[2017] UKFTT 0438 (TC)

# TC05900

**Appeal number: TC/2014/02962**

***Income tax return. Date of filing. Can HMRC reject a return and then charge penalties. It is a matter of fact and degree.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**LUKE PIDGEON** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE GERAINT JONES Q.C.**

**The Tribunal determined the appeal on 17 May 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 19 May 2014 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 24 February 2017.**

## DECISION

1. The appellant, Mr Pidgeon, appeals against penalties imposed by the respondents in respect of his alleged late filing of his self-assessment tax return for the fiscal year ended 5 April 2012. The respondents claimed that a return was issued on 6 April 2012 with a paper return being due by 31 October 2012 or an electronic return being due by the later date of 31 January 2013.

2. The penalties imposed were £100 on 12 February 2013 as a late filing penalty under paragraph 3 of Schedule 55 to the Finance Act 2009; £900 on 14 August 2013, being a daily penalty of £10, calculated over 90 days, under paragraph 4 of the same Schedule to the 2009 Act; £300 on 14 August 2013, often referred to as the six month late filing penalty, under paragraph 5 of the same Schedule to the 2009 Act; and £300, often referred to as the 12 month late filing penalty, under paragraph 6 of the same Schedule to the 2009 Act. Thus, the total penalties demanded were £1600. It is against those penalties, except for the first £100 penalty, that this appeal has been brought.

3. This appeal was lodged with the Tribunal on 22 May 2014, being more than 30 days after the conclusion of a Statutory Review which the appellant had requested, with the outcome thereof being notified on 30 April 2014.

4. I consider the period of delay to be comparatively short and the appellant said in his email of 10 June 2014 that he had sent it to the Tax Tribunal via the couriers DHL two weeks prior to the appeal deadline. He had used that method of delivery because he was resident in Dubai.

5. I extend the period of time for bringing an appeal to 22 May 2014.

6. In the Notice of Appeal the appellant says that he is content to pay the £100 penalty levied under paragraph 3 of Schedule 55 to the Finance Act 2009 because he recognises that his paper tax return was not sent to the respondents by 31 October 2012.

7. This is an appeal against a penalty and accordingly it is for the respondents to establish that a penalty is due and payable. On that issue. The respondents bear the onus of proof.

8. Under section 8 of the Taxes Management Act 1970, a taxpayer "may be required by a notice given to him by an officer of the Board …… a return containing such information as may reasonably be required in pursuance of the notice …….".

9. The respondents say, and it is not disputed, that a notice was sent to the appellant on 6 April 2012 "when the return was issued". I take that to mean that a blank paper return was then sent to the appellant. However, there is no evidence available to me to establish what was sent to the appellant. I say that because a tax return might contain various different sections or pages which will only be relevant

depending upon the individual circumstances of any individual taxpayer. That much is made clear by section 8(4) of the 1970 Act because it specifically provides that notices given under the section may require different information in respect of different descriptions of taxpayers.

10. In the respondents' Statement of Case under the subheading "Facts" it is said that on 20 January 2014 the respondents received a non-electronic return for the fiscal year ended 5 April 2012. It is on that basis that the disputed penalties rest. One has to go on further in the Statement of Case to find a pertinent fact which has been omitted under the subheading "Facts", that is to say, that the respondents acknowledged that the appellant sent a tax return to them and that it was received on some unspecified date (but after 31 October 2012) because they say that they rejected it and returned it to the appellant on 31 December 2012. The respondents have not produced a copy of that which was then submitted to them. That return was late and justified the £100 penalty which the appellant has said is not in issue in this appeal. Whether it constituted a tax return and whether the respondents were entitled to reject it must be a matter of fact and degree. If penalties are to be triggered. It is for the respondents to prove that that which was sent to them, did not constitute a tax return because, as a matter of fact and degree, its content was such that it could not properly be described as such.

11. What then happened was that the respondents decided that the return submitted was not sufficient for their purposes and so decided to treat it as though it was not a filed tax return. The respondents chose not to inform the appellant that they had taken that view. The consequence, so far as the respondents were concerned, was that the penalties clock was ticking against the appellant. The document at folio 5 in the respondents' enclosures suggests that the penalties under paragraphs 4 and 5 of Schedule 55 to the 2009 Act were levied on 14 August 2013. I have no way of knowing, because, there is no evidence upon the issue, whether those penalties were then notified to the appellant so that he could become aware of the fact that the respondents had decided not to treat the return that he had submitted as a filed tax return. The respondents have not produced any correspondence sent by them to the appellant informing him that that which had been received, was not regarded by them as a document which could probably satisfy the requirement of being a tax return complying with the notice sent under section 8 of the 1970 Act.

12. The penalty under paragraph 6 of Schedule 55 to the 2009 Act was levied on 25 February 2014.

13. The papers include a letter dated 3 February 2014 from the respondents to the appellant (at his address in Dubai), which refers to contact having been made on 16 January 2014. It therefore seems to me that I can infer that by 16 January 2014 the appellant had become aware of the penalties levied against him, although I do not have any evidence as to when same were first notified to the appellant by the respondents.

14. The respondents have attached an undated letter sent to them by the appellant, who refers to having only just received letters informing him of penalties. Because

that letter is not dated it is of little assistance save to the extent that it does suggest that the respondents did issue "letters" concerning penalties.

15. The first issue that arises in this appeal is whether the appellant filed his tax return outside the time permitted for so doing so as to trigger each of the penalties to which I have referred above. The appellant has not disputed that the £100 penalty due under paragraph 3 of Schedule 55 to the 2000 Act is due and payable, because even on his case the paper tax return was filed after 31 October 2012, but, quite plainly, prior to 31 December 2012.

16. In respect of the other penalties the first issue is whether they have been triggered as a result of the late filing of the required tax return. This requires a consideration of what the appellant was required to return to the respondents; what he did in fact return to them; and whether the respondents were entitled to treat the return actually sent to them in November/December 2012 as not being a return (as required by the notice served under section 8 of the 1970 Act).

17. Whether a return sent to the respondents pursuant to a notice served under section 8 of the 1970 Act, does or does not amount to a tax return within the meaning of that statutory provision must be a matter of fact and degree. It cannot be open to the respondents to reject a return simply because it contends that there may be some detail lacking from it, which might automatically give rise to penalties being incurred, unless the omissions are, as a matter of fact and degree, so serious as to allow it to be said that the return is not, in reality, a return in respect of the matters which the notice served under section 8 of the 1970 Act required to be returned.

18. The respondents say in their Statement of Case that a return, which the respondents found satisfactory, was not filed until after the 12 month penalty date had elapsed.

19. I must keep in mind that it is for the respondents to prove, on the balance of probabilities, that the disputed penalties are due. If the respondents are to do that, they must prove that the appellant did not submit a tax return in November/December 2012 which can properly be described as such. It is simply not enough for the respondents to assert, in their Statement of Case, that a satisfactory return was not submitted until some much later time. It is for the respondents to prove that the document that was submitted in 2012 cannot properly be described as a tax return as required by the notice served under section 8 of the 1970 Act.

20. In that regard, it is relevant to mention that as the appellant was abroad his liability to file a tax return arose because he was a non-resident landlord in respect of real property in this country.

21. In their Statement of Case the respondents state that the appellant sent a satisfactory return to them on 20 January 2014. I have not seen a copy of it. I have not seen a copy of that which was sent in November/December 2012. I am not in a position to make any comparison between those two documents.

22. The respondents bear the onus of proving the default said to give rise to the penalties (other than the first £100 penalty). They have failed to do so. The respondents have adduced no or no sufficient evidence to establish that the document which was sent to them by the appellant in November/December 2012 could not properly be described as a tax return of the type required pursuant to the notice served under section 8 of the 1970 Act. The mere fact that the respondents seem to have rejected it is not sufficient to allow me to draw the conclusion that it is more probable than not that it was not a tax return sufficient to meet the requirement made under section 8 of the 1970 Act.

23. It follows that the respondents have failed to prove the alleged filing default which is a necessary precedent fact to the levying of the penalties under appeal.

24. Accordingly, this appeal succeeds in full.

25. 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.

**GERAINT JONES Q.C.**
**TRIBUNAL JUDGE**

**RELEASE DATE: 23 MAY 2017**