TC01596

Appeal number: TC/11/05678

Income Tax – Penalty Assessment – Section 93 of the Taxes Management Act 1970 – whether return received by tax payer or agent – HMRC errors – reasonable excuse. Appeal allowed.

FIRST-TIER TRIBUNAL

TAX

ALASDAIR CHARLESON **Appellant**

- and -

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

TRIBUNAL JUDGE: W Ruthven Gemmell, WS

Sitting in public at George House, 126 George Street, Edinburgh on Friday 11 November 2011

Ian Smith, CA for the Appellant

Pauline Carney of H M Revenue and Customs for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment under Section 93 of the Taxes Management Act 1970 for a sum of £100 in relation to a late submission of a personal income tax return.

2. The penalty relates to the tax year 2009-2010.

3. The issue before the Tribunal rested on the credibility of the likely sequence of events.

The Facts

4. The evidence consisted of a bundle of documents and evidence was given by Alasdair Charleson ("AC") and by his agent Ian Smith ("IS"), both of whom were credible.

5. The following facts were found –

6. IS had been AC's agent for fifteen years.

7. IS stated that he lodged the 2009-2010 return on 12 July 2010 but claimed not to have received the tax return which HMRC, according to their computerised records, returned to him on 22 July 2010.

8. IS stated that he had received all other correspondence from HMRC relevant to the appeal and AC's tax affairs which they had sent to him.

9. HMRC confirmed that they had sent letters that should have been sent to IS to AC.

10. No copy of the tax return which was sent on 12 July 2010 was submitted to the Tribunal by IS or AC or HMRC.

11. HMRC claim that the original return was sent back because the foreign income section of the return had been omitted.

12. IS denied that the section had been omitted and produced in evidence, his working schedule which showed an amount of two USA pensions due to AC, together with a note of the columns which he said they had been entered in to in the tax return.

13. A self assessment calculation dated 13 July 2011, showing the tax calculation for 2009-2901 for AC, showed an amount of foreign income of £17,045. This led IS to assume that they had reached this total by adding the gross amount of the pensions, translated in to sterling at an exchange rate of US$2.52 to £1 and the taxable amount (after the deduction of 10%).

14. A further self assessment tax calculation for 2009-2010 was produced on 21 July showing the taxable amount of £8,074 as the foreign income, being the net amount alone, which IS confirmed was correct.

15. IS had no photocopying facilities and, accordingly, had kept no copy of AC's tax return nor copy of his handwritten letters although copies of the letters were subsequently retrieved from HMRC and produced in evidence.

16. HMRC were unable to produce, as is their custom, the computerised letter of 22 July 2010 sending the return to IS.

17. AC's tax return, being a paper return, was due to be submitted by 31 October 2010.

18. In December 2010, IS stated that he telephoned AC's tax office and was assured the return had been received and that no mention had been made of it being returned.

19. There was no written note of this telephone conversation and no note of the individual concerned at HMRC to whom IS spoke.

20. On 15 February 2011, a notice of determination of penalty for a late tax return was sent by HMRC and a response sent by IS on 23 February 2011.

21. The letter of 15 February 2011 sent to AC stated that HMRC had not received AC's return by the due date. This was later, in correspondence, clarified by HMRC to mean that the return had been received but was incomplete.

22. IS then wrote to HMRC with the details of the return and requested clarity as to why the return was incomplete.

23. HMRC wrote to AC on 30 March 2011 intimating their review and upholding their decision on the penalty. AC and IS did not receive this letter until 21 April 2011 and it was answered by IS on 22 April 2011.

24. HMRC admitted that there had been inefficiencies in relation to the initial first self assessment calculation and in replying to letters sent by IS to AC.

Legislation

25. Section 93 Taxes Management Act 1970 – as amended -

> **Failure to make return for income tax and capital gains tax**
>
> *(1) This section applies where—*
>
> *(a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act … to deliver any return, and*
>
> *(b) he fails to comply with the notice.*

(2) The taxpayer shall be liable to a penalty which shall be £100.

(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above [that is notified to the tribunal], neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the [tribunal] may—

(a) if it appears … that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or

(b) if it does not so appear …, confirm the determination.

(9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.

(10) In this section—

["the filing date" in respect of a return for a year of assessment (Year 1) means—

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given.]

"the period of default", in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered.]

Submissions of the Parties

26. IS stated that until the hearing he was unaware that HMRC were claiming the allegedly "incomplete" return had been sent to him but, in any event, said that it had been received neither by him nor by AC.

27. IS stated that AC would always refer any matters that had been sent to him, albeit correctly by HMRC, to IS to deal with. IS had received no incomplete return from AC and IS had not received an incomplete return himself.

28. IS stated that HMRC knew that all correspondence should be sent to him and yet they did not do so.

29. IS stated that as soon as the issue became clear to him the correct information was completed and returned to HMRC who then made a calculation error which had to be corrected.

30. HMRC stated that whilst a number of administrative errors were made, the return was sent to IS by post and made reference to Section 7 of the Interpretation Act 1978 which states that any document served by post means that unless the contrary intention appears service is deemed to be effected by properly addressing, prepaying and posting a letter containing a document and to have been effected at the time at which the letter would be delivered in the ordinary course of post.

31. HMRC were also unable to shed any light on why their letter dated 30 March 2011, addressed to AC, was not received until 21 April 2011 and, in consequence, reducing the thirty day period in which action could be taken.

32. HMRC stated that, in line with their review of the decision, the penalty should be upheld.

Reasons for the Decision

33. There were manifest inefficiencies by HMRC in dealing with AC's and IS's correspondence in relation to AC's tax affairs and an incorrect calculation of his liability when the information was in HMRC's view received for the first time.

34. These reasons on their own are insufficient for the penalty decision to be overturned.

35. The issue comes down to one of credibility and, unfortunately, neither the letter returning the tax return was produced in evidence by HMRC nor was the original tax return produced.

36. AC and IS dealt with each matter of correspondence as it was received by them or, in AC's case, passed this immediately to IS and taking all these factors into account the reasonable conclusion is that HMRC considered the return made on 12 July 2010 to be incomplete, returned it to IS but on the balance of probabilities it must have been lost in the post.

37. As soon as the issue came to the attention of IS and AC the return was completed and completed correctly which was acknowledged on the second attempt by HMRC when they issued a corrective assessment on 21 July 2011, accompanied by HMRC's letter of apology for this, dated 20 September 2011.

38. The Tribunal consider that the tax payer acted reasonably in dealing with his tax obligations which he took seriously and employed an experienced accountant for this purpose.

39. In view of all the circumstances, the appeal is allowed.

40. 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.

W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2011