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TC01932

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Appeal number: TC/2011/4853

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Income Tax-penalty for late filing of partnership return – return filed as PDF with partners’ returns – whether PDF filed as attachment was an “electronic return” as prescribed under ss12AA(5E) TMA – whether return delivered before the day specified by notice in the return form - appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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FITZPATRICK & CO SOLICITORS

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE CHARLES HELLIER

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The Tribunal determined the appeal on 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 26 June 2011 (with enclosures), HMRC’s Statement of Case submitted on 2 August 2011(with enclosures).

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DECISION

5 1. The partners in Fitzpatrick & Co Solicitors appeal against two penalties of £100 assessed for the late delivery of their partnership return for 2009/10.

2. Section 12AA TMA 1970 authorises an officer of HMRC to give notice to a partner in a firm requiring the making of a return. Section 93A(2) TMA provides for a penalty on each partner if the notice is not complied with.

10 3. The firm's return was initially submitted by their agent as a PDF file attached to the online returns submitted on behalf of the partners. These returns were submitted on 26 January 2011.

15 4. I understand that a return form for 2010 was sent to one of the partners. The return form contained notice indicating: that the partner was required to send a return to HMRC, that the return could be made using the form or the Internet, and that the return had to reach HMRC by 31 January 2011 "if you file online".

5. If the inclusion of the partnership return as a PDF file in the partners self-assessment returns was the delivery of a return online (or by Internet) for the purposes of the notice on the front of the return, then the partnership return was submitted on time and no penalty is due.

20 6. If the inclusion of the PDF in the partners return was not an online submission for the purposes the notice in the return, the return was not submitted on time (it was resubmitted in paper on 31 March 2011). In that case it falls to be considered whether there was a reasonable excuse for the delay. If there was such an excuse it is accepted by HMRC that section 118 (2) TMA as the effect that the failure can be ignored.

25 Was the inclusion of the return form as a PDF in a partners' self-assessment return in compliance with the notice given under section 12AA?

7. Subsections 12AA (2) and (3) permit an officer of the Board to give notice requiring a partner to "make and deliver" to the officer "before such day as may be specified, a return ...".

30 8. It is to be noted that this section does not permit the officer to require any particular mode of delivery.

9. Subsection (4) provides that:

35 "In the case of a partnership which includes one or more individuals, a notice under subsection (2) or (3) above may specify different days depending upon whether a return in respect of a year of assessment (Year 1) is electronic or non-electronic."

10. By subsection (4A) the date specified for a non electronic return must not be earlier than 31 January of year 2.

11. By subsection (4B) the date specified for an electronic return must not be earlier than 31 January of Year 2. There are exceptions which are not relevant in this case.

12. Subsection (5E) provides:

"The Commissioners --

5 (a) shall prescribe what constitutes an electronic return for the purposes of this section, and

(b) may make different provision for different cases or circumstances."

13. Thus the Act leaves it to HMRC to prescribe what constitutes an electronic return. If what was submitted was not an "electronic return" as so prescribed then the
10 firm will have submitted a return but will not have submitted an electronic return. In that case the provisions of subsection (4B) would not apply; and the earliest date which could therefore be prescribed for compliance with the notice would be 31 October; and if the notice can be read as requiring a non-electronic return (as so prescribed) to be made before 31 October then the return will have been late.

15 14. I turn first to considering what has been prescribed for the purposes of subsection (5E) by HMRC.

15. In their statement of case HMRC referred to the following:

16. (1) The front of the partnership tax return for 2009/10 which tells the recipient that it may file a return using the paper form or

20 "the Internet (you will need to use commercial software which may have to buy). If you file online you will receive an instant online acknowledgement that your tax return has been safely received. To register and enrol for Self Assessment Online for Partnerships go to www.HMRC.gov.uk and from the "do it online" menu select "self-assessment".

25 17. (2) That part of HMRC's website which, in relation to the option for filing online partnership returns indicates that a partnership return may be filed either on paper or online and that different deadlines apply. It then says:

30 "HMRC does not provide a free online product for filing a partnership return. However there are low cost, commercial products available. Follow the link below for a full list ...".

18. (3) In relation to self-assessment, HMRC's website has a section which relates to attachments to online returns. It explains that an additional feature has been present since 2006 to allow online attachments to be made. In the majority of cases it says it
35 should not be necessary for a taxpayer to attach accompanying materials to the return: if more information was required it could be entered in the "Additional Information" box. There is then a heading "When use of the Self-Assessment Attachment Feature is not appropriate". The paragraph thereunder reads:

"the online Self Assessment of attachments feature **must not** be used to submit:

a further Self-Assessment Tax Return".

19. I ask myself whether these documents "prescribed" an electronic return in such a way that the delivery of a PDF file within an online self-assessment return was not the delivery of an electronic return for the purposes of section 12AA.

5 20. To my mind it is not clear that these materials constitute the "prescription "of an electronic return which does not include the online delivery of a PDF with another return:

10 (1) The first concerns the information at the front of the tax return which indicates that the recipient can use the Internet but will need third-party software. The words quoted could be mean that unless you use such software your return will not be an "electronic return" for the purposes of the regulations but they could also be advice as to how best to submit the return online: they say "you will need", not "you must use"). It is not clear that a requirement is being made.

15 (2) The second concerns the statement that HMRC does not provide a free online product. It likewise suggests that some sort of software may be needed. But it does not "prescribe" the use of such a product.

20 (3) In relation to (3) it is necessary first to say a little bit about what "Self Assessment Tax Return" may mean for the purposes of this web page. In this context I note that section 9 TMA provides that "every return under section 8 or 8A of the Act shall include a self-assessment". That provision does not apply to returns made under section 12AA ; that is plainly because the assessment of the tax is the level of the partners not the partnership. This suggests to me that it is not clear that a Self Assessment Tax Return is intended to include a Partnership Return. At best the indication is unclear.

25 Even if the this web information might be read as prohibiting the use of the self assessment tax attachments feature for partnership returns there is a difference between prohibiting something and prescribing something. HMRC may, by prescribing what is and what is not an electronic return, exclude from the meaning of that phrase a return delivered in a particular manner, but these words are not directed at the definition of what is and what is not an electronic return: they are not a prescription.

30 It seems to me that taking all these items together the reader would conclude that it was unlikely that HMRC would want a partnership return to be submitted as a PDF attachment to a self-assessment return, but I do not think it can be said that they "prescribed" something which excludes a return made by such delivery from being an electronic return..

35 21. I therefore conclude that the documents produced by HMRC do not prescribe the use of third-party software as the only way to make an electronic return. The best that can be said is that they prescribe the making of a return via the internet as
40 constituting an electronic return.

22. It may be that there are other notices documents in which HMRC make their prescription clearer. I fear I found no regulations which assisted.

23. Thus I conclude that what was submitted was an electronic return for the purpose of section 12AA, and accordingly that the earliest date which could have been set for its submission was 31 January 2011.

24. In that context the notice given on the face of the return complies with section (4B) only if what was submitted can properly be called an online submission by the Internet. In my opinion that is clearly the case. Thus the deadline given by the notice for submission of a return in this manner was 31 January 2011. The return was submitted online by the Internet before that date. Accordingly the partner complied with the notice.

25. I also bear in mind that section 12AA gives no power to the officer to prescribe the *manner* in which the return must be delivered save as follows from any prescription of what constitutes an electronic return, so that the notice on the return could not be read as having the effect that a delivery in a prohibited manner was not a delivery for the purposes of the notice.

26. There is another way of looking at this. Subsections (2) and (3) enable the officer to require the relevant partner to "make and deliver" the return. They do not permit the officer to prescribe the means of delivery. The notice in the front page of the return requires it to be filed before 31 January 2011 "if you file online". The words of subsections (4A) and (4B) specify the earliest possible date which may be specified for making and delivery of the return. The specification of 31 January for a non electronic return filed online would be within the power given by subsections (2), (3), (4A) and (4B) (although there is no power to give different deadlines for the same method of filing) . Even if the return submitted by the partners was not an electronic return it was nevertheless a return which was delivered: it was delivered online (see Sch 3A below). Thus the requirement on the face of the notice of the return for the date of online delivery was met. That requirement is not limited to returns which are "electronic returns".

27. Sch 3A TMA 1970

28. The parties' submissions did not draw my attention to Sch 3A TMA . Part I of that schedule provides that a requirement to deliver a return is to be treated as satisfied if it is transmitted electronically and each of three conditions in Part III are satisfied.

29. The first condition is that the transmission is made by a person authorised by the Board. The acceptance by HMRC of the partners' return indicates that the firm's agent was so authorised.

30. The second condition is that if any requirements applicable to the manner of making the transmission are notified to the person making the transmission, those requirements are complied with (para4). HMRC's statement of case makes no mention of any specific requirement notified to the agent. I do not, for the reasons set

out above regard the items on the website as “requirements” and there was no evidence as to whether or not they were notified to the agent. The partnership return may well have been sent to the agent (but I doubt whether it was sent directly to him), but, again for the reasons set out above I do not regard the legend on the face of that
5 return as a requirement. The statement in the letter in relation to the 2008 appeal that “the partnership return should have been submitted on its own” is the nearest to a requirement but it was not sent to the agent but to the firm. The second condition thus appears to be satisfied.

31. The third condition is that there is provision for making a hard copy before the
10 return is transmitted. There was not suggestion that this was not satisfied. I conclude that it was.

32. As a result para 1 Sch 3A appears to treat the electronic transmission of the PDF file attached to the partners’ individual returns as delivery of those returns.

Reasonable excuse

15 33. If I am wrong and (1) the PDF return was not an "electronic return" because it was not as prescribed by HMRC and (2) the online submission of the PDF was not the filing the return online within the words on the front of the return, it falls to be considered whether there was a reasonable excuse for the failure to submit on time.

34. The firm's tax advisers indicate that they had used this PDF attachment method
20 for the past three years.

35. For the year ending April 2008 HMRC assessed a penalty but on appeal HMRC accepted that the firm intended to file on time and lifted the penalty. The letter announcing this started by saying "The reason why the penalty was charged is because you filed the Partnership Return as an attachment to the Individual Returns.
25 The Partnership Return should have been submitted on its own."

36. For the year ending April 2009 the penalty was again assessed. On appeal HMRC wrote simply saying that "The penalty charge has been removed and your appeal is agreed under section 54 TMA 1970". That letter made no mention of the need to file separately.

30 37. HMRC say that the acceptance of a reasonable excuse in prior years was not accepting a practice adopted by the accountants.

38. I agree that the acceptance of something as a reasonable excuse does not imply, and could not reasonably be taken to imply, an acceptance of incorrect practice. But these letters did not refer to a reasonable excuse. From the first letter it could be
35 inferred that HMRC thought that the method of filing adopted was non-compliant, but that inference is not possible from the second letter. And the failure of the second letter to refer to the PDF practice as unacceptable could indicate a reasonable reader that the practice might no longer be so considered.

39. Taking together an ill advertised prescription of what constitutes an electronic return, the real possibility that the notice on the front of the return might reasonably be read as permitting online filing of a PDF (since it did not *require* the use of third party software) , and the absence in the letter of acceptance of the 2009 appeal of a
5 mention of reasonable excuse or comment on the manner of delivery of the return, it seems to me that the appellant would have a reasonable excuse if the return had been late.

Disposition

40. I allow the appeal.

10 Rights of Appeal

41. 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
15 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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CHARLES HELLIER

TRIBUNAL JUDGE

RELEASE DATE: 4 April 2012

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