



TC01898

Appeal number: TC/2011/07747

Income tax – partnership return – whether Notice to File delivered, or deemed delivered under the Interpretation Act s 7 – on the evidence, no – delivery rebutted – appeal allowed and penalty set aside.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**ALAN CORNISH
t/a KITTIWAKE PARTNERSHIP**

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 27 February 2012 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 21 September 2011, HMRC's Statement of Case submitted on 18 November 2011 and the Appellant's Reply dated 29 November 2011.

DECISION

5 1. This is an appeal against four £100 penalties charged on the partners in the Kittiwake partnership (“the partnership”), for late submission of the 2009-10 partnership return.

2. The Tribunal decided that the appeal was allowed and set aside the penalties of £100 on each of the partners.

The representative partner

10 3. The partnership has four partners, Mr A Cornish, Mr SM Goodwin, Mr M Jordan and Mr GR Bailey. Mr Cornish is the representative partner.

4. Only the representative partner can appeal late filing penalties levied on other partners in the partnership, and such an appeal is a “composite appeal” on behalf of both the representative partner and the other three partners.

15 5. This appeal is thus a composite appeal by Mr Cornish against the £100 levied on himself and the £100 levied on the other three partners.

The issue in the case

6. It is not in dispute that the partnership return was filed after the due date for filing 2009-10 paper returns, being 31 October 2010.

20 7. The issue in the case is whether the Notice to File the partnership return was delivered, or deemed to be delivered, to Mr Cornish.

The facts and submissions

8. On 30 July 2009, HMRC set up a partnership record in response to a notification by the nominated partner.

25 9. HMRC say that they issued a Notice to File a partnership return on 6 April 2010 to the same address as that being used for these Tribunal proceedings. Mr Cornish says the Notice was not delivered. This is the key issue in dispute and I discuss it below.

10. On 15 February 2011, HMRC issued a £100 penalty notice to each partner.

30 11. On 2 March 2011, Mr Cornish sent a paper copy of the partnership return (SA800) to HMRC at Chapel Wharf, by special delivery, and a further copy to HMRC in Ipswich, also by special delivery.

12. On 2 March 2011, Mr Cornish spoke to Mary Stewart at Team 3 of HMRC’s East Kilbride contact centre and confirmed that he had done all that was required.

13. On 7 March 2011, Mr Cornish appealed the penalties.

14. On 9 March 2011, Mr Cornish called HMRC's Sunderland office and spoke to "Brett", who told him that HMRC do not sign for special delivery post. He was advised to call back in seven days to see if the partnership return had been logged. Mr Cornish asked Brett to make a note of the call.

5 15. On 16 March 2011, Mr Cornish called HMRC again and spoke to Paul in Liverpool and was told that that it might take until the end of April before the position was clear.

16. By letter dated 23 March 2011, Mr Kennedy of HMRC's Thornaby office wrote to Mr Cornish, saying "we received your 2009-10 tax return on 4 March 2011 but as yet have not processed it. I am trying to locate this return and get it processed for you."
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17. On 25 March 2011, Mr Cornish called HMRC and spoke to Emma in Newcastle. He was told that the partnership return and covering letter had been received on 4 March 2011.

15 18. By letter dated 12 April 2011, HMRC wrote to Mr Cornish saying that the partnership return had not been received. This letter was delivered to Mr Cornish's home when he was away on holiday

19. By letter dated 3 May 2011, Mr Cornish sent HMRC a further copy of the partnership return and photocopies of the special delivery receipts. He said "if the copy SA800 sent to Salford has not appeared in your work for processing, what has happened to the SA800 sent as back-up to Ipswich please?"
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20. HMRC registered the return as delivered on 4 May 2011.

Mr Cornish's submissions

21. Mr Cornish said that, because no partnership Notice to File was received, he did not realise it had to be completed. Once aware of the obligation, he complied without delay. He says "we always treat HMRC matters seriously and promptly"
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22. He provided the Tribunal with copies of all the special delivery receipts for his correspondence with HMRC.

23. He says that the partnership have been penalised "by HMRC acting in a manner akin to cowboy car clampers."
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HMRC's submissions

24. HMRC submit that the Notice to file was delivered to Mr Cornish as it was sent to the correct address and not returned to them undelivered.

25. They further say that the partnership return sent on 2 March 2011 was not delivered and "apologise for this error". The Tribunal reads this as an apology for telling Mr Cornish on the telephone and by letter that the return had been received.
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26. HMRC also say that information about partnership filing obligations is on the HMRC website and that ignorance of the law is not a reasonable excuse.

The law on delivery

27. Both a Notice to File and a partnership return can be sent by post (TMA s 115(2)).

5 28. The Interpretation Act 1978, s 7 states if a document is properly addressed, had the correct postage and was then posted, it is deemed to be delivered unless the recipient can rebut delivery. It reads:

10 “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.”

15 29. The question as to what is required before a person can rebut the deeming provision was recently discussed in *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 (Ch), in reliance on the Court of Appeal authorities of *Chiswell v Griffon* [1975] 2 All ER 665 and *R v County of London Quarter Sessions Appeal Committee, ex p Rossi* [1965] 1 All ER 670.

20 30. At [26] of *Calladine-Smith* Morgan J said:

25 “if the addressee of the letter proves on the balance of probability that the letter was not served upon him then that matter has been proved and the section should be applied accordingly. Of course it is not enough simply to assert that someone did not receive the letter; the court will consider all the evidence and make its findings by reference to the facts which are established including issues as to the credibility of witnesses. That is the ordinary way in which a court goes about making findings of fact.”

30 31. If the Notice to File was not delivered, there is no obligation on the partnership to complete it, and there can be no penalty: the legislation says¹:

“An officer of the Board may by a notice given to the partners require such person as is identified in accordance with rules given with the notice or a successor of his

35 (a) to make and deliver to the officer in respect of such period as may be specified in the notice, on or before such day as may be so specified, a return containing such information as may reasonably be required in pursuance of the notice...”

¹ Taxes Management Act 1970 s 12AA(2)

Discussion and decision

32. I deal first with the sending of the partnership return.

33. Mr Cornish provides extensive evidence, including the provision of post office receipts, his own detailed telephone records, and the letter of 23 March 2011 from Mr Kennedy of HMRC, to support his submission that he did send the partnership return to HMRC on 2 March 2011.

34. I accept his evidence and find as a fact that he did send the return on 2 March 2011, and that it was in fact delivered to HMRC on 4 March 2011.

35. Mr Cornish says that the Notice to File was not delivered. He says that, once he was aware that the return was required, he filled in and sent a copy to HMRC.

36. I have already found as a fact Mr Cornish did send the return on 2 March 2011, soon after he received the Penalty Notice. He diligently and carefully followed up with HMRC to see if they had received and logged the return. He is a compliant taxpayer who takes his tax responsibilities seriously.

37. On the basis of the detailed evidence submitted, I find Mr Cornish to be a highly credible witness. In my judgment it is extremely unlikely that he received the Notice to File and then ignored it. I therefore find that the Notice was therefore neither delivered, nor deemed to be delivered.

38. In consequence, Mr Cornish was not required to send a partnership return, and there can be no penalty.

39. I therefore accept the appeal and set aside the penalties.

40. 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.

ANNE REDSTON
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 19 March 2012

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber), Rules 2009 on 30 March 2012.