[2018] UKFTT 728 (TC)

TC06861

Appeal number: TC/2017/07152

HYDROCARBON OIL DUTY – Return under regulation 9 of SI 2002/2057 – whether submitted after due date – whether penalty validly imposed – whether failure to submit return on time – whether s 7 Interpretation Act 1978 applies – whether reasonable excuse – appeal upheld.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HOLSWORTHY LTD **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 29 November 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 25 September 2017 (with enclosures), HMRC's Statement of Case (with enclosures), the Appellant's Statement of Case (with enclosures) and post-hearing submissions from both parties received on 23 November 2018.

DECISION

1. This was an appeal by Holsworthy Ltd against a penalty of £250 imposed under s 9 Finance Act ("FA") 1994 for failure to deliver a return to HMRC by the due date. Originally this case was classified as a standard one, but by agreement it was reclassified as a paper case.

Facts

2. I find the facts set out below from the documents in the papers sent to me. I find certain facts about matters which are in contention later in this decision.

3. Holsworthy Ltd ("the appellant") trades as Beacon Garage, Dolton in Devon. It is a Registered Dealer in Controlled Oils, presumably red diesel for agricultural machines.

4. On 15 February 2016 HMRC's Mineral Oils Reliefs Centre ("MORC") wrote to the appellant informing them that they had withdrawn a recently issued "HO5 warning letter". This letter had been sent because of non-submission of the November 2015 HO5 return, but it seemed that the letter had been issued in error. What the error was is not explained.

5. On 9 February 2017 MORC wrote to the appellant in a letter headed "RDCO Late return – Warning letter". This said that it was sent because the HO5 return for the period ending 31 December 2016 with a due date of 21 January 2017 was "received late on 24/01/17." [I assume this means it was received on 24 January and was therefore late, not that it was received in the evening on 24 January].

6. The letter told the appellant that they should ensure that returns are received at HMRC by the due date and advised them that they should obtain and retain proof of postage when submitting the returns and that such proof could be obtained free of charge from the Post Office. It also warned the appellant that if they submitted another late return within 12 months of "this" return period, HMRC would automatically issue them with a penalty of £250 under s 9 FA 1994, and that persistent lateness or non-submission of returns might result in the withdrawal of RDCO approval.

7. The letter had earlier said it was the first stage in action that *could* result in penalties or revocation of the appellant's RDCO registration for any future failure to comply with the appropriate legislation on submission of RDCO returns. This letter does not make clear what the second stage is: as the action of which this letter is the first stage *might* not result in a penalty, then presumably there is something that happens between this first warning letter and a penalty.

8. On 9 June 2017 MORC sent a letter headed "RDCO Late Return – Pre Penalty Notification". This then it seems is the second stage. The letter says that the "law requires you to send HMRC a complete and accurate RDCO return which must reach us by the 21st day of the month following the accounting period which it relates (*sic*)."

9. HMRC's records, it went on, show that they did not receive the return for the period ending 30 April 2017 until 26 May 2017. The appellant was therefore liable to

a penalty of £250, but if the appellant had any evidence or "reasonable arguments" that could change the decision they were to be sent to MORC within 20 days, after which a penalty would be issued.

10. The faint photocopy of the H05 for April 2017 submitted by HMRC shows a faint and almost illegible date stamp, and also shows that it was signed by Andrew Cattle and dated 20 April 2017. While "May" and "2017" are legible, as is the number "2", the second digit in the date is very difficult to determine. From the shape of what is visible it could be a "0", a "6" or an "8". I find as a fact that it was a "6", for two main reasons. One that is the evidence of HMRC and the appellant does not challenge it, and the other is that 20 May 2017 was a Saturday. I add that HMRC should be more careful when providing to the Tribunal photocopies of what themselves may be scans of documents, as the appeal nearly succeeded at this stage on account of lack of evidence of the date of receipt.

11. But the date stamp is proof only that the HO5 was date stamped in MORC on that day. I do not have the evidence to find as a fact that the HO5 was received by HMRC on that day.

12. On 27 June 2017 the appellant emailed MORC to say that they had received the "pre Penalty Notification" and wished to supply a "reasonable argument" . They said that they checked their documentation and the return for April 2017 had been posted First Class on 16 May 2017 using the HMRC supplied envelope, and that it was a "zero return". They also asked if they should send the HO5 by recorded post in future or if they could email it to ensure that they had a trace of any documents as they felt it unjust to be penalised for an error by Royal Mail.

13. On 7 July 2017 MORC replied saying they were unable to rescind the penalty as neither proof of postage nor reasonable excuse had been provided, and that they recommend that the appellant obtain proof of postage.

14. On 13 July 2017 MORC sent the appellant a letter headed "RDCO return – penalty notification". It referred to regulation 9(1) Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002 (SI 2002/2057) ("HORDCO Regulations") which they said required the appellant to send HMRC a complete and accurate return (HO5) which must reach them within 21 days of the end of the month for which the return is made.

15. The letter said that two copies of penalty notice EX601 were enclosed, one for the appellant's records and one to accompany payment. The letter says that the appellant could request a review if they disagreed with the decision or appeal to an independent tribunal.

16. The two copies are in fact different. The EX601(1) calls itself the "Trader's payment copy" and gives in a table the details of the penalty. The first column shows the period is 01/04/2017 to 30/04/2017, the second the amount of the "duty/penalty" £250.00, next to which is a series of columns with various code numbers which are not explained on the copy in the bundle. They are apparently explained on EX603 which I do not have.

17. The narrative explanation of the notice before the table says:

> "The Commissioners of (*sic*) HM Revenue & Customs (HMRC) hereby assess the amount(s) of excise duty, together with any liability to a civil penalty, due from you. Payment of any assessment is due under Section 116 of the Customs & Excise Management Act 1979. You must not enter the amount on any duty Return."

18. On 20 July 2017 the appellant requested a review. They explained that they always send the return within the given period using the envelope provided by HMRC, and are not to blame for postal delays. They said that the envelope is not prepaid and there is nothing on the documentation each month to say that "signed for" delivery must be used or proof of postage obtained.

19. They also added that the return was nil as they have not been able to sell gas oil for some time as the tank is out of order.

20. On 29 August 2017 HMRC's reviewing officer gave her conclusions of the review she carried out which was to uphold the penalty. In this she explained that a warning letter had been sent on 9 February 2017.

21. On 25 September 2017 the appellant appealed to the Tribunal.

Law on the penalty

22. The penalty was imposed by s 9 FA 1994 which relevantly provides:

> "**Penalties for contraventions of statutory requirements.**
>
> (1) This section applies, subject to section 10 below, to any conduct in relation to which any enactment (including an enactment contained in this Act or in any Act passed after this Act) provides for the conduct to attract a penalty under this section.
>
> (2) Any person to whose conduct this section applies shall be liable—
>
> (a) …
>
> (b) in any other case, to a penalty of £250.
>
> …
>
> (9) Schedule 4 to this Act (which provides for the conduct to which this section applies, repeals the summary offences superseded by this section and makes related provision with respect to forfeiture) shall have effect."

23. Section 10 FA 1994, to which s 9 is subject, provides:

> "**10 Exceptions to liability under section 9.**
>
> (1) Subject to subsection (2) below and to any express provision to the contrary made in relation to any conduct to which section 9 above applies, such conduct shall not give rise to any liability to a penalty under that section if the person whose conduct it is satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for the conduct.
>
> …

(3) For the purposes of this section—

(a) an insufficiency of funds available for paying any duty or penalty due shall not be a reasonable excuse; and

(b) where reliance is placed by any person on another to perform any task, then neither the fact of that reliance nor the fact that any conduct to which section 9 above applies was attributable to the conduct of that other person shall be a reasonable excuse.

24. Provisions about the procedure for assessment of the penalty are found in s 13 FA 1994:

"**13 Assessments to penalties**.

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.

…

(5) If an amount has been assessed as due from any person and notified in accordance with this section, then unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced, that amount shall, subject to any appeal under section 16 below, be recoverable as if it were an amount due from that person as an amount of the appropriate duty.

(6) In subsection (5) above "the appropriate duty" means—

(a) the relevant duty (if any) by reference to an amount of which the penalty in question is calculated; or

(b) where there is no such duty, the relevant duty the provisions relating to which are contravened by the conduct giving rise to the penalty or, if those provisions relate to more than one duty, such of the duties as appear to the Commissioners and are certified by them to be relevant in the case in question.

(7) In this section "representative", in relation to a person liable to a penalty under this Chapter, means his personal representative, trustee in bankruptcy or interim or permanent trustee, any receiver or liquidator appointed in relation to that person or any of his property or any other person acting in a representative capacity in relation to that person."

25. Appeals are covered by section 16 FA 1994, the relevant provisions of which are:

" …

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision … may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

…

(1C) In a case where HMRC are required to undertake a review under section 15C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

(1F) An appeal may be made after the end of the period specified in subsection … (1B), (1C)(b) … if the appeal tribunal gives permission to do so.

(1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review".

(2A) An appeal under this section with respect to a relevant decision … shall not be entertained unless the appellant is—

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by the relevant decision,

…

(5) … the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the M1Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter."

Submissions

HMRC

26. HMRC say that the return for April 2017 was not received until 26 May 2017, and so was late. The appellant had received a warning letter within the previous 12 months for a late return which warned that a penalty may be sought. This was not a statutory requirement before a penalty could be issued but is HMRC's practice.

27. There is insufficient evidence to provide the appellant with a reasonable excuse. There is no proof of posting the return in time to allow it to be received by HMRC before 22 May. Unless a trader can demonstrate that "he" was alive to and accepted the need to comply with "his" responsibilities, then no reasonable excuse exists. HMRC say that any reasonable business knowing their tax obligations and responsibilities would not (*sic*) obtain proof of posting. HMRC accept that the appellant was not responsible for the actions of Royal Mail, but they did not obtain proof of posting so they placed reliance on a third party (which by implication cannot found a reasonable excuse).

28. The appellant had a history of submitting returns later than the due date.

Appellant

29. The appellant, in their statement of case, says that the return form was completed within the given period of 21 days using the envelope provided by HMRC. Neither the return form nor the envelope say that it is a requirement to use a registered delivery service or proof of postage to prove the return was sent to HMRC within time.

30. The return was posted to allow a reasonable time for delivery, and the fault for the late receipt was with the postal service.

31. They had not received the warning letter on 9 February 2007. Did HMRC obtain proof of postage of this letter?

32. The appellant properly prepaid and posted a letter containing the document within the 21 days allowed, and so it would be considered delivered in the ordinary course of business. In support of this contention they attached s 7 of the Interpretation Act 1978 ("IA78").

33. They add that HMRC's documents make it unclear as to which address a letter is to be sent. The return forms say send it to an address in Southend: the envelope says send it to Newcastle. The appellant attached a copy of the return they made for November 2017 showing an address in Southend and a copy of the envelope they received for sending that return showing the address in Newcastle, as well as a copy of a return downloaded from the gov.uk website also showing an address in Newcastle.

Discussion

34. HMRC's statement of case, unusually in a penalty case, fails to refer to the burden of proof. It is on HMRC. This is despite what is said in s 9(6) FA 1994 which puts the burden of proof on the appellant in relation to their grounds of appeal. Section 9(6) does not remove from HMRC the burden of showing that the penalty was properly imposed by law. Unusually too HMRC do not refer to Article 6 of the European Convention on Human Rights, not even to dismiss its applicability. In my view it is applicable to this penalty which is clearly punitive and not restorative.

35. A penalty must be imposed by law, not at the whim of the executive. HMRC said in their statement of case that s 9 FA 1994 is the provision which imposes this penalty. Section 9(1) though only imposes a penalty if there is an enactment, which may be, but

need not be, in FA 1994, which provides for certain conduct to attract a penalty under s 9 FA 1994.

36. Because of the lack in the statement of case of any reference to an enactment that so provides, I made directions addressed to HMRC as follows:

> "What enactment provides for the conduct in this case (the failure to deliver by a particular date a return under the Hydrocarbon Oil (Registered Dealers in Controlled Oil) Regulations 2002 ("the 2002 Regulations")) to attract a penalty under s 9 Finance Act ("FA") 1994?"

37. I pointed out in my reasons for the direction that:

> "Section 9(1) FA 1994, on which HMRC rely to establish their right to impose a penalty, only applies where an enactment provides for it to apply. The only enactments that HMRC refer to are those in the 2002 Regulations, but there is nothing in the version in the bundle that refers to s 9 FA 1994. Given s 9(9) FA 1994 it may be that it is referred to in Schedule 4 to FA 1994, but no part of that Schedule has been included in the bundle."

38. Section 9(9) FA 1994 is a paving enactment that provides that Schedule 4 to FA 1994 has effect. It describes Schedule 4 as providing for the conduct to which the section applies. The natural reading of that is that if one wishes to find out which enactments so provide then Schedule 4 is the only place to look.

39. In their response to the directions HMRC referred me to s 100J Customs and Excise Management Act 1979 ("CEMA") which at the relevant time read:

> "**100J Contravention of regulations etc.**
>
> If any person contravenes any provision of registered excise dealers and shippers regulations or fails to comply with any condition or restriction which the Commissioners impose upon him under section 100G above or by or under any such regulations, his contravention or failure to comply shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties), and any goods in respect of which any person contravenes any provision of any such regulations, or fails to comply with any such condition or restriction, shall be liable to forfeiture."

40. They did not mention that s 100J CEMA is in fact referred to in, and indeed amended so that it reads as above by, paragraph 4 Schedule 4 FA 1994, so that is the link I was looking for in the directions.

41. Section 100J CEMA requires a little unpacking. Section 9 FA 1994 penalties apply to:

(1) Contravention of any provision of registered excise dealers and shippers regulations ("REDS regulations")

(2) Failure to comply with any condition or restriction which the Commissioners impose upon him under section 100G CEMA

(3) Failure to comply with any condition or restriction which the Commissioners impose upon him by any REDS regulations

(4) Failure to comply with any condition or restriction which the Commissioners impose upon him under any REDS regulations

42. I fail on first glance to understand the difference between (3) and (4), but what is clear is that in CEMA, unlike in Part 1 FA 1994 (see section 17(3)), contravention and failure to comply are treated as different things. Contravention I read as meaning that someone does something which the law does not permit them to do, while failure to comply means not doing something which the law requires them to do. So the search for the relevant provision is narrowed to failures to comply with s 100G CEMA conditions ("restrictions" not being relevant to the delivery of returns) or with any provision of REDS regulations setting out conditions. That leads to an oddity. REDS regulations are defined in CEMA as regulations under s 100G. Thus it is to s 100G (which HMRC also supplied in the response to directions) that I must turn.

43. Section 100G says:

> "(1) For the purpose of administering, collecting or protecting the revenues derived from duties of excise, the Commissioners may by regulations under this section (in this Act referred to as "registered excise dealers and shippers regulations")—
>
> (a) confer or impose such powers, duties, privileges and liabilities as may be prescribed in the regulations upon any person who is or has been a registered excise dealer and shipper; and
>
> (b) impose on persons other than registered excise dealers and shippers, or in respect of any goods of a class or description specified in the regulations, such requirements or restrictions as may by or under the regulations be prescribed with respect to registered excise dealers and shippers or any activities carried on by them.
>
> (2) The Commissioners may approve, and enter in a register maintained by them for the purpose, any revenue trader who applies for registration under this section and who appears to them to satisfy such requirements for registration as they may think fit to impose.
>
> (3) In the customs and excise Acts "registered excise dealer and shipper" means a revenue trader approved and registered by the Commissioners under this section.
>
> (4) The Commissioners may approve and register a person under this section for such periods and subject to such conditions or restrictions as they may think fit or as they may by or under the regulations prescribe.
>
> (5) The Commissioners may at any time for reasonable cause revoke or vary the terms of their approval or registration of any person under this section."

44. Section 100H(1) particularises the scope of REDS regulations under s 100G(1) by providing that REDS regulations may make provision:

> "…
>
> (p) authorised by section 24AA of the Hydrocarbon Oil Duties Act 1979 (regulation of traders in controlled oil)."

Paragraph (p) is the only conceivably relevant paragraph. Nothing in s 100H was mentioned to me by HMRC.

45. Section 24AA of the Hydrocarbon Oil Duties Act 1979 ("HODA"), which was not mentioned by HMRC in their statement of case or directed submissions, in turn provides (relevantly) that:

> "**24AA Registered excise dealers and shippers regulations: special provision for traders in controlled oil**
>
> (1) For the purposes of section 100H(1)(p) of the Management Act (registered excise dealers and shippers regulations may, in particular, make provision authorised by this section), this section authorises provision—
>
> …
>
> (b) requiring traders in controlled oil to make prescribed returns;
>
> …
>
> (e) for taking into account, in determining whether a trader in controlled oil has—
>
> (i) contravened any provision of registered excise dealers and shippers regulations, or
>
> (ii) failed to comply with any prescribed condition, restriction or requirement,
>
> the extent to which the trader has followed guidance issued by the Commissioners (including guidance issued after the making of provision under this paragraph referring to it).
>
> (2) In this section—
>
> …
>
> "trader in controlled oil" means a registered excise dealer and shipper carrying on a trade or business that consists of or includes the dealing in, buying or selling of controlled oil."

46. The HORDCO regulations are made under, among others, the power in s 24AA HODA. and relevantly provide:

> "***Interpretation***
>
> **2**. In these Regulations—
>
> …
>
> "prescribe" means prescribe in a notice published by the Commissioners and not withdrawn by another notice;
>
> …
>
> ***Returns and information***
>
> **9.**—(1) Registered dealers in controlled oil must make returns concerning their dealing in, buying and selling of controlled oil, at such time, in such form and manner, and containing such particulars as the Commissioners prescribe.

…

Guidance

10. For the purpose of determining whether a registered dealer in controlled oil has—

(a) contravened any provision of these Regulations, or

(b) failed to comply with any condition, restriction, or requirement prescribed by the Commissioners under these Regulations,

the extent to which he has followed any current guidance issued by the Commissioners must be taken into account."

47. It is these regulations that HMRC told the appellant contain the requirement to make the return by 21 May 2017. I comment that regulation 9 certainly provides for returns to be made, but does not itself say for what period they are to be made or by when, nor does not it provide for any failure to deliver the return in time to attract a penalty under s 9 FA 1994, as subsection (1) of that section seems to require.

48. Regulation 9 says though that the time when, and the form or manner in which, the returns are to be made and the particulars that must be contained in the return are such as HMRC prescribe and that prescription must be found in an unwithdrawn notice that has been published by HMRC (or one of its predecessor bodies).

49. Regulation 10 tells me that in determining whether the appellant, who is a registered dealer in controlled oil, has failed to comply with any requirement prescribed by HMRC in such a notice, the extent to which the appellant followed any current guidance issued by HMRC must be taken into account. This is expressed in the agentless passive voice and leaves open to inference who it is who must take compliance with the guidance into account. The obvious inference is that it is HMRC when they make their determination that a penalty has been incurred, but there is also the question whether the Tribunal can take the guidance into account in determining whether there has been a contravention by the appellant or whether the appellant had a reasonable excuse.

50. However I do not really understand what this regulation requires of HMRC in a case such as this. It may be that in this particular case, where the issue is whether a return was made in time, there is no guidance that is relevant. But if there is, regulation 10 seems to require HMRC to take it into account when they are determining whether there has been a failure to send the return in on time.

51. In the statement of case and in their submissions HMRC refer to Excise Notice 192 as showing what the time limit for making a return is, and I infer that they are saying that this notice is the notice referred to in regulation 9(2) of the HORDCO Regulations read with regulation 2. The problem I see with that is that a prescription under regulation 9 must have the force of law if it is to provide for something as important for a person's rights as a penalty and, so Notice 192 says, a possible revocation of the person's approval to deal in controlled oils. Yet Notice 192 specifically says that, apart from any boxed passages in section 5, the Notice does not have the force of law but is guidance, and nothing in section 5 relates to the providing of returns and penalties for failure to do so in time. I add that as guidance Notice 192

seems then to be what HMRC must take into account when determining whether there is a failure.

52. But it is clear to me from the documents provided in the bundle that there is something which does meet the requirements of regulation 9 HORDCO Regulations as to the time, form and manner of the return, and that is Form HO5, the form which, for April 2017, HMRC say was not received in time. Notice 192 does refer to the HO5 in a few places, but certainly does not say that the HO5 is prescribed in the Notice itself.

53. Notice 192 is emphatic that it is not a notice with the force of law so far as the return requirements are concerned. So is the sending of an HO5 to a registered dealer in controlled oils sufficient for it to constitute "publication" of a notice of the form, manner and time for a return? I think it is for this reason: it is HMRC's practice to send an HO5 to every RDCO during the month for which it is required, even if the RDCO is in the habit of making, as they apparently can, an electronic return.

54. I am therefore satisfied that a penalty under s 9 FA 1994 can be validly imposed in a case, and only in a case, where an HO5 has been sent to the RDCO concerned. I find that in this case an HO5 was issued to the appellant for the period April 2017 during that month.

55. So what then is the conduct by the appellant that s 100J CEMA says leads to a penalty and which is to be found in the HO5? The copy of the HO5 return for November 2017 included with the appellant's stated case says:

> "[i]t is a condition of your Approval that this return must be completed and submitted to [Southend address] within 21 days from the end of the accounting period to which it relates".

56. I note that the copy of the HO5 downloaded from HMRC's website and which was exhibited by the appellant shows the same text, save that it says "returned" instead of "submitted" and shows the Newcastle address.

57. Thus what is prescribed by a published notice which has not been withdrawn (or it would not have been sent) is a requirement that the return must be "submitted" to HMRC within, ie by the end of, the 21st day after the end of the month to which the return relates.

58. The question this then raises is what is meant by "submitted". That substantial section of the UK population who file their income tax returns electronically are familiar with the final step they must take, to click the "submit" button. But in legal terms what they are doing is "delivering" their return, as they are when they send a paper return through the post to HMRC. A VAT registered trader who sends their return electronically, or by post, is "making" it. In both of these common cases it is accepted that for delivery or making to be complete and effective, the return must have been received by HMRC and that the relevant time for determining whether a penalty or surcharge is payable is the time of receipt by HMRC. This notion is of course not a one way street, and applies to communications from HMRC to taxpayers unless the context requires otherwise, eg by an enactment stipulating that time is to run from a date which is not necessarily the date of receipt.

59. There are verbs which describe the communication process between taxpayers and HMRC which clearly refer to the action of the sender rather than the receiver, eg "despatch" in s 59(7)(a) Value Added Tax Act 1994, where the contrast is with "receive". The question is whether "submit" is a verb which refers only to the act of the sender. In my view "submit" in the sense it is used in the HO5 is a cognate of "serve", "give" and especially "send", words used in IA78. I note in passing that the downloadable copy of the HO5 says "returned" rather than "submitted" – in my view "returned" is at least as strong a verb as, if not stronger than, "submitted" in implying the need for receipt as well as despatch,. However the online HO5 is not a notice which imposes a penalty (see §53).

60. The next question is whether, when HMRC determined the penalty they had taken into account any relevant and current guidance before coming to the decision that a penalty was due and to be determined?

61. Excise Notice 192 at 6.5 says:

> "***6.5 What happens if I fail to render my returns on time?***
>
> There are civil penalties for failure to render returns on time and also for making false or incorrect declarations. If your return has not been received by the due date, we will remind you by letter. We may allow further time for submission of the return if we are satisfied there is a good reason for the delay. Persistent lateness or non-submission of returns may, however, result in the withdrawal of your RDCO approval.
>
> We recommend that you obtain and retain proof of postage when submitting your return.
>
> The above sanctions are subject to the appeal provisions contained in the Finance Act 1994. If we impose any of these sanctions we will offer you a review and tell you about your right of appeal."

62. In this case HMRC did send a letter on 9 June 2017, a "Pre-penalty letter". This was in accordance with section 6.5 of Notice 192. I can see no other relevant guidance from the copy of Notice 192 sent to me by HMRC. Therefore in my view HMRC did take into account current guidance and allowed for a good reason for the delay to be put forward against the imposition of a penalty. The fact that HMRC rejected it is neither here nor there when considering whether they took the guidance into account.

63. The final issue then is whether HMRC are either presumed to have received the HO5 before 22 May 2017 or, if not, whether s 10 FA 1994 applies. The appellant's evidence is that the return was posted on 16 May 2017, though they have no proof of postage. In my view and contrary to HMRC's submission, that is not fatal. HMRC's guidance in Notice 192 says that an RDCO may think it advisable to obtain proof of postage, but is clearly not a legal requirement or even a matter of guidance to say that an appellant must or should obtain such proof. And that it was a recommendation only was repeated by HMRC in their email of 7 July.

64. I need to mention here that I asked of the appellant in a direction:

> "(1) Is the photocopy of a completed HO5 on page 32 of the document bundle a copy of the appellant's return for the month of April 2017?

(2) If it is, who is Andrew Cattle and what position does he hold in the appellant?

(3) Why is this document dated 20 May 2017 if it is the appellant's case, as stated in the review letter of 29 August 2017 (bundle page 49), that the return was posted on 16 May 2017?"

65. This was because the copy of the return exhibited by HMRC showed that it was signed by Andrew Cattle on 20 May 2017, but Andrew Cattle was not a person who was corresponding with HMRC of behalf of the appellant.

66. In response the appellant said the copy was of the actual HO5, that Andrew Cattle was the person authorised to make the return and that he had mistaken the date when he completed the form, and that he looked at Tuesday 20 June when he signed it and not Tuesday 16 May.

67. I need to make findings of fact about the actual date when the return was sent and the method used. The appellant, as I have said, prays in aid s 7 IA78. That section applies where an "Act" authorises or requires a document to be served by post. I can see no relevant Act that does so authorise or require. I can find nothing in CEMA or HODA to that effect (unlike s 115(2) TMA or s 95 VATA), and secondary or tertiary legislation is not an "Act" (see s 21(1) IA78 and the contrast there and elsewhere between an "act" and "subordinate legislation"). Nor does any relevant subordinate legislation specifically invoke s 7 IA78.

68. But that is not to say that an appellant cannot rely on the normal course of business of the postal authorities to decide when to send a return if they cannot rely on s IA78. In my view *if* the return was posted first class on 16 May then it was reasonable for the appellant to assume that it would be received by HMRC by 21 May: but if it was posted first class on 20 May it would not be reasonable to make that assumption (20 May being a Saturday). In this connection it is notable that HMRC recommend in Notice 192 that proof of postage is obtained: but if the only crucial date is the date of receipt, how can obtaining proof of postage make any difference? If HMRC are saying, as they seem in their submissions to say, that if the appellant had been able to prove by such means that they did post the letter first class on 16 May, they would have regarded that as a reasonable argument that would enable them to withdraw the penalty, then that shows that they recognise that the ordinary course of business of Royal Mail is a very relevant matter, and from that I infer that my task is simply to decide whether it is more likely than not that it was posted on 16 May. It also seems to me to be relevant that the importance of the date of postage is in guidance (Notice 192) falling within the scope of regulation 10 HORDCO Regulations and should be taken into account by the Tribunal.

69. But for the Andrew Cattle date of 20 May 2017, I would have no hesitation in finding from the appellant's unchallenged evidence that the appellant had despatched the return first class on a date such that it would in the ordinary course of Royal Mail business have been received by HMRC in time.

70. I am however satisfied by the appellant's explanation for the dating of the HO5 signed by Andrew Cattle. It is a plausible error. Posting a letter on the Tuesday before the 21st of the month is clearly giving sufficient time for it to be received by HMRC by

first class post in the normal course of business. And HMRC did not suggest in their statement of case that the letter was posted on 20 April even though they must have been aware of the Andrew Cattle date, nor did they comment on my direction to the appellant and their reply.

71. I therefore find that it is more likely than not that the appellant, acting through an authorised person, posted the HO5 first class on 16, not 20, May 2017, in accordance with their usual practice which had ensured that all returns have been on time bar one (December 2016) where HMRC did not seek a penalty.

72. Because s 7 IA78 does not apply, I cannot say that the HO5 is deemed in law to have been received by HMRC no later than 21 May 2017. Such evidence as there is suggests it was received by HMRC on or a few days before 26 May 2017. The appellant has therefore failed to submit the return in time, and to quash the penalty it just be held that there was a reasonable excuse for the failure.

73. I have mentioned the HMRC guidance in Notice 192 and their apparent acceptance that if there had been proof of postage there would be a reasonable excuse. I see no reason to depart from this approach.

74. I also note from HMRC' submissions that it is their view that unless a trader can demonstrate that they were alive to and accepted the need to comply with their responsibilities, then no reasonable excuse exists. In my view the appellant was so alive and did so accept.

75. HMRC also say that any reasonable business knowing their tax obligations and responsibilities would obtain proof of postage. I do not agree. HMRC refused to tell the appellant that it must obtain proof of postage if it wanted to avoid penalties: they said that they recommended it: they didn't say in Notice 192 that failure to obtain and retain it would means that no reasonable excuse could exist.

76. And I should also add that HMRC did not in their statement of case argue explicitly that s 10(3)(b) FA 1994 applied, although I infer this is what they were referring to when they said that as the appellant did not obtain proof of posting they were placing reliance on a third party (which by implication cannot found a reasonable excuse).

77. This submission simply does not wash. A trader sending an HO5 by post who does obtain proof of postage is also relying on Royal Mail to deliver the return to HMRC on time. Proof of postage does not guarantee delivery by any particular day or at all.

78. But in ay event I do not think s 10(3)(b) FA 1994 applies as it requires reliance on another person to "perform a task". In the context of the making of a return then the task is the completion of the return and the submitting of it, for example by an accountant or other adviser. The Royal Mail are not performing a task in that sense: the obvious distinction is that the actions of the Royal Mail once the return has been posted are outside the appellant's control.

79. I therefore find that the appellant had a reasonable excuse for their failure to submit the return on time.

80. I add that if I am wrong about s 7 IA78 and there is a relevant authorising enactment in an Act then I would also have found for the appellant on the basis that there was no default. Where the second leg of s 7 IA78 (where date of service critical) applies, as it does here, deemed service is rebuttable, but I do not consider that HMRC have rebutted timely deemed service (see §11).

Decision

81. Under s 16(5) FA 1994 I quash the decision of HMRC to assess a penalty under s 9 FA 1994 for a failure to file a return April 2017 by the due date.

82. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 12 DECEMBER 2018