



TC01614

Appeal number: TC/2011/05077

Income tax return—Penalty for late return (Taxes Management Act 1970 s.93(2))—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MR DAVID PHILIP EDDIES

Appellant

- and -

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

Respondents

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 17 November 2011 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 4 July 2011, HMRC's Statement of Case dated 19 August 2011, and other papers in the case.

DECISION

Introduction

- 5 1. The Appellant appeals against a penalty of £100 imposed in respect of the late filing of his income tax return for the tax year 2009/10.

The relevant legislation

2. Section 8 of the TMA provides in relevant part as follows:

- 10 (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—
- 15 (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
- (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
- ...
- 20 (1D) A return under this section for a year of assessment (Year 1) must be delivered—
- (a) in the case of a non-electronic return, on or before 31st October in Year 2, and
- 25 (b) in the case of an electronic return, on or before 31st January in Year 2.
- (1E) But subsection (1D) is subject to the following two exceptions.
- (1F) Exception 1 is that if a notice in respect of Year 1 is given after 31st July in Year 2 (but on or before 31st October), a return must be delivered—
- 30 (a) during the period of 3 months beginning with the date of the notice (for a non-electronic return), or
- (b) on or before 31st January (for an electronic return).
- (1G) Exception 2 is that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.
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- ...
3. Section 93 of the TMA states in relevant part as follows:

- (1) This section applies where—

- (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act) to deliver any return, and
- 5 (b) he fails to comply with the notice.
- (2) The taxpayer shall be liable to a penalty which shall be £100.
- ...
- (4) If—
- 10 (a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and
- (b) no application is made under subsection (3) above before the end of that period,
- 15 the taxpayer shall be liable to a further penalty which shall be £100.
- ...
- (6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.
- 20 (7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.
- (8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above that is notified to the tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the tribunal may—
- 25 (a) if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or
- 30 (b) if it does not so appear, confirm the determination.
- (9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.
- 35 (10) In this section—
- “the filing date” in respect of a return for a year of assessment (Year 1) means—
- 40 (a) 31st January of Year 2, or
- (b) if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given;

“the period of default”, in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered.

5 4. Section 118(2) of the TMA provides as follows:

10 (2) For the purposes of this Act, 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 Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, 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.

15 **The arguments of the parties**

5. The Appellant’s case as stated in the notice of appeal and supporting documents includes the following. Over the past two years he has made repeated requests and supplied clear information with a view to paying tax on his pension through PAYE. He was told over the course of 2010 that he had received various letters and a self-assessment (SA) form, which was not true. He received the SA form in February 2011. He has asked for advice and written many letters, but has received no advice. He has received letters from five different tax offices, none of which appear to be aware of his long-running problem. It took three years for the Appellant to be able to pay his tax through PAYE, which began in May 2011. He has been very confused, has always done his best to do the right thing, and the matter has made him feel very ill.

6. The HMRC statement of case states that a notice to file a self-assessment tax return was issued to the Appellant on 6 April 2010. Undelivered correspondence is recorded by HMRC, and it has no records to show any mail was returned undelivered. The statement of case goes on to explain why tax had previously not been collected through the Appellant’s PAYE, states that the Appellant had an underpayment of tax for 2009/10, and that the Appellant was now deemed as satisfying self-assessment criteria due to his reduced age allowance.

The Tribunal’s view

7. Difficulties that the Appellant says he had in arranging for his tax to be collected through PAYE are not relevant to the issue in the present appeal. Liability to tax, and the obligation to file a self-assessment tax return are two separate matters. Nothing has been advanced to suggest that HMRC was not lawfully entitled to issue to the Appellant a notice to file a self-assessment tax return under s.8(1) of the TMA. If such a notice is issued, regardless of whether or not the Appellant owes any tax, and regardless of any difficulties that Appellant may have experienced in arranging payment of tax, the Appellant is under an obligation to file a tax return by the applicable deadline, and will incur the statutory penalty if he fails to do so.

8. In the papers is a printout from the HMRC database indicating that a notice to file a 2009/10 self-assessment tax return was issued to the Appellant on 6 April 2011, indicating that the deadline for submitting the return was 31 January 2011, or if a paper return is submitted, 31 October 2010. On the evidence before it, the Tribunal is satisfied that a notice to file was issued on 6 April 2010.

9. The Appellant's case is that he did not receive a self-assessment return before the filing deadline. A letter from the Appellant to HMRC dated 25 February 2011, appealing against the penalty notice, states that "The only correspondence I have received from you over the last twelve months, I enclose copie of with this letter. I have received no self assessment forms from you either this year or last year". The HMRC decision on that appeal dated 21 March 2011 failed to address this argument. Under the heading "Why I do not think that you have a reasonable excuse", the HMRC decision stated that "You are still required by law to complete a tax return as your age allowance had been reduced because of your total income". In his request for a review of the HMRC decision dated 18 April 2011, the Appellant did not raise the contention that he had not received the notice to file a tax return. The HMRC decision on review dated 9 June 2011 again does not address the contention that the Appellant never received the notice to file.

10. HMRC contends that undelivered correspondence is recorded by HMRC, and it has no records to show any mail was returned undelivered. However, that of itself does not mean that the notice was in fact actually delivered to the correct address.

11. In the circumstances, the Tribunal is required to decide this case on the basis of the evidence before it, on a balance of probabilities. The Tribunal is satisfied on the evidence that the notice to file was sent to the Appellant and not returned to HMRC undelivered. The vast majority of letters sent though the post are correctly delivered. The Tribunal appreciates that it is difficult for the Appellant to provide any positive evidence to prove a negative, namely that he did not receive the notice. However, the Tribunal takes into account that the Appellant appears to have received other correspondence from HMRC, that the Appellant offers no particular explanation of why he might not have received this notice, and that he did not press the point about not having received the notice in his request dated 18 April 2011 for review of the HMRC decision. Given that the HMRC decision dated 21 March 2011 never addressed this contention, it could be expected that this would have been a main ground on which the Appellant would have requested a review of that decision, if the Appellant was genuinely convinced that he had never received the notice to file. From the papers, it would seem that the Appellant was more concerned with the difficulties he had experienced in paying his tax by PAYE. One possible explanation is that the Appellant, being preoccupied with seeking to arrange payment of his tax by PAYE so that he would not have to file tax returns, overlooked the fact that he had in fact received a notice to file a tax return for 2009/10. However, even if this were the explanation, the Tribunal is not satisfied on the evidence before it that overlooking the need to file a tax return in such circumstances would in this case amount to a reasonable excuse.

12. The burden of proof is on the Appellant to establish that he has a reasonable excuse for the late filing of the tax return, for purposes of s.93(8) or 118(2) of the TMA. The Tribunal finds that the Appellant has not discharged that burden.

Conclusion

5 13. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalty and dismisses the appeal.

14. 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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DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

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RELEASE DATE: 1 DECEMBER 2011