[2018] UKFTT 461 (TC)

TC06639

Appeal number: TC/2018/00543

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" – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL SMITH **Appellant**

- and -

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

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 19 January 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 5 March 2018 and various correspondence between the parties.

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 2013-2015.

(1) A late filing penalty of £100 ("**late filing penalty**").

(2) A daily penalty of £900 ("**daily penalty**").

(3) A 6 month late filing penalty of £300 ("**6 month penalty**").

(4) A 12 month late filing penalty of £300 ("**12 month penalty**").

Evidence and findings of fact

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

(1) The respondents' computer records suggest that a "notice to file" was issued to the appellant on 6 April 2014 at his home address. 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 [9-14] below.

(2) The filing date for a tax return for the tax year ending 5 April 2014 is 31 October 2014 for a non-electronic return, and 31 January 2015 for an electronic return.

(3) The appellant's paper return for the year 2013-2014 was received by HMRC on 9 December 2016.

(4) As the return was not received by the filing date, HMRC issued a notice of penalty assessment on or around 18 February 2015 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 14 August 2015 for the daily penalty.

(5) As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on or around 14 August 2015 for the 6 month penalty.

(6) As the return had still not been received 12 months after the penalty date, HMRC issued a notice of penalty assessment on 23 February 2016 for the 12 month 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 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).

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

(d) failure to file for 12 months (i.e. the 12 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 6).

(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 penalty notices were sent to the appellant in February 2015, August 2015 and February 2016. The appeal was not made to HMRC until 5 December 2017. The appellant is therefore out of time to make the appeal. However, I have jurisdiction to permit a late appeal under section 49(2)(b) TMA 1970.

5. The Upper Tribunal in the case of *William Martland v HMRC* [2018] UKUT 178 has recently provided helpful guidance on the principles that I should adopt when considering an application for permission to appeal out of time.

6. These principles can be paraphrased as follows:

(1) Granting permission to appeal out of time should be the exception rather than the rule.

(2) I need to establish the length of the delay and whether it is serious and/or significant.

(3) I need to consider the reasons why the appeal could not have been made on time, or at least well before the time it was actually made. When considering the reasonableness of the appellant's explanation of the delay, I should give little weight to lack of funds and/or that a litigant is acting in person.

(4) I should then conduct a balancing exercise in which I should consider the merits of the reasons for the delay and the balance of prejudice (i.e. will prejudice to the appellant outweigh prejudice to HMRC).

(5) When undertaking this balancing exercise, I must take into account the importance of the need for litigation to be conducted efficiently, at proportionate cost and for statutory time limits to be respected.

(6) I may have regard to any obvious strengths or weaknesses of the appellant's case, but I should not descend into a detailed analysis of the underlying merits of the appeal.

7. Applying these principles to the appellant's position:

(1) In this case the delay is serious. It is more than 2½ years late from the date of the late filing penalty and 1½ years late for the 12 month penalty.

(2) The delay may not be as significant as it first appears. I say this, since this is a "*Donaldson"* appeal (*Donaldson v HMRC* [2016] EWCA Civ 761), and had the appellant made a timely appeal in February/March 2015 (and subsequently against the other penalty assessments) I have no doubt that the appeals would have been stood over pending the Court of Appeal decision in *Donaldson*.

(3) The Court of Appeal decision was given on the 18 July 2016. So although the appeal is late in the light of that date, it is not as significantly late as appears at first blush. But it would still have been heard before now had a timely appeal been made.

(4) The fact that the appellant has provided no evidence as to why he could not appeal on time weighs heavily against him. I do not give the appellant credit for the fact that he is a litigant in person nor his contention that he could not afford tax advice.

(5) So at this stage of the analysis, he is thirty love down. But I must then conduct a balancing exercise weighing up the prejudice to the appellant against the prejudice to HMRC. And in so doing I can consider any obvious strengths in the appellant's case (or indeed any obvious weaknesses in HMRC's).

(6) It is for HMRC to prove to me that it is more likely than not that a valid notice to file was given to the appellant pursuant to section 8(1)(a) TMA 1970. Having reviewed the papers and for the reasons set out in more detail below, it has become apparent to me that they have not managed to provide sufficient evidence that such a valid notice to file was so given.

(7) If I do not give the appellant permission, then the appellant is seriously prejudiced. If I do, then I do not consider that HMRC is prejudiced to any (or any material) extent. HMRC have certainly not provided any evidence as to how they have been prejudiced. They have not closed their file. They will not have to divert resources to this appeal which they would not otherwise have had to do had the appeal been made on time. They have provided no evidence that they have incurred greater cost in terms of time and money by dealing with this late appeal than would have been the case had the appeal been made on time.

(8) I am conscious that I must consider the need for finality in litigation and that time limits should be respected.

(9) But in my view (and it is finally balanced) the prejudice to the appellant outweighs the prejudice to HMRC, the fact that the appellant has given no explanation as to why the appeal could not have been made on time, and the fact that it was made very late. And so I give permission to the appellant to make his appeal out of time.

The Law

8. 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 payabe.

(13) In *Donaldson* 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

9. In this case HMRC have provided the following evidence that a valid notice to file was issued to the appellant on 6 April 2014.

(1) an extract from HMRC's computer records entitled "Return Summary" which purports to indicate that a notice to file for the tax year 2013/2014 was issued on 6 April 2014.

(2) an extract from HMRC's computer records indicating that a notice to file was sent to the appellant at his address as 26 Oakland Road; and

(3) a generic copy of a notice to file comprising a letter (pro forma) dated 6 April 2014 but with no addressee or signature (or indeed signature block).

10. 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) Although not referred to by HMRC in this context, the bundle of documents contains a copy of a letter which has been sent to the appellant. The copy referred to in HMRC's Statement of Case is totally illegible (although there is a legible copy in the court bundle). It is the first page of a letter which is clearly two or three pages long. It is dated 16 January 2018 and is the letter reviewing the appellant's appeal and in which HMRC rejects the appeal since it was made late. There is nothing which suggests that it was signed by an officer even though part of it is written in the first person. It therefore sheds no light on whether the purported notice to file was given by an officer of the Board. It does however suggest that it is possible for HMRC to provide copies of letters sent to the appellant rather than pro formas.

11. In their Statement of Case, HMRC say that the issue of the notice to file or the return is made by an automated service so HMRC is unable to produce a copy of the actual notice sent to Mr Smith. It is for this reason that they have provided a pro forma notice.

12. They also say in the Statement of Case that penalty notices, reminders and statements are issued directly to HMRC's customers and copies of the actual document issued are not held on the individual's records for HMRC to access. The cost of keeping this physical evidence for all customers, for all penalties, reminders and statements would be vast and is unrealistic. The computer systems HMRC have in place show a high probability the notices, reminders and statements recorded on HMRC's systems were posted.

13. On the second of these points, the issue is not whether a notice to file was posted. It is whether a notice to file has been given by an officer of the Board.

14. As regards the first point, then if HMRC cannot provide a copy of the actual notice sent to Mr Smith, and can provide me with only a pro forma which in this case has no signature block, with no indication as to the identity of the officer who they say gave this notice, then I'm afraid I cannot say that it is more likely than not that an officer of the Board gave the notice to file to the appellant.

15. 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.

16. Under these circumstances therefore, 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.

17. 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.

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

Decision

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

Appeal rights

20. 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: 22 June 2018.