



TC03196

Appeal number: TC/2013/05077

Income tax –penalties for failure to file P35 end of year PAYE forms for 2010-11 and 2011-12 – first charity removed from Charity Commission website and new charitable trust established – whether penalties validly issued – held, yes in relation to three of the penalties and no decision on the fourth – whether valid application for late appeal made – held yes, in relation to 2011-12 only – whether permission should be given for a late appeal – permission refused.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE REDHILL ISLAMIC CENTRE TRUST

Appellant

- and -

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

Respondents

**TRIBUNAL: ANNE REDSTON (TRIBUNAL PRESIDING MEMBER)
MS HELEN MYERSCOUGH**

**Sitting in public at Copthall House, the Pavement, Sutton, Surrey on 12
December 2013**

**Miss Karen Weare of HM Revenue & Customs' Appeals and Reviews Unit, for
the Respondents**

The Appellant was not represented

DECISION

5 1. HMRC issued four penalties to Mr Mohammed Khalid in relation to failures by “the Islamic Centre Trust” to file end of year PAYE returns (“P35s”) for the tax years 2010-11 and 2011-12. The penalties total £2,000.

2. On 27 July 2013 Mr Imran Saghir completed a Notice of Appeal on behalf of “the Islamic Centre Trust” against penalties of £2,000, and included an application for the appeal to be admitted late.

10 **No representative of the Appellant**

3. The appeal was scheduled for 2pm, but no representative of the Appellant was present at the hearing venue. We therefore delayed the start of the hearing for twenty minutes.

15 4. We confirmed by reference to the paperwork that Mr Saghir had been notified of the time and location of the hearing. No reason had been provided for the failure to attend the hearing. Further, we noted that the Tribunal clerk had also written to Mr Saghir to advise that, if no representative of the Appellant attended, the case could be decided in the absence of the representative.

20 5. After twenty minutes we asked Miss Weare for HMRC’s views. She said that HMRC’s position was that the case should proceed. She had attended the hearing centre in Sutton especially for this hearing and had also provided the Appellant with a bundle of documents. It was in the interests of justice to consider HMRC’s position as well as that of the Appellant.

25 6. The Tribunal therefore considered whether or not to proceed with the hearing in the light of Rules 2 and 33 of the Tribunal Rules¹. In so doing we took into account the matters set out above, as well as the evidence and submissions already sent to the Tribunal. We had a detailed Notice of Appeal completed by Mr Saghir, letters between Mr Saghir and HMRC, and records of telephone calls between HMRC of the one part and Mr Saghir and Mr Khalid of the other.

30 7. Taking all the above into account we decided that it was in the interests of justice to proceed with the hearing, despite the failure of the Appellant to send a representative. In making that decision, we noted that if we were unable to decide the case without the representative being present, we would adjourn the case and make appropriate directions. However, in the event this was not necessary.

35 **The facts of the case**

8. A charity with the name “Redhill Islamic Centre” was registered with the Charity Commission on 2 December 1980 under reference number 281189. The

¹ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

Charities Commission record states that it was also known under the names “Islamic Centre, Redhill (old name)” and “Jamia Masjid Al-Mustafa (working name)”. For the purposes of this decision, we have called this charity “RIC1”.

5 9. In 1980 a charity could be set up as a company limited by guarantee, a formally constituted trust, or an unincorporated association². RIC1 was not a company. In his letter of 22 April 2013 (referred to below), Mr Saghir refers to “the charity having changed its status to ‘a Trust’”. From this we find as a fact that RIC1 was an unincorporated association.

10 10. Mr Khalid was the contact person for RIC1 in its dealings with HMRC; all HMRC correspondence was issued to him and he was the person who spoke to HMRC on behalf of RIC1 when telephone contact was made. HMRC’s telephone records describe him variously as “director” and “owner” and “general secretary” of RIC1, based at 30 Earlswood Road, Redhill, RH1 6HW. We therefore find as a fact that Mr Khalid had management responsibility for RIC1.

15 11. On 26 April 2011 Mr Khalid told HMRC by telephone that RIC1 had two part-time employees for the whole of the 2010-11 tax year. He said they were below the threshold for PAYE and in the same telephone call HMRC “educated [him] about nil slips”. The Tribunal understands this to be a reference to making “nil” monthly returns.

20 12. On 16 February 2012, HMRC issued a penalty of £800 to RIC1, addressed to Mr Khalid, for failure to file its P35 return for 2010-11.

25 13. On 21 March 2012, a new charity under the name “Redhill Islamic Centre/Jamia Masjid al-Mustafa” was registered with the Charity Commission under reference 1146489. We have called this charity “RIC2”. The Charity Commission records that RIC2 has two “other names”, namely “Redhill Islamic Trust (old name)” and “Jamia Masjid al-Mustafa (working name)”. It also lists ten trustees, including Mr Mohammed Khalid and Mr Mohammed Saghir.

30 14. The contact for this charity on the Charity Commission website was Mr Mohammed Khalid. HMRC records show that his contact details are the same as the Mohammed Khalid who represented RIC1, and we find as a fact that this is the same individual who was responsible for the management of RIC1.

15. On 27 March 2012, RIC1 was removed from the Charity Commission register.

35 16. On 28 May 2012, HMRC issued a penalty of £400 to “the Redhill Islamic Centre Trust” addressed to Mr Khalid at 30 Earlswood Road for continuing failure to file the 2010-11 P35.

² www.charitycommission.gov.uk/start-up-a-charity/setting-up-a-charity/what-type-of-charity-to-set-up/ Since 2012 a charity can also be set up as a charitable incorporated association, but that option was not available in 1980.

17. On 24 September 2012 a further penalty of £400 was issued to Mr Khalid, also in the name of the Redhill Islamic Centre Trust, for failure to file the 2011-12 P35, and a second penalty, also of £400, was issued on 28 January 2013.

5 18. On 4 April 2013 HMRC wrote again to Mr Khalid. The letter began as follows (emboldening in the original):

“Please pay £2,000.

We have already told you about the penalty we charged you for not filing your PAYE annual return by the due date. We asked you to pay this penalty, but our records show that you have not done so.

10 **Previously we treated your lack of payment as an oversight. Now, if you do not pay or contact us, we will treat this as a deliberate decision not to pay.”**

19. On 22 April 2013 Mr Saghir replied to HMRC, saying that:

15 “...we can reassure you that we were not deliberately ignoring you nor did we make a deliberate decision not to pay.

Due to the charity having changed its status to a ‘Trust’ and also have change hands [sic] from the December 2012 and we were quite unsure what to do...we would ask...that the penalty should be waived.”

20. On 10 May 2013, Mr Khalid called HMRC and said that the organisation had been “taken over”.

21. On 14 May 2013, HMRC wrote to Mr Khalid, stating that the appeal against the penalty notices contained in Mr Saghir’s letter of 22 April 2013 was out of time, and that no reasonable excuse had been put forward as to why appeals had not been made within the 30 day deadlines. HMRC explained that permission to appeal could be
25 sought from the Tribunal.

22. On 4 June 2013 Mr Saghir wrote to HMRC saying that:

30 “one of the reasons for our appeal being late was due to a back log issue...our charity is run by volunteers and we’re not always able to respond to letters straight away...in regards to the outstanding P35 returns we have spoken to the stationery department and an Employers CD Rom has been sent to us and we are still waiting...the previous charity has ceased and we will try and obtain the correct information and resolve the issue.”

35 23. On 21 June 2013 HMRC replied, repeating its earlier statement that the Tribunal could be asked to give permission to make a late appeal.

24. On 27 July 2013 Mr Saghir filed an appeal with the Tribunal and also applied for permission to make the appeal late. He asked that the penalty of £2,000 be waived. and said there were “two part-time staff and their salaries were not taxable”. On the

balance of probabilities we find that these were the same two part-time staff as referred to by Mr Khalid on 26 April 2011.

25. On 12 September 2013 Mr Saghir called HMRC and said that RIC1 had ceased and was no longer registered as a charity. He was “very upset” about continuing
5 correspondence from HMRC and that he would register a formal complaint if he continued to get letters. He also stated that he had never received the CD-Rom he had requested.

26. As at the date of the Tribunal hearing, neither the P35 for 2010-11 nor that for 2011-12 had been filed.

10 27. The Tribunal makes further findings of fact later in this decision notice.

The issues before the Tribunal

28. The Tribunal first considered whether the penalties had been validly issued, given the removal of RIC1 from the Charity Commission register, as the merits of the appeal are relevant when considering whether or not to give permission to appeal.

15 29. The second issue was whether an application to make late appeals in relation to the penalties had been properly made.

30. If so, the third issue was whether the Tribunal should allow one or more late appeals.

20 31. If the Tribunal allows one or more late appeals, the fourth issue was whether or not there the penalties should be confirmed or set aside.

Whether the penalties for 2010-11 were validly issued

25 32. The P35 for 2010-11 was due to be filed on 19 May 2011. At that time RIC1 was in existence and Mr Khalid was responsible for its administration. The first penalty of £800 was issued to Mr Khalid on 16 February 2012, when RIC1 remained on the charity’s register, so the penalty was valid and properly issued.

33. On 27 March 2012 RIC1 was removed from the Charity Commission’s register. On 28 May 2012 the second penalty of £400 was issued to Mr Khalid, following RIC1’s continued the failure to file its 2010-11 P35.

30 34. Unincorporated bodies are not like companies and do not have limited liability; the fact that RIC1 was removed from the Charity Commission register does not of itself mean that the penalty was not validly issued to Mr Khalid in relation to RIC1’s failure to file the P35 in the period before it was removed from that register.

35 35. The question as to whether or not HMRC can pursue Mr Khalid for the penalty was not argued before us, and in view of our decision set out below on the late appeal application, it is not necessary for us to make a decision on this point. Were it to have been necessary, we would have considered adjourning the case to obtain further

evidence in relation to the nature of the unincorporated association, any continuing obligations of Mr Khalid, and whether RIC1's outstanding liabilities were transferred to RIC2.

Whether the penalties for 2011-12 were validly issued

5 36. On 21 March 2012 RIC2 was established, and on 27 March 2012 RIC1 was removed from the Charity Commission's register.

37. Regulation 102 of the Income Tax (PAYE) Regulations³ is headed "Succession to a business" and reads, so far as relevant to this decision, as follows:

10 (1) This regulation applies if there is a change in an employee's employer while the employee remains in employment in the same business.

(2)-(3) ...

15 (4) The new employer is, in relation to any matter arising after the change, liable to do anything which the former employer would have been liable to do under these Regulations if the change had not taken place.

(5)-(8) ...

(9) In paragraph (1), "business" includes any trade, concern or undertaking.

20 38. A "business" therefore includes "any concern or undertaking", terms which are broad enough to encompass charities. RIC1 and RIC2 operated from the same premises, with the same name and the same employees. Mr Khalid was HMRC's named contact for RIC1 and continued to be in a position of responsibility for RIC2. In the letter of 22 April 2013, Mr Saghri refers to "the charity having changed its
25 status to a 'Trust'". On the basis of the foregoing, we find as a fact that RIC1 and RIC2 were in substance "the same business".

39. As a result, when the employees of RIC1 were transferred to RIC2 on or before March 27 2012, RIC2 became liable to file the 2011-12 P35, which was due on or before 19 May 2012.

30 40. No P35 was filed, and two penalties were issued to Mr Khalid, who was a trustee of RIC2 as well as of RIC1. The penalties were issued in name of the Islamic Centre Trust and were correctly addressed. As a result, these two penalties were validly issued.

Whether a valid application to make a late appeal has been made

35 41. The Notice of Appeal contains an Application to make a late appeal. However, the Notice refers to only one Appellant, and not two. It is possible for an appeal to be

³ All references in this Decision to Regulations are to these Regulations

made jointly, but both Appellants at least need to be identified on the Notice of Appeal. We are aware, of course, that both RIC1 and RIC2 have the same name. Nevertheless, the only indication that Mr Saghir may be attempting to make an appeal on behalf of two separate charities is that he has appealed the total penalties of £2,000.

42. There is a further problem. Mr Saghir is a trustee of RIC2, but there is no evidence that he had any management responsibility for RIC1. HMRC made many calls to RIC1 but Mr Saghir's name was never mentioned by those who answered the phone (in contrast to Mr Khalid's), and there is no correspondence or other documentation relating to RC1 which refers to him. As a result, we find as a fact that Mr Saghir has no standing to make an application to appeal penalties for failure to file the 2010-11 P35, as these relate to RIC1.

43. The Application was therefore validly made in relation to the penalties issued in respect of RIC2's failure to file the 2011-12 returns but not in relation those issued in respect of RIC1's failure to file the 2010-11 returns. As a result, no application for a late appeal is before the Tribunal in relation to those 2010-11 penalties.

Whether the Tribunal should give permission for a late appeal

44. HMRC opposed the Application for permission for a late appeal. Miss Weare said that:

- (1) the time delay was not reasonable;
- (2) the fact that the Islamic Centre continued to receive penalty notices should have alerted the recipients to the problem, and the organisation(s) should have had a process for dealing with "time-sensitive post"
- (3) time limits are there to be observed and should only be extended for a good reason. No such reason was present in this case.

45. When considering whether to allow an appeal out of time, the Tribunal must consider the overriding objective to deal with cases justly. Morgan J in *Data Select Limited v R&C Commrs* [2012] UKUT 187 (TCC) recently summarised the position as follows:

"As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions."

46. Morgan J also said at [37] that the "correct approach" included consideration of the factors listed in the Civil Procedure Rules (3.9) at rule 3.9. At the time of that decision, CPR 3.9 set out a list of specific points which should be considered, including, in addition to those matters set out in the list above, the extent to which the

party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol and whether the failure to comply was caused by the party or his legal representative.

47. CPR 3.9 was reformulated in April 2013 and now reads as follows:

- 5 “the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
- (a) for litigation to be conducted efficiently and at proportionate cost; and
 - (b) to enforce compliance with rules, practice directions and orders.”

10 48. The reformulated CPR therefore emphasises the requirement to consider “all the circumstances of the case” (which may or may not include the factors in the previous CPR) but must consider the two factors set out at (a) and (b) above. We return to this reformulation below.

15 49. The process the Tribunal is required to undertake when deciding whether or not to allow a late appeal has frequently been described as a “balancing exercise”, see *R (oao Cook) v General Commissioners of Income Tax* [2007] EWHC 167 (Admin) and *B Fairall v R&C Commrs* [2010] UKFTT 305(TC). In *R (oao Browallia) v General Commissioners of Income Tax* [2003] EWHC 2779 (Admin), Evans-Lombe LJ clarified that the issue of “consequences” or “prejudice” to the taxpayer should

20 include “the question of whether the basic appeal was arguable”, see *O’Flaherty v R&C Commrs* [2013] UKUT 0161 at [35].

50. In deciding this issue we have used the headings listed by Morgan J, and included as appropriate the other points set out above. Our findings are that:

25 (1) The delay in seeking to appeal the penalty notice issued in September 2012 was six months and the delay in appealing the penalty notice issued in January 2013 was three months. Both are well outside the 30 day deadline. We also take account of the fact that no appeal was made until HMRC issued their letter of 4 April 2013, stating that the failure to respond would be treated as “a deliberate decision not to pay.”

30 (2) The purpose of the 30 day time limit is to give the recipient of the penalty notice a reasonable time to appeal, and also allow HMRC to deal efficiently and expeditiously with such appeals.

35 (3) Mr Saghir’s explanation for the delay is that there was a “backlog” of post and it was not always possible “to respond to letters straight away.” This might excuse a few days delay, but not three to six months. We agree with Miss Weare that it would be reasonable for RIC2 to have had a process for dealing with “time-sensitive” post. Finally, we note that the delay was not the fault of a third party.

40 (4) If permission is refused, the consequence for RIC2 is that it has no opportunity to put its case to the Tribunal. On the submissions made, the case rests on the “backlog of post” point already discussed, and Mr Saghir’s

statement that he is still waiting for the CD-Rom. The first of these is without merit, and there was no request for a CD-Rom until long after the penalties had been issued. It cannot therefore provide an excuse for the failure to file the P35s.

5 Mr Saghir also says that the employees are below the threshold for PAYE or NICs to apply. However, we note that Regulation 73(1) requires that “an employer must deliver” a P35 before 20 May following the end of a tax year, and that Regulation 73(10) states that “Section 98A – special penalties in case of certain returns – applies to paragraph (1)”.

10 Taxes Management Act s 98A sets out a penalty of £100 per month or part month for the late filing of P35s. There is no statutory reduction for employers whose employees are below the threshold for PAYE and NICs.

The Tribunal asked Miss Weare for her submissions on this point. She said that where all employees were below the threshold for PAYE and NICs, HMRC’s practice was to reduce the penalty for each tax year to the higher of £100 and the total PAYE and NICs due (if this was less than the penalty charged). The mitigation of the penalty was a matter of HMRC discretion and was only exercised after the P35s were filed.

20 The legal merits of the case are thus weak. Whether HMRC reduce the penalties once the P35s are filed is a matter for their discretion and not for this Tribunal.

(5) The penalties in dispute relate to the 2011-12 tax year. The first of these was issued on 24 September 2012 and the second on 29 January 2013. This is not so long ago that hearing the appeal would cause any significant prejudice to the conduct of HMRC’s administration. In this context, although we are not bound by the CPR, we have also considered the need for litigation to be conducted efficiently and at proportionate cost.

51. We have balanced the points set out above, and despite our findings on (5) above, have decided that the weight of the factors is strongly in favour of refusing permission to make a late appeal.

30 **Decision**

52. As a result of the foregoing we decide as follows.

- (1) The first penalty notice of £800 for 2010-11 was validly issued to Mr Khalid. We make no decision as to whether the second penalty notice (for £400) was validly issued.
- 35 (2) The penalty notices for 2011-12 were validly issued to RIC2.
- (3) No valid application for a late appeal has been made against the 2010-11 penalties.
- (4) A valid application for permission to make a late appeal was made against the 2011-12 penalties, but permission is refused.

53. 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.

5 54. 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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**ANNE REDSTON
TRIBUNAL PRESIDING MEMBER**

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RELEASE DATE: 10 January 2014