



TC02317

Appeal number: TC/2011/2309

INCOME TAX – surcharges and penalties – whether appeal against fixed penalties barred as return has not yet been filed – no – whether reasonable excuse – no – appeal dismissed – sections 59C, 93 and 100 Taxes Management Act 1970

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTOPHER KITE

Appellant

- and -

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

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
ANTHONY HUGHES**

Sitting in public at 45 Bedford Square, London on 23 March 2012

Mark Ratcliff, an officer of HM Revenue & Customs for the Respondents.

The Appellant failed to attend the hearing and was not represented, but the Tribunal proceeded with the hearing, being satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed.

DECISION

1. This is an appeal against surcharges and penalties for the late submission of various tax returns. He also appeals against the tax charged under self-assessments for the years 1998/99 and 1999/2000.

2. Mr Kite did not attend the hearing, but the Tribunal was satisfied that Mr Kite was sent notice of the hearing and that it was in the interests of justice to proceed. The Tribunal file showed that Mr Kite had been sent notice of the hearing to the address given on his notice of appeal. The Tribunal clerk attempted to telephone Mr Kite on the number given on the notice of appeal (which was a mobile number), but the telephone was switched off. Mr Ratcliff, representing HMRC told us that he had sent Mr Kite the hearing bundles in the post and these had not been returned. We decided that it was in the interests of justice for the hearing to proceed.

3. HMRC were represented by Mr Ratcliff. He produced a bundle of documents and correspondence in evidence.

Background facts

4. Mr Kite appeals against the following surcharges and penalties:

Year	Type	Amount	Date Charged	TMA section
1999-00	Surcharge	£100.75	18 May 01	59C
1999-00	Surcharge	£100.75	24 Aug 01	59C
2000-01	Fixed Penalty	£100.00	23 Apr 02	93(2)
2000-01	Fixed Penalty	£100.00	02 Aug 02	93(2)
2001-02	Fixed Penalty	£100.00	12 Aug 03	93(2)
2001-02	Fixed Penalty	£100.00	12 Aug 03	93(2)
2003-04	Fixed Penalty	£100.00	15 Feb 05	93(2)
2003-04	Fixed Penalty	£100.00	06 Aug 05	93(2)
2006-07	Fixed Penalty	£100.00	19 Feb 08	93(2)
2006-07	Fixed Penalty	£100.00	05 Aug 08	93(2)
	Amended	£74.30	06 Aug 08	
2000-01	Daily Penalty	£420.00	31 Jan 08	100(1) & 93(3)
2001-02	Daily Penalty	£420.00	31 Jan 08	100(1) & 93(3)
2002-03	Daily Penalty	£420.00	31 Jan 08	100(1) & 93(3)
2003-04	Daily Penalty	£420.00	31 Jan 08	100(1) & 93(3)
2004-05	Daily Penalty	£420.00	31 Jan 08	100(1) & 93(3)

5. Mr Kite also appeals against the tax charged and shown in his self-assessment for the years 1998/99 and 1999/2000.

6. On the basis of the evidence before us we find the background facts to be as follows:

7. Mr Kite worked as a cab driver. At the end of 2000 he became ill and his marriage ended. For the next few years he moved from place to place. He has been under medical supervision for the whole of this period, and has been prescribed medication for his illness.

5 8. In January 2002, Mr Kite registered with HMRC under the Construction Industry Scheme as a self-employed plasterer.

9. He has subsequently worked as an employee with his wages being paid subject to PAYE.

10 10. Mr Kite filed his tax return for the period 1999-2000 on 11 December 2000. But he has not paid his tax for this period. Surcharges for late payment of tax were raised by HMRC as shown in the table above.

15 11. HMRC posted notices to file tax returns for the period 2000-01 on 6 April 2001; for the period 2001-02 on 6 April 2002; and for the period 2003-04 on 6 April 2004 to Mr Kite at the addresses on their records, but no tax returns for these periods have been filed to date. Fixed penalties for failure to file tax returns were raised by HMRC as shown in the table above.

20 12. HMRC posted notices to file a tax return for the periods 2004-05 on 6 April 2005; for the period 2005-06 on 6 April 2006; and for the period 2006-07 on 6 April 2007 to Mr Kite at the address on their records, which were all filed on 16 June 2010. The return for the period 2006-07 includes a self-assessment for £174.30. Fixed penalties for failure to file tax returns on the due date were raised by HMRC as shown in the table above. The penalty for 2006-07 was subsequently reduced, so that the penalty charged for that year did not exceed the tax payable.

25 13. On 21 October 2007, HMRC wrote to Mr Kite reminding him that tax returns were overdue, and that if they were not filed, they would apply to the General Commissioners for a direction allowing daily penalties to be charged. On 7 January 2008, the General Commissioners issued a direction that Mr Kite should be liable for daily penalties under section 93(3) Taxes Management Act 1970 ("TMA") for the periods 2000-01, 2001-02, 2003-04, 2004-05 and 2005-06. On 2 March 2008, HMRC
30 issued penalty notices for £420 for each failure.

Mr Kite's submissions

14. Mr Kite makes the following submissions in his correspondence with HMRC and the Tribunal.

35 15. Mr Kite did not become aware of the outstanding tax returns and penalties until he was contacted by HMRC in 2010. If he had known about them previously, he would have tried to sort them out. As far as he was aware, he was being paid under PAYE and all his tax was paid by his employers, and he was therefore up-to-date. As his employers would have been sending P60s to HMRC, he thought that HMRC

would be aware that he was no longer self-employed and no longer needed to file tax returns.

16. Given the time that has elapsed, Mr Kite believes he has paid the tax due for the periods 1998-99 and 1999-2000, but can no longer prove that he has done so, as he no longer has the relevant paperwork.

17. Mr Kite now earns only £250 per week on average, and cannot afford to pay the amounts outstanding. He wants to pay the tax that is due, but is only able to afford a small amount.

HMRC Submissions

18. HMRC submit that the appeals against surcharges for the year 1999-2000, and against fixed penalties for the years 2000-01, 2001-02 and 2003-04 should be struck out under Rule 8(3)(c) of the Tribunal's Rules, as there is no prospect of the appeal succeeding, or alternatively that the appeal should be dismissed. This is because it is not disputed that the tax for the relevant period has not been paid, or the relevant returns filed – as the case may be. The only grounds therefore on which an appeal can be made is because Mr Kite has a "reasonable excuse" for his default, and that the reasonable excuse exists throughout the "period of default". The period of default only ends on the day before the date on which payment is made (or the relevant return is filed). As payment has not been made, nor the returns filed, the period of default has not yet ended. As the periods of default have not yet ended, it is impossible to determine whether a reasonable excuse can have been in existence throughout the periods of default.. HMRC therefore argue that an appeal against the surcharges and fixed penalties is premature.

19. HMRC go on to submit that even if the appeal is not premature, Mr Kite does not have a reasonable excuse for any of his defaults, or a reasonable excuse that was in existence throughout the periods of default.

20. "Reasonable excuse" is not defined in the legislation, but HMRC submit that it must be something unusual or unexpected and that were unforeseeable and beyond a taxpayers control. HMRC submit that a shortage of funds and reliance upon another person cannot be a reasonable excuse.

21. HMRC acknowledge that Mr Kite has been ill. However they note that has continued to work, and registered as a self-employed plasterer under the Construction Industry Scheme with effect from January 2002. Subsequently he has found work subject to PAYE, and at the time of the appeal was earning £250 per week. HMRC submit that as Mr Kite has not indicated how the illness has affected him, in view of his ability to work, there appears to be no reason why Mr Kite should not also be able to file tax returns. HMRC therefore submit that his illness does not amount to a reasonable excuse for his defaults, and certainly not one that would have continued throughout the period of default.

22. HMRC submit that although Mr Kite's marriage broke down in 2000, it does not appear to have affected his ability to work. It happened a considerable time ago, and there is no evidence of any continuing issues, accordingly this does not amount to a reasonable excuse that was in existence throughout the period of default.

5 23. HMRC note that Mr Kite has moved a number of times since 2002. However they submit that the onus is on Mr Kite to keep them informed of his address and any changes. In fact, they amended his address on their records from information available to them. The last record that they have of mail being returned to them as undelivered was in 2003.

10 24. As regards Mr Kite's ignorance of his defaults, HMRC submit that a proportion of the regular statements of account would have been sent to Mr Kite's then current address and would have been received by him. These would have shown the outstanding penalties as well as the overdue tax. In addition, HMRC have attempted to contact Mr Kite by telephone. Eventually HMRC spoke to Mr Kite on 25 May
15 2010, and since at least that date, Mr Kite has been aware of the outstanding items against which he has appealed.

25. HMRC note that Mr Kite regularly submitted tax returns for many years prior to 2000-01, and registered as a self-employed plasterer with effect from January 2002. At no time has he informed HMRC that his self-employment has ceased. Although he
20 has subsequently moved onto PAYE, there is no reason why he should believe that he no longer needs to file tax returns. The fact that statements and notices were issued to him would have alerted him to this.

26. Since November 2008, HMRC have suspended penalties and surcharges for late payments for taxpayers who have difficulties paying their tax, providing they
25 approach HMRC before the surcharge or penalty arises, and they agree (and keep to) a time-to-pay agreement. No such agreement has been made by Mr Kite, and therefore his inability to pay is not a reasonable excuse.

27. HMRC therefore submit that Mr Kite did not have a reasonable excuse for his defaults, and even if some of his reasons might give rise to a reasonable excuse, they
30 did not exist throughout the period of default.

28. As regards the daily penalties, HMRC submit that these were issued following a direction by the General Commissioners, and that they were correctly calculated and charged. The returns for the first three years still remain outstanding.

29. Finally, although Mr Kite is only under an obligation to keep records for seven
35 years, the outstanding tax returns were issued within that seven year period, and so he should have been able to complete the returns from the records he would have had at that time. As taxpayers are under a legal obligation to complete an income tax return once a Notice to File has been issued, the onus is on taxpayers to keep their records until the return has been filed – even if this extends beyond the seven year statutory
40 retention requirement. All that said, HMRC say that they have tried to help Mr Kite resolve some of the outstanding issues in order to reduce some of his liabilities. They

have tried to telephone Mr Kite on many occasions, but his phone has been switched off. On 7 November 2011, Ms Cook of the Appeals and Reviews Unit wrote to Mr Kite suggesting that he might complete the outstanding returns using his best estimate of income – giving details of employers, wages earned or self-employed income per week, and whether tax was deducted. Mr Ratcliffe wrote to Mr Kite on 12 December 2011 to explain the position again – but to date he has not received any response.

Consideration of issues

30. There is set out in an appendix to this decision extracts from relevant provisions of the Taxes Management Act 1970 ("TMA").

10 *Appeal against assessments for 1998-09 and 1999-2000*

31. Mr Kite appeals against his own self-assessments for 1998-99 and 1999-2000. In his Notice of Appeal he says that he cannot prove whether these have been paid as twelve years have now passed, nor can he tell whether they have been estimated. The amounts of tax for these two tax years are the amounts that would have been included in his tax return for the years in question. As these are figures provided by Mr Kite, they are not appealable. Mr Kite's appeal against these self-assessments is therefore struck-out.

32. As to whether Mr Kite has paid these amounts, that is not a matter in respect of which an appeal can be made.

20 *The law on delivery*

33. Notices and other documents that are required to be served under the Taxes Acts can be sent by post to a taxpayers usual or last known residential address (TMA s 115(2)) 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:

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.

34. We are satisfied on the basis of the evidence before us that Notices to File tax returns were posted to Mr Kite under s8 TMA to his residential addresses last known to HMRC. We are satisfied also that the warning letter of 21 October 2007 relating to daily penalties, and the penalty notices were also posted to Mr Kite at his residential address last known to HMRC. We have had no evidence from Mr Kite which rebuts the presumption that the notices were so delivered, save that he cannot recollect having received them.

35. We therefore find that the Notices to File tax returns, the surcharge and fixed penalty determinations, and both the warning letter relating to daily penalties and the penalty notices were duly delivered to Mr Kite for the purposes of the tax legislation. The onus is on taxpayers to tell HMRC of their current address, and they cannot complain if documents are sent to former addresses, if HMRC has not been notified of their current address.

Surcharges and fixed penalties

36. On the basis of the evidence before us, we find that Mr Kite has not paid the income tax shown as due on his tax return for 1999-2000.

37. It is not disputed that tax returns for 2000-01, 2001-02, 2003-04 and 2006-07 either have not been filed, or were filed after their due date.

38. Accordingly surcharges and fixed penalties are due unless Mr Kite has a reasonable excuse for his default, and that excuse existed throughout the period of his default.

39. HMRC submit that since the "period of default" has not yet ended in respect of the surcharge for 1999-2000, or for the failure to submit returns for 2000-01, 2001-02, and 2003-04, the Tribunal cannot determine whether any excuse given by Mr Kite exists throughout the period of default, and accordingly his appeal must be struck out.

40. In this context we note that appeals against surcharges and fixed penalties must be made within 30 days of the imposition of the surcharge or penalty. Although both HMRC and the Tribunal have powers to extend the time for making an appeal – that power is discretionary. It cannot be right that a taxpayer could be shut out of his right to make any appeal merely because his default (and his excuse for the default) continues beyond 30 days after the imposition of the surcharge or penalty. We therefore have decided that his appeal against these surcharges and penalties should not be struck out.

41. We then have to consider how we construe "period of default" in the context of an appeal that is made before the period of default has finished. In circumstances where a period of default has not reached an end by the time the appeal is heard, we consider that we should consider all the circumstances in existence up until the hearing date (or as near as practicable before that date).

42. "Reasonable excuse" is not defined in the legislation. Although we agree with HMRC that something unusual or unexpected and that was unforeseeable and beyond a taxpayers control is likely to amount to a reasonable excuse, the meaning of the term is not limited to such circumstances. "Reasonable excuse" bears its ordinary and natural meaning.

43. We are not satisfied that Mr Kite's illness or the breakdown of his marriage provides a reasonable excuse for the periods of default. Although these may have caused him difficulties in the past, we have had no evidence that they continued to

prevent him from either paying tax due, or filing returns throughout the relevant periods of default.

44. As regards his frequent changes of address, as we have stated above in relation to the due service of the Notices to File tax returns and the penalty determinations, the onus is on Mr Kite to inform HMRC of his changes of address. Accordingly, his frequent changes of address cannot amount to a reasonable excuse.

45. Nor do we consider that the fact that Mr Kite may have been unaware of the fact that payments and tax returns were outstanding gives rise to a reasonable excuse for his failure to pay tax due. First, we find that Mr Kite was duly served with Notices to File the tax returns, and so would have been on notice to file the returns. He would have received at least some of the HMRC's statements of account, which would have shown the tax and penalties outstanding. HMRC also made telephone contact with him in May 2010, and certainly since that date he was aware of the defaults. We therefore find that he was aware of the defaults since at least May 2010, and that even if lack of knowledge could amount to a reasonable excuse, his lack of knowledge did not exist throughout the period of default.

46. As regards his belief that he did not need to file tax returns since he became paid under PAYE, we find that this can amount to a reasonable excuse in the current circumstances. Mr Kite regularly filed tax returns prior to 2000, and was registered as a self-employed plasterer in January 2002. He has never notified HMRC that his self-employment has ceased. He is aware of the process of preparing and filing tax returns. And was duly served with Notices to File tax returns. Certainly since May 2010 when he was telephoned by HMRC, he would have been aware that the fact that he was now paid under PAYE did not absolve him from filing tax returns. Accordingly we find that his belief did not amount to a reasonable excuse that existed throughout the period of default.

47. We appreciate that given the time that has elapsed, it may be difficult for Mr Kite to now complete the oldest outstanding tax returns. However HMRC have attempted to assist him, suggesting that he should prepare the returns using his best estimates. However Mr Kite has made things difficult for himself by keeping his phone switched off – so that it is difficult for HMRC to contact him - and by not replying to letters. We take account of the fact that Mr Kite is only under an obligation to keep tax records for seven years. However the Notices to File tax returns were issued to him within those seven years, and if he had attended to them promptly, he would have had all the records to hand.

48. We also note that Mr Kite is only earning £250 per week. However the inability of a taxpayer to pay his tax cannot amount to a reasonable excuse (see section 59C(10) TMA). HMRC in their submissions also stated that reliance on third parties cannot amount to a reasonable excuse. In fact there is no suggestion of any such reliance in this case – but we would note that although reliance on third parties is expressly excluded from being a reasonable excuse in relation to VAT, no such restriction exists in relation to income tax.

49. We therefore find that Mr Kite did not have a reasonable excuse for any of his defaults that existed throughout the relevant period of default.

Daily penalties

50. We also find that the fixed penalties and surcharges were correctly calculated.

5 51. Finally, as regards the daily penalties, we find that Mr Kite was given due
warning of HMRC's intention to apply to the General Commissioners for a direction if
he failed to file his tax returns. We find that the General Commissioners duly gave a
direction and that the penalty notice was properly issued on Mr Kite in accordance
with the General Commissioners' directions. We find that the daily penalties were
10 correctly calculated and charged.

Conclusions

52. For the reasons given above, we therefore:

(1) Strike out Mr Kite's appeal against his self-assessment for income tax for
1998-99 and 1999-2000

15 (2) Dismiss Mr Kite's appeal against surcharges, fixed penalties and daily
penalties.

53. We would however make the following comments. Section 102 TMA gives
HMRC discretion to mitigate penalties, and their policy on mitigation is explained in
their Enquiry Manual at paragraph EM5310. In particular the manual explains that
20 HMRC will consider mitigation where there has been "some sort of HMRC
maladministration, usually delay", which has contributed to the size of the penalty.
From the records before us, apart from warning Mr Kite about daily penalties at the
end of 2007 and levying them in early 2008, there was little contact between HMRC
and Mr Kite from mid-2003 until mid-2010, or, it would appear, any attempt by
25 HMRC to make contact with Mr Kite to encourage or help him bring his tax affairs
up-to-date. Although this does not excuse Mr Kite's defaults, it does go some way to
explain them. Of course Mr Kite has not helped himself by not telling HMRC of his
changes or address, and by his apparent refusal to engage with HMRC to clear up his
affairs (for example by not replying to letters and by keeping his phone switched off).

30 54. We would therefore encourage HMRC to treat Mr Kite sympathetically, and
give consideration to mitigating penalties under section 102. Mr Kite should talk to
HMRC about how he might best deal with his outstanding commitments. Mr Kite
might usefully obtain help from the Citizens' Advice Bureaux or from Tax-Aid.

55. This document contains full findings of fact and reasons for the decision. Any
35 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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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 19 October 2012

Taxes Management Act 1970

s8 - Personal return

5 (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—

10 (a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, 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.

[...]

15 s59C - Surcharges on unpaid income tax and capital gains tax

59C (1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

20 (2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.

25 (3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

[...]

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

30 [...]

(9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—

35 (a) if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(b) if it does not so appear, confirm the imposition of the surcharge

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

[...]

(12) In this section—

5 “the due date”, in relation to any tax, means the date on which the tax becomes due and payable;

“the period of default”, in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

10

s93 - Failure to make return for income tax and capital gains tax

(1) This section applies where—

15 (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

(b) he fails to comply with the notice.

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

20 (3) If, on an application made to them by an officer of the Board, the General or Special Commissioners so direct, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).

(4) If—

25 (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,

the taxpayer shall be liable to a further penalty which shall be £100.

30 (5) Without prejudice to any penalties under subsections (2) to (4) above, if—

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and

(b) there would have been a liability to tax shown in the return,

the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.

(6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.

5 (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.

10 (8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the Commissioners may—

(a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or

(b) if it does not so appear to them, confirm the determination.

15 (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.

(10) In this section—

20 “the filing date” means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act

“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.

25 **100 Determination of penalties by officer of Board**

30 (1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

[...]

115 Delivery and service of documents

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

5 (2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners,]1 may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment ...

[...]