



TC06326

Appeal number: TC/2017/06290

CORPORATION TAX – penalty for failure to file return in time – whether notice to file served: yes – whether failure to file by due date: yes – whether penalty determinations valid: no, applying Khan Properties Ltd – in alternative, on basis that Khan Properties was wrongly decided, whether both determinations were valid – no: only the first one – in any event, whether reasonable excuse: yes – whether HMRC responsible for 2016 being leap year: no – that was Augustus Caesar – penalties cancelled.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BELLS FINANCIAL SERVICES LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 24 January 2018 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 24 November 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 6 October 2017.

1. This is an appeal by Bells Financial Services Ltd (“the appellant”) against a penalty of £100 imposed for its failure to file a company tax return for the accounting period 1 March 2015 to 28 February 2016 by the due date, and a further penalty of £100 because the same failure extended to a date 3 months after the due date.

Facts

2. The bundle I had contains HMRC’s “paper submission” which take the form of a statement of case. This contains a recital of the chronology of events, with supporting documentation. From this I find the following matters as fact.
3. On 20 March 2016 the appellant was issued with a notice to file a company tax return for its accounting period 1 March 2015 to 29 February 2016.
4. On 16 March 2017 the appellant appealed against a notice of determination dated 16 March 2017 charging £100.
5. On 27 April 2017 HMRC responded referring to the penalty as being for the period ended 29 February 2016. They rejected the appeal, and added that the appellant could ask for an “independent” review or send the appeal to the Tribunal.
6. On 24 May 2017 the appellant sought a review using Form CTS 158 with an enclosure.
7. On 16 June 2017 HMRC sent its conclusion of the review which was to uphold the penalty.
8. On 11 July 2017 HMRC made another determination of a penalty of £100 and notified it to the appellant on 12 July 2018. This determination was in addition to the March determination in the amount of £100.
9. On 12 July 2017 the appellant filed its return online.
10. On 7 August 2017 the appellant notified its appeal to the Tribunal against the determination of a penalty of £100.
11. On 24 August 2017 HMRC Debt Management and Banking sent a demand for £200 to the appellant.
12. On 5 September 2017 HMRC responded to what seems to have been an appeal against the second penalty. They rejected the appeal, and added that the appellant could ask for an “independent” review or send the appeal to the Tribunal.
13. On 29 September 2017 the appellant requested a review of the determination of the second penalty.
14. On 2 November 2017 HMRC sent its conclusion of the review which was to uphold the determination of the second penalty. In the course of the letter the reviewing officer agreed that the accounts filed with Companies House by the appellant were for

the period 1 March 2015 to 28 February 2016. I have checked this myself on the Companies Website and it is correct. On that website are the following period's accounts which show on their face that they are for the period 29 February 2016 to 28 February 2017.

- 5 15. On 24 November 2017 the appellant notified its appeal to the Tribunal against penalties of £200.

The law

16. The law imposing requirements to make Corporation Tax ("CT") returns is in Schedule 18 Finance Act ("FA") 1998 ("Schedule 18").

10 "3—(1) An officer of Revenue and Customs may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports—

(a) relevant to the tax liability of the company, or

15 (b) otherwise relevant to the application of the Corporation Tax Acts to the company,

as may reasonably be required by the notice.

(2) Different information, accounts, statements and reports may be required from different descriptions of company.

20 (3) A company tax return must include a declaration by the person making the return that the return is to the best of his knowledge correct and complete.

(4) The return must be delivered to the officer of the Board by whom the notice was issued not later than the filing date.

Meaning of delivery of return

25 4 References in this Schedule to the delivery of a company tax return are to the delivery of all the information, accounts, statements and reports required to comply with the notice requiring the return.

Period for which return required

30 5—(1) A notice requiring a company tax return must specify the period to which the notice relates.

(2) If an accounting period of the company ended during (or at the end of) the specified period, a return is required for that accounting period.

If there is more than one, a separate company tax return is required for each of them.

35 (3) If sub-paragraph (2) does not apply but an accounting period of the company began during the specified period, a company tax return is required for the part of the specified period before the accounting period began.

40 (4) If the company was outside the charge to corporation tax for the whole of the specified period, a company tax return is required for the whole of the specified period.

(5) If none of the above provisions applies, no company tax return is required in response to the notice.

Return to include self-assessment

5 7—(1) Every company tax return for an accounting period must include an assessment (a “self-assessment”) of the amount of tax which is payable by the company for that period—

- (a) on the basis of the information contained in the return, and
- (b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period.

10 (2) For this purpose a company tax return is regarded as a return for an accounting period if the period is treated in the return as an accounting period and is not longer than twelve months, even though it is not, or may not be, an accounting period.

15 ...

Accounts required in case of Companies Act company

11 (1) In the case of a company which—

- (a) is required to deliver a company tax return for a period,
 - (b) is resident in the United Kingdom throughout that period, and
 - (c) is required under the Companies Act 2006 to prepare accounts for a period consisting of or including the whole of that period,
- the power to require the delivery of accounts as part of the return is limited to such accounts, containing such information and having annexed to them such documents, as are required to be prepared under that Act.

25 ...

Filing date

14—(1) The filing date for a company tax return is the last day of whichever of the following periods is the last to end—

- (a) twelve months from the end of the period for which the return is made;
- (b) if the company’s relevant period of account is not longer than 18 months, twelve months from the end of that period;
- (c) if the company’s relevant period of account is longer than 18 months, 30 months from the beginning of that period;
- (d) three months from the date on which the notice requiring the return was served.

40 (2) In sub-paragraph (1) “relevant period of account” means, in relation to a return for an accounting period, the period of account of the company in which the last day of that accounting period falls.”

17. “Accounting period” is defined in s 1119 Corporation Tax Act (“CTA”) 2010 so:

““accounting period” is to be read in accordance with Chapter 2 of Part 2 of CTA 2009 ...”

18. In that Act sections 9 and 10 are relevant and relevantly say:

“Beginning of accounting period

5 9 (1) An accounting period of a company begins—

...

(b) immediately after the end of the previous accounting period of the company ...

...

10 (5) This section is subject to any provision of the Corporation Tax Acts which provides for an accounting period of a company to which this section applies to begin at a different time.

End of accounting period

15 10 (1) An accounting period of a company comes to an end on the first occurrence of any of the following—

(a) the ending of 12 months from the beginning of the accounting period,

(b) an accounting date of the company,

....

20 (6) This section is subject to any provision of the Corporation Tax Acts which provides for an accounting period of a company to which this section applies to end at a different time.”

19. “Accounting date” is defined in s 1119 Corporation Tax Act (“CTA”) 2010 as:

“the date to which a company makes up its accounts”

25 20. As to penalties Schedule 18 FA 1998 provides:

“Failure to deliver return: flat-rate penalty

17—(1) A company which is required to deliver a company tax return and fails to do so by the filing date is liable to a flat-rate penalty under this paragraph.

30 It may also be liable to a tax-related penalty under paragraph 18.

(2) The penalty is—

(a) £100, if the return is delivered within three months after the filing date,

(b) £200, in any other case.

35 ...

Excuse for late delivery of return

19 A company is not liable to a penalty under paragraph 17 (flat rate penalty) if—

(a) the period for which the return is required is one for which the company is required to deliver accounts under the Companies Act 2006, and

5

(b) the return is delivered no later than the last day for the delivery of those accounts to the registrar of companies.

21. Assessment of the penalties is made by way of a determination under Part 10 Taxes Management Act 1970 (“TMA”), the relevant parts of which say:

“100 Determination of penalties by officer of Board

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(1) ... 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.

...

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(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

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(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

100A Provisions supplementary to section 100

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(2) A penalty determined under section 100 above shall be due and payable at the end of the period of thirty days beginning with the date of the issue of the notice of determination.

(3) A penalty determined under section 100 above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

100B Appeals against penalty determinations

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(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to ... the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

35

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but--

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

40

(i) if it appears ... that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears ... to be correct, confirm the determination, or

(iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount,

...

102 Mitigation of penalties

5 The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.

118 Interpretation

...

10 (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a
15 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 ...”

22. The “provisions of this Act relating to appeals” include relevantly:

“31A Appeals: notice of appeal

20 (1) Notice of an appeal under section 31 of this Act must be given—
(a) in writing,
(b) within 30 days after the specified date,
(c) to the relevant officer of the Board.

...

25 (4) In relation to an appeal under section 31(1)(d) of this Act ...
(a) the specified date is the date on which the notice of assessment was issued, and
(b) the relevant officer of the Board is the officer by whom the notice of assessment was given.
30 (5) The notice of appeal must specify the grounds of appeal.”

23. Those provisions also include ss 49 to 49I TMA, none of which is in issue in this case.

Discussion

Burden of proof

35 24. Somewhat surprisingly HMRC’s submission does not address the issue of the burden of proof. It is quite clearly on them. That means that they must show that the penalty has been validly determined.

Grounds of appeal

25. In the second notification of its appeal, the appellant says

- (1) no notice was received requiring the company to file a return
- (2) the company was unable to file the return despite several attempts
- (3) accounts for the period were filed at Companies House in time, but HMRC's website said that no returns were due.
- 5 (4) it is unfair for the to be penalised for a clerical error which caused HMRC website to say no return was due when the HMRC system does not have safeguards to say what the correct dates should be.
- (5) they had a reasonable excuse because HMRC's website is not set up to deal with accounting years ending on a leap year.
- 10 (6) no tax was payable.

HMRC response

26. HMRC say

- 15 (1) the notice to file for the accounting period ended 29 February 2017 [sic – a typo for 2016] was addressed to the company's registered office on 20 March 2016 in accordance with Companies House records. All HMRC correspondence is sent second class by Royal mail and so paper evidence of delivery cannot be provided
- (2) the notice to file was not returned by Royal Mail.
- 20 (3) by virtue of s 115 TMA and s 7 Interpretation Act 1978 there was valid service.
- (4) there is no obligation on HMRC to issue reminders
- 25 (5) Companies House and HMRC are separate entities: For CT purposes the end of the accounting period in a leap year is 29 February (presumably only when it would in another non-leap year be 28 February). HMRC will not accept a tax return for more than 365 days (366 in a leap year).
- (6) the annual return to Companies House was made up to 29 January, but the accounts are made up to 28 February. This is permitted by the Companies Act 2006.
- 30 (7) if the appellant had been permitted to file a return to 28 February, it would have had to file a return for the 1 day period of 29 February, and if it was not filed a late filing penalty would be required.
- (8) the company had not demonstrated the due level of prudence and diligence necessary to adhere to its filing obligation.
- 35 (9) HMRC cannot take responsibility for 2016 being a leap year; the computer system is set automatically whenever a leap year occurs and HMRC assume that any company would be aware of their end of year and filing obligations.
- (10) the appellant has provided no evidence to support its statement that the HMRC website did not show a return as due.

(11) HMRC has no discretion over the amount of a penalty charged and must act in accordance with the legislation.

(12) the appellant had no reasonable excuse.

Service of the notice to file

5 27. The evidence that the notice was issued consists solely of a screen-print of a page COT208C “Display Determined Flat rate Penalties” which shows “Notice to file issued” with a box which says “20/03/2016”.

10 28. Given that from his initial appeal the appellant has put in issue receipt of the notice I find it surprising that HMRC has not given me evidence of their systems for ensuring that notices to file are issued when and to whom the computer says they are. HMRC cannot rely on regulation 9(1)(b) of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (SI 2003/282) because the notice to file was posted, not issued by electronic communication.

15 29. I accept that it is more likely than not that the notice to file was issued. I also accept that s 115 TMA permits service at the usual place of residence of the company, s 1139 Companies Act 2006 permits service at the registered office and s 108 TMA permits service on the company secretary. The registered office of the company is also shown as its address on HMRC records and to the Tribunal.

20 30. In these circumstances s 7 Interpretation Act 1978 deems service to have made if the letter is properly addressed, prepaid and posted. The HMRC reviewing officer says that notices to file are sent by second class post. I am satisfied that a notice to file was properly served on the appellant, and the mere assertion by the appellant that it did not receive it does not prove that in fact the notice was not received.

What was the relevant period?

25 31. The notice to file was for a period ending on 29 February 2016 (and presumably starting on 1 March 2015). Thus it met the requirements of paragraph 5(1) Schedule 18 and was a notice relating to the period 1 March 2015 to 29 February 2016 (“the specified period”). It was a valid notice to file.

30 32. Under paragraph 5(2) if an accounting period of the company ended during (or at the end of) the specified period, a return is required for that accounting period.

33. By s 9(1) CTA 2009 an accounting period of the company began on 1 March 2015.

35 34. By s 10(1) CTA 2009 an accounting period of the company ended on the earlier of 12 months from the opening date (29 February 2016) or an accounting date. From s 1119 CTA 2010 we know that an accounting date is the date to which the accounts are made up, in this case 28 February 2016. Thus the accounting period is 1 March 2015 to 28 February 2015.

35. Although not relevant to this appeal the next accounting period began on 29 February 2016 and ended on 28 February 2017, which is both the last day of the 12

month period and the accounting date. There is not, despite what HMRC say, a 1 day accounting period on 29 February 2016.

36. Thus the notice to file required a return to be made for the period ending on 28 February 2015. I do not know what the notice actually said as no copy, even a specimen copy, was provided in the bundle.

What was the filing date?

37. By paragraph 14 Schedule 18 it is 12 months from the end of the accounting period, ie 27 or 28 February 2017. The answer depends on how a period of 12 months is to be measured, but the answer is irrelevant in this case as there is no doubt that the return was delivered later than 28 February 2017.

Did the appellant become liable to a penalty?

38. It became liable to a penalty if it failed to deliver its return by the filing date. It did so fail, so it became liable to a penalty?

How much was the penalty and how many penalties?

39. The appellant failed to deliver its return until 12 July 2017. Because that is, by any measure, more than three months after the filing date the company became liable to a penalty of £200 – paragraph 17(2)(b) Schedule 18.

The penalty determinations

40. Apparently (there is nothing in the papers to show this) HMRC issued a notice of determination to a penalty on 16 March 2017 charging £100. I am prepared to find that HMRC did this as the appellant appealed against it. Since no other address was available to HMRC I assume that it was issued to the company's registered office and place of business – no objection to it on the grounds of failure to serve had been raised.

41. Because HMRC issued a determination in the amount of £100 in March 2017 for the appellant's failure to file its return, HMRC must be taken to have concluded that the return was not going to be more than three months late. If it was more than three months late it is arguable that they have, by assessing the one and only "penalty" that may be determined under paragraph 17 Schedule 18, precluded themselves from making another determination by virtue of paragraph 17.

42. The argument against this proposition is, if anywhere, in s 100(5) TMA which permits a further determination if there is a discovery by an authorised officer of the Board (ie after 2005 the Commissioners for Her Majesty's Revenue and Customs) that the amount of the penalty has become insufficient.

43. I have seen no indication that any officer of HMRC discovered anything about the penalty in this case. I hold therefore that the second penalty is invalid.

Is the (single) penalty determination in any case valid?

44. The answer is no. In my decision in the case of *Khan Properties Ltd v HMRC* [2017] UKFTT 830 (TC) I held that where a CT penalty determination was made by a

computer, not an officer authorised by the Commissioners for Her Majesty's Revenue and Customs, the determination was invalid.

45. But it may be that that decision will be appealed and overturned, so I go on to consider the arguments in this case.

5 *Reasonable excuse*

46. I should say that nowhere in the submission have HMRC explained why s 118(2), which they have cited, applies to a penalty under Schedule 18 FA 1998. That explanation is needed because s 118(2) applies "for the purpose of this Act", ie TMA. The "failure" which s 118(2) may excuse is the failure to file a return referred to in
10 paragraph 17 Schedule 18 FA 1998 which obviously is not part of TMA. But the answer is in s 117(2) FA 1998 which says:

"Schedule 18 to this Act, the Taxes Management Act 1970 and the Tax Acts shall be construed and have effect as if that Schedule were contained in that Act."

15 47. HMRC do not dispute that the appellant attempted to file online in time, filing online being the only method available to it. They say that the reason why the online filing was unsuccessful was because the appellant wrongly tried to file a return for an accounting period ending on 28 February 2016. HMRC's software would not accept such a filing.

20 48. If it is true that HMRC's software would not accept a filing for the correct accounting period, then I have no hesitation in holding that the appellant had a reasonable excuse for not filing on time. Such an excuse would last until HMRC reprogrammed its system to accept a valid return.

49. I wrap this section up by dealing with HMRC's arguments in §26(5), (7) and (9).

25 50. As to §29(5) it seems the reviewing officer cannot count. There is no accounting period of more than 366 days here. Nor does she understand the rules that determine the length of accounting periods and their application in this case.

30 51. I have shown that HMRC are simply wrong in §29(7) about when an accounting period ends and begins. There is no one day period, and no possibility of penalties for any supposed failure to file a return for that period.

52. As to §29(5) I do accept however that HMRC cannot take responsibility for 2016 being a leap year. The responsibility for that lies with the emperor Augustus Caesar who in AD4 had the Julian calendar recalibrated to make leap years every four years starting with AD8. But the appellant was not, so far as I can tell, seeking to blame
35 HMRC for the fact that 2016 was a leap year.

Decision

53. The penalty of £200 is cancelled because:

- (1) there was no valid determination of any penalty, or, if that is wrong,

- (2) there was a valid determination of a penalty of £100, but
- (3) the appellant had a reasonable excuse for not filing on time.

54. 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: 5 FEBRUARY 2018