



TC01651

Appeal number: TC/2011/05514

Penalties for late filing of P35 for three consecutive years– whether returns for first two years were delivered to HMRC – Interpretation Act 1978 – appeal for those two years allowed and penalties set aside – whether penalty of £400 for not filing the 2009-10 return online was unfair and/or disproportionate – no – appeal dismissed and penalty confirmed.

FIRST-TIER TRIBUNAL

TAX

**JEAN ROSS
t/a HILLTOP BOARDING KENNELS**

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 22 November 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 14 July 2011, HMRC's Statement of Case submitted on 12 October 2011 and the Appellant's Reply submitted on 7 November 2011.

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DECISION

1. This is the appeal by Ms Jean Ross against penalties totalling £1,200 imposed for late filing of the 2007-08, 2008-09 and 2009-10 end of year return of payments due under Pay As You Earn (“P35”).
2. The Tribunal decided that the appeal against the penalties for 2007-08 and 2008-09 returns were allowed, but dismissed the appeal against the penalty for 2009-10. As a result penalties of £800 were set aside, and the penalty of £400 confirmed.
3. The issues in the case were:
- (1) whether Ms Ross had filed the returns by the due date;
 - (2) if not, whether the penalty breached HMRC’s common law duty of fairness and/or was disproportionate.

The legislation and regulations

4. Regulation 73 of the Income Tax (PAYE) Regulations (“the Regulations”) requires that P35s are filed on or before 19 May following the end of a tax year.
5. For the 2009-10 tax year, Reg 205 of the Regulations was amended so that employers were required to submit their P35 returns online. There were certain exceptions to this requirement, but the Appellant does not come within any of these exceptions.
6. Taxes Management Act 1970 (“TMA”) s 98A sets out the liability to fixed penalties for non-compliance with the P35 filing regulations. In so far as relevant to this Decision, it reads as follows:
- (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,
 - (b) ...
 - (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...
7. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B. TMA s 102 allows HMRC to mitigate any penalty.

8. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2).

The earlier years

5 9. For 2007-08 and 2008-09, there was no online filing requirement. The first issue before the Tribunal is whether Ms Ross submitted her returns by the filing date of 19 May following the end of each fiscal year.

Ms Ross's submissions on these earlier years

10. Ms Ross says that she submitted her returns on paper by the due date and has supplied copies of these returns to HMRC.

10 11. She records that "everyone I spoke to within HMRC have been very kind, understanding and honest enough to admit that the forms have probably been filed incorrectly."

12. She states that other correspondence posted to HMRC has been mislaid by them, and cites in particular a recorded delivery letter which the tracking system confirmed
15 was received by HMRC on 26 February 2011. Ms Ross says that she waited a week and "when I had heard nothing, I telephoned them. They told me that they DID NOT KNOW where it had gone." She was told to call again in 3-4 weeks, which she did, but they had still not found the letter. HMRC wrote on 8 April 2011 and apologised, saying the letter had now been located.

20 13. Ms Ross also says that she was not informed that these returns had not been received by HMRC until she was issued with a penalty notice for £400 for each of these two years; the penalty Notice was dated 16 February 2011.

25 14. Finally, she says that she has always filed her returns on time, and that this unblemished compliance record has lasted for 16 years. She asks "why would I stop for 3 years?"

HMRC submissions on these earlier years

15. HMRC say that they have "no proof" that the 2007-08 or 2008-09 returns were received.

16. They also submit that the legislation:

30 "does not define 'delivery' but HMRC takes this to mean that a paper return must be physically handed over to Revenue staff; or placed in the office letterbox. A return sent by post is therefore not delivered until it reaches the office...It is "not enough simply to have posted the returns in what is believed to be sufficient postage and time to reach
35 HMRC by the relevant due date."

17. HMRC also say that they sent reminders about the late returns, and provide screenprints to support their submission. As these reminders were not returned

undelivered HMRC say they “were deemed to have been received within the ordinary course of post in line with Section 7 of the Interpretation Act 1978.”

Discussion and decision on the earlier years

The law on delivery

5 18. HMRC make contradictory submissions on “delivery”.

19. In the context of post sent by Ms Ross, they say that the statute does not define “delivery”, and that her returns are only “delivered” if they are “physically handed over to Revenue staff; or placed in the office letterbox.”

10 20. However, in the context of documents sent out by HMRC, they seek to rely on the Interpretation Act, so that the reminders are “deemed to have been received” if they have been posted “in the ordinary course of post.”

21. The Interpretation Act s 7 reads as follows:

15 “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 22. The provisions of this statute apply both to post sent to HMRC and to post received by HMRC, and the Tribunal is surprised that HMRC seek to rely on the statute in one context, but disavow any knowledge of the same provisions in another.

25 23. This might have been more understandable had these two contrasting positions been taken by different HMRC officers, but both submissions are contained within a single page of their Statement of Case.

Discussion and decision on the earlier years

24. I find as a fact that in 2007-08 and 2008-09 Ms Ross sent her returns by post, and on time, as she had done for each of the 13 previous years.

30 25. Under the Interpretation Act they are thus deemed to be delivered “unless the contrary is proved.”

26. I do not find that HMRC have “proved” that the returns were not delivered. Ms Ross records that, in phone conversations, HMRC staff have admitted that “the forms have probably been filed incorrectly.”

35 27. I thus find that the returns sent by Ms Ross were both sent by her and either received, or deemed to be received, by HMRC.

28. As a result I accept her appeal and set aside the penalty of £400 for 2007-08 and the penalty of £400 for 2008-09.

29. For completeness I note Ms Ross's evidence in relation to the document sent by registered post. While this may be illustrative of deficiencies in HMRC's post-handling arrangements, it is not relevant to the facts of this case, and I have not relied on it in coming to my Decision.

5 **The 2009-10 P35**

30. In 2009-10 Ms Ross was under a statutory obligation to file her P35 return online.

31. However, she submitted her return on paper: this is not in dispute. In a letter dated 5 July 2011 to HMRC she asks them to quote "the relevant legislation that authorises you to require an Employers' Annual Return online (and by no other means)."

32. Ms Ross does not put forward any reasonable excuse for not filing the return online.

33. She does, however, say that not informing her of the problem until January 2011 and then imposing a penalty of £400, was "contrary to natural justice". She further says that the penalty is "disproportionate and unfair."

34. HMRC do not make any submissions on fairness or proportionality other than to say that the penalty has, in fact, been mitigated to £400: had the full penalty been charged, it would have been £100 a month for each month or part month after 19 May 2010.

35. Furthermore, their records show that a Mr Doneghan called HMRC on 4 October 2010 to discuss a late payment for Ms Ross's business. The call record is as follows:

"09.44 Pyt Promise – MR DONEGHAN (3rd Party owner's husband)
[information about late payment] Late due to cash flow. Reminded of
pyt dates. P35s 07/08, 08/09 and 09/10 will be filed by
01/11/10.WLAP."

36. In their Statement of Case, HMRC say that "WLAP" means "warned with regard to legal action and penalties."

37. In relation to this call, Ms Ross says:

"I am unable to ascertain what Brian Doneghan allegedly said in a conversation with HMRC staff but he is not a partner in my business and I am surprised that anything was discussed with him. I cannot be held accountable for any such conversations and in any event what he did or did not say or understand cannot be pertinent."

Discussion and decision on 2009-10

35 *Jurisdiction and obligations*

38. There is a question, not raised by either party, as to the extent of the Tribunal's jurisdiction over issues of fairness (see Sales J in *Oxfam v HMRC* [2009] EWHC 3078

(Ch)); there is also uncertainty as to its jurisdiction in direct tax cases to consider proportionality.

39. If the Tribunal does have jurisdiction, the obligations of a statutory body such as HMRC to act fairly are succinctly summarised in Halsbury's Laws¹:

5 “If the repository of a power exceeds its authority, or if a power is exercised
without lawful authority, a purported exercise of power may be pronounced
invalid. The lawful exercise of a statutory power presupposes compliance not
10 only with the substantive, formal and procedural conditions laid down for its
performance but also with implied requirements governing the exercise of
discretion. All statutory powers must be exercised in good faith, and for the
purpose for which they were granted. The repository of a power must have
regard to relevant considerations and not allow itself to be influenced by
15 irrelevant considerations. It must act fairly and reasonably. Following the
coming into force of the Human Rights Act 1998, it is likely to be the case
that acting fairly and reasonably will in general incorporate an obligation to
act proportionately.”

40. The test for assessing proportionality was set out by Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [28]:

20 “... it seems to me that ultimately one single question arises for
determination by the court: is the scheme not merely harsh but plainly unfair
so that, however effectively that unfairness may assist in achieving the social
goal, it simply cannot be permitted? In addressing this question I for my part
would recognise a wide discretion in the Secretary of State in his task of
25 devising a suitable scheme, and a high degree of deference due by the court to
Parliament when it comes to determining its legality. Our law is now replete
with dicta at the very highest level commending the courts to show such
deference.”

41. The “not merely harsh but plainly unfair” test sets a high threshold before a court
30 or tribunal can find that a penalty, correctly levied on the taxpayer by statutory
provisions set by parliament, should be struck down as disproportionate. Perhaps
higher still is the threshold set by Waller LJ in *R (Federation of Tour Operators) v
HM Treasury* [2008] STC 2524 at [32], when he said that the penalty in that case was
disproportionate as it was “devoid of reasonable foundation”.

Discussion and decisions of the facts

35 42. I accept HMRC's evidence that Mr Doneghan was told, on 4 October 2010, that
the P35 return had not been received by HMRC. Although Ms Ross seeks to disown
any responsibility for this conversation, it is nevertheless the case that Mr Monaghan
called HMRC and not the other way round, and that he called to discuss a failure by
his wife's business to make a particular payment.

40 43. I thus find that Mr Monaghan was acting as agent of the business within the
normal legal meaning of “agent”. Where an agent obtains information that he should

¹ Administrative Law (Volume 1(1) 2001 Reissue) online edition Chapter 2(1)(19): Statutory and prerogative powers.

communicate to his principal, the latter is taken to have received notice of it from the agent, whether or not he actually did so (the “imputation” or “attribution” principle).

5 44. I thus find that from 4 October 2010 Ms Ross either was aware, or is presumed to have been made aware by Mr Monaghan, that there was a problem with the filing of the 2009-10 return.

45. Had she called HMRC to sort out the matter at that point, before a penalty Notice was issued, it is possible that no penalty would have been charged.

10 46. In the event, nothing happened until receipt of the penalty Notice dated 16 January 2011. This is more than three months after Mr Monaghan had been told that the return had not been received.

47. The penalty for late filing of a P35 return is set by statute at £100 per month or part month, and thus the penalty would have been £400 from the date of the phone call to the date on which the penalty was issued, without even considering the earlier period from 20 May to 4 October.

15 48. I take into account also Ms Ross’s lack of knowledge of the change to her statutory obligations, and the high threshold required before a court or tribunal can interfere with a statutory provision on the basis that it is disproportionate; that threshold is clearly not met in this case.

49. I find that the penalty was neither unfair nor disproportionate.

20 50. I thus reject the appeal in relation to the late filing of the 2009-10 P35 and confirm the penalty of £400.

Conclusion

51. In summary, the appeals for 2007-8 and 2008-09 is allowed, and that for 2009-10 is refused. The total penalties are reduced from £1,200 to £400.

25 52. 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
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **Anne Redston**

**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 12 DECEMBER 2011**