



TC01931

Appeal number: TC/2011/04855

Income tax - penalty for late return- whether notice to deliver return given to taxpayer

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DENNIS MARSHALL

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE CHARLES HELLIER

The Tribunal determined the appeal 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 23 June 2011(with enclosures), HMRC's Statement of Case submitted on 4 August 2011(with enclosures) and the Appellant's Reply received on 1 September 2011.

DECISION

1. Mr Marshall appeals against the imposition of a penalty of £100 under section 93 TMA 1970 for the failure to deliver his tax return for the year ended 5 April 2010 on time.

2. Mr. Marshall contends that he did not receive a tax return until January 2011 and that he returned it shortly after its receipt.

3. Section 93 TMA 1970 provides so far as is relevant:

“(1) This section applies where --

(a) any person (the taxpayer) has been required by notice served under or for the purposes of section 8 ... of this Act ... to deliver any return, and

(b) he fails to comply with the notice.

(2) The taxpayer shall be liable to a penalty which shall be £100.”

4. Thus Mr. Marshall is liable to a penalty only if he failed to comply with a notice served under section 8 TMA 1970.

5. Section 8 TMA 1970 provides that:

“(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—

(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.

...

“(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

(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—

- (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).

5 “(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.”

6. Thus if notice was given to Mr. Marshall before 31 July 2011 to make and deliver a return and he failed to deliver his return before 31 October 2011 (since it was a paper return) he is liable to a penalty.

7. But if notice was given to Mr Marshall after 31 July, and in particular if it was given after 31 October 2011 then a paper return had to be delivered within three months after that notice was given. If it was given in January 2011 then the return had to be delivered by sometime in April 2011, and, since the return was delivered in January 2011, it would have been on time.

8. I take notice of the fact that a tax return form contains on its face a notice requiring the recipient to complete and deliver the return. Thus the receipt of the return form will be notice to make and deliver the return for the purposes of section 8.

9. In their statement of case HMRC say that "the return was issued 6 April 2010". If the return was sent to Mr. Marshall on this date and received by him then he would have been given notice that he was required to deliver his return by 31 October 2010 (or 31 January 2011 if online). If that is the case then he failed to comply with the notice and is liable to a penalty under section 93.

10. Mr. Marshall says in his notice of appeal that he did not receive a return form which HMRC say was issued on 6 April 2010. If the first form given to him was that which he received in January 2011, then the earliest date he could have been required to submit it was three months thereafter; it was submitted within that period: he would therefore not have failed to comply with the notice and would not be liable to a penalty under section 93.

11. The question therefore is whether the notice (in the return from) was given to Mr. Marshall in April 2010. That question I have to decide on the evidence put before me. That evidence is this:

(1) HMRC say that the return was issued on 6 April 2010. They produced no evidence that this was the case. They do not indicate how it is known that the return of form was in fact dispatched.

(2) Mr. Marshall says that the return which HMRC say was issued on 6 April 2010 was not received by him.

(3) The parties concur that a reminder was sent to Mr. Marshall on 16 December 2010 which Mr. Marshall received and that on 11 January 2011 he rang HMRC saying that he had not received a return.

5 (4) In a letter from HMRC's review team of 6 June 2011 the writer states that "our records indicate that our correspondence [the return] was not delivered.". In their statement of case HMRC say that this was a typing error, that their records do not show that the return was undelivered and that the letter should have said that the records "do not indicate that the" return was not delivered.

(5) Mr. Marshall submitted tax returns for previous years on time.

10 12. On this evidence I find it likely that this return was not received by Mr. Marshall. His actions are consistent with that conclusion, and the evidence offered in support of the dispatch of the return was of insufficient weight to tip the scales in the other direction.

15 13. There is one other statutory provision which I should refer. Section 115(2) TMA provides that a notice to be given may be sent by post and may be addressed to a person at his last known place of residence. In my view this section does not have the effect that if the notice is sent it is irrebutably presumed to have been received. Thus even if HMRC had proved that the notice was sent by post to Mr. Marshall it would not follow that for the purposes of the Taxes Acts it had to be treated as having been received by him.

14. I conclude that Mr. Marshall did not fail to comply with the notice given to him under section 8 and accordingly that no penalty is exigible under section 93.

20 15. In the light of this conclusion it is not necessary to consider the parties' submissions in relation to reasonable excuse.

16. I allow the appeal.

25 17. 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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TRIBUNAL JUDGE

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RELEASE DATE: 04 April 2012

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