



**TC01838**

**Appeal number: TC/2011/04096**

*Appeal against late finalising penalty for partnership return – no return submitted – confusion over what was sent- Appellant alleges sent same details as previous years – was he properly notified – no clear evidence of notice being sent out – appeal allowed.*

**FIRST-TIER TRIBUNAL**

**TAX**

**Jamie Stirling T/A Back 2 Roots**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Judith Powell (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 28 September 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 13 May 2011 and HMRC's Statement of Case submitted on 21 June 2011 .**

## DECISION

1. This is an appeal against the first fixed penalty imposed under section 93A (2) Taxes Management Act 1970 (“TMA”) for the late filing of the partnership return for the year ending 5 April 2010. In fact it seems that a partnership return had still not been submitted when the Respondent’s Statement of case was prepared. The Appellant is apparently the representative partner of the partnership between himself and Ms L Stirling and in accordance with section 93A (6) TMA the Respondents have treated this as a composite appeal against the determination of the penalties on all of the partners’ self assessment records.

2. Section 12AA (2) TMA contains the provisions whereby persons can be required to make partnership returns. A partnership return is not the same as the return required of each individual partner of his or her partnership profit in his or her individual self assessment return. The sub section provides that an officer of the Board may by notice require the person identified in that notice to make and deliver a return containing such information as may reasonably be required in pursuance of the notice and to deliver with the return such accounts, statements and documents relating to information contained in the return as may reasonably be so required. The procedure is important. If the Appellant did not receive a Notice he cannot have been at fault in failing to make a partnership return. The Respondents say they sent him the relevant Notice on 6 April 2010 so that he was obliged to deliver a return by 31 October 2010 in paper form and by 31 January 2011 in electronic form

3. In summary the Appellant says he sent everything he believed was required of him in connection with his tax affairs for the relevant year well in advance of the due date. He says he sent everything to the Respondents in a single envelope posted in September 2010 and he knows it arrived because he received a Tax Calculation that could not have been prepared without the Respondents referring to documents he sent out in that envelope. He also says he had sent the same type of documents in previous years and had not been penalised for any shortcomings. When he was sent a Penalty Notice he believed that the Respondents were arguing he had sent the return late rather than that he had not sent a return at all and his subsequent arguments were based on his belief that they were wrong because what he had sent to them could not possibly have arrived late. He felt there must be an administrative error which meant that what he had sent had not been recorded as received. In fact the Respondents were saying he had not submitted a Partnership return at all and this turns out to be the case. The only logical explanation for his confusion is that the Appellant thought the partnership pages he had prepared as part of his self assessment return was the information the Respondents were asking him to provide. It seems quite clear the Appellant did not submit a Partnership return - he may still not have done so.

4. The two questions are whether he was properly notified of the need to make a Partnership Return and, if he had been so notified, whether he had a reasonable excuse for his failure to do so. The Respondents say that a notice to file was sent to the Appellant on 6 April 2010. The Appellant does not say whether or not he received this document but he either did not receive it or he received it and for some reason ignored it. For reasons we come onto it is unlikely he ignored it but he may

5 simply have forgotten about it or did not realise what it was. The document to which the Respondents refer us in the papers is not a copy of the actual Notice but is an electronic document generated internally and contains summary information about the partnership affairs headed "Return Summary" which merely records that a Notice to file was sent on that date. We do not know on what basis this record was made. The Respondents also say that the Notice they have recorded as being sent out on 6 April 2010 was sent to the correct address but again we do not know on what basis they know this to be correct; the address is not noted at all on the Return Summary and there is no reference to the person to whom it was sent.

10 5. The Respondent's Statement of case contains a pro forma example of a Notice to File. That Notice to File states that pages 1 to 8 of the partnership tax return is sent with the Notice; this accords with current information on HMRC's web site stating that a return is sent to the representative partner - although the web site refers to this person as the nominated partner. It also accords with the Return status being recorded as "issued" on the Return Summary. We conclude on the basis of what we have seen that if the Appellant had received a Notice of the type produced to us he would also have received pages 1 to 8 of a partnership tax return. If that is the case we cannot see that he had any excuse for his failure to complete it on time. If he confused the pages which the pro forma notice states are sent out with it with the partnership pages for his self assessment return that is unfortunate and may even be understandable but does not amount to a reasonable excuse.

25 6. Of course, unless the Appellant had received the Notice he would have been unaware of all this since he would not have seen the Return Summary which we understand is an internal document. If it had been properly dispatched but he had not received it he might well have a reasonable excuse for his failure to complete the return. If we had clear evidence of the dispatch of the Notice, the addressee and the address to which the notice was sent we would conclude he had received it unless we heard some evidence from him to the contrary. We do not have clear evidence that the Notice was dispatched to the Appellant. We have an internal record that a Notice was issued but no mention of the person to whom it was sent nor the address that was used.

35 7. The Respondent's review letter written on 4 May 2011 (after the Appellant had requested a review of the original decision dated 16 March 2011 following the Appellant's appeal against the penalty) is confusing. It states that "a notice to file letter replaces the issue of a tax return" which implies that no actual return (not even the pages 1 to 8 mentioned in the pro forma Notice) is enclosed with it. We have found that if the Notice had been received by the Appellant he would have received the pages 1 to 8 of the partnership return. It is rather less likely that the Appellant, who seems to have taken some considerable care to submit his individual return properly and on time, would have chosen to ignore an actual return. Not only did he submit his personal return on time but he dealt promptly with the penalty notice and all subsequent correspondence. The tone of his correspondence is absolutely consistent with someone who was organised with his paperwork, believed that he had done what was required of him, was confident he had sent everything required to the Respondents and that it was they who had overlooked the relevant documents. Of

course it is possible he received the Notice plus the pages from the partnership return and confused these with the partnership pages associated with his individual self assessment form (so that he thought he had been sent a duplicate) but that is less likely. The Appellant says nothing about what he did or did not receive. The Respondents say what they believe was sent out but do not produce a copy of what was sent and in particular do not produce any evidence of the person to whom it was sent nor the address to which it was sent and it is not clear to us that they knew exactly what would have been sent out even if the pro forma notice had been dispatched. It is interesting to note that whilst the Respondents have provided actual copies of the correspondence relation to the Appellant's individual return (including the statement of his self assessment account) they have only provided pro forma copies of the documents associated with the partnership return – this includes the Notice and also the penalty notice itself. They do not explain why they have not produced actual copies of these documents.

8. The Appellant states in his appeal notice that he sent the same documents as he had sent in previous years “which proved to be adequate”. The Respondents do not say what they had received from the Appellant in the previous years. In view of the Appellant's evident confusion it would have been helpful to know that.

9. The Appellant says he did not realise until he received the letter dated 4 May 2011 and was preparing his appeal that the Respondents had not received the return; until that date he thought they were arguing the return was late and he was puzzled by this since he had sent what he thought was the correct information in a single envelope in September 2010 and knew it had been received since he had received a Self Assessment tax calculation dated 19 November acknowledging the return and confirming he had no tax to pay. It is now clear the tax calculation referred only to the Appellant's personal self assessment return (with its partnership pages) and did not acknowledge receipt of a partnership return. The Respondents say the calculation contained the Appellant's UTR number rather than the partnership details but it is understandable if the Appellant did not notice this at the time since he was sure he had submitted the correct documents and that letter (mistakenly as it happens) reinforced his belief that all was well.

10. The Respondents say the Appellant must have been aware that the partnership return had not been completed because of the penalty notice issued in February 2011 but of course the Appellant mistakenly thought the penalty was issued because the return was late rather than because it had not been submitted at all; this stems from his belief he had submitted everything required of him in September 2010. In addition the penalty is shown on his “Self Assessment” statement so it is unsurprising he thought it related to the partnership pages he had submitted with that self assessment return. The first decision letter in March does refer to the partnership return as being outstanding but it also refers to the penalty being for “the late filing return for your partnership” and might also be consistent with the Appellant's belief the return he thought related to the partnership had been overlooked. As he was confident he had sent everything to the Respondents he was unlikely to have submitted a partnership return at that stage - he plainly thought they had overlooked receiving the required documents whereas of course he had not submitted the partnership return.

11. The Appellant does not argue he did not receive the Notice and the partnership pages. We have, nevertheless concluded that his pattern of behaviour is such that if he had done so he would have completed them or raised enquiries about the need to do so. There is no clear evidence of the Notice being dispatched to him at the correct address. We conclude that he did not receive it. This may be because it was not in fact dispatched or because it was not sent to the correct address or because it was not delivered. The position is confused and we are persuaded that if it was sent out he did not receive it and there is some doubt that it was properly dispatched so we allow his appeal.

12. 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.

**TRIBUNAL JUDGE**  
**RELEASE DATE: 18 January 2012**