



TC07061

Appeal number: TC/2018/01694

INCOME TAX – Schedule 36 penalty – Schedule 36 Notice issued to the Appellant with a deadline of 29 September 2016 – dispute over whether the Appellant sent material to HMRC on 30 November 2016 – HMRC issued £300 penalty to the Appellant on 19 January 2017 for non-compliance with the Notice – whether 30 November material met requirements of Notice – no – whether legislative requirements for penalty met – yes – whether Appellant had a reasonable excuse for his non-compliance – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BENJAMIN SURTEES

Appellant

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

The Tribunal determined the appeal on 4 February 2019 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, having first read the Notice of Appeal dated 2 March 2018 (with enclosures), the Tribunal Directions issued on 6 August 2018, HMRC's submissions of 28 August 2018, the Appellant's submissions dated 24 September 2018, with Bundle, and HMRC's Documents and Authorities Bundle.

DECISION

Introduction

1. This appeal was made against a review decision dated 31 January 2018 upholding the imposition of penalties issued on 19 January, 20 February and 31 March 2017 for the Appellant's failure to comply with two Notices, issued on 25 August and 23 December 2016, under Schedule 36 of Finance Act 2008.
2. During the course of these proceedings, HMRC conceded the appeal against the penalties issued on 20 February and 31 March 2017. Therefore, the only penalty remaining in dispute is the penalty (of £300) issued on 19 January 2017.

History of this appeal

3. On 17 March 2018, the Tribunal acknowledged the appeal and asked the Appellant to authorise his agent if he wished the Tribunal to correspond with that agent directly. The Tribunal assigned this appeal to the Basic category, which meant that the appeal would proceed straight to a hearing without HMRC filing a Statement of Case, and notified the parties accordingly.
4. On 11 April 2018, HMRC wrote to the Tribunal conceding the appeal against the Notice issued on 23 December 2016 and the penalties issued for failure to comply with that Notice. HMRC stated their intention to defend the Notice issued on 25 August 2016 and the penalty issued on 19 January 2017.
5. On 18 May 2018, the Tribunal listed this appeal for hearing on 27 July 2018 before the Tribunal (Judge Sarah Allatt and Mr Nicholas Dee). Following the hearing, on 6 August 2018, Directions were issued to the parties. Direction 1 required the Appellant to provide HMRC with a copy of the letter and attachments which were said to have been sent to HMRC on 30 October 2017 (though this seems to be a typographical error and should read 30 November 2016.) Direction 2 of the Directions required HMRC to consider whether they still wished to pursue the penalty for non-compliance. Directions 3 and 4 enabled the parties to make written submissions about the penalty, and Direction 5 provided that in the absence of a request for an oral hearing, the Tribunal would determine this appeal against the penalty of £300 on the papers.
6. On 28 August 2018, HMRC informed the Tribunal that they had considered the letter and attachments said to have been sent on 30 November 2017 (also referred to as having been sent on 30 November 2016). HMRC confirmed their continued desire to defend the penalty imposed. In their written submissions, HMRC referred to certain documents in HMRC's Documents and Authorities Bundle, prepared for the hearing on 27 July 2018. No copy of this bundle was forwarded with HMRC's submissions (presumably on the basis that the original bundle had been retained by the original Tribunal panel and the misapprehension that Judge Allatt would determine the paper hearing). On 12 December 2018, the Tribunal requested HMRC

to provide a further copy of this bundle so that I could be provided with a copy. This further copy of HMRC's bundle was provided to the Tribunal on 17 December 2018.

7. Unfortunately, the Tribunal erroneously made a further request of HMRC on 2 January 2019, on the mistaken impression that no bundle had been provided. On 4 January 2019, the Appellant objected to what he described as HMRC being given an extension of time to provide their bundle, and asked that HMRC's application be dismissed. On 7 January 2019, HMRC explained that the bundle had already been provided.

8. For the avoidance of doubt, I am satisfied that the duplicate bundle was provided by HMRC in response to the Tribunal's request of 12 December 2018, and so an extension of time was neither requested nor required.

The Appellant's closure notice application

9. The Appellant concluded his letter of 2 January 2019:

... I believe that it is reasonable for the Tribunal to require HMRC to issue a closure notice with immediate effect and I invite them to do so.

10. The Tribunal will treat this as an application to the Tribunal for a closure notice and this application will be processed separately from the present appeal.

HMRC's submissions of 28 August 2018

11. It is unclear whether HMRC still maintain that the letter of 30 November 2016 was not sent. It is clear that HMRC do not accept that the letter of 30 November 2016 meets the requirements of the Notice dated 25 August 2016.

12. HMRC's case is put in two ways: firstly, that the Notice of 25 August 2016 required items to be provided by 29 September 2016, and so any response sent on 30 November 2016 must be a failure to comply; secondly, even if it had been received, the documents enclosed with the letter of 30 November 2016 do not meet the requirements of the 25 August 2016 Notice.

13. Although prior to the hearing on 27 July 2018, HMRC's case was that neither of items 10 nor 11 on the Notice of 25 August 2016 had been provided, in their August 2018 written submissions, HMRC refer only to the Appellant's failure to provide item 10 on the Notice dated 25 August 2016: bank statements for the period 6 April 2013 to 5 April 2014.

14. Item 11 on the 25 August 2016 referred to the provision of accounts created for the Appellant's period of self employment. In his skeleton argument for the hearing on 27 July 2018, the Appellant submitted that no accounts were created for his self employment. The Appellant's submission was that there was no requirement to create accounts and the Appellant's advisors had used a simplified form of reporting. Given the absence of a reference to item 11 in HMRC's 28 August 2018 submissions, I assume that the parties are no longer in dispute with regard to item 11.

The Appellant's submissions

15. On 24 September 2018, the Appellant sent his submissions to the Tribunal with a supporting bundle of documents. The Appellant's submission is that the documents required in the 25 August 2016 notice were supplied, and in particular were supplied under cover of a letter dated 30 November 2016.

16. The Appellant also relies on the recent Tribunal decision in *Expion Silverstone Limited* [2018] UKFTT 0460, a decision of Judge Popplewell to the effect that penalties issued under the provisions of Section 100 Taxes Management Act 1970 must be issued by an officer. The Appellant argues that the penalty under appeal here cannot have been issued after the review of a real officer as no officer reviewed the information contained in the Appellant's letter of 30 November 2016.

17. The Appellant also submitted a lengthy analysis of the material sought, and argued that the bank statements sought had changed over time.

My decision

18. I remind myself that the appeal is against the imposition of a penalty dated 19 January 2017 for failure to comply with the information notice dated 25 August 2016. In an appeal against a penalty issued under paragraph 39 of Schedule 36 to the Finance Act 2008, the Tribunal does not have jurisdiction to consider the necessity of the information sought, the focus is solely upon compliance with the notice.

19. In this appeal the onus is first upon HMRC to demonstrate that the penalty has been imposed in accordance with the legislation. If the Tribunal is satisfied that is the case, the onus switches to the Appellant to demonstrate that there is a reasonable excuse for his failure to comply.

Was the penalty issued in accordance with the legislation?

20. In considering whether the penalty has been issued in accordance with the legislation, I start by setting out Paragraph 39 of Schedule 36 as it applied on 19 January 2017, the date of the penalty:

- 39** (1) This paragraph applies to a person who—
- (a) fails to comply with an information notice, or
 - (b) ...
- (2) The person is liable to a penalty of £300.
- (3) ...

21. The current penalty was issued under Paragraph 39(1)(a). Therefore, for this penalty to have been imposed, there must have been a failure to comply with an information notice. It is not in dispute that the Notice of 25 August 2016 was served upon the Appellant; the issue is whether there was a failure to comply with that

Notice. To decide whether there has been a failure to comply, first I must ascertain what was required under the Notice of 25 August 2016.

22. Item 10 of the Notice of 25 August 2016 required the following:

10. Please now provide the bank statements for the period 6 April 2013 to 5 April 2014 into which retainers were paid to you or into which the loan drawdown amounts were paid.

I require unredacted bank statements as I am checking your tax position to verify that all payments have been notified to HMRC.

23. The Appellant has argued that what was asked for changed over the course of 2016. While changes to what was required may be relevant to the question of whether the Appellant has a reasonable excuse for not complying with the notice of 25 August 2016 (for example, because he was confused about what he had been asked to provide – see below), my initial task is to determine whether there was compliance with the 25 August 2016 notice. In order to consider if there was compliance with the Notice of 25 August 2016, I do not need to decide if that notice differed from other notices which were issued to the Appellant on other occasions.

24. In respect of item 10, I conclude that the Appellant was asked to provide statements covering the whole of the period 6 April 2013 to 5 April 2014. Bank statements were to be provided for any bank account into which retainers or loan drawdown amounts were paid.

25. Having established what was required by the Notice of 25 August 2016, next I consider whether there was a lack of compliance – had the Appellant provided what was required by the stated deadline of 29 September 2016?

26. With his bundle of documents, the Appellant provided (at tab 3) a bank statement for a First Direct account for the period 23 September 2013 to 9 October 2013 and an online print for the period 14 October 2013 to 5 November 2013, and (at tab 7) bank statements for a HSBC account for the period 6 April 2013 to 5 November 2013.

27. Given my conclusions below (and as it is unclear whether the parties remain in dispute about whether the Appellant's letter of 30 November 2016 was sent and, if so, whether it was received and subsequently lost by HMRC) I do not intend to consider whether or not the Appellant sent the letter of 30 November 2016 and, if so, whether it was received and then lost by HMRC. In considering whether the Appellant has complied with the Notice I shall assume, in the Appellant's favour, that the letter of 30 November 2016 and enclosures were received by HMRC on 2 December 2016 (two working days after the date of the letter).

28. I have considered whether the Appellant provided what was required by item 10 of the Notice of 25 August 2016 by the deadline of 29 September 2016, and I have reached the conclusion that the Appellant did not provide statements for the whole of the period 6 April 2013 to 5 April 2014 for either of his two bank accounts. I agree

with HMRC that the Appellant has not complied with the Notice of 25 August 2016 in providing the items required at item 10.

29. As I have concluded that the Appellant has not provided a complete set of bank statements, and so not fully complied, it follows that I also agree with HMRC's first argument that there was not full compliance with the Notice by the deadline of 29 September 2016.

30. Having concluded that there was failure to comply, I consider next the Appellant's reliance on *Expion Silverstone* and his argument that the penalty was not issued correctly because there was no proper review by an officer.

31. In *Expion Silverstone*, the Tribunal (Judge Popplewell) decided that an appeal against penalties issued under Section 98(1) of the Taxes Management Act 1970 ("TMA 1970") for failure to file timeous Employment Intermediaries returns would be allowed on the basis that, as conceded by HMRC, no actual HMRC officer had taken the decision to issue a penalty. The penalty had been issued automatically by the operation of an automated system, acting on the instruction of a policy officer. The Tribunal held that this automation was insufficient for the purposes of Section 100 TMA 1970 (which enabled a Section 98(1) penalty to be determined) with Judge Popplewell concluding that an actual officer must make each Section 100 TMA 1970 determination.

32. In reaching that conclusion, the Tribunal contrasted Section 100 TMA 1970 with Schedule 55 to the Finance Act 2009. While Section 100 TMA 1970 enables an officer to determine a penalty, Paragraph 55 of Schedule 55 enables HMRC to assess a penalty. In *Donaldson v HMRC* [2016] EWCA Civ 761, the Court of Appeal decided that where HMRC had taken a policy decision to issue penalties in specific circumstances then that was sufficient to conclude that HMRC had decided to impose each penalty.

33. In this dispute currently before the Tribunal, the penalty was issued under the machinery of Paragraph 46 of Schedule 36. Paragraph 46 provides:

46 (1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A, ... —

- (a) HMRC may assess the penalty, and
- (b) if they do so, they must notify the person.

(2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3).

(3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—

- (a) the date on which the person became liable to the penalty,

- (b) the end of the period in which notice of an appeal against the information notice could have been given, and
 - (c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.
- ...

34. The Appellant relies on *Expion Silverstone* to argue that the officer who decided to issue the penalty cannot have conducted an appropriate review because HMRC do not accept having received his letter of 30 November 2016. However, I do not consider that *Expion Silverstone* can assist the Appellant. Section 100 TMA 1970 required an officer to decide to issue a penalty, and so the Tribunal in *Expion Silverstone* sought details about the specific officer who had made that decision. When HMRC conceded there was no officer, that the appeal was allowed.

35. However, the relevant legislation here is Paragraph 46 and that does not refer to an officer. Paragraph 46 requires that the penalty be issued by HMRC. All that is required is for HMRC to make a decision that there has been a failure to comply and the penalty can be issued. The deadline for the Appellant to comply with the Notice was 29 September 2016. There is no suggestion that the bank statements enclosed with the letter of 30 November 2016 had been provided to HMRC by 29 September 2016. Even if HMRC (collectively) were aware on 19 January 2017 that they had received material (that might be relevant) in early December 2016, in making the decision that there was non-compliance with the Notice of 25 August 2016, the relevant officer was entitled to conclude that such material had not been received by 29 September 2016.

36. In this case I am satisfied that the Appellant failed to comply with the Notice issued on 25 August 2016, that HMRC made the decision that there was a failure to comply and that the penalty issued on 19 January 2017 was issued in accordance with Paragraph 46.

Does the Appellant have a reasonable excuse?

37. The onus now switches to the Appellant. Paragraph 45 of Schedule 36 provides that a person is not liable to a penalty if there is a reasonable excuse for his failure to comply. Although the Appellant has not relied on any matter as giving him a reasonable excuse, given the Appellant's references to the information requests as a whole being unclear, I have considered whether the Appellant's failure to comply with the Notice of 25 August 2016 was as a result of confusion about what was required of him.

38. Looking at the requests for information issued to the Appellant as a whole, I agree with the Appellant that there are differences between what has been requested by HMRC at different stages. However, I do not consider the information notices, taken singly or together, are unclear or ambiguous in specifying what was required. I take the view that a reasonable and prudent person who took the time to read each notice would not been confused about what he was required to provide to satisfy each

of the notices (even if that reasonable person also concluded that more material was required to satisfy one notice than to satisfy another). I conclude that it was not objectively reasonable for the Appellant to have been confused or unclear about what he was required by the Notice of 25 August 2016 to provide.

39. In the circumstances, I am not satisfied that the Appellant has a reasonable excuse for his failure to comply with the Notice of 25 August 2016 by the 29 September 2016 deadline.

Conclusion

40. This appeal is dismissed for the reasons set out above. The penalty of 17 January 2017 is confirmed in the sum of £300.

41. A summary decision was released to the parties on 11 February 2019.

42. On 8 March 2019, the Appellant requested full findings of fact and reasons for this decision. This document contains those 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.

**JANE BAILEY
TRIBUNAL JUDGE**

RELEASE DATE: 29 MARCH 2019