



TC01281

Appeal number: TC/2011/01162

Appeal against penalties - whether for three or two years - whether there was a reasonable excuse for not filing the 2005-06 return - held, yes - penalty for the two remaining years set aside as incorrect - appeal for all three years allowed.

FIRST-TIER TRIBUNAL

TAX

BUXTON RUGBY UNION FOOTBALL CLUB

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 2 June 2011 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 8 February 2011 and HMRC's Statement of Case submitted on 8 March 2011.

DECISION

1. This is the appeal by Buxton Rugby Union Football Club (“the Club”) against penalties of £565, £500 and £500 imposed for late filing of the 2005-06, 2006-07 and 2007-08 end of year returns (P35) respectively. The Tribunal decided that the appeal should be accepted.

The law

2. The regulations for the filing of P35s are set out in the Income Tax (PAYE) Regulations, SI 2003/2682 reg 73:

- 10 “(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.
- (2) The information is—
- (a) the tax year to which the return relates,
- (b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and
- 15 (c) the total net tax deducted in relation to those payments.
- (3) - (9) ...
- 20 (10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).”

3. As provided in Reg 73(10) above, Taxes Management Act 1970 (TMA) s 98A sets out the liability to penalties for non-compliance with these regulations:

- 25 “(1) PAYE regulations...may provide that this section shall apply in relation to any specified provision of the regulations.
- (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
- (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed...
- 30 (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—
- (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100...”
- 35

4. TMA s 102 reads as follows;

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

5. The taxpayer’s right of appeal and the Tribunal’s powers are at TMA s 100B, which so far as relevant to this appeal, are as follows:

“(1) An appeal may be brought against the determination of a penalty under section 100 above and...the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax...

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

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

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

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

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

6. Section 118(2) TMA, so far as is material to this appeal, provides:

“...where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.”

The facts

7. The Club is a small local rugby club with one part-time paid staff member, the barman. Most of the work, including the filing of tax returns and the making of tax payments, is carried out by volunteers.

8. The facts in relation to each of the three years are set out separately below

2005-06

9. Mr Wilcock, the Club Treasurer, had filed the 2004-05 return online but found it complex. He decided to revert to paper filing for 2005-06. However, because the Club had used online filing for 2004-05, HMRC did not issue a paper form for 2005-06. The Club missed the filing deadline of 20 May 2006. The total tax and NICs for the year was £565.18

10. By letter dated 12 March 2007, almost two years later, HMRC advised the Club that it had missed the filing deadline and charged it a penalty of £900. The Club appealed the penalty by letter dated 25 March 2007. A paper return was submitted by the Club and received by HMRC on 30 April 2007.

5 11. HMRC did not respond to the appeal until, by letter dated 11 August 2010, over three years later, the Club was told that a penalty of £1,900 was owed. A copy of the letter was provided to the Tribunal. The letter did not identify the years for which the penalties had been charged.

12. On 17 October 2010, Mr Wilcock replied as follows:

10 “With regard to the statement of liabilities we have received from your Debt Management Office in Chesterfield which sets out penalties incurred in 2006 and 2007 for the late filing of our end of year P35s in those years adding up to £1,900.

15 I believe we have already appealed against the penalties for both years and these were kindly waived following your office’s reassessment. Please can you confirm the position however, if these are still on your books for some reason. I would like to restate our appeal against the penalties...”

13. HMRC treated this letter as an appeal against the two years, 2005-06 and 2006-07. They issued two letters dated 12 November 2010, both headed “Appeal against a penalty for sending your tax return in late.”

14. The first of these opens by saying “I have considered your appeal against the penalty for the year 2005-06.” The second letter is identical in all respects but refers to 2006-07.

15. On 27 November 2010, Mr Wilcock asked for a HMRC review. In relation to 2005-06 the HMRC review letter dated 13 January 2011 states that:

“As a concession to small employers, HMRC allows fixed penalties to be mitigated to the amount of the duties on the return (ie total tax and NIC) if these are less than the penalty, down to a minimum of £100. As your duties for 2005-06 totalled £565.18, your penalty has been mitigated to £565.”

30 *2006-07*

16. Mr Wilcock paid the PAYE/NICs for 2006-07 by way of three cheques on 22 May 2007. The cheques cleared on 30 May 2007.

17. He says in his submissions that he sent the P35 with the cheques. However, HMRC say they did not receive the P35, although they received and cashed the cheques. I consider this conflicting evidence below.

18. By notice dated 24 September 2007, HMRC issued a penalty of £400 for late filing of the return. Mr Wilcock submitted another P35 in October 2007 and says he appealed the penalty. A further penalty of £100 was levied on 16 November 2007, making a total of £500. It is unclear whether this was received by Mr Wilcock, and it is also unclear whether it was appealed at that time.

19. Nothing further was heard from HMRC until 11 August, when, as explained above, HMRC wrote to the Club saying that £1,900 was owed. Mr Wilcock replied on 17 October 2010, again as set out above, and this reply was treated as an appeal against the two years, 2005-06 and 2006-07.

- 5 20. In his letter of 27 November 2010, Mr Wilcock requested an HMRC review, but the penalty of £500 was confirmed.

2007-08

21. The position for 2007-08 is confused. Mr Wilcock says that he paid the tax and submitted the return on time.

- 10 22. This is clear from his letter dated 27 November 2010 which, as well as asking for a review of the penalties which he understood to have been levied in respect of 2005-06 and 2006-07, also summarises the P35 position for the four years 2005-06 through to 2008-09.

- 15 23. Because HMRC's letter of 11 August 2010 simply referred to penalties of £1,900 without identifying the years to which these penalties attached, and because Mr Wilcock believed that the return for 2007-08 had been submitted on time, his letter dated 17 October 2010 did not make reference to 2007-08 - although it was clearly an appeal against the full £1,900 of penalties.

- 20 24. HMRC's statement of case states, at the top of the final page and after the detailed consideration of the appeal, that:

“there is a penalty of £500 outstanding for 2007-08 but the appellant has not appealed it. The request for payment of £1,900 issued by Debt Management was for 2004-05 £900 (now £565), 2005-06 £500 and 2006-07 (£500).”

- 25 25. On the evidence before the Tribunal, this was the first time that Mr Wilcock was told that £500 of the £1,900 penalty related to 2007-08.

Mr Wilcock's submissions on behalf of the Club

26. Mr Wilcock said:

- 30 (1) for 2005-06, that he did not realise that no return form would be sent for completion, and said “if the return had been received I would have completed it straightaway.”

(2) for 2006-07, that he believed he had posted the P35 with the cheque “as I carry out this task [of completing the P35] when I make the final PAYE/NI payment which was made on time.”

(3) for 2007-08, that the return was submitted on time.

- 35 27. Generally, Mr Wilcock said:

“We are a small club with only one part-time staff member, the bar manager, so our annual PAYE/NI payments are small. All our jobs are carried out by

volunteers and it seems that overall the penalties (which are for late confirmations not for underpaying tax) are very disproportionate to the actual tax amounts involved.”

HMRC’s submissions

5 28. HMRC say that:

“The legislation does not say what a reasonable excuse is, but HMRC takes the view that it is an exceptional event beyond the taxpayer’s control which prevented the return from being filed by the due date, for example because of severe illness or bereavement.”

10 29. They say that the Club does not have a reasonable excuse. They further say that “HMRC has no statutory obligation to issue reminders, rather the obligation to submit end of year returns lies with the employer as per the legislation.” Nevertheless, HMRC made the deadline known to people via a national media campaign “early in the year”, on the internet, in the employer bulletin and on the employer CDROM and
15 “on the P35 (although online filers do not get paper returns)”.

Discussion and decision

The years under appeal

20 30. It is clear to this Tribunal that Mr Wilcock’s letter of 17 October 2010, which was treated by HMRC as an appeal against 2005-06 and 2006-07, was an appeal against the total of the penalties charged of £1,900.

31. Had Mr Wilcock realised that £500 of the £1,900 penalties referred to in HMRC’s letter of 11 August related to 2007-08, it is self-evident that he would have made reference to that year in his response.

25 32. The Tribunal has no information as to why HMRC did not make the position plain to Mr Wilcock. In any event, I find that his appeal against the full £1,900 is an appeal for the three years to which those penalties attach.

Reasonable excuse

30 33. HMRC are right to say that “reasonable excuse” is not defined in the legislation. However, this Tribunal has held that “an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act.” *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC). It has also been held to be “a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* [2006] STC (SCD) 536).

35 34. In the recent decision of *N A Dudley Electrical Contractors Ltd v R&C Commrs* [2011] UKFTT 260 (TC) (“*Dudley*”), the Tribunal explicitly rejects HMRC’s formulation of the “reasonable excuse” defence, saying:

5 “HMRC argues that a "reasonable excuse" must be some exceptional
circumstance which prevented timeous filing. That, as a matter of law,
is wrong. Parliament has provided that the penalty will not be due if an
appellant can show that it has a "reasonable excuse". If Parliament had
intended to say that the penalty would not be due only in exceptional
circumstances, it would have said so in those terms. The phrase
"reasonable excuse" uses ordinary English words in everyday usage
which must be given their plain and ordinary meaning.”

10 35. I too consider that HMRC’s formulation of the “reasonable excuse” defence is too
narrow and reflects neither the normal and natural meaning of the term (per *Dudley*),
nor the earlier *dicta* of this Tribunal quoted above.

2005-06

15 36. For 2005-06 the position of the Club was similar to that of the taxpayer in *Dudley*:
no P35 was sent to the Appellant in that case because, in the previous year, the
company filed online. The judge in *Dudley* said “one cannot deliver what one has not
received” and:

20 “HMRC has failed to satisfy me that it was justified in assuming that it
need not send a paper return to the appellant simply because, as a
matter of fact, its P35 for the year ended 5 April 2007 had been filed
online”.

25 37. Although there were public statements about the P35 filing deadline, HMRC have
provided no evidence that this Appellant was told that the Club would not receive a
paper form because they had filed online the previous year. The position is thus
similar to that in *Dudley*, and like the judge in that case, I find that the Club had a
reasonable excuse for its late filing.

2006-07

30 38. In relation to 2006-07, I accept Mr Wilcock’s evidence that he completed the P35
at the time he was working out the tax and NICs that were due. There is no dispute
that the cheques were posted on 22 May, as they were safely received and banked. Mr
Wilcock says he sent the P35 with the cheques; this would clearly have been a natural
and sensible thing to do, and I accept his evidence.

35 39. The P35 was therefore posted two days after the due date and so received by
HMRC one or more days later. HMRC would thus have been empowered to issue a
penalty of £100. In fact they have levied a penalty of £400 followed by a further
penalty of £100. The penalty is thus clearly incorrect.

40. The Tribunal has the power, if “the amount determined appears to be incorrect,
[to] increase or reduce it to the correct amount”.

40 41. Before the Tribunal can impose a reduced penalty, it must be sure that it is the
“correct amount”. Although HMRC would have been able, under the legislation, to
charge a £100 penalty for a P35 return which was a few days late, there is no evidence

before me that HMRC applied the legislation in 2006-07 so as to penalise minor lateness. The fact that no penalties were issued until the P35 had been “late” for four months suggests that there may have been no policy of issuing penalties for returns which were merely a few days late.

5 42. I am thus unable to say that £100 would be the “correct amount” of penalty to impose on a 2006-07 P35 which was late by only a few days, and as a result have not replaced the £400 penalty with one for £100. Instead, I simply set aside the incorrect £400 and £100 penalties.

2007-08

10 43. HMRC decided to treat Mr Wilcock’s letter as an appeal against only two of the three years in question. As a result, they have put forward no evidence to support their case in relation to the filing of the 2007-08 P35.

44. Mr Wilcock says clearly that he filed the return on time. In the absence of any other evidence, I accept this. The penalty for 2007-08 is set aside as incorrect.

15 *Conclusion*

45. I therefore find that the Club’s appeal succeeds for all three years: 2005-06, 2006-07 and 2007-08. As a result, it was not necessary to consider the question of proportionality.

20 46. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30

Anne Redston

**PRESIDING MEMBER
RELEASE DATE: 29 JUNE 2011**

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