



TC06238

Appeal number: TC/2016/04749

INCOME TAX – failure to file returns by due date – Schedule 55 FA 2009 – whether penalties validly assessed – held notice to file not proved to have been given to appellant, so no penalties due – whether failure to notify - penalties cancelled.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FIONA JOHNSTON

Appellants

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 16 November 2017 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 4 September 2016 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 30 August 2017.

DECISION

1. This was an appeal by Mrs Fiona Johnston (“the appellant”) against penalties
5 assessed by the respondents (“HMRC”) under Schedule 55 Finance Act (“FA”) 2009
for her failure to file her returns for the tax years 2012-13, 2013-14 and 2014-15 on
time. I have found that HMRC have not shown that she received the notice to file for
those years and I have cancelled the penalties.

Facts

10 ***Background***

2. The matters set out below in §§3 to 9 are taken from the appellant’s notice of
appeal and other correspondence. HMRC have not suggested that they are not true
and I find them as fact.

3. In July 2011 the appellant emigrated to Australia with her husband. At the time
15 she was not within self-assessment.

4. The appellant and her husband jointly own a house in the UK which they rent
out. The lease and mortgage are in joint names.

5. From July 2011 to November 2012 the appellant and her husband lived in
rented accommodation (“the old address”), before moving to their present address in
20 Wandana Heights, Victoria.

6. In 2012 the appellant filed a tax return on line (presumably that for 2011-12)
having phoned HMRC to enquire about her obligations.

7. In May 2013 her husband received a notice to file for 2012-13 which had been
redirected to their new address in Wandana Heights.

25 8. The appellant’s husband completed the return and on it informed HMRC of the
change of address and that the property from which rents were received was in joint
names.

9. No UK tax is due on the rents.

2012-13

30 10. The appellant was issued with a notice to file an income tax return for the tax
year 2012-13 on 6 April 2013. That notice required the appellant to deliver the return
by 31 October 2013 if filed in paper form or by 31 January 2014 if filed electronically
 (“the due date”).

35 11. On 18 February 2014 HMRC issued a notice informing the appellant that a
penalty of £100 had been assessed for failure to file the return by the due date.

12. On 18 August 2014 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

5 13. Also on 18 August 2014 HMRC in the same notice informed the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

14. On 24 February 2015 HMRC issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 12 months after the due date.

10 15. The return was filed electronically on 3 July 2016.

2013-14

15 16. The appellant was issued with a notice to file an income tax return for the tax year 2013-14 on 6 April 2014. That notice required the appellant to deliver the return by 31 October 2014 if filed in paper form or by 31 January 2015 if filed electronically.

17. On 18 February 2015 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

20 18. On 14 August 2015 HMRC issued a notice informing the appellant that a penalty of £900 had been assessed for failure to file the return by a date 3 months after the due date.

19. Also on 14 August 2015 HMRC in the same notice informed the appellant the appellant that a penalty of £300 had been assessed for failure to file the return by a date 6 months after the due date.

25 20. On 23 February 2016 HMRC issued a notice informing the appellant that a penalty of £300 had been assessed for failure to file the return by a date 12 months after the due date.

21. The return was filed electronically on 3 July 2016.

2014-15

30 22. The appellant was issued with a notice to file an income tax return for the tax year 2014-15 on 6 April 2015. That notice required the appellant to deliver the return by 31 October 2015 if filed in paper form or by 31 January 2016 if filed electronically.

23. On 17 February 2016 HMRC issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date.

35 24. On 5 July 2016 HMRC issued a notice informing the appellant that a penalty of £640 had been assessed for failure to file the return by a date 3 months after the due date.

25. The return was filed electronically on 3 July 2016.

The appeals

26. On 3 July 2016 the appellant appealed to HMRC against all penalties.

27. On 9 August 2016 HMRC wrote three letters, one for each tax year, informing the appellant that the deadline had passed for appealing. As HMRC have only included the first page of each letter I cannot tell if they informed the appellant of her right to seek the permission of the Tribunal to make a late appeal to HMRC.

28. But it seems that they did, because the appellant notified her appeals to the Tribunal on 4 September 2016.

The law in brief

29. The law imposing these penalties is in Schedule 55 Finance Act 2009 (“Schedule 55”) and in particular paragraph 3 (initial penalty of £100), paragraph 4 (daily penalties) and paragraphs 5 and 6 (fixed or tax geared penalty after 6 and 12 months respectively). The penalties may only be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date, or if HMRC’s decision as to whether there are special circumstances was flawed.

The appeals

30. The position is that the appeals against all penalties except the daily penalties in 2014-15 were given late to HMRC. The appellant has notified the appeals to the Tribunal clearly under the understandable misapprehension that this is what HMRC advised her she could do. In fact what she has to do is to seek the Tribunal’s permission to give the appeals late to HMRC. HMRC does not object to the application for that so I give permission for the appeals to be given to HMRC late.

31. Because HMRC have prepared their case against all the appeals including the daily penalties for 2014-15 which were assessed after the appeals had been made to HMRC I accept that I have jurisdiction to decide them all, and waive any formalities necessary to achieve that.

Grounds of appeal and HMRC’s response

32. The grounds of appeal are:

(1) Between May 2012 and July 2016 the appellant received no notifications of any sort from HMRC, whether by post or email.

(2) Nothing was forwarded from the old address until July 2016 when a reminder was passed to her by the then occupier of that address.

(3) She assumed that because her husband had notified his change of address and that the property was jointly owned she thought that she did not need to file a return.

33. HMRC say in response that:

- (1) The onus is the appellant to notify chargeability.
- (2) Because the appellant's husband was notifying (ie returning to) HMRC his share of the rents, the appellant would be expected to be aware of her own obligations.
- 5 (3) A notice to file a 2011-12 return was issued to the appellant. She telephoned HMRC on 31 August 2012 to ask if she needed to complete a return and which HMRC confirmed, and she filed the return electronically on 10 October 2012.
- (4) The appellant did not contact HMRC again until 30 June 2016.
- 10 (5) HMRC have issued numerous penalty reminders and statements of account to the appellant.

Discussion

Burden of proof and the issues

34. HMRC's 15 page Statement of Case does not explicitly refer to the burden of
15 proof. The nearest I can find is a statement that HMRC's submission is:

“HMRC request that the Tribunal find that the late filing penalties charged are in accordance with legislation and there is no reasonable excuse for [the appellant's] failure to file her tax returns on time.”

35. HMRC have the burden of proving that the penalty assessment meets all the
20 requirements of Schedule 55.

36. If the assessment does meet the requirements of Schedule 55 it is for the
appellant to show that she had a reasonable excuse for her failure. The evidence she
puts forward as constituting her reasonable excuse may then put an evidential burden
on HMRC to rebut it, as of course may any grounds she puts forward for saying that
25 the assessments are not valid, as she has done in this case.

37. HMRC in this case say they have considered whether there are special
circumstances but have found none. I can consider whether this decision was flawed
in the judicial review sense, and if so what are the consequences.

Was the notice to file received by the appellant?

30 38. The first issue here is whether the appellant was given, ie served with, a notice
to file a return for the three tax years in question. Her evidence is that she did not
receive any such notices at the Wandana Heights address.

39. HMRC have not supplied, as they often do when this ground of appeal is raised,
a printout of the address record they undoubtedly have for the appellant. They have
35 supplied SA Notes as they always do, but with the exception of the note of the
matters mentioned in §33(3) they have redacted the rest, for a reason which escapes
me.

40. The printout of the computer records which I do have show a notice to file as having been issued for each of the years, but that does not give an address or constitute evidence of receipt by the appellant.

41. Nor do HMRC refer, as they often do in this sort of case, to s 115 TMA or s 7 Interpretation Act 1978 (“IA78”). Even if they had I do not think that it would not have helped them. Section 7 IA78 deems service if a notice is, among other things, “properly addressed”, and s 115 TMA shows that this can be the case if the notice is sent to the person at their “last known place of residence”.

42. As I have noted, HMRC did not send a copy of their address records from the computer so I do not know what that “last known address” was at the time the notices to file were sent.

43. It seems from evidence not emanating from HMRC that the notices were sent to the old address in Australia, because the occupiers of that property handed the appellant a reminder notice in 2016. But the appellant’s husband had informed HMRC of their change of address in 2013. There is therefore proof to the contrary, paraphrasing words in the second part of s 7 IA78.

44. I therefore hold that the notices were not “properly addressed” and are not deemed by s 7 IA78 to be served on the appellant.

45. On that basis the appellant’s appeals succeed because she had not failed to file a return under s 8 TMA at all, ie one for which she was given a notice to file.

Did she fail to notify chargeability, and if she did, so what?

46. HMRC suggest that she should have notified her chargeability to UK income tax and did not. That is an odd suggestion and a two-edged sword, as a person who has received a notice to file a return is under no obligation to notify chargeability, yet it is HMRC’s case that the appellant *did* receive a notice. It also seems to me that if the appellant was not liable to tax as she says, s 7(7) TMA 1970 means that no notification is required.

47. In case HMRC think that they could now impose penalties under Schedule 41 FA 2008 instead, I remind them that there is no potential lost revenue so no penalty can be charged, or if it can it cannot exceed £0, and what is more they are out of time to assess a penalty under paragraph 1 Schedule 41 FA 2008.

Reasonable excuse or special circumstances?

48. I do not therefore need to consider whether the appellant would have had a reasonable excuse for the failure to file the returns by the due date.

49. Nor do I need to consider the question whether there were special circumstances, if HMRC’s decision on this aspect was flawed.

Beware the elephant trap

50. I should mention to the appellant and her husband that they should be aware that if they sell or otherwise dispose of their house in the UK they will need to make a non-resident CGT return within **30 days** of the date of completion **and** to put any gain and tax on their tax return and self-assessment. For a salutary tale of what might happen if they did not know this they may care to read my decision in the case of *Rachel McGreevy v The Commissioners for Her Majesty's Revenue and Customs* which they can find at <http://www.bailii.org/uk/cases/UKFTT/TC/2017/TC06109.pdf>.

Decision

51. Under paragraph 22(1) Schedule 55 FA 2009 I cancel HMRC's decision to assess penalties under paragraphs 3, 4, 5 and 6 Schedule 55 FA 2009 for the tax years 2012-13, 2013-14 and 2014-15.

52. 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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**RICHARD THOMAS
TRIBUNAL JUDGE**

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RELEASE DATE: 23 NOVEMBER 2017