



TC02144

Appeal number:TC/2011/6762

PAYE – regulation 80 determination – application to appeal out of time.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

UNIVERSAL (Commercial) LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
SONIA GABLE**

Sitting in public in Ashford on 5 May 2012

Mr Hamilton, a director of the Appellant, for the Appellant

Karen Weare, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application to make appeals out of time under section 49 TMA 70
5 against PAYE determinations under regulation 80 of the PAYE Regulations 2003 for
the years 2006/07, 2007/08 and 2008/09. The determinations were made on 12 May
2010 and the appellant wrote to HMRC seeking to appeal on 26 July 2011.

2. In the case of an appeal against a regulation 80 assessment the relevant time
limit is 30 days after the regulation 80 determination is issued (see Regulation 80(5)
10 and section 31A TMA 1970). The appellant was therefore out time in making its
appeals by over a year.

3. Section 49 TMA 1970 provides that notice to appeal may be given after the
relevant time limit if either HMRC agree, or, where HMRC do not agree, the tribunal
gives permission. Subsection (3) of section 49 provides that if three conditions are
15 met HMRC must agree to permit the late appeal. One of those conditions is that there
was a reasonable excuse for not giving notice to appeal before the relevant time limit.

4. It is plain that HMRC may agree to an appeal being given out time even if the
relevant conditions are not satisfied. If they are satisfied however they are required to
give permission. The tribunal on the other hand is given a discretion by section 49
20 which is not limited in any way by that section.

5. In considering whether to permit an extension of time the tribunal must seek to
act justly and fairly and to consider all the relevant circumstances. Among those
circumstances are the following:

(1) there is a public interest in finality: that interest is indicated by Parliament
25 in the setting of time limits. That suggests that if a time limit set by Parliament
is to be extended there must be some reason for so doing.

(2) the length of and reasons for any delay

(3) the steps taken after any reason for the delay has ceased;

(4) any prejudice which may be suffered by a party as a result of not
30 extending, or of extending the time limit: the amount of money involved and the
financial circumstances of the claimant may be relevant to this;

(5) the apparent strength of the appellant's case;

(6) any relevant behaviour of the parties; and

(7) whether the evidence, in a case where evidence is an important factor, has
35 gone stale.

The evidence and facts.

6. We had before us a bundle of copy correspondence and notes of telephone calls
and meetings. We heard oral evidence from Mr. Hamilton.

7. Mr. Hamilton's recall of dates and details was not as precise as it might have been and was in some cases contradictory. However the overall picture in our view was as follows.

5 8. Mr. Hamilton started the business of the company in 2006. The initial business was repairing vans. The work of the company was initially done by him with the help from time to time of his sons and occasionally on a short-term basis of other persons. The business went well but the paperwork built up, and he found he was not good at keeping on top of it.

10 9. Mr. Hamilton owned Preston Mill. This was the site of an old windmill and also of a number of barns. The business was started in one of the barns. Mr Hamilton had a mobile home at Preston Mill where he stayed from time to time.

15 10. In 2007 he moved the operations of the business to Canterbury industrial Park (also described as Hersden). It returned to Preston Mill between March 2008 and May 2009 and then moved to Wingfield Industrial Estate, and in April 2011 returned to Preston Mill.

11. In 2008 Mr Hamilton secured a bank loan which enabled the company to develop units at the industrial estate. The business of the company expanded and after 2009 was divided between three subsidiaries: services, parts, and MOT. These subsidiaries now operate from separate units on the industrial estate.

20 12. In May 2008 Mr. Hamilton had a car accident. He spent a month in hospital and thereafter had sight problems and a stutter. His recovery continued over a number of months and is not complete.

25 13. In 2007 the company appointed Mr Croney of Croney & Co to act as its accountants. Croney & Co advertised themselves as chartered certified accountants and, Mr Hamilton told us, were given responsibility for VAT, PAYE, corporation tax and accounts preparation and filing.

30 14. In 2010 a creditor took action to have the company wound up. HMRC (in relation to one of the taxes under its care other than PAYE) supported the winding up petition. The company engaged advisers but because of a communication error the company was struck off. It was reinstated in March 2012.

35 15. In late 2010 after the winding up petition appeared in the Gazette the company was "inundated with offers of help", Mr Hamilton said. A man telephoned him who said he could introduce Mr Hamilton to an ex-HMRC officer who could help. This was Mr. Langley who confirmed that he was ex-revenue. Mr. Hamilton viewed Mr. Langley as a friend who would help him in his hour of need. Mr. Langley told Mr. Hamilton to leave matters with him and that he thought steps should be taken to refer all the tax issues facing the company to special compliance office ("SCO). The company was in difficulties in relation to VAT and corporation tax.

40 16. Mr. Langley told Mr. Hamilton that Mr. Croney had not done a good job and was not a chartered certified accountant as he purported to be.

17. Mr. Langley took various actions in behalf of the company but in February or early March 2011 he sent the company a bill for £5000, which Mr. Hamilton thought excessive. The company therefore ceased using Mr. Langley's services after that time.

The PAYE Investigation

5 18. In August 2009 Mr. Small of HMRC wrote to the company indicating that he would make a compliance check of their PAYE records on 2 September 2009. On that day Mr. Small called at Preston Mill and saw Mr. Hamilton who said he had not received the letter of 12 August. The meeting was postponed. On 23 September 2009 Mr. Hamilton telephoned Mr. Small saying that he would ask his agent (Mr. Croney) to ring. On 22 October 2009 Mr Small wrote to the company at Preston Mill saying that he would be calling for an inspection. It appears that in response to this letter Mr. Croney telephoned Mr. Small saying that the company had moved to Hersden and that the records of the company had been stolen.

15 19. Mr. Hamilton told us that the company's records were kept in his brother's van which had been stolen from Hersden on or around 29 October 2009. He said that all the records were kept in the van so that Mr. Croney could work on them when he needed to.

20 20. Further attempts to arrange meetings and discussions between Mr. Small and Mr. Hamilton took place between November 2009 and March 2010 and on 23 March 2010 Mr. Small wrote to the company at Preston Mill enclosing a PAYE computation based on the information he held. In the absence of a reply Mr. Small issued the determinations against which the company wishes to appeal on 12 May 2010.

25 21. On 9 November 2010 Mr Hamilton spoke to Mr. Green of HMRC. Mr. Small was away. HMRC's note of the telephone call records that Mr. Hamilton asked Mr. Green to give him time and that a late appeal was discussed. Mr. Hamilton confirmed that the discussion was about appeals against the PAYE determinations. Mr. Green gave Mr. Hamilton seven days to provide late appeals and reasons for them and said that otherwise the determinations would remain in place. Mr. Hamilton said that Mr. Langley would be contacting Mr. Green. Seven days later on 16 November 2010 Mr. Hamilton spoke to Mr. Small. Mr. Small told him that the appeal period was closed and the tax was due. Mr. Hamilton said that Mr. Green had told him that he needed to contact HMRC by 16 November. He said he had engaged Mr. Langley who would be writing to Mr. Green about the PAYE determinations. Mr. Small said that the letter needed to say why the appeals were late.

35 22. The next communication was on 6 December 2010 when Mr. Hamilton called Mr. Green. Mr. Green said he had heard nothing from Mr. Langley. Mr. Hamilton said he was seeing Mr. Langley on the next day and would get Mr. Langley to call him.

40 23. Mr. Hamilton duly called Mr. Langley and on the following day Mr. Langley called Mr. Green. The conversation between Mr. Langley and Mr. Green

encompassed corporation tax matters as well as PAYE matters. Mr. Langley indicated his intention to get the matters dealt with by special compliance office.

24. There was a further telephone call on 13 December 2010 between Mr. Langley and Mr. Green in which Mr. Langley indicated that the regulation 80 position might be slightly wrong but that the corporation tax position was more serious.

25. Mr. Hamilton told us that after Mr. Langley had ceased to work for the company in February or March 2010 there was a period when he gave up hope. But he then did some research on the Internet and spoke to other people and realised that he might appeal against the regulation 80 determinations. So, in July 2011 he wrote to Mr. Small seeking to make the company's appeals.

Discussion

26. It was plain to us that from about 2009 onwards the company had severe difficulties occasioned in part by its inadequate record-keeping and compliance. These problems may have been attributable to Mr. Croney, but were also the responsibility in part of the company's director Mr. Hamilton.

27. It seemed to us that the appointment of Mr. Langley was a reasonable attempt to sort out the company's difficulties. However it also appeared that Mr. Langley saw corporation tax and perhaps VAT as more significant problems than PAYE and did not focus on the need to make appeals in relation to the regulation 80 determinations. It may have been reasonable to rely on Mr Langley to have made the appeals on its behalf in this period, but after Mr Langley no longer worked for the company such reliance would have been misplaced.

28. In correspondence Mr Hamilton has said that the company did not receive many of the letters sent by HMRC to Preston Mill in the period January 2010 to May 2010. He said that the company's business was not conducted at that address in that period and told us that his mobile home was not the only place at which he resided. HMRC say however that no correspondence addressed to Preston Mill was returned by the Royal Mail.

29. We did not find it necessary to make a decision as to whether the letters sent by HMRC in fact arrived: it was clear that by November 2010 the company had received copies of the determinations; and we found that consideration of the period after November 2010 enabled us to reach a conclusion. The remainder of this decision is therefore on the basis that the company had an excuse or number of excuses – Mr. Hamilton's recovery from his accident, the company's problems with record-keeping, possibly reliance on Mr Langley, and possibly its problems Mr. Croney – which may have made it reasonable to extend the period of appeal against the May 2010 determinations to some time in November 2010 or even February 2011.

30. However in November 2010 the company was on notice of the determinations and was given extra time to appeal. It may have been Mr. Langley's fault that no appeals were made but, even if that did amount to a reasonable excuse, that could excuse only the period from the first discussion with Mr. Green in November 2010

to about February 2011. From about February to July 2011 there seemed no reason for the company's inaction.

The possibility of an appeal being successful

5 31. The determinations are based on estimated payments to employees and directors in each year of £46,000 (£46,331 for 2007), and an obligation to deduct tax from payments at the basic rate. If on an appeal the company could show that either lesser amounts were in fact paid, or that the appropriate deduction rate was lower (as would be the case if notices of coding had been supplied in relation to the relevant employees) it is possible that the company could persuade a tribunal to reduce the
10 assessments.

32. So far as the amounts were concerned Mr. Hamilton told us that he took some £250 per week from the company (or £1,000 a month) and made payments to his sons for their work from time to time. For PAYE purposes these would be treated as net amounts from which tax had been deducted and therefore the grossed up amounts
15 would be used for the calculation of the PAYE liability. Overall this evidence indicated to us that it is likely that the company made payments of no less than £20,000 per annum to employees and directors.

33. There was no evidence that any tax code had been notified to the company in respect of any of the persons to whom it made a payment. The basic rate deduction on
20 the regulation 80 determinations seemed unlikely to be upset on appeal.

34. On this basis the very best the company might expect in any appeal would be a reduction of the determinations by half for some £5,000 of the PAYE. But the likelihood of such an outcome seemed remote. Mr. Hamilton told us that the company had been trying to reconstruct its records for the period of the assessments. It was
25 using copies of the company's bank statements and Mr. Hamilton's own banking records. However set against such evidence as those records might produce are accounts produced by Croney & Co which show for the years to July 2008 and 2009 labour costs of £72,000 and £61,000, salaries of £31,000 and £28,000, and net profits of £89,000 and £90,000 respectively. The evidence obtained by reconstruction from
30 bank statements when taken against the accounts, which seem to have been prepared from records that had been stolen with the van, would be unlikely to convince the tribunal that the emoluments paid in the relevant periods were less than £46,000 a year. We concluded that the prospect of success before a tribunal was remote.

Conclusion

35 35. The remote possibility of any success in an appeal, the likely lack of evidence or of well-remembered evidence available to a tribunal, and the lack of reasons for the company's inaction between March and July 2011, persuade us that there is no reason why permission should be granted to extend the time limit for making an appeal against these determinations.

40 36. We do not give permission to appeal.

37. 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.

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CHARLES HELLIER
TRIBUNAL JUDGE

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RELEASE DATE: 11 July 2012