TC05668

Appeal number: TC/2016/186 and TC/16/566

ONLINE FILING – corporation tax returns – strike out application –appeal struck out in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADDITIONAL AIDS (MOBILITY) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Fox Court, Brook Street, London on 1 February 2017

There was no appearance by or for the appellant

Mr N Nagle, HMRC presenting officer, for the Respondents

DECISION

1. HMRC applied for the appellant's two appeals to be struck out on the grounds that they did not have a reasonable prospect of success if allowed to proceed to hearing.

Absence of appellant

2. No one attended the hearing on the appellant's behalf. I was satisfied that the appellant was aware of the date, time and location of the hearing as this was notified direct to the appellant and, separately, to the appellant's representative, both on 17 November 2016.

3. While the representative (Mr Bland) later applied for postponement of that hearing, the guidance notes which accompanied the Notices of Hearing stated that parties should assume a hearing will take place, even if they have applied for it to be postponed, unless the Tribunal tells them otherwise.

4. The Tribunal did not notify any party that the hearing was cancelled: on the contrary on 16 January, both Mr Bland and the appellant were notified that the postponement application was refused. The letter made it clear that the hearing previously notified would go ahead on 1 February.

5. Taking all this into account, I am satisfied that the appellant was notified of the hearing.

6. I then considered whether it was in the interests of justice to proceed in the absence of the appellant.

7. While I had no explanation of why a director of the appellant did not attend the hearing, it seemed likely that Mr Bland did not attend it on their behalf because he was on holiday. His holiday was the reason why he had asked for the postponement. The postponement had been refused because the evidence before me was that Mr Bland had booked the holiday after receiving notice of the hearing, so he had known when he booked it that it would mean he could not attend the hearing.

8. In these circumstances, it seemed to me to be in the interests of justice to proceed. The appellant, who must be presumed to know that Mr Bland would not attend on its behalf, nevertheless chose not to appoint a new representative, or attend itself, nor even to make written representations. Mr Bland, knowing the hearing date, nevertheless chose to book a holiday which meant he would be unavailable to attend the hearing.

9. It is a matter of choice whether or not to attend a hearing, but litigants must abide by that choice. Fairness and justice means that parties, including HMRC, are entitled to have a hearing without unnecessary delays. It would be wrong to put off a hearing because one party, knowing the date, then chose to make themselves unavailable to attend. It was in the interests of justice to proceed without the appellant.

The dispute

10. HMRC applied for the appeals to be struck out. Before considering that application I had to decide what was under appeal.

11. Appeal TC/16/186 was stated by Mr Bland to be against three penalties, two for £200 and one for £100. He did not enclose copies of the assessments, as he was required to do, despite being reminded by the Tribunal. Mr Nagle accepted that the appellant had had two penalties imposed of £200 but did not consider that there was a £100 penalty.

12. Appeal TC/16/566 was stated by Mr Bland to be against an assessment of £8,894.50. Again he did not enclose copies of the assessments nor provide them to the Tribunal when asked for them later. HMRC accepted that the appellant had had a determination of £7,000, a penalty of £1000, and a further tax geared penalty of £700, so I accepted that the appeal was intended to be against these. The balance may have been an amount of interest.

13. Therefore, I find that the appeals are against the following matters:

		Tax period	Date of issue	
Penalty	£200	Y/E 23/4/13	5/11/15	
Penalty	£200	Y/E 30/4/13	5/11/15	
Penalty	£100	Y/E 30/4/14	uncertain	
Penalty	£1000	Y/E 30/4/14	25/12/15	
Determination	£7000	Y/E 30/4/15	7/1/16	
Penalty	£700	Y/E 30/4/15	7/1/16	
Interest	Unspecified amount		uncertain	

14. If the appellant intended to appeal anything else, it should lodge an appeal as soon as possible.

The issue before me

15. As I have said, HMRC applied to strike out the appeals on the basis that the appellant had no reasonable prospect of success. The purpose of striking out an appeal is not to deny anyone justice but to administer justice by obviating the need for a defendant (in this case HMRC) to prepare for a full hearing of a case which has no real merit.

16. To succeed in its appeals, the appellant must show that on the facts proved, the law is in its favour. So there are two aspects to an appeal: (a) proving the facts are what the appellant says they are and (b) showing that the law is what the appellant says it is. For HMRC to succeed in its strikeout application, therefore, it only needs to show either that the appellant has no reasonable prospect of either proving the alleged facts or winning on the law.

17. So far as the facts are concerned, strike out applications must not turn into mini-hearings of the evidence, with the judge making findings of fact which should be left to a substantive hearing. Of course, where the appellant advances no facts to support its case then it might well be appropriate to strike out the appeal. But where the appellant does advance a factual case, to succeed in striking out the appeal on the basis that that factual case has no real prospect of success, HMRC would have to show to me that the evidence relied on by the appellant was either internally inconsistent or so improbable that there is no real prospect of success.

18. So far as the law is concerned, while I am not called to decide the points of law, HMRC have to show that, even if the facts are what the appellant alleges them to be, it has no real prospect of succeeding in its case on the law. And that is what HMRC sought to demonstrate in this case.

The factual disputes

19. Very few facts were asserted by the appellant, discernible from the notice of appeal and various letters, so I take much of the below summary from the documents in front of the Tribunal and assume that the appellant's case only differs to the extent that is apparent from what is said in the notice of appeal and the appellant's letters. Nevertheless, as this is only a strike out application, the below are not findings of fact but a statement of background which it does not appear is in dispute.

20. The appellant was incorporated on 24 April 2012, its directors being persons previously trading in partnership under the same or similar name. At some point it notified HMRC that it wished to end its accounting periods on 30 April of each year. On 5 November 2013 it was sent two notices to file, one for the year to 23 April 2013 and one for the six days to the end of the new accounting period of 30 April 2013.

21. On 19 December 2013, the appellant via its agent Mr Bland filed by post a single paper return for the period 24 April 2012 to 30 April 2013. That return would have been on time if it had been filed electronically, and if it had complied with the law which required the return to cover no more than 12 months.

22. Mr Dundas, who was the officer dealing with the appellant's tax affairs, replied by letter of 30 June 2014. In that letter HMRC notified Mr Bland that HMRC were not accepting or processing the return as it was not in electronic format but that HMRC would await the Tribunal decision in a case brought by the appellant's directors and others concerning their VAT returns. In the meantime, Mr Dundas stated no penalties would be imposed for late filing. The writer also commented that the return was invalid due to covering a period six days too long but that HMRC would be prepared to overlook this 'minor technical issue' if the outcome of the tribunal case was that it was lawful for the appellant to file paper returns.

23. In the meantime, on 18 May 2014, HMRC served the appellant with notice to file its return for its accounting period ended 30/4/14. On 6 January 2015, Mr Bland, on behalf of the appellants, filed a paper corporation tax return for that period. Mr Dundas' reply said that HMRC would not process this return and again warned of the

risk of penalties HMRC would impose for the late filing of the CT returns if the appellant's litigation over its VAT returns was unsuccessful.

24. On 22 October 2015 the Tribunal released my decision in *Organ and Bryant t/a Additional Aids (Mobility) and others* [2015] UKFTT 0547 (TC). All the various appeals against the obligation to file tax returns online which were the subject of that hearing were struck out for having no reasonable prospect of success.

25. In accordance with his earlier letters to the appellant, Mr Dundas then proceeded to impose late filing penalties. So in November the 2 penalties for £200 were imposed in respect of the two year end ('Y/E') returns in 2013 and in December 2015 the £1000 penalty was imposed in respect of the Y/E in 2014. I do not know when the £100 penalty was imposed and indeed HMRC's case is that there was no such penalty.

26. The appellant unsuccessfully sought permission to appeal my decision mentioned above, which was finally refused by the Upper Tribunal at an oral hearing and the decision released on 15 April 2016. There has been no challenge to that refusal.

27. On 22 June 2016, two returns were electronically submitted to HMRC for the appellant, one for each of the Y/Es in 2013. HMRC's case is that these were submitted via the Government Gateway by the taxpayer: Mr Bland does not accept this: his version of events appears to be that HMRC finally chose to process the paper return that had been sent to them on 19 December 2013 (see §21) and held by them ever since.

28. Another relevant factual circumstance, and one which does not appear to be in dispute, is that back in 2015, Mr Bland filed a paper CT return for one of his other clients, which I shall refer to as SFC Ltd although that is not its name. This paper return was initially rejected by Mr Naylor, who was the HMRC officer responsible for that taxpayer and who was based in a different area to Mr Dundas. Mr Bland replied to Mr Naylor saying that I had ruled on 30 September 2013 (the *L H Bishop* case [2013] UKFTT 522 (TC)) that it was unlawful for HMRC to compel older persons to file online and as he was 69, he fell into that category. In response, in August 2015, Mr Naylor accepted and processed SFC Ltd's paper return and removed the late filing penalty. A few months later, on 18 December 2016, Mr Dundas reversed the position, rejecting SFC's paper return and reinstating the late filing penalty. He wrote to Mr Bland explaining this and saying that in his opinion Mr Naylor had been misled by an incorrect statement in Mr Bland's letter referred to above.

The law

29. The legislation is contained in Schedule 18 of the Finance Act 1998 ('Sch 18'). Paragraph 3 allows HMRC to issue a notice to file. Where a notice to file is issued, it provides:

> **3(4)** the return must be delivered to the officer of the board by whom the notice was issued not later than the filing date

30. That by itself does not require CT returns to be filed electronically. However, in Finance Act 2002 s 135 Parliament provided as follows:

> **s 135 Mandatory e-filing**
>
> (1) The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") may make regulations requiring the use of electronic communications for the delivery by specified persons of specified information required or authorised to be delivered by or under legislation relating to a taxation matter.
>
> (2) Regulations under this section may make provision -
>
> ...
>
> (e) for treating information as not having been delivered unless conditions imposed by any of the regulations are satisfied;
>
> …..
>
> (7) The power to make provision by regulations under this section includes power –
>
> (a) to provide for a contravention of, or any failure to comply with, the regulations to attract a penalty of a specified amount not exceeding £3,000;
>
> ….

31. The Income and Corporation Taxes (Electronic Communications) (Amendment) Regulations SI 2009/3218 were made under s 135 FA 2002. These Regulations inserted amendments into the Income and Corporation Taxes (Electronic Communications) Regulations 2003. The effect of the amendments was, in summary, to make electronic filing compulsory rather than merely optional as it had been before: prior to the amendments the 2003 Regulations (by Reg 3(1) and 3(1ZA) only permitted electronic communications if the taxpayer consented. After the 2009 amendments, the Regulations then read:

> **3 Use of electronic communications**
>
> (1A) Paragraph (1) does not apply to a company tax return delivered by, or a corporation tax-related payment made by, electronic communications under paragraphs (2A) to (2C).
>
> ....
>
> (2A) Such a person must use electronic communications to deliver a company tax return, and in doing so need only satisfy the second to fourth of those conditions.
>
> This paragraph only applies to a company tax return delivered on 1 April 2011 or later, relating to a return period ending on 1 April 2010 or later.
>
> It does not apply to an amendment to such a company tax return.
>
> .....

> (9) The consequences of contravening or failing to comply with paragraph (2A) (company tax returns) are—
>
> .....
>
> (b)the Board must disregard the return and treat it as not having been delivered.

32. In effect, this required corporate taxpayers to file electronically on or after 1 April 2011. While paragraph 3(2A) referred to 'such a person' this was a reference to the use of the phrase 'a person other than the Board' in the previous paragraph. While there were exemptions for certain religious beliefs and insolvent companies, the appellant does not suggest that any of these exemptions applied to it.

33. The appellant relies on my decision in *L H Bishop* (above) which decided that it was an unlawful breach of human rights to compel elderly and disabled taxpayers to file online. My decision that there was no reasonable prospect of success in a case that it was breach of the taxpayer's or agent's human rights in compelling all agents, even elderly agents, to file online in *Organ and Bryant T/A Additional Aids and others* is rejected by the appellant, even though permission to appeal it has been finally refused, as set out above at §26.

Jurisdiction to hear matters appealed

34. The appellant appears to wish to appeal against an assessment of interest and a tax determination which HMRC say the Tribunal has no jurisdiction to hear. But HMRC's strike out application was made on the basis the appellant's various appeals would have no prospect of success, and not on the basis that there was no jurisdiction to hear them. While it is true that to the extent the Tribunal has no jurisdiction to hear some or all of appeals, those appeals can have no prospect of success, it is also axiomatic that the appellant must have the opportunity to respond to HMRC's case on this. I find that the question of jurisdiction was first raised by HMRC in their skeleton argument served about a week before the hearing. Even putting aside the knowledge that Mr Bland is on holiday, I am concerned whether the appellant has therefore had time to consider this matter.

35. For this reason, I will not at the present time strike out the appeals in so far as there are concerns about jurisdiction but will give the appellant time to respond. On the other hand, it would be wrong to leave the issue of jurisdiction outstanding until the substantive hearing as the parties need to know in advance whether the determination is a live issue on which evidence should be brought.

36. So I will issue directions to resolve this legal matter on the papers before the substantive hearing.

Penalty assessments

37. There is a clear right of appeal against all penalty assessments and the Tribunal has jurisdiction to hear all of them, so I will go on below to decide the extent to which

the appellant's grounds of appeal have any prospect of success. So far as I can make out, the appellant's grounds of appeal are as follows:

> (a) HMRC did receive the corporation tax returns on time as they were lawfully filed by paper before the due dates;
>
> (b) HMRC have accepted the paper CT returns because they have held on to them and not returned them to the appellant;
>
> (c) HMRC are bound to accept paper CT returns from the appellant because they accepted CT returns from another taxpayer;
>
> (d) HMRC are bound to treat the paper 2013 Y/E returns as filed on time as ultimately HMRC accepted them and similarly are bound to treat the 2014 Y/E return as timeous because HMRC accepted the paper 2013 Y/E returns.
>
> (e) Even if none of the above are correct in law, any or all of them amount to a reasonable excuse as the appellant or the appellant's agent thought they applied.

(a) HMRC did receive the corporation tax returns on time?

38. There is no relevant factual dispute on this ground of appeal: the appellant maintains and HMRC accept that paper CT returns were filed before the due dates. While HMRC maintain that the first paper return was technically flawed as it covered too long a period, it is clear that HMRC do not wish to stand on this ground of defence.

39. The issue between the parties is the law. the appellant does not accept that its paper returns were invalid. Have HMRC shown that the appellant's legal case on this does not have a reasonable prospect of success?

40. The statute law, as set out above at §§29-32, is clearly against the appellant's position. It was obliged to file its tax returns for years ended in 2013 and 2014 electronically. Nevertheless, as I have said, Mr Bland's case appears to be that the appellant can rely on my decision in *L H Bishop,* although of course he rejects my decision in *Organ and Bryant t/a Additional Aids (Mobility) and others.*

41. He has not raised any arguments other than those considered in *Organ and Bryant*, and I am not persuaded that anything I said in that decision was wrong. Moreover, it seems to me as applicable to corporation tax returns as to VAT returns (although the legislation is slightly different). But for the reasons given there and in particular at [25-31] I consider that the appellant's case, that the legal requirement for its agent to file online is unlawful, is hopeless:

> Do the appellants have a reasonable prospect of establishing they were not liable to file online?
>
> 25. As I have said, Mr Bland appeared to put the case that it was unlawful for HMRC to require the various appellants to file online at

all. Mr Bland relies on my decision in L H Bishop where I did indeed decide (for complex reasons given at some length) that the VAT regulations requiring online filing were unlawful under the European Convention on Human Rights where the taxpayers were elderly and/or disabled and/or in a remote location, such that they were unable to file online.

26. The entire tenor of Mr Bland's submissions in this hearing was that it was not fair to him to require his clients to file online, because he was elderly (aged 69 at present), he did not own a computer and (it appears) did not know how to use one, and so he would lose business because his clients might instead instruct someone who could comply with the law on their behalf. In other words, Mr Bland's real complaint (albeit made in an appeal against the various appellants' liability to penalties) was that it was a breach of his human rights to require his clients to file online.

27. I do not consider that such a claim could succeed. While Mr Bland is truly, and understandably, aggrieved by the threat the obligation on his clients to file online poses to his ability to carry on in his business, there is no human right to carry on a business (R (Countryside Alliance)[2007] UKHL 52 eg at §§14-15). The reality is that it would cost him money, and presumably make his business less profitable, if he either has to buy a computer or sub-contract the online filing to another person. While there is a human right to non-interference with property, the obligation on their clients to file online affects all agents equally. Therefore the obligation to file online, which as explained in L H Bishop has the objective of saving the Government money, would appear justified and well within the UK's margin of appreciation. Mr Bland might claim indirect discrimination on the basis the rules makes no exception for agents unable to file online due to age and computer illiteracy, but again it appears that such indirect discrimination is justified. Indeed if an exception were made for taxpayers who wished to instruct agents who were elderly and did not use a computer, any taxpayer could avoid the liability to file online by instructing such an agent. Such an exception could not in my view be justified: certainly its absence is justified.

28. Moreover, in L H Bishop, while I did not find the failure to exempt taxpayers who were elderly, disabled, computer illiterate and/or living remotely to be justified that was in the special circumstances that (a) the government had made it a universal requirement for all taxpayers and (b) the government had recognised that elderly and disabled persons should have an exemption by giving them a concession (albeit unlawful and unpublished). In the case of agents there are no exceptions and no concessions. The failure to make an exception for elderly agents is, I consider, well within the margin of appreciation for the UK.

29. For these reasons, I do not believe that Mr Bland has a case under the Human Rights Act or European Convention on Human Rights nor under the EU law on proportionality (which applies to VAT returns if not the CT and PAYE returns). But in any event, this is an appeal against the appellants' liability to penalties and not the forum in

> which Mr Bland can complain of any breach of his rights. If he wants to do that he needs to take a case personally, perhaps in the European Court of Human Rights, although, as I have said, I do not think such a case could possibly succeed.
>
> 30. Nor do I consider that the appellants can rely on an alleged breach of Mr Bland's rights as a defence to their liability to the penalties. Firstly, as I have said, I do not consider that Mr Bland has any rights which have been breached by the requirement for his clients. In any event, to rely on human rights they would have to prove a breach of their own rights and claim 'victim' status: those without victim status cannot rely on the rights of others. Nor do I consider it to be a reasonable excuse to rely on a breach of the rights of others.
>
> 31. In conclusion, I do not consider that the appellants' appeals have a reasonable prospect of success in claiming that they should not have been required to file online because they employ an elderly agent to file online on their behalf.

42. The Upper Tribunal refused leave to appeal that decision. In conclusion, the appellant's case that HMRC received the 3 returns at issue on time because it was unlawful for HMRC to refuse paper returns filed by an elderly agent is without a reasonable prospect of success. It is without a reasonable prospect of success as only paper returns were submitted on time, and the regulations lawfully required the returns to be filed by any agent electronically.

HMRC are holding the returns and refusing to process them?

43. Again there is no dispute on the facts here: HMRC accept that they retained the paper returns and did not send them back to Mr Bland. The issue between the parties is only one of law: does the holding of the returns amount to a waiver by HMRC of the law requiring them to be filed online?

44. Mr Bland's claim is that the retention by HMRC of the paper returns should be treated as HMRC having accepted them. However, as cited above at §31, paragraph 3(9)(b) of the Regulations provide that HMRC must 'disregard' paper returns and treat them as not delivered. So the receipt of paper returns is not acceptance of them. Nor is the continued holding of papers sent to them amount to acceptance of them.

45. I note that as a matter of practical reality it makes sense for HMRC to hold the paper returns which they have rejected, because if they were to send them back, the taxpayer might send them back again, and so on ad infinitum.

46. I note that paragraph 3(9)(a) (not cited) does permit HMRC to accept paper returns but only where either the failure to delivery online does not undermine the requirement to deliver online, or where the taxpayer made genuine efforts to file online by the due date. Neither exception could apply in this case, where there is no suggestion that the appellant attempted to file online on or before the due date, and as its failure to file online is because it doesn't believe it should be required to do so, its failure does undermine that requirement.

47. I find that the appellant has no real prospect of success in its case that the retention of the paper returns by HMRC amounts to acceptance of them at any point.

HMRC accepted paper returns by another taxpayer?

48. So far as I understand it, the appellant's case here is that all taxpayers should be treated alike and as one HMRC officer accepted a paper tax return from another taxpayer who was, like the appellant, liable to file online under the regulations, HMRC should accept paper tax returns from all taxpayers.

49. This is a case that must be made out on the law and on the facts and, as I have said, HMRC only needs to show that one of the two elements has no reasonable prospect of success.

50. So far as the facts are concerned, I have set out the documentary evidence in front of me, relating to SFC Ltd, the veracity of which does not appear to be in dispute. On the basis of the documents in front of me, I do not think that the appellant has a reasonable prospect of success of making out a case on the facts that HMRC treated SFC Ltd more favourably than the appellant: while HMRC at one point did accept a paper return, it later rejected it and reimposed the penalties.

51. Even if the appellant could make out its factual case that another taxpayer was treated more favourably than itself, it would need to make out a legal case that could succeed in this Tribunal. And, as a matter of law, while HMRC does have the power to relieve taxpayers from liabilities imposed on them by legislation, such as the obligation to file online, its discretion must be exercised in a lawful manner and it would normally be unlawful to discriminate between taxpayers without good reason.

52. But the forum for complaining that HMRC, or any public body, has acted unlawfully in its exercise of its public powers and duties is the Administrative Division of the High Court in an action for judicial review. It is very well established that this Tribunal, as a statutory body, has no jurisdiction to conduct judicial reviews and no jurisdiction to consider whether HMRC should have relieved a taxpayer of liability: see the recent statements of this in *Hok Ltd* [2012] UKUT 363 (TCC) and *BT Pension Trustees* [2015] EWCA 713 (Civ) both of which decisions are binding on this Tribunal.

53. I am satisfied that the appellant has no reasonable prospect of success in its case in this Tribunal that HMRC acted unlawfully in penalising it for breach of the obligation to file online (I also very much doubt for the reasons given above in §62 that such a case would succeed on the facts before the High Court either).

HMRC accepted paper returns by this taxpayer?

54. The appellant relies on the fact that (it says) HMRC accepted paper returns for the appellant. It does not explain its case any further than that so I am left to speculate to what extent that could be a ground of appeal.

55. As before, to strike out such a case HMRC must show either that it has no reasonable prospects of success on the facts, or on the law, or both.

56. I will deal with the legal case first, which is a little more complex than with the allegations arising out of the alleged acceptance of SFC Ltd's returns.

57. Unlawful to discriminate? In so far as the appellant's legal case is the same as I have presumed it to be in respect of HMRC's alleged acceptance of SFC Ltd's paper returns, I am satisfied for the reasons given above at §64 that this has no prospect of success. It is not within the Tribunal's jurisdiction.

58. Legitimate expectations? In so far as it is the appellant's legal case that HMRC's alleged acceptance of its Y/E 2013 paper returns gave it an expectation that HMRC would accept paper returns for subsequent years, then such a case fails because the Y/E 2014 return was due in 2015 whereas the Y/E 2013 returns were not accepted by HMRC until mid-2016. No expectations could have existed at the time the Y/E 2014 return was due to be filed. Legally, it is also clear that the Tribunal has no jurisdiction to consider legitimate expectations in any event: *B T Pensions* (cited above). Such a case, therefore, has no reasonable prospect of success.

59. Returns not late? In so far as it is its case that its Y/E 2013 returns were not late because HMRC (allegedly) ultimately accepted them, then I am not so sure that such a case would be without a prospect of success if it could be proved factually. As a matter of law, while Reg 3(9)(b) provides that HMRC 'must' disregard paper returns, if HMRC ultimately chose to accept paper returns, it seems arguable that such returns would not be late if delivered before the due date (as they were). I would not strike out this ground of appeal as being without a prospect of success on the law.

60. So I turn to whether the appellant has a reasonable prospect of making out its factual case on this. As recorded at §27, the appellant appears to assert a factual case and I do not consider it either internally inconsistent or improbable. There is simply a complete disagreement between the appellant and HMRC on the facts which can only be resolved with evidence. This must be left for trial.

61. So this ground of defence is not struck out.

62. Reasonable excuse: There is a defence to late filing of reasonable excuse as set out in s 118 Taxes Management Act 1970 ('TMA') as follows:

> ....where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased....

63. It is well-established and clear from the wording of this provision that the Tribunal must consider whether there was a reasonable excuse for the entire time that the taxpayer failed to do what was required of him to be done. It is not enough to show a reasonable excuse as at the due date. The section only operates to negate

liability if the taxpayer complied with his obligation without unreasonable delay after the excuse ceased. It is also established that the 'reasonable excuse' must be the cause of the failure to comply and that to be 'reasonable' the taxpayer must show that in failing to comply he was acting as a reasonable taxpayer, mindful of his obligation to comply with his tax obligations, could have acted in the same circumstances.

64. This defence turns on the factual reasons why the appellant did not file online, including why (says HMRC) it ultimately did file its 2013 returns online, so I will not strike this part of the appeal out either, but leave it for the appellant to seek to prove its case factually.

Conclusion

Matters struck out:

(1) The grounds of appeal as follows:

(a) The case that HMRC did receive the corporation tax returns on time as they were lawfully filed by paper before the due dates;

(b) The case that HMRC have accepted the paper CT returns because they have held on to them and not returned them to the appellant;

(c) HMRC are bound to accept paper CT returns from the appellant because they accepted CT returns from another taxpayer;

Matters not struck out

(1) The appeal against interest (save on the grounds set out above)

(2) The appeal against the determination for £7,000 (save on the grounds set out above);

(3) The grounds of appeal as follows:

(d) HMRC are bound to treat the paper 2013 Y/E returns as filed on time as ultimately HMRC accepted them and similarly are bound to treat the 2014 Y/E return as timeous because HMRC accepted the paper 2013 Y/E returns.

(e) Reasonable excuse (this only applies to the penalty appeals).

65. So the appeal is not entirely struck out but there are caveats to this:

Evidence

66. The appeal against the penalties is continuing on only two grounds both of which will require evidence from the appellant itself as to:

(a) Whether or not it electronically filed its Y/E 2013 returns;

(b) Why it has failed to file its returns electronically (relevant to reasonable excuse).

67. A further hearing on this will be pointless unless evidence is advanced by the appellant and so I will issue directions that will require the appellant to state in advance what its evidence will be.

The £100 penalty

68. There is one further caveat that relates to the £100 penalty. At the hearing Mr Nagle did not consider that a £100 penalty had been levied and was inclined to think that the Notice of Appeal which referred to the £100 penalty was a typographical mistake for £1000, a penalty which has been levied and which is under appeal.

69. However, it seems to me that a £100 penalty may have been issued under paragraph 17(2)(a) and then increased under paragraph 17(3) to the £1000 penalty when the return was not delivered within 3 months of the filing date. So it seems that the £100 may have existed but been superseded.

70. So either way it seems questionable whether there is an extant £100 penalty: I will issue directions that if the appellant intends to continue with the appeal against it, it produce a copy of the penalty notice or such other evidence of its existence that it is able to obtain. In any event, in so far as there is an appeal against the £100 the grounds of appeal struck out as set out above apply as much to the £100 penalty as to the other penalties.

71. 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.

Barbara Mosedale
TRIBUNAL JUDGE
RELEASE DATE: 15 FEBRUARY 2017

DIRECTIONS

Jurisdiction

1. Not later than 10 March 2017 the appellant and HMRC are at liberty to make representations on why it considers the Tribunal has (or does not have) jurisdiction to consider the appellant's appeal against:

(1) An interest assessment

(2) The determination of tax for £7,000.

2. So far as the determination is concerned, the parties may make what representations they see fit but it would be helpful if they could refer to:

(a) Paragraph 48 of Sch 18 Finance Act 1998 which provides:

An appeal may be brought against any assessment to tax on a company which is not a self-assessment.

(b) Paragraph 97 of Sch 18 Finance Act 1998 which states as follows:

***97** any reference in the Tax Acts (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, include a reference to his being so assessed, or being so charged –*

(a)by a self assessment under this Schedule, or an amendment of such a self-assessment, or

(b)by a determination under paragraph 36 or 37 of this Schedule (which, until superseded by a self-assessment, has effect as if it were one)

(c) The Upper Tribunal decision in *Bertram* [2012] UKUT 184 (TCC) which decided that there was no right of appeal against a determination issued to a natural person who should have made a self-assessment under the Taxes Management Act 1970.

The £100 penalty

3. Not later than 10 March 2017, if the appellant intends to continue with the appeal against the alleged £100 penalty, it should produce a copy of the penalty notice or such other evidence of its existence that it is able to obtain.

Evidence

4. Not later than 10 March 2017, if the appellant intends to maintain its case that it did not electronically file its two Y/E 2013 returns, it should send to HMRC and the

Tribunal a short witness statement from the director(s) setting out what their evidence on this will be.

5. Not later than 10 March 2017, if the appellant intends to maintain its case that it has a reasonable excuse for not filing its various returns electronically before the due date, it should send to HMRC and the Tribunal a short witness statement from the director(s) setting out what their evidence on this will be.