



TC01859

Appeal number: TC/2011/03936

PAYE – penalty for late employer’s return for 2009-10 – evidence that filing was actually made rejected – no reasonable excuse for delay found – penalty not “plainly unfair” – no obligation on HMRC to issue penalties earlier than September 2010 – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

HARDAKERS (HORSFORTH) LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: KEVIN POOLE (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 14 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 28 June 2011 and HMRC’s Statement of Case received on 9 September 2011.

DECISION

Introduction

1. This appeal relates to fixed penalties of £600 imposed in respect of the late
5 filing of the Appellant's employer's annual return for the year ended 5 April 2010.

The facts

History and background

2. The Appellant at all material times carried on business as a manufacturing
bakery and two retail shops. It employed a number of individuals who were subject to
10 deduction of income tax and national insurance (NICs) under the PAYE system.

3. The Appellant had filed its employer's annual return online for a number of
years before 2009-10, being late with each year as follows:

Year	Due Date	Date of filing
2004-05	19 May 2005	8 April 2008
2005-06	19 May 2006	8 April 2008
2006-07	19 May 2007	8 April 2008
2007-08	19 May 2008	7 July 2008
2008-09	19 May 2009	22 June 2009

The Appellant has incurred and paid penalties totalling some £4,700 in relation to
these defaults.

15 *The present default and the appeals against it*

4. The Appellant was required to deliver an employer's annual return under the
PAYE system for the year ended 5 April 2010. That return was required to be
delivered no later than 19 May 2010, by online filing.

5. The return was not filed on time. HMRC did not issue a penalty notice (for
20 £400 in respect of the initial period of delay up to 19 September 2010) until 27
September 2010. The Appellant subsequently filed its return online on 2 November
2010. HMRC then issued a further penalty notice dated 5 November 2010 for £200 in
respect of the final part of the delay.

6. The Appellant appealed against the penalties by letter dated 29 November
25 2010. That letter (signed by one Sean Hardaker, who I infer to be one of the directors
of the Appellant) gave the following grounds of appeal:

“I wish to appeal against the penalties as I actually filed the returns online (5/4/10) and I also sent paper copies (19/4/10) as I was not totally confident with my computer skills!

5 Upon contacting the helpline I was advised to do both of the above ref:12804508.

Obviously you have thousands of returns to process but to allow four months to pass without contact seems unfair as this amounts to a fine of £400. I would have acted sooner if I had known the facts.”

7. In their initial letter date 26 January 2011 rejecting the appeal, HMRC said “I
10 am rejecting your appeal as my records show your P35 was not received until 2 November 2010 this is well after our deadline of 19 May, our records show no submission attempts prior to the successful one in November.”

8. The Appellant submitted a request dated 20 February 2011 for a review of HMRC’s decision, effectively repeating its earlier grounds of appeal.

15 9. HMRC confirmed its earlier decision by letter dated 13 April 2011, giving the following reasons:

20 “You have advised that you filed your return online on 5 April 2010. Unfortunately I have no record of your return being submitted at that time. I have checked with my Online Services colleagues and they have advised that they hold no records of you logging into the system between 9 February 2010 and 3 October 2010. In addition there are no records of submission attempts prior to the successful submission on 2 November 2010. I attach a printout that shows the dates and year of returns received from you. You can note that the 2009/2010 return was
25 only received on 2 November 2010.

You have advised that you also sent in a paper copy of the return on 19 April 2010. Again there is no record of this return being received. In any case 2009/10 was the first year that it was mandatory for you to file your return electronically.

30 In your appeal you state that our Help line advised you to send in your return both electronically and in paper. I can advise that I can trace no call reference, 12804508, on our systems for the past 2 years. I have searched under your employer reference and can’t find any calls raised with the Online Services Helpdesk in 2010 or 2011.

35 In relation to the 4 month period before a penalty notice was issued, I would advise that this is normal procedure for HMR&C. The law states that the forms P35 should be with HMRC by 19 May 2010. We have to update our relevant computer systems once returns are submitted to us, and then we perform checks to see what returns were still not with us by
40 19th May. We take care to try and ensure that we do not send out penalty notices when we have had the return in by the due date. All this does take time, and so we do not issue penalty notices until about September.

In light of the above I have to rule that you have not offered a reasonable excuse so the decision to reject the penalty appeal was correct.”

5 10. The Appellant then appealed to the Tribunal, by notice of appeal dated 10 May 2011. The notice of appeal was only received by the Tribunal on 23 May 2011 and the Appellant was requested to provide reasons why the appeal was made late.

11. In the notice of appeal itself, the grounds of appeal were given as follows:

“I thought I had filed my return online 5/4/10.

10 I also sent paper copies following advice from the helpline ref: 12804508 I spoke to Greg.

I have enclosed evidence that I logged onto the system 28/3/10 and 27/1/11.

I have called the helpline on numerous occasions.

15 Because I thought that I had already filed the return I did not need to act further.

4 months is a long time to wait to be notified that I had not successfully filed the return.”

12. As to the question of the lateness of the appeal to the Tribunal, by email dated 27 June 2011, Mr Hardaker on behalf of the Appellant explained:

20 “The reason our appeal was late is simply that we did not pay the correct amount of postage when we originally posted our appeal.

It was therefore returned to us to pay the correct amount.

We duly did this but of course this adds a number of days onto the postage time obviously taking us over the 30 day limit.”

25 13. In a letter dated 19 June 2011 (received by the Tribunal on 28 June 2011), he gave slightly different reasons:

“The reason our appeal was out of time was simply that we allegedly did not put the correct amount of postage on the envelope.

It was returned to us to re-post with the correct amount of postage paid.

30 We duly did this but of course this adds a number of days onto the postage time obviously taking us over the 30 day limit.”

14. In his letter dated 19 June 2011, the extra word “allegedly” was inserted, the effect of which is to raise an inference that Mr Hardaker considers the original letter to have been stamped appropriately. The email dated 27 June 2011 however raises no such inference, simply accepting that the original letter was inadequately stamped.
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15. Permission was however given for the appeal to proceed out of time.

Findings in relation to the grounds of appeal

16. The Appellant has provided no significant evidence in support of its assertion that it believed it had filed its return on 5 April 2010. In its notice of appeal, it refers to “enclosed evidence that I logged onto the system 28/3/2010 and 27/1/11.” I accept HMRC’s view that the document dated 28 March 2010 provided by the Appellant is a CD-ROM summary of payments checklist and is not evidence of logging onto HMRC’s system. The evidence in relation to a logon in January 2011 is irrelevant, as it postdates the eventual filing of the return in November 2010.

17. I must therefore decide whether to believe HMRC’s system which reports no attempt to log on to their system or make a submission at the relevant time, or the Appellant’s assertion that it filed the returns online on 5 April 2010. I note that whilst the Appellant is very specific about the date on which the filing was supposedly made, there is no supporting evidence for it. I ask myself why there is no explanation (and corroborating evidence) as to why Mr Hardaker feels able to be so specific as to the date of filing.

18. Mr Hardaker also asserts that he sent in a paper return, and is again specific as to the date on which he says he did so (19 April 2010). Yet he has not provided any copy of the paper return he says he submitted, or any covering letter when he submitted it, or any other corroborating evidence of such submission. Nor has he explained how he feels able to be so certain that he submitted the paper return on the specific date he identifies. I accept HMRC’s evidence that they have no record of receiving any paper return from the Appellant.

19. I note that the Appellant had made its filings online for the preceding few years, therefore familiarity with the system can be assumed. No allegation has been made of any particular difficulties supposedly experienced when attempting to file the 2010 return. No explanation is given why Mr Hardaker felt it necessary to resort to the expedient of submitting a paper filing on 19 April 2010 when there was still one month to go before the deadline for online filing.

20. He also gives a reference number for a supposed contact with HMRC’s helpdesk, but no information about the date of that contact (and I accept HMRC’s evidence that they cannot trace any contact with the Appellant and the reference number given would relate to a contact occurring in 2008 or before). I find that if the conversation took place at all, it took place much earlier and in relation to a completely different return.

21. In short, I find Mr Hardaker’s account entirely unconvincing and I find that no attempt was made to submit the return until it was actually done in November 2010.

22. Since the summary decision was issued in this case on 29 November 2011, the Appellant has written in to appeal that decision. The summary decision itself made it clear that the first step in any appeal was to request full reasons for the decision, within 28 days of the release of the decision. The Appellant’s letter of appeal was

dated 21 December 2011, and was received at the Tribunal on 29 December 2011, outside the 28 day time limit. Whilst I have been prepared to allow a short extension of that time limit and to treat the request to appeal as a request for full written reasons for the decision (this document), I observe that the Appellant's approach to the question of deadlines does at least appear to be consistent.

Decision

23. I therefore regard the failure to file the return in May 2010 as a simple continuation of the previous years' pattern of disregard for the time limit, regardless of the financial consequences. Whether the failure was intentional or inadvertent, I can find no reasonable excuse for it.

24. The Appellant also complains that the penalty is too high. In appropriate situations, I consider the Tribunal has power to strike down a penalty which is "not just harsh but plainly unfair". I do not however consider this to be one of those situations. Given the background and history, I certainly cannot regard the penalty as "plainly unfair" and I would question whether it can even be regarded as harsh.

25. I do not consider the penalty can be struck down simply because of the delay until September 2011 by HMRC in issuing the first penalty notice. Whilst I consider such a delay highly undesirable, I do not consider that on its own it can justify the striking down of a penalty which does not breach the "plainly unfair" threshold.

26. It follows that the appeal must be dismissed and the penalty confirmed.

27. Should the Appellant wish to appeal against this decision, it should read the following paragraph, which sets out the procedure to be followed. An appeal against a decision of this Tribunal arises only on a point of law.

28. 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.

KEVIN POOLE
TRIBUNAL JUDGE
RELEASE DATE: 28 February 2012