[2016] UKFTT 518 (TC)

TC05267

Appeal number: TC/2015/04243

VALUE ADDED TAX – EC Sales Statements – late filing penalties – s 66 VATA 1994 – burden of proof of posting – whether service deemed – s 7 Interpretation Act 1978 – whether reasonable excuse – whether penalties disproportionate – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AGC CUSTOMS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds on 7 March 2016

No representation nor attendance by the Appellant

Mr David Wilson, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

1. The appeal is against two civil penalty notices issued pursuant to section 66 of the Value Added Tax Act 1994 ('VATA') for the late submission of two EC Sales Statements. The first penalty for £500 was imposed by notice dated 12 March 2015 in relation to the VAT quarter 09/14, and the second penalty of £780 by notice dated 7 May 2015 in relation to quarter 12/14. The total amount under appeal is £1,280.

Hearing in absence

2. There was no appearance of the appellant on the day of the hearing at the scheduled time. The tribunal clerk spoke to the appellant's representative, BFS Accountants Ltd, and was advised that the appellant was going into administration and its directors were all busy dealing with that, and confirmed that no one would be attending the hearing. The representative, who had filed the Notice of Appeal for the appellant, was duly advised that the hearing would proceed in the appellant's absence.

3. The Tribunal was satisfied that the appellant had been notified of the hearing, and that no postponement application had been made. We considered the position in the light of Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and decided that it would be in the interests of justice to proceed with the hearing in the appellant's absence.

Post-hearing information

4. During the hearing, Mr Wilson was asked if he could assist the Tribunal by providing more information concerning the appellant's history of submission of EU Sales Statements, the reasons for the penalty notices to be issued almost 6 months after the defaults, and the date of publication of Public Notice 725. Mr Wilson did so by way of a letter dated 8 March 2015, and insofar as relevant, the additional information has been incorporated into the background facts to the case.

Factual background

5. The appellant was registered for VAT from October 2013 and its main business activity is the retail of guitars and guitar accessories.

6. The VAT return for 12/13, (the first return to be submitted since registration), contained an EC sales figure in Box 8. On 22 May 2014, the appellant was sent an information letter with a questionnaire for the purpose of ascertaining if an EC Sales Statement, commonly known as EC Sales List, ('ESL'), was due for the quarter.

7. Mr Wilson's post-hearing letter confirmed that no ESL is on file for 12/13 and 03/14, and it is assumed that none was required for either period. He also confirmed that an ESL form (VAT 101) had been sent automatically to the appellant on or around 20th of the last month for every reporting quarter since the filing of the questionnaire. Form VAT 101 is sent accompanied by a prepaid envelope fully addressed to the Southend VAT office.

8. The quarter 06/14 was the first return period when the appellant was required to submit an ESL. When the due date for submitting the ESL for 06/14 had well passed, the appellant was sent a penalty liability notice (PLN) on 1 October 2014. The PLN

states that the appellant was in default, but no penalty action would be taken in respect of the first default if the outstanding ESL was received by 19 October 2014, and that a daily penalty of £5 would be imposed from 20 October 2014 until the ESL was submitted, subject to a maximum of 100 days (£500 in terms of penalty).

9. The PLN also contains the following regarding future ESL submission:

(1) Public Notice 725 is referred to for guidance on VAT compliance in relation to making supplies to other EU Member States; (the current version was published in January 2014).

(2) On the front page of the PLN highlighted as 'Important' is the statement that if future ESLs are not submitted on time, the appellant 'will be issued with a penalty without any further notices being served, until there has been a clear 12 months period without default'.

(3) The message is reiterated in the notes overpage to the letter in italics: '*If you do not submit future ESLs on time, penalties will be issued without further warning.*'

(4) The penalty is stated as: first default at £5 per day for a maximum of 100 days (£500); second default at £10 per day for a maximum of 100 days (£1,000); third and subsequent defaults at £15 per day for a maximum of 100 days (£1,500), and that the minimum penalty is £50.

(5) The due date for electronic submissions is within 21 days of the end of the reporting period, and for paper submissions, within 14 days of the end of the reporting period.

(6) The right to request a review of a decision to impose a penalty and the right of appeal to the Tribunal.

(7) Specific note to give guidance on postal submission of ESL states: 'If you know there is going to be a delay with the postal system you may want to consider submitting your ESL online or alternatively, you can obtain a certificate of posting (free of charge from the Post Office) as confirmation of when you posted your declaration.'

10. HMRC's records of the appellant's ESL submission history is as noted below, and the date of receipt on record is the date the return was received at the relevant HMRC office:

Period	**ESL due date**	**Date received**	**Date of penalty notice / Amount**
06/14	14 July 2014	16 October 2014	1 October 2014 (PLN no penalty)
09/14	14 October 2014	7 April 2015	12 March 2015 for £500
12/14	14 January 2015	7 April 2015	7 May 2015 for £780

11. For periods 03/15 and 09/15, the appellant was required to submit an ESL and a paper ESL was submitted late for both periods. (No ESL was required for the intervening periods 06/15 or 12/15.) The appellant therefore consistently submitted ESLs in paper format, and not once by online submission.

12. A statutory review upheld the penalties imposed for periods 09/14 and 12/14 and the review decision by letter dated 9 April 2015 made particular reference to the PLN issued to the appellant on 1 October 2014. That the outstanding ESL for 06/14 was received on 16 October 2014 was taken as indicative of the PLN having been received and acted upon by the company.

13. By letter dated 21 April 2015, the agent responded to the statutory review decision. It is difficult to read the full contents of the letter as the agent's company logo (which probably have appeared as background watermark in the original) was rendered in opaque black ink on the photocopy of the letter. The main point of the letter would seem to assert that the disputed ESLs had been posted, and the appellant could not have known of their non-delivery until the notification of the penalties.

14. HMRC regarded the letter of 21 April 2015 as a request for independent review; the review conclusion upheld the statutory review decision and was communicated by letter dated 10 June 2015.

Applicable legislation

15. The requirements for submitting EC Sales Statements are legislated under Part IV (regulations 21 to 23) of VAT Regulations 1995, implementing Article 263 of Council Directive 2006/112/EC.

16. The legislation governing the imposition of penalty for a failure in submitting EC sales statement is under section 66 of VATA. The definition of the due date, and the terms for the penalty to be applied in respect of the first, second and subsequent defaults as provided by the statute are as related in the PLN.

17. Of particular relevance to the current appeal is sub-section 66(7), which states:

> '(7) If a person … satisfies the Commissioners or, on appeal a tribunal, that –
>
> (a) an EC sales statement has been submitted at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit; or
>
> (b) there is a reasonable excuse for such a statement not having been dispatched,
>
> he shall be treated for the purposes for this section … as not having been in default in relation to that statement and, accordingly, he shall not be liable to any penalty under this section in respect of that statement …'

18. The time limits for issuing penalty assessments are set out in s 77 VATA, and in respect of a penalty under s 66, s 77(2A) provides as follows:

> 'Subject to subsection (5) below, an assessment under section 76 of a penalty under section 65 or 66 may be made at any time before the expiry of the period of 2 years beginning with the time when facts sufficient in the opinion of the Commissioners to indicate, as the case may be –
>
> (a) that the statement in question contained a material inaccuracy, or
> (b) that there had been a default within the meaning of section 66(1),

came to the Commissioners' knowledge.'

19. The penalties relate to two ESLs that were submitted by post, and s 7 of the Interpretation Act 1978 provides:

> 'Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

20. Key authorities interpreting s 7 are discussed in Calladine-Smith v SaveOrder Ltd ('Calladine-Smith')[1], and the Court of Appeal decisions in Chiswell v Griffon ('Chiswell') and R v County of London Quarter Sessions Appeal Committee, ex p Rossi ('ex p Rossi') are followed[2]. The crux of the analysis of the two parts to s 7 concerns the burden of proof and what needs to be proved for each part. The burden to prove the first part concerning the 'service' of the document is on the sender, and the burden to prove the second part concerning 'delivery' lies with the addressee.

21. In *Heronslea Ltd v HMRC* ('*Heronslea*')[3], the taxpayer's appeal was allowed by virtue of s 7 of the Interpretation Act that the service of the return could be deemed to be on time and that HMRC failed to discharge the burden of proving 'the contrary' once the date of posting had been established.

22. Of ancillary relevance is the High Court judgment[4] on two appeals from decisions of the then VAT Tribunal, both of which concern the non-receipt of the Surcharge Liability Notice (SLN). In *C&E Comrs v Medway* ('*Medway*'), the receipt of the SLN is held to be crucial for the purpose of enabling the person to whom it was addressed to take requisite action, and the rolling 12-month surcharge liability period cannot be triggered until the receipt of the SLN. In *C&E Comrs v Adplates* ('*Adplates*'), the first-instance decision that the non-receipt of the SLN amounts to a reasonable excuse for the late filing of a return is rejected as 'unsustainable'.

23. In *Stereomeatic Limited v HMRC* ('*Stereomeatic*') the appellant habitually dispatched its ESLs around the same time as the VAT return for the related quarter because it did not consider it 'practical to prepare the [ESLs] before the VAT quarterly return'[5]. With the due date of a paper ESL being some three weeks before the VAT return, the appellant was therefore in habitual default in submitting its ESLs.

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[1] [2011] EWHC 2501 (Ch)

[2] The two Court of Appeal decisions in *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, and *R v County of London Quarter Sessions Appeal Committee, ex p Rossi* [1965] 1 All ER 670 are followed by Morgan J, whereas the higher burden of proof (beyond the balance of probabilities) for the non-receipt of post in *Lex Service plc v Johns* [1990] 1 EGLR 92 (another Court of Appeal decision) is set aside.

[3] [2011] UKFTT 102 (TC)

[4] The judgement covers the two appeals *Customs & Excise Comrs v Medway Draughting Technical Services Limited; Customs & Excise Comrs v Adplates Offset Limited* [1989] STC 346.

[5] [2016] UKFTT 0225 (TC), at [12]

24. The only authority referred to by HMRC is *Rayknight Enterprises Limited v HMRC* ('*Rayknight*')[6] in which the appellant complained that HMRC had failed to advise the appellant in early course that it was in default with the ESL and had allowed the maximum penalty to clock up before serving the penalty notice. Judge Brannan ruled that 'there is no statutory obligation for HMRC to notify the appellant and their failure to do so cannot, in our view, constitute a reasonable excuse within the meaning of section 66 (7)'.

Grounds of appeal

25. The appellant's agent lodged an appeal with the Tribunal dated 7 July 2015. The main ground of appeal is that 'the [ESL] forms were *sent via the postal services and would have been delivered on time*', and is elaborated upon as follows:

> '…We respect that it is rare that the postal services make mistakes but it has happened on two occasions which is very unfortunate. …'
>
> 'We submitted the statements in such a time and manner that it was reasonable to expect that it would be received by … [HMRC] well within the 14 days of the end of the reporting period for paper returns. As soon as we were notified many months later that they had not been received we resubmitted these forms as soon as possible.'

26. Related to the main ground is the appellant's contention that:

> '… we felt we had submitted the ESL but [HMRC] have a policy of not notifying us otherwise, that we are at fault even though we had no way of knowing HMRC had not received it due to their policy.'

While the appellant had not used the term 'reasonable excuse', HMRC have treated this contention as a pleading on reasonable excuse, and the Tribunal will consider it under that light.

27. The third ground of appeal would seem to concern proportionality, stated in the following terms: 'that the penalties for both ESL's [*sic* ESLs] should be cleared as it is an extortionate amount for a matter that we could not control.'

Discussion

28. The appellant's appeal is staked on the claim that both ESLs for 09/14 and 12/14 had been sent by post '*well within the 14 days of the end of the reporting period*', and that it would be reasonable to expect their delivery within the appropriate time limit in the ordinary course of post.

29. HMRC contend that the onus is on the appellant to show that the ESLs were submitted in such time and in such a manner that it was reasonable to expect that they would be received by the due dates. That the appellant has not provided any documentary evidence to prove the ESLs were sent on time, or evidence of any specific problems with the postal services around the time of the alleged submissions, and its appeal must therefore be dismissed.

30. The Tribunal agrees that the mere claim of the posting of these forms is not sufficient, and the person asserting a claim has the onus to prove it. However, before I

[6] [2014] UKFTT 278 (TC)

can dismiss the appeal, I need to consider the extent the appellant can rely on the deeming provision of s 7 of the Interpretation Act. I am satisfied that s 7 applies in this case with reference to the wording of sub-section 66(7)(a) VATA whereby an ESL is 'to be submitted at such a time and in such a manner', and that the post is one of the methods of delivery expressly endorsed by HMRC's practice of sending out paper ESLs accompanied by a pre-paid and addressed envelope.

31. Section 7 provides that 'service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document'. For the deeming provision to apply in the appellant's case, the fact in issue is whether the ESLs for 09/14 and 12/14 were properly addressed, pre-paid and posted. Assuming that the appellant had used the pre-paid addressed envelope for the purpose of delivery, my finding of fact is therefore confined to posting. (If the appellant had not used the pre-paid addressed envelope, and the non-delivery of the ESLs was the result of the documents not having been properly addressed or pre-paid, then s 7 cannot be relied upon anyway.)

32. The appellant has not provided positive evidence to establish these forms were posted in good time to meet the respective time limits, nor could evidence be adduced from any witnesses given the absence of the appellant at the hearing. I am therefore unable to make a finding of fact based on positive evidence as regards posting. The unsatisfactory state of the evidence from the appellant means that I have to decide the case on burden of proof based on inferences I can draw from findings of primary fact. The 'fact in issue' is whether posting had been effected, and I have to decide whether on the balance of probabilities, the said documents were more likely than not to have been posted at such a time and in such a manner as to enable 'service' to be deemed.

33. My findings of primary fact and the inferences I draw from them are as follows:

(1) This is not a case of postal delay, but non-delivery; the two ESLs alleged to have been posted did not arrive late; they simply had not arrived at all; HMRC had no records of their receipts; nor were they returned to the appellant marked as 'undelivered' given that the appellant claimed they knew nothing of the non-delivery until the notification of penalties.

(2) All of the appellant's ESLs were in paper format delivered by post; there were no other incidents of non-delivery of ESLs. That the post should fail to deliver on two consecutive occasions is highly improbable, especially in view of the use of the prepaid and addressed envelope. The appellant has admitted as much in its grounds of appeal that 'it is rare that the postal services make mistakes but it has happened here on two occasions', and that it was 'very unfortunate'. The non-delivery of one ESL may be regarded as unfortunate; the non-delivery of both ESLs in succession with a time gap of some 3 months in between (ie not due to a cluster of postal failures), rather than being 'very unfortunate', renders it more improbable as a matter of statistics.

(3) The due date of the ESL for 09/14 was Tuesday 14 October 2014, and therefore pre-dated the date of receipt of 16 October 2014 for the 06/14 ESL, the submission of which would seem to have been prompted by the PLN dated 1 October 2014. To ensure the 09/14 ESL was received by the due date, it should have been posted by Friday 10 October 2014. It is unlikely that the appellant would have posted the ESL for 09/14 *before* it posted the ESL for 06/14.

(4) The submission of the 12/14 ESL on 7 April 2015 would seem to have been prompted by the penalty notice dated 12 March 2015 in relation to 09/14.

The submission of *both* ESLs for 09/14 and 12/14 on 7 April 2015 fell between the dates of the two related penalty notices. If the 12/14 ESL had already been posted for the appellant to assume its delivery in the ordinary course of post, it seems very odd (as against reason) to re-submit the 12/14 ESL as a default response on 7 April 2015, *before* the related penalty notice was issued on 7 May 2014 to notify the appellant that it was in default for 12/14 as well.

(5) The due date for the 03/15 ESL was 14 April 2015, within a week after the delivery of both 09/14 and 12/14 on 7 April 2015. One would expect, if there should be an ESL period that was on time, the period 03/15 should be it, given the concomitant awareness of penalties. But the ESL for 03/15 was late. The appellant claimed the ESLs in dispute were submitted '*well* within the 14 days of the end of the reporting period for paper returns'. For a paper ESL to be received within 14 days after the end of a VAT quarter, it has to be dispatched some three weeks before the related VAT return is due. This in turn necessitates a compliance routine of commencing the preparation of an ESL almost immediately after the end of the reporting period. The facts in *Stereomatic* highlight the potential pitfall for a trader whose compliance routine was to prepare the related ESL in conjunction with the VAT return. On balance, it is not likely that the appellant would have dispatched its paper ESLs on time for 09/14 and 12/14 (as alleged) and then went on to defaulting for the ensuing periods 03/15 and 09/15, in that if a compliance routine was in place to deal timeously with the ESL submission in those disputed periods, it would be more likely than not to be reflected in the later periods of 03/15 and 09/15.

(6) The appellant's compliance history (see §10-11) of ESL submissions suggests a pattern of lateness; of the five periods for which an ESL was required, three of them were submitted late (06/14, 03/15 and 09/15), and the other two (09/14 and 12/14) are under appeal. From the pattern of lateness, it is more likely than not that the appellant had not established a compliance routine for completing and dispatching the ESLs for the disputed periods 'well within the 14 days of the end of the reporting period for paper returns' as alleged.

(7) The course of dealing between HMRC and the appellant did not show a fact pattern of non-delivery of correspondence or a frustrated course of communication as in the case of *Heronslea*. Furthermore, the appellant in *Heronslea* was able to show a pattern of due diligence and of taking pre-emptive initiatives in meeting its compliance obligations, which enabled that Tribunal to find that the timely service of the disputed return could be deemed under s 7 of the Interpretation Act. The appellant in this case has not demonstrated the same level of due diligence; the course of dealing between the appellant and HMRC, so far as the submission of ESLs is concerned, has been characterised by the appellant's dilatoriness.

34. The burden of proof for the deeming provision under s 7 is on the sender, and what is required to be proved is that the document has been properly addressed, prepaid and posted. If the sender can prove that, then he can rely on the deeming provision of s 7, and if he cannot prove that, then s 7 cannot be relied on (*Callidine-Smith* at [25]). Based on the inferences drawn from my findings of primary fact, the appellant has not proved, on the balance of probabilities, that it had submitted the two ESLs at such a time and in such a manner that it was reasonable to expect that they would be received by the Commissioners within the appropriate time limit. It follows that the appellant cannot rely on the deeming provision under the first part of s 7.

35. The second part of s 7, that of proving the contrary, is therefore not engaged in this case as in *Heronslea*. The burden is otherwise on the addressee to prove the contrary; namely, the contrary of the deeming provision that the document in question was delivered in the ordinary course of post. Since there is no deemed service found under the first part of s 7, there is no engagement of the second part of s 7 to require HMRC to prove the contrary.

36. Related to the main ground of appeal is the appellant's contention that the penalty notices arrived many months after the defaults and the appellant was not alerted in good time to the fact that HMRC had not received the ESLs claimed to have been posted. If I had been able to make a finding of fact that the disputed ESLs were submitted for receipt by their due dates, the penalties would have fallen away and this contention of the arrival of the penalty notices at a late stage has no relevance. Since I cannot make such a finding of fact, I will consider whether the issue of the penalty notices months after the defaults amounts to a reasonable excuse.

37. The authority of *Medway* points to the importance of the appellant having received the PLN, and I am satisfied that the PLN was served on 1 October 2014 and was duly received and acted upon by the appellant. The details on the PLN (see §9) clearly alert the appellant *twice* to the fact that future defaults will attract penalties '*without any further notices being served*' and '*without further warning*'. The penalty notices, though issued months after the defaults, were issued within the time limits as provided by s 77(2A) VATA. Section 66 places the onus on the taxpayer to meet the statutory obligation with regard to the submission of an ESL, where required, within the appropriate time limit. The obligation is not on HMRC to issue a penalty notice in good time to help mitigate the penalty that a default may incur.

38. Whether an ESL is required for a certain VAT quarter will not be known by HMRC until after the VAT return for the said period has been processed, which then needs to be matched up with the fact that no ESL has been submitted before a penalty notice can be issued. In contrast, the trader knows that an ESL is due for a certain reporting period the moment he has made a sale to a customer in an EU member state. There is an incomparable timing difference in the knowledge between the tax authority and the trader whether an ESL is required for a particular period. In *Adplates*, that the non-receipt of the surcharge liability notice should amount to a reasonable excuse for the late submission of a return was found to be 'unsustainable'. It is equally unsustainable that the timing factor in the issue of the penalty notices should amount to a reasonable excuse for the late submission of the ESLs.

39. Finally, on the matter of proportionality, unless the statute has specifically authorised, this Tribunal does not have jurisdiction to consider issues of proportionality as pertaining to fairness or reasonableness in the judicial review sense. There is no such statutory authorisation in this case; the matter of proportionality therefore cannot be considered in the judicial review sense. Applying the principles from *Total Technology*[7], the penalties are not disproportionate, especially in view of the capping of the penalty to a maximum of 100 days, and the scaling of the daily penalty from £5, to £10, and to £15 in proportion to the number of defaults in a rolling 12-month penalty period.

[7] *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC)

Decision

40. The appeal is accordingly dismissed. The penalties of £500 and £780 for the respective periods 09/14 and 12/14 are confirmed.

41. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 29 JULY 2016