



TC01368

Appeal number: TC/2010/06467

SDLT – Failure to deliver SDLT Return on time - Penalty Imposed – Was it properly imposed? Yes – Was there a reasonable excuse? No, none shown – Appeal dismissed on the facts

**FIRST-TIER TRIBUNAL
TAX SDLT**

COLIN BASON

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: ADRIAN SHIPWRIGHT (TRIBUNAL JUDGE)
LESLEY STALKER (TRIBUNAL MEMBER)**

The Tribunal determined the appeal on 26 October 2010 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 30 July 2010, HMRC's Statement of Case submitted on 15 September 2010 and the correspondence provided.

DECISION

Introduction

History

5 1. The Tribunal determined this appeal on 26 October 2010 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 30 July 2010, HMRC's Statement of Case submitted on 15 September 2010 and the correspondence provided.

10 *Decision in outline*

2. The Tribunal decided that the Appeal should be dismissed as no reasonable excuse within the statutory meaning had been shown. It did so on the factual evidence before it as the Appellant failed to discharge the evidential burden of showing that the return had been delivered in time and/or that in the circumstances there was a "reasonable excuse" within the statutory meaning of the phrase. In particular, no proof of posting was produced and no evidence that the return was delivered and/or received in time.

Full decision requested

3. The Appellant has requested, as is his right, a full form decision. This document sets out the full form decision. We note that the decision is a purely factual one and that we consider that no issue of law arises in this case. It is one where the Appellant failed to discharge the onus of proof on factual matters.

4. It is not clear that certain applications in this matter have been made in time. Notwithstanding this a full decision has been produced.

5. It should be noted that the Appellant's Application to set aside the Decision was refused. This was done by Judge Kempster in a Decision Notice released on 6 April 2011.

Appeal

6. This is an appeal by Colin Bason ("the Appellant") against a surcharge for late submission of return form SDLT1 ("the Surcharge").

30 7. The Surcharge was for £100 and was imposed under paragraph 3 Schedule 10 FA 2003 on 12 May 2010. It was upheld on the Appellant having queried it. This was notified by letter dated 25 June 2010. A review was requested on 2 July 2010. The imposition of the penalty was upheld on review and notified by letter dated 26 July 2010.

35 8. The SDLT 1 was received 32 days after the filing date i.e. 62 days after the transaction date.

9. As was said in the short form decision "...the Appellant contended that the return had been posted in time. However, there was no proof of posting. Accordingly, we cannot find that it was posted in time as there is no evidence that it was". Even if it were shown that would not necessarily be sufficient. The requirement is for the return to be delivered within 30 days of the transaction date. Accordingly, the appeal was dismissed.

The Issue

10. The issue in this case is essentially whether it can be shown that the letter was actually posted and/or whether there was a reasonable excuse.

45 11. As this is a case involving penalties we remind ourselves that the onus is on HMRC to show that the circumstances for the imposition of the penalty are fulfilled in the first

instance but that the evidential burden then shifts to the taxpayer. For example, it is for the taxpayer to show there is a reasonable excuse.

12. It is also important to consider whether the SDLT was due and whether there was a notifiable transaction.

5 13. Other questions arise including the following:

(1) Has it been proved that the letter and form were posted when it was claimed to be?

(2) Were the individual returns received more than 30 days after the date but within three months of it?

10 (3) Is there any reason why the penalty provisions are not engaged such as there being a reasonable excuse?

(4) How many notifiable transactions were involved?

(5) Should any penalty be further mitigated?

These matters are considered below.

15 ***The Law***

14. The legislation, in so far as is relevant here, is found in Part 4 Finance Act 2003.

15. By section 42 FA 2003 Stamp Duty Land Tax (“SDLT”) is charged in accordance Part 4 FA 2003 on the consideration in respect of “land transactions” which are “chargeable transactions”.

20 16. The phrase “Land transactions” is defined in section 43 FA 2003.

Subsection (1) provides “In this Part a “land transaction” means any acquisition of a chargeable interest”.

17. Section 48 FA 2003 defines “Chargeable interests”. It provides:

“(1) In this Part “chargeable interest” means—

25 (a) an estate, interest, right or power in or over land in the United Kingdom, or

(b) the benefit of an obligation, restriction or condition affecting the value of any such estate, interest, right or power, other than an exempt interest¹”.

30 18. By section 49 FA 2003 “A land transaction is a chargeable transaction if it is not a transaction that is exempt from charge”. Schedule 3 provides for certain transactions to be exempt from charge².

19. It was not in issue that there were chargeable transaction(s) here. It appears to be accepted that there were.

35 20. FA 2003 requires certain returns to be made by the purchaser of a chargeable interest.

21. Section 76 FA 2003 is headed “Duty to deliver land transaction return”. It provides:

“(1) In the case of every notifiable transaction the purchaser must deliver a return (a “land transaction return”) to the Inland Revenue before the end of the period of 30 days after the effective date of the transaction....”

40 22. By Section 44 (3) FA 2003 “If the transaction is completed without previously having been substantially performed³, the contract and the transaction effected on completion are treated as parts of a single land transaction. In this case the effective date of the transaction is the date of completion”. This is the case here and it does not appear to be disputed that the effective date was the date of completion.

¹ No exempt interests are involved here.

² None of them is applicable here.

³ It was not suggested that there was substantial performance here.

23. “Notifiable transactions” are defined in section 77 FA 2003. This provides:
“(1) A land transaction is notifiable if it is—
(a) an acquisition of a major interest in land that does not fall within one or more of the exceptions in section 77A...⁴”.
- 5 24. The meaning of “major interest” in land is given in section 117 FA 2003. It reads:
“(1) References in this Part to a “major interest” in land shall be construed as follows.
(2) In relation to land in England or Wales, the references are to—
(a) an estate in fee simple absolute, or
(b) a term of years absolute,
10 whether subsisting at law or in equity...⁵”
25. It was not suggested that there were not major interests in land involved here. It appears to be accepted that there was a major interest here.
26. Special provision is made for “Loss or destruction of, or damage to, return etc.” by section 82 FA 2003 which reads:
- 15 “(1) This section applies where—
(a) a return delivered to the Inland Revenue, or
(b) any other document relating to tax made by or provided to the Inland Revenue, has been lost or destroyed, or been so defaced or damaged as to be illegible or otherwise useless.
- 20 (2) The Inland Revenue may treat the return as not having been delivered or the document as not having been made or provided.
(3) Anything done on that basis shall be as valid and effective for all purposes as it would have been if the return had not been made or the document had not been made or provided.
- 25 (4) But if as a result a person is charged with tax and he proves to the satisfaction of the tribunal having jurisdiction in the case that he has already paid tax in respect of the transaction in question, relief shall be given, by reducing the charge or by repayment as the case may require”.
27. We note (it not having been argued or suggested by the parties) that section 7 Interpretation Act 1978 is headed “References to service by post” and provides:
30 “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,
35 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”⁶.
28. Section 76 FA 2003 provides that “... the purchaser must deliver a return (a “land transaction return”)” so that section 7 of the Interpretation Act could be engaged. However, this is subject to contrary intention appearing.
- 40 29. We consider that sections 82 and 84 provide sufficient contrary intention such that section 7 Interpretation Act does not apply.

⁴ None of the exceptions apply here.

⁵ As to rent charges being Estates or interests in land see section 1 Law of Property Act 1925 (“LPA”) and section 7 (1) LPA added by the Scheduled to the Law of Property (Amendment) Act 1926 as amended and the Rent Charges Act 1977

⁶ We also considered the case of *Wing Hung Lai v Bale (Inspector of Taxes)* [1999] STC (SCD) 238. in this context but did not find it assisted us.

30. Even if it did then it is still necessary to prove the letter was posted before section 7 Interpretation Act 1978 is engaged. Even if section 7 Interpretation Act 1978 was engaged then it would be defeated by section 82 FA 2003 set out above.

5 31. Paragraph 3 Schedule 10 FA 2003 imposes a fixed rate civil penalty for late filing of a land transaction return. This is the provision under which the penalties in question in this appeal were imposed. It provides:

“(1) A person who is required to deliver a land transaction return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.

He may also be liable to a tax-related penalty under paragraph 4.

10 (2) The penalty is—

(a) £100 if the return is delivered within three months after the filing date⁷, and

(b) £200 in any other case”.

32. The meaning of filing date and delivery of return is set out in Paragraph 2 Schedule 10 FA 2003 which reads:

15 “2—(1) References in this Part of this Act to the filing date, in relation to a land transaction return, are to the last day of the period within which the return must be delivered.

(2) References in this Part of this Act to the delivery of a land transaction return are to the delivery of a return that—

20 (a) complies with the requirements of paragraph 1(1) (contents of return)...”

33. Section 97 FA 2003 headed “Power to allow further time and reasonable excuse for failure” is also relevant in this context. It provides:

25 “(1) For the purposes of this Part a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Inland Revenue may allow.

(2) Where a person had a reasonable excuse for not doing anything required to be done for the purposes of this Part

(a) he shall be deemed not to have failed to do it unless the excuse ceased, and

30 (b) after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased”.

34. Paragraph 5 Schedule 14 FA 2003 deals with “Appeal against penalty determination”. The Tribunal’s jurisdiction is set out in subparagraph (4) which reads:

“4) On an appeal under this paragraph that is notified to the First-tier Tribunal, the tribunal may—

35 (a) if it appears ... that no penalty has been incurred, set the determination aside;

(b) if the amount determined appears ... to be appropriate, confirm the determination;

(c) if the amount determined appears to them to be excessive, reduce it to such other amount (including nil) as appears to them to be appropriate;

40 (d) if the amount determined appears to them to be insufficient, increase it to such amount, not exceeding the permitted maximum, as the First-tier Tribunal considers appropriate...”

The Evidence

35. We were provided with a volume of documentation. The documents were all admitted in evidence no objection having been taken to any of the documents.

45 36. No witness statements were produced.

The Facts

⁷ This is seemingly the position here.

37. From the evidence we make the following findings of fact.

- (1) The Appellant purchased a property in Skelmersdale.
- (2) The purchase was completed on 29 January 2010. This was the Effective Date for SDLT purposes. This would require the return to be submitted i.e. by 28 February 5 2010. It was not shown that it was delivered by that date.
- (3) There was no evidence that HMRC had received the SDLT 1. We find on the balance of probabilities, that HMRC did not receive that SDLT 1 and not within the required period. We find this as a primary fact i.e. the SDLT 1 was not delivered to HMRC by the due date.
- 10 (4) The Appellant said the SDLT 1 had been submitted on 29 January 2010. Unfortunately, there was no evidence to corroborate this. Accordingly, we find on the balance of probabilities, that it was not submitted on that date nor within the relevant period. We find this as a primary fact.
- (5) No evidence was led to show and/or corroborate that the document had been 15 posted. Accordingly, we are unable to find that the letter and enclosure were posted as there is no compelling or other evidence on which to base such a finding.
- (6) HMRC said they had no evidence of receipt of the document. We accept this and so find. Consequently we are unable to find that the documents were delivered to HMRC within the relevant period.
- 20 (7) The Appellant later submitted a return in respect of the property. We understand that this was because the Appellant had not received the SDLT 5 Certificate. This is hardly surprising if the SDLT 1 had not been received.
- (8) The Land Transaction Return for the purchase was received by HMRC on 31 March 2010. This was 32 days late.
- 25 (9) We find that the only land transaction return in respect of the property was received more than 30 days after the effective date but within three months of the filing date.

The Submissions of the Parties

The Appellant's Submissions in outline

- 30 38. In essence, the Appellant submitted that:
- (1) He had posted the return but it must have been lost in the post or elsewhere or otherwise gone astray;
 - (2) He had done what was required and so there should be no penalty as it was unfair to punish him when he complied with what was required;
 - 35 (3) At any rate as the Appellant had done all he reasonably could in the circumstances he had a reasonable excuse and the penalty regime should not apply
 - (4) Accordingly, the appeal should be allowed.

HMRC's Submissions in outline

- 40 39. In essence, HMRC submitted that:
- (1) There was no proof of posting of the return;
 - (2) The copy letter was just that – it was not proof of posting;
 - (3) Effectively, HMRC appeared to be saying, even if there were any proof of posting the position is governed by section 82 FA 2003 which allows HMRC to treat the return as not having been delivered or the document as not having been 45 made or provided;
 - (4) Accordingly, the penalty provisions were engaged and applied unless a reasonable excuse could be shown;

- (5) No reasonable excuse had been shown – delay or loss in the post is not a reasonable excuse;
- (6) Consequently, the appeal must be dismissed.

Discussion

5 40. This case requires a number of questions to be considered in order to decide it. They include the following:

- (1) Has it been proved that the SDLT 1 was posted when it was claimed to be posted?
- 10 (2) Was the return received more than 30 days after the date but within three months of it?
- (3) Is there any reason why the penalty provisions are not engaged such as there being a reasonable excuse?
- (4) Should any penalties be further mitigated?

Posting proved?

15 41. There was no evidence led that showed that the SDLT 1 had actually been posted. It was asserted but not shown that it had been posted. There was no evidence of posting.

42. We accept that HMRC had no evidence of receipt and we so find.

20 43. In the circumstances we find that it has not been shown that the SDLT 1 had been posted when it was said to have been posted. We do so reminding ourselves that the standard of proof is the civil standard of balance of probabilities. However, applying that standard we still consider that it has not been shown that the SDLT 1 had been posted within the requisite period and we so find.

44. There was no evidence led to show that the letter had been mislaid by the Royal mail or by HMRC and we so find.

25 45. Even if it had been shown (which is not the case here) the position would have been covered by section 82 FA 2003 (set out above). This allows HMRC to treat a return as not having been delivered if it has been lost or destroyed.

46. We answer the question in the negative i.e. it has not been shown that the SDLT 1 was posted within the requisite period.

30 *Receipt of individual returns more than 30 days after date*

47. It was not disputed that the return actually received by HMRC was received more than 30 days after the due date.

48. Accordingly, if there is no reasonable excuse the penalty provisions are engaged and apply.

35 *Reason why the penalty provisions are not engaged*

40 49. The penalty provisions were thus engaged and applied unless a reasonable excuse within the statutory meaning could be shown. The onus is on the Appellant to do this. Given that we have found that it has not been shown that the SDLT 1 was posted in the requisite period it is hard to see how there could be a reasonable excuse in the present circumstances for not posting the letter. No reasonable excuse other than, in effect, loss in the post was suggested or occurred to us. We find that the Appellant has not discharged the burden of showing reasonable excuse. Even if contrary to our finding and there was some reasonable excuse it did not exist throughout the relevant period and we so find.

45 50. Accordingly no reasonable excuse been shown and no reason has been shown why the penalty provisions should not apply. Consequently, they apply.

Should any penalties be further mitigated?

51. We consider that the penalties imposed were reasonable and proportionate and we so find. We see no reason to alter them even if we could as they are flat rate penalties. We consider the amount determined to be appropriate and confirm the determination.

Conclusion

5 52. We have found that:

- (1) it has not been proved that the first SDLT 1 had been posted or mislaid. Even if it had been shown (which it was not) section 82 Finance Act 2003 covers the position;
- (2) the one return that was received was received more than 30 days after the effective (but within three months) so the penalty provisions were engaged;
- 10 (3) no reasonable excuse has been shown;
- (4) the penalties were reasonable and proportionate and should be confirmed.

53. We make these findings as findings of fact and to the extent we can we find them as primary fact.

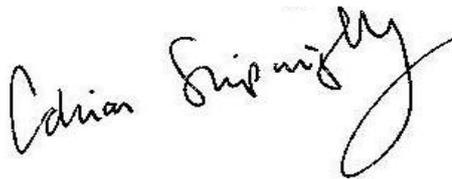
54. Accordingly, the Appeal is dismissed on the facts.

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55. 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.

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ADRIAN SHIPWRIGHT

TRIBUNAL JUDGE

RELEASE DATE: 1 AUGUST 2011

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