[2018] UKFTT 652 (TC)

TC06800

Appeal number: TC/2018/04592

INCOME TAX – self assessment – late filing penalties – whether a Notice to File was served – yes – whether the Appellant was under a duty to file a return – yes – whether the Appellant had a reasonable excuse for his delay – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ENAYATULLAH ROEEN **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 15 October 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 25 June 2018 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 7 August 2018 and the Appellant's agent's emails dated 3 and 11 September 2018 (with enclosures).

DECISION

Introduction

1. The Appellant's appeal is against HMRC's imposition of a late filing penalty (in the sum of £100), imposed under Paragraph 3 of Schedule 55 to the Finance Act 2009 in respect of the Appellant's delay in filing his tax return for 2016/17.

Procedural background

2. The Tribunal received the Appellant's appeal on 27 June 2018. The appeal was categorised as a "default paper" case, meaning that the appeal would be decided without an oral hearing. The Appellant was advised to inform the Tribunal as soon as possible if he would prefer an oral hearing. No response was received to that Tribunal correspondence.

3. On 25 July 2018, HMRC filed their Statement of Case with enclosures with the Tribunal and confirmed that a copy had been sent to the Appellant. On 3 September 2018, the Appellant's agent emailed the Tribunal to say that no Statement of Case had been received. On 10 September 2018, the Tribunal forwarded a copy of HMRC's Statement of Case to the Appellant's agent. On 11 September 2018, the Appellant's agent emailed the Tribunal, attaching a letter to the Tribunal dated 10 September 2018, reiterating that no Notice to File was received and that the Appellant was not required to file a tax return.

4. Therefore, I proceed to hear this appeal on the basis of the Appellant's Notice of Appeal with enclosures, HMRC's Statement of Case with enclosures, and the Appellant's letter to the Tribunal dated 10 September 2018.

The main point of dispute between the parties

5. The main issue between the parties is whether the Appellant's received a Notice to File. It will be helpful to explain at the outset what must be demonstrated where there is a dispute about items sent through the post.

6. Section 7 of the Interpretation Act 1978 provides that:

> 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.

7. So, Section 7 deems service of an item sent by post to have been effected at the time at which the letter would be delivered in the ordinary course of post. The first

step is for the person asserting that a document has been sent through the post to demonstrate (on the balance of probabilities) that that document was posted. This is considered in the light of all the evidence available.

8. If a person satisfies the Tribunal that a document has been posted, then the onus will be upon the other person to demonstrate (again, on the balance of probabilities), that the document was not received.

9. Having provided that explanation of how I will approach the main point in dispute between the parties here, I set out my findings of fact.

Findings of fact

10. On the basis of the documents before me I find the following:

a) On the basis of automatically generation information contained in the computer-generated Return Summary provided by HMRC, I am satisfied on the balance of probabilities that, on 6 April 2016, HMRC issued a Notice to File a tax return for 2016/17 to the Appellant.

b) HMRC have provided a copy of the address that they have on record for the Appellant. I am satisfied that it is more likely than not that HMRC issued the Notice to File to the address they held for the Appellant, and that the Notice to File was posted to that address.

c) I appreciate that this conclusion differs from that reached in *Qureshi v HMRC* and *Loial v HMRC*, both recent decisions of Judge Geraint Jones, quoted by the Appellant in his letter of 10 September 2018. Judge Jones was not satisfied, on similar evidence, that the documents in dispute before him had been posted to the correct address. However, there are numerous Tribunal decisions where the panel has been satisfied that HMRC's Return Summary and evidence of an appellant's address is sufficient. Previous decisions of this Tribunal are persuasive but not binding on me. Where there are conflicting decisions, then I must decide for myself. In the context of a highly automated system which operates successfully for the vast majority of individuals in Self Assessment in the UK, I am satisfied that the Notice to File in dispute here was issued and posted to the Appellant. I will consider below whether the Notice to File was received by the Appellant.

d) On 13 February 2018, HMRC issued the Appellant with a late filing penalty of £100. It is accepted that this was received.

e) On 1 March 2018, the Appellant filed his tax return for 2016/17 electronically. On the same day the Appellant wrote to HMRC to appeal against the late filing penalty. The Appellant wrote:

> Further to the penalty letter issued to, I would like to appeal against the penalty on the basis that I am and have already written to HM Revenue and Customs twice requesting them not to issue anymore tax returns.

> Unfortunately, HM Revenue and Customs did not take heed and now I have been lumbered with a penalty.
>
> I trust that you will acknowledge this as a reasonable excuse, for the purposes of penalty determination, and waive the late filing financial penalty.

f) The Appellant has asserted that he wrote twice to HMRC. In considering whether the Appellant's two letters were sent and received, the first step is for the Appellant to demonstrate, on the balance of probabilities, that two letters were sent.

g) The Appellant has not provided any dates for when his two letters were sent. I assume that the letters were sent on different dates because it would make no sense for the Appellant to write twice on the same day.

h) The Appellant apparently did not retain a copy of his correspondence to HMRC. This is surprising in a digital age where most people have a camera on their mobile telephone and it is a simple matter to take a digital photograph of a letter before it is posted. As there is no copy, I do not know what the Appellant wrote in his first letter or where it was sent. I am not told what prompted the first letter – was it sent as soon as the previous year's return had been filed? Was there some other event which prompted the Appellant to write? I do not know how long the Appellant waited without a reply before he sent his second letter. Did the Appellant eventually reach the conclusion that his first letter had not reached HMRC or was there some other event which caused him to write his second letter?

i) I appreciate that the Appellant might not have thought it necessary to keep a copy of his first letter. However, as it seems likely that the second letter was written because there was no response to the first letter, it is surprising that he did not keep a copy of his second letter, or keep some record of posting that letter. The Appellant also states that neither letter was sent recorded delivery and so he cannot show that they were sent. Although it is not mentioned, I assume that the Appellant also did not obtain a certificate of posting. I understand why the Appellant might not consider this necessary for the first letter, but, again, it is more surprising that he does not have a record for the second letter.

j) So, I do not know what was sent, where it was sent or when it was sent. In the circumstances I am not satisfied that it is more likely than not that the Appellant posted to HMRC the two letters he describes.

k) In the Notice of Appeal, the Appellant claims that there are double standards where HMRC:

> can claim their letter was sent though no proof and I can not say the same?

l) I understand the Appellant's frustration but I do not consider the situations are the same. HMRC provided an automated record of issuing a document and a record of the Appellant's address, and HMRC asked the Tribunal to infer that they had followed their usual procedure of posting that document to the address for which they held a record. As the Tribunal stated in *Loial*, where information is input into a business record or business computer system by somebody acting in the course of his/her employment, for a business record making purpose, it is inherently likely that such information will be reliable. So, for HMRC, I have evidence of a Notice to File being issued and I have evidence of the address to which it was said to be have sent. I know the date on which HMRC state they issued the Notice to File. And I know it was a Notice to File which was said to have been issued. But, for the Appellant, unfortunately I have none of these things. The Appellant, as an individual, does not have an automated system. But that also means that the Appellant does not have to keep many millions of records; as an individual, he only has his own affairs to be concerned about. If the Appellant considered the issue important enough that he would write twice, then it is surprising that he did not keep a record of his second letter or obtain a certificate of posting. I am afraid the Appellant has not produced anything beyond his assertion that two letters were sent, and I do not consider that to be sufficient.

m) Returning to the chronology, by letter dated 22 March 2018, HMRC rejected the Appellant's appeal. They stated that, as a director, the Appellant was liable to file tax returns. HMRC did not address the Appellant's statement that he had sent correspondence asking for returns not to be sent.

n) On 9 April 2018, the Appellant's agent wrote to HMRC seeking a review. The agent quoted *Kadhem v HMRC* [2017] 0466, and continued:

> We can confirm that [the Appellant] had no income other than PAYE for the period 2016/17. The client notified HM Revenue and Customs to stop sending him tax returns and is adamant that he never received any request to submit a tax return for the period 2016/18 (sic). Therefore, he believed that no tax return was due until he received the penalty notification, following which the tax return was submitted immediately.

o) This is the first occasion of the Appellant stating that he had not received the Notice to File. Section 7 (set out above) proves that service of a document is effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved. Therefore, I now consider whether the Appellant can prove that the Notice to File was not received. Proving a negative is notoriously difficult, and so I look at the surrounding circumstances to see if that would indicate one way or another. Firstly, have there been other issues with post? The Appellant has received other post sent by HMRC to his address (for example, the penalty notification) but apparently did not receive HMRC's Statement of Case in these proceedings, so at least one other item of post has gone missing. Although it is unusual, items of post can be lost in the postal system. Secondly, how did the Appellant react when he received the

penalty notification? If the Appellant had not received the Notice to File, I would have expected that lack of receipt to be his first point to HMRC. However, the Appellant's initial response to the penalty was to state that HMRC had not taken any notice of his letters requesting that no more returns be issued. The Appellant did not state that he had not received a Notice to File for 2016/17. Indeed, the Appellant's reference to HMRC not taking heed of his requests not to issue any more tax returns implies the contrary: that the Appellant had received a Notice to File, and this was unwanted. Very unfortunately, the Appellant did not raise the issue of whether he had received his Notice to File with HMRC until after he was aware of the Tribunal's decision in *Kadhem* that a director with only employment income was not obliged to file a tax return if he did not receive a Notice to File.

p) The onus of proof on this issue is upon the Appellant. Weighing all the circumstances of this case, I am not satisfied that it is more likely than not that the Notice to File was not received.

q) Returning again to the chronology, on 29 May 2018, HMRC issued a review decision, upholding their decision to reject the appeal against the penalty. In this decision HMRC mentioned (for the first time) that they had not received the two letters from the Appellant mentioned in his letter of 1 March 2018. (I have found that these were not sent.) HMRC relied upon the obligation to file created when the Notice to File was served, and concluded that there was no reasonable excuse for the Appellant's delay.

r) On 27 June 2018, the Tribunal received the Appellant's appeal.

Onus and standard of proof

11. In an appeal against the imposition of a penalty, the onus of proof is first upon HMRC to satisfy the Tribunal that the penalty has been imposed in accordance with the legislation. If I am satisfied that has occurred then the onus switches to the Appellant to demonstrate that he has a reasonable excuse for his delay or that there is another reason why the penalty should not be imposed. The standard of proof in both cases is the civil standard of the balance of probabilities.

Was the penalty properly imposed?

12. Before the Appellant can be liable to penalties for default, HMRC must establish not only that the Appellant was late in filing his tax return but that the Appellant was under an obligation to file a tax return in the first place. A taxpayer cannot be penalised for being late in filing a return which he was not required to provide.

13. The Appellant has relied upon *Kadhem v HMRC* [2017] 0466. I agree with the Presiding Member, Mr Sheppard, in *Kadhem*, and with the Appellant here, that being a director is not, by itself, sufficient to bring the Appellant within Section 7 of the Taxes Management Act 1970. However, I have found as a fact that the Notice to File

for 2016/17 which was issued to the Appellant was served upon him. I conclude that the Appellant was liable to file a tax return because he did receive a Notice to File.

General requirements of Schedule 55

14. The relevant parts of Paragraph 1 of Schedule 55 provide as follows:

> **1.** (1) A penalty is payable by a person ("P") where P fails to make or deliver a return … on or before the filing date.
>
> (2) Paragraphs 2 to 13 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraphs 14 to 17, the amount of the penalty.

Late filing penalty of £100

15. The initial late filing penalty of £100 was imposed under Paragraph 3 of Schedule 55 to the Finance Act 2009. Paragraph 3 provides:

> **3.** P is liable to a penalty under this paragraph of £100.

16. Therefore, if the return is not filed on or before the filing date, the taxpayer is liable to pay a late filing penalty. I have found that the Appellant filed an online tax return on 1 March 2018. It follows that I am satisfied that the Appellant's tax return for 2016/17 was not filed by the filing date, and that the late filing penalty of £100 has been imposed in accordance with the legislation.

Does the Appellant have a reasonable excuse for his delay?

17. The onus now shifts to the Appellant to establish that he had a reasonable excuse for his delay. However, the Appellant's case was only that he did not file his return on time because he had no liability to file. I have found that the Appellant did receive a Notice to File and so was liable to file a tax return. There do not seem to be any other circumstances suggested for me to consider which might amount to a reasonable excuse.

18. Given my finding that a Notice to File was received, the best that can be said for the Appellant is that he misunderstood the situation and thought that he did not have to file a return. It may be that the Appellant thought he had asked HMRC not to send him any further returns and that was all that was required to absolve him of responsibility. If that was the case, I am afraid I do not accept that would be a reasonable excuse for the delay. If the Appellant was in any doubt about whether he needed to file a return, he should have checked with HMRC before the filing deadline.

Special reduction

19. I have considered whether there are flaws in the way in which HMRC have approached the question of whether there are exceptional circumstances which would make it right for the penalty to be reduced. I have concluded that there are no errors of law in HMRC's approach, and so I have no jurisdiction to interfere with their conclusion that the penalty imposed on the Appellant should not be reduced.

Conclusion

20. Therefore, for the reasons set out above, this appeal is dismissed.

21. A summary decision was issued to the parties on 23 October 2018, in which the parties were advised that any request for full findings of fact and reasons for the decision should be made within 28 days. Also on 23 October 2018, the Appellant made such a request.

22. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 6 November 2018