



Neutral Citation: [2023] UKFTT 865 (TC)

Case Number: TC08942

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13374

*INCOME TAX – Late Filing Penalties – Income and Corporation Taxes (Electronic Communications) Regulations 2003 - Electronic service of notices – Had HMRC proven that the relevant notices had been electronically served? - no – Appeal Allowed*

**Heard on:** 10 July 2023

**Judgment date:** 29 September 2023

**Before**

**TRIBUNAL JUDGE FROST  
JAMES ROBERTSON**

**Between**

**CLAIRE MARIE WALKER**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Ms Walker represented herself

For the Respondents: MsChinwe Ojini, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. This matter is an appeal against late filing penalties for the tax year ending 5 April 2021.
2. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system.
3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
4. The documents to which we were referred are a document bundle of 83 pages, a statement of reasons for HMRC of 24 pages and a legislation and authorities bundle of 144 pages. Ms Walker gave oral evidence and was cross-examined.

### BACKGROUND

5. This matter relates to three late filing penalties for the tax year ending 5 April 2021. There is a fundamental factual dispute between the parties as to whether any of the relevant notices were served, and therefore the validity of the penalties.
6. The penalties in dispute are as follows:

| Tax Year ending | Date of Penalty | Legislation                | Description                    | Amount (£) |
|-----------------|-----------------|----------------------------|--------------------------------|------------|
| 5 April<br>2021 | 10/03/2022      | Para 3, Sch. 55<br>FA 2009 | Initial late filing<br>penalty | £100       |
| 2021            | 18/08/2022      | Para 4, Sch. 55<br>FA 2009 | Daily late filing<br>penalty   | £900       |
| 2021            | 18/08/2022      | Para 5, Sch. 55<br>FA 2009 | 6 Month late<br>filing penalty | £300       |
|                 |                 | Total                      |                                | £1,300     |

7. HMRC's system recorded Ms Walker as having signed up to receive paperless contact from HMRC. Therefore, no paper copies of any notices were sent to Ms Walker. Instead, HMRC say that notices were validly served electronically using their Self-Assessment system. We make specific findings in relation to the evidential requirements for service of notices later in this decision.
8. HMRC say that on 6 April 2021, Ms Walker was issued a notice to file for the year ending 5 April 2021. As a result, HMRC say that the filing date for the return was 31 October 2021 for a non-electronic return or 31 January 2022 for an electronic return.
9. HMRC say that they issued penalty notices on 10 March 2022 and 18 August 2022, as summarised in the above table. Ms Walker disputes that any notices were served. We make further findings on this point below.
10. On 29 September 2022, HMRC's Self-Assessment Debt Management Team wrote a hard copy letter to the Appellant regarding outstanding Self-Assessment payments. Ms Walker received that letter shortly afterwards.
11. Following receipt of the Respondents letter of 29 September 2022, Ms Walker telephoned HMRC on 6 October 2022. The HMRC operator explained to Ms Walker that the

2020-21 return was still outstanding. The operator was advised Ms Walker to submit the return and explained the appeals process.

12. Later that same day, on 6 October 2022, the Ms Walker filed her return for the relevant tax year electronically through the online Self-Assessment system.

#### **THE ISSUES**

13. The issues between the parties can be summarised as:

- (1) Whether the late filing penalties charged to Ms Walker were correctly issued.
- (2) Whether Ms Walker has a reasonable excuse for the late filing of the return.

#### **THE LAW**

14. The provisions governing the assessment of the relevant penalties are set out in paragraph 18 of Sch 55 Finance Act 2009 (“FA 2009”). Paragraph 18(1) provides:

18- (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must-

- (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.

15. HMRC must therefore prove to the satisfaction of the Tribunal, on the balance of probabilities, that they had fulfilled these requirements. In particular HMRC must prove that they had notified Ms Walker of the penalties.

16. The use of electronic communications for these purposes is governed by the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (2003/282) (“the Electronic Communications Regulations”). References to regulations in this decision are to the Electronic Communications Regulations. Part 3 of those regulations sets out a number of evidential provisions which are relevant to the present case.

17. The overarching effect of compliance with the Electronic Communications Regulations is set out in regulation 5, which provides:

5 Effect of delivering information by means of electronic communications

(1) Information to which these Regulations apply, and which is delivered by means of electronic communications, shall be treated as having been delivered, in the manner or form required by any provision of the Taxes Act, the relevant Finance Acts or the Management Act if, but only if, all the conditions imposed by

- (a) these Regulations,
- (b) any other applicable enactment (except to the extent that the condition thereby imposed is incompatible with these Regulations), and
- (c) any specific or general direction given by the Board, are satisfied or, but only in the case of the conditions mentioned in regulation 3(2A) (electronic delivery of company tax returns), are taken to be satisfied under regulation 3(8).

(2) Information delivered by means of electronic communications shall be treated as having been delivered on the day on which the last of the conditions imposed as mentioned in paragraph (1) is satisfied. This is subject to paragraphs (3) and (4).

(3) The Board may by a general or specific direction provide for information to be treated as delivered upon a different date (whether earlier or later) than that given by paragraph (2).

(4) Information shall not be taken to have been delivered to an official computer system by means of electronic communications unless it is accepted by the system to which it is delivered.

(5) For the purposes of this Part, information which is delivered by means of electronic communications includes information delivered to a secure mailbox.

(6) For the purposes of paragraph (1) “the relevant Finance Acts” means the Finance Act 2007, the Finance Act 2008 or the Finance Act 2009.

18. Therefore, a penalty notice which meets the requirements set out in regulation 5 is to be treated as having been delivered for the purposes of paragraph 18 Sch 55 FA 2009.

19. Regulation 6 provides for a means by which HMRC can create a rebuttable presumption that information was delivered electronically. Regulation 6 states:

#### 6 Proof of content

(1) A document certified by an officer of the Board to be a printed-out version of any information delivered by means of electronic communications under these Regulations on any occasion shall be evidence, unless the contrary is proved, that that information-

(a) was delivered by means of electronic communications on that occasion; and

(b) constitutes the entirety of what was delivered on that occasion.

(2) A document purporting to be a certificate given in accordance with paragraph (1) shall be presumed to be such a certificate unless the contrary is proved.

20. Therefore, in accordance with regulation 6, HMRC need only provide the Tribunal with a document purporting to be a duly-certified copy of the notice in order to create a rebuttable presumption that the notice was both delivered and contained the information set out in that copy.

21. We revisit the point further below, but it is notable that HMRC did not seek to provide any such certificates to the Tribunal in these proceedings. This seems surprising given the effect of providing such certificates would be to definitively shift the burden of proof in relation to service of notices onto Ms Walker.

22. Regulation 9 provides a further rebuttable presumption in relation to delivery of information and payments, it provides:

#### 9 Proof of delivery of information and payments

(1) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, to have resulted in the making of a payment or the delivery of information-

(a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has been recorded on an official computer system; and

(b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has been recorded on an official computer system.

(2) The use of an authorised method of electronic communications shall be presumed, unless the contrary is proved, not to have resulted in the making of a payment, or the delivery of information-

(a) in the case of information falling to be delivered, or a payment falling to be made, to the Board, if the making of the payment or the delivery of the information has not been recorded on an official computer system; and

(b) in the case of information falling to be delivered, or a payment falling to be made, by the Board, if the despatch of that payment or information has not been recorded on an official computer system.

(3) The time of receipt of any information or payment sent by an authorised means of electronic communications shall be presumed, unless the contrary is proved, to be that recorded on an official computer system.

23. The relevance of the regulation 9 presumption is that HMRC could potentially prove delivery of notices if they could prove that such delivery is recorded in an official computer system. The regulation does not provide any detail as to how HMRC would satisfy the Tribunal that such delivery has been recorded in an official computer system. As such, we consider that ordinary evidential principles would apply.

#### **Were the late filing penalties correctly charged to Ms Walker?**

24. The key issue to be determined in relation to the penalties is whether or not the relevant notices (being either the notice to file, or the penalty notices) were properly served.

25. Ms Walker has maintained throughout that she had never received any notice, and gave oral evidence to that effect before us.

26. HMRC accept that the burden is on them to prove that notice was given.

27. We noted above that regulation 6 of the Electronic Communications Regulations provides a relatively straightforward means by which HMRC can discharge the burden upon them. We were surprised that HMRC had not sought to put forward any certificates in accordance with that section. Instead, it appears that HMRC seek to prove the point from first principles.

28. It may also be the case that HMRC seek to rely on the regulation 9 presumption of proof of delivery. However, HMRC did not explicitly do so. For completeness we have considered the application of regulation 9 to the material put before the Tribunal.

29. The material put before the Tribunal was, to put it mildly, difficult to comprehend. By way of example, the document relied upon by HMRC to show service of the initial £100 late filing penalty reads as follows:

10/03/2022 14:21:09.804

{[-]

AuditSource:message

AuditType: TxSucceeded

DataPipeline: {[-]

}

Detail: {[-]

BatchID:P1961504

FormId: SA326D

MessageId: 622a0955190000c797600bf1  
MessageType:mailout-batch  
OriginalRequest: {“externalRef”{“id”:”P1961504HZ1C390AE72”,”source  
time”,”content””Cgo8CD5XZSYjMzk7dmUgY2hhcmdlzcCB5b3UgySAmIz  
E2MzsxMDAgcGV  
{“formID”:”SA326d”,”issueDate”: “2022-03-08”,”batchID”:”2022-03-  
08”,”batchID”:”P1961504”,”source  
Sautr:1749657436  
ThreadId: 622a0955190000c797600bf2  
}  
EventId: a2d87aff-dac0-46f8-bbb4-327552114527  
GeneratedAt: 2022-03-10T14:21:09.804Z  
Metadata: { [-]  
}  
Tags: { [-]  
Akamai-Reputation: -  
X-Request-ID: 1edd3843-36fe-4d0a-8d32-b5cc9b76f02e  
X-Session-ID: -  
ClientIP: -  
ClientPort: -  
DeviceID: -  
Path: /messges  
TransactionName: message Created  
}  
}  
Show as raw text  
Host=ip-10-206-25-229 source = stomp://txm\_rabbitmq-eu-west-2b-  
2:6163/queue/splunk

30. Ms Ojini, for HMRC, made valiant attempts to persuade the Tribunal that this did indeed prove that the £100 penalty notice was properly served. She drew our attention to the presence of the text strings “SA326D”, “TxSucceeded” and “2022-03-08” as evidence that an SA326D document (which Ms Ojini told us was a reference to a notice of penalty assessment) was successfully transmitted on 08 March 2022.

31. The Tribunal cannot accept that the presence of particular text strings provides proof of any particular point. Indeed, if the Tribunal were to speculate as to the significance of the text strings we might point out that the entries next to “clientIP” and “clientPort” indicate a zero entry. This could indicate that no client computer had in fact been connected to and no message could be received.

32. As a result, the Tribunal is not able to come to any conclusion based on this material.

33. As a general proposition, if a party wishes to put forward complex evidence said to have been extracted from a particular computer system the Tribunal would expect:

- (1) A witness of fact to provide evidence as to how, when and from where the data was extracted; and
- (2) An expert witness to enable the Tribunal to understand the significance of the data.

34. We appreciate that provision of separate witnesses of fact and expert witnesses is likely to be disproportionately costly in many cases. This is why the Tribunal was surprised that HMRC had apparently chosen not to make use of the far simpler certification process provided for in regulation 6.

35. In addition, although we of course welcome attempts by advocates to assist the Tribunal in as far as they are able, they should generally resist the urge to give factual evidence. Much of HMRC's Statement of Reasons relating to electronic communications comprised factual assertions for which no primary evidence was provided, or assertions of fact that purported to be legal submissions.

36. For example, paragraph 50 of HMRC's Statement of Reasons read:

“The Respondents submit that when an online communication has been made to a taxpayer's online PTA, an e-mail will also be sent to their verified e-mail address notifying that information has been delivered to the secure mailbox.”

37. This is a simple factual assertion as to how HMRC's system is intended to work, with no inherent evidential value. The use of the formula “The Respondents submit” does not change that position.

38. If HMRC wish to provide evidence of their internal processes and procedures in order to establish a contested point in relation to which the burden rests upon them, basic fairness requires that HMRC should put forward a statement from a suitable witness or other relevant primary evidence. It is not fair to rely on advocates to fill the gaps in evidence through purported submissions.

39. We must emphasise that we make no criticism of Ms Ojini in the above. We are very grateful for her attempts to assist the Tribunal in circumstances where she had not been provided with appropriate material.

40. Having come to the view that HMRC have not proven service of the relevant notices on the application of basic principles, we also comment on whether regulation 9 of the Electronic Communications Regulations may have applied to the material provided to the Tribunal in order to give rise to a rebuttable presumption of delivery (albeit not a presumption as to the content of the message delivered).

41. Regulation 9 provides that information is presumed (unless the contrary is proved) to have been delivered if “the delivery of the information has been recorded on an official computer system”.

42. Ms Ojini might have sought to argue that the documents provided to the Tribunal were copies of the records of the official computer system, and therefore proof that delivery of the information has been recorded on an official computer system. Such a submission would suffer from the same shortcomings as proving delivery on general principles. The material provided simply consists of strings of text, without evidence that the text came from the relevant official computer system or expert evidence as to the meaning of the text.

43. The Tribunal is intended to be a less formal forum than a court. Indeed, rule 15(2) of the Tribunal Rules (The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) specifically permits the Tribunal to admit evidence whether or not that evidence would be

admissible in a civil trial. However, the Tribunal will still normally require cogent (and comprehensible) evidence on a point of critical dispute between the parties.

44. Overall, we find that HMRC has not persuaded us that it validly served any of the notices it claims to have served. Without context, the material provided by way of evidence carries no weight.

45. As HMRC have not proven that any of the relevant notices were served, Ms Walker's appeal must be allowed.

#### **Did Ms Walker have a reasonable excuse for the late filing?**

46. In case we are wrong in finding that the notices were not properly served, we have set out our findings in relation to Ms Walker's reasonable excuse defence below.

47. HMRC submitted, and we accept, that the correct approach to take to a question of reasonable excuse is that set out in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) at paragraph [81]:

81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

48. The facts put forward by Ms Walker by way of reasonable excuse can be summarised as follows:

(1) Ms Walker relied on her husband to submit the return. She stated that her husband was adamant that he had filed the return online on 1 November 2021.

(2) Having been given the impression by her husband that the return had been filed, HMRC had not served her with any penalty notices that would have made her aware of any difficulty with the filing. It was only on receipt of the letter dated 29 September 2022 from the HMRC's Self-Assessment Debt Management Team informing her she had failed to pay her tax liability that she first became aware the return was outstanding. Following a phone conversation with HMRC on 6 October 2022 she filed the return.



49. We accept Ms Walker’s evidence that she believed that her husband had filed the return. However, we have not been provided with a great deal of detail so as to allow us to assess whether or not that belief was objectively reasonable. Ms Walker’s husband did not give evidence before the Tribunal. As such, Ms Walker’s assertions that her husband was ‘adamant’ he had submitted the return carry very little weight.

50. HMRC drew our attention to paragraph 23(2)(b) of Schedule 55 to FA 2009 which provides that:

“where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure”

51. Accordingly, Ms Walker’s reliance on her husband to deal with her tax filings cannot constitute a reasonable excuse unless she took reasonable care to avoid the issue.

52. In this case, we have no evidence from Ms Walker’s husband as to the steps he in fact took to ensure the return was filed. Ms Walker stated that during the period in question her husband had handled her tax affairs. She did not monitor the position closely as historically she had not had any tax liability. The return primarily related to a rental property and it had historically been possible to offset rental income against mortgage interest. We do not consider that such an approach gives rise to an objectively reasonable excuse for the failure to file.

53. Furthermore, we find that Ms Walker had not taken reasonable positive steps to confirm that her return had been filed, such as logging in to her online self-assessment account and confirming that the return was not outstanding.

54. It follows from the above that we do not consider Ms Walker took sufficient care to avoid the failure. As such, pursuant to paragraph 23(2)(b) of Schedule 55 to FA 2009 she does not have a reasonable excuse.

55. As noted above however, our finding on this point does not alter our overall conclusion as HMRC has failed to demonstrate that the penalties were properly imposed.

#### **CONCLUSION**

56. We allow the appeal on the basis that HMRC has not discharged their burden of establishing that the relevant notices were served on Ms Walker.

57. The penalties are therefore cancelled.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

58. 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.

**MALCOLM FROST  
TRIBUNAL JUDGE**

**Release date: 29<sup>th</sup> September 2023**