13] above).

24. There is no suggestion that she did not receive the second Notice to File nor that it was sent to the wrong address, nor that there was a delay in delivery.

25. The fact that her husband signed the first return is irrelevant to the failure to file the return following the second Notice to File.

26. And so I find that the appellant has no reasonable excuse for failing to submit the return within 3 months of the date of the second Notice to File.

27. Nor do I consider that there are any special circumstances which apply to the appellant. To comprise special circumstances, a circumstance must be exceptional,

abnormal or unusual or there must be something out of the ordinary run of events as regards the taxpayer's situation. None of the information given to me by the appellant suggests that her circumstances fall into either category. The fact that she owes no tax is not a special circumstance. Parliament has clearly decided that penalties can be visited on a taxpayer who owes no tax

28. The appellant suggests, too, that the penalties are inappropriate and unfair. I have no jurisdiction to consider the unfairness. If the appellant believes HMRC have behaved unfairly then her remedy must be to consider proceedings for judicial review. As regards proportionality, I do not consider that late filing penalty goes beyond what is strictly necessary for the objective pursued (namely promotion of the timely submission of tax returns). The daily penalty is far from being not merely harsh but plainly unfair.

Decision

29. In light of the above:

- (1) I allow this appeal as regards the daily penalty.
- (2) I dismiss this appeal as regards the late filing penalty.

Appeal rights

30. 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: 17 JULY 2018