



## DECISION

1. This matter concerns the Applicant's application for permission to appeal out of  
5 time against the imposition of penalties for late filing of P35 forms for the years 2008-  
2009 and 2009-2010.

2. The Applicant is represented by Leonard Mogilner & Co, Chartered  
Accountants, who sent a letter to the Tribunal making clear that the Applicant was  
aware of the hearing but would not be attending. In the circumstances, the Tribunal  
10 decided that it was in the interests of justice to proceed with the hearing in the  
Applicant's absence, having regard to rule 33 of the Tribunal Procedure (First-tier  
Tribunal) (Tax Chamber) Rules 2009.

### *Factual Background*

3. The Applicant is a company limited by guarantee and HMRC's records show  
15 that it has been an employer since at least the 2003-2004 tax year.

4. The P35 for 2008-2009 was due to be filed on or before 19 May 2009. HMRC  
records show that an incomplete P35 was submitted and returned to the Applicant. At  
the time of this hearing no valid P35 for that year had been received. Penalties were  
issued as follows: on 28 September 2009, £400; on 25 January 2010, £400; and on 24  
20 May 2010, £400. No appeal was made against any of these penalties within the 30  
day period set out in the legislation and notified to the recipient on the penalty notices.

5. The P35 for 2009 – 2010 was due to be filed on or before 19 May 2010. HMRC  
records show that it was filed on 15 March 2011, being 300 days late. Penalties were  
issued as follows: on 27 September 2010, £400; on 24 January 2011, £400; and on 18  
25 March 2011, £400. No appeal against any of these penalties within the 30 day period  
set out in the legislation and notified to the recipient on the penalty notices.

6. A late application to appeal in respect of all the penalties was received by  
HMRC on 13 March 2014. HMRC rejected the application for a late appeal on 27  
March 2014. The Notice of Appeal to the Tribunal was filed on 26 April 2014.

### 30 *The Law*

7. The P35 form is an employer's end of year return. The requirement to file it is  
imposed by regulation 73 of the Income Tax (Pay As You Earn) Regulations 2003  
and Schedule 4 to the Social Security (Contributions) Regulations 2001.

8. Penalties for late filing are imposed under s. 98A of the Taxes Management Act  
35 1970 ("TMA"). The relevant penalty is a monthly amount of £100.

9. The right of appeal against penalties falls under s. 31 TMA. Section 31A TMA  
sets out the manner of appealing and the time limit for doing so. Section 49TMA  
provides for a late appeal to be made only if HMRC or the Tribunal agrees to this.

10. Mr Kruyer for HMRC referred us to a number of decisions of differently-constituted panels of the First-tier Tribunal. Such decisions turn on their own facts and do not create legal precedent so we are not bound by them. One of the First-tier decisions refers to a decision of the Upper Tribunal, which does create a legal precedent. This is *HMRC v McCarthy and Stone (Developments) Ltd* [2014] UKUT 196 (TCC), which considered the impact on Tribunal procedure of the Court of Appeal's decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 and its emphasis on the need for compliance with time limits to be enforced.

#### *Submissions*

11. The Applicant's written submission was that the Applicant is run by volunteers and the current committee had been unaware of the fact that returns had not been filed, or filed late, in the past. It was submitted that they had also been unaware of the penalties imposed. It was further submitted that HMRC had delayed unreasonably in contacting the Applicant about these matters.

12. Mr Kruyer's submission, in short, was that these appeals had been made extremely late and that no good reason for the delay had been given to the Tribunal. He submitted that many volunteer-run organisations comply with their legal obligations as employers. He did not accept that HMRC had delayed in contacting the Applicant and produced to the Tribunal copies of penalty notices and reminder notices which had not been returned by the Royal Mail and so were assumed to have been delivered. He also referred the Tribunal to HMRC's records of telephone contact with the Applicant.

13. Mr Kruyer submitted that HMRC was informed of the appointment of the Applicant's current representative in May 2011. HMRC records show that the representative was informed of the outstanding return and penalties situation during a telephone conversation on 12 March 2012, but even then no appeal was made until March 2014. No explanation has been given for the further delay after the representative was made aware of the issues.

14. Finally, Mr Kruyer submitted that if the application for a late appeal was allowed, there was little chance of the appeals succeeding in any event. No substantive case had been put forward for why the penalties ought not to have been imposed, and it did not seem to be disputed that the 2009 – 2010 return had been submitted 300 days late and that the 2008-2009 return was still outstanding.

#### *Conclusion*

15. The question of whether to allow these appeals to proceed out of time is a matter for the Tribunal's discretion. In exercising our discretion we are required to have regard to all the circumstances of the case but, following *McCarthy and Stone*, to give weight to the need for litigation to be conducted efficiently and to encourage compliance with time limits. We find that there was a long and largely unexplained delay in making the application to the Tribunal both before and after the instruction of a professional adviser and we take the view that there would be considerable

prejudice to HMRC if the issue of the imposition of the penalties was to be re-opened at this late stage. We note that there is a public interest in the efficient conduct of litigation and we note that there would be considerable disruption to the Tribunal if applications were allowed to proceed out of time in the absence of good reasons being shown. We find that the reasons given for the late appeal in this case are insufficiently compelling when weighed against the consequences to both HMRC and the Tribunal of the very serious delay in filing the appeals. We recognise that a decision to refuse the application to proceed out of time effectively shuts the Applicant out from litigation, so we have also considered the likelihood of the Applicant's appeal succeeding if it were allowed to be made out of time. We note that the Applicant's written submissions make no challenge to the underlying facts regarding the late submission and non-submission of the respective P35s. In these circumstances, the Applicant's appeal seems unlikely to succeed if it were permitted to be made out of time. For all these reasons we refused the application for permission to proceed out of time.

*Post-Script*

16. Since the date of the hearing and our decision, our attention has been drawn to two significant decisions concerning the making of late applications. These are, firstly, the decision of the Court of Appeal in *Denton, Decadent Vapours Limited and Utilise TDS Limited* [2014] EWCA Civ 906 and, secondly, the decision of the Upper Tribunal in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC), in which Judge Bishopp noted that Tribunals operate differently from the courts and preferred the approach previously taken in Tribunals to that of the Court of Appeal in *Mitchell and Denton*. He commented at [19] that:

25                   In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select*.

16. This is a reference to the following passage in Morgan J's decision in *Data Select Limited v HMRC* [2012] UKUT 187 (TCC):

30                   "[34] ... Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. 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.

13. At the hearing of this application, *Leeds City Council* had not yet been decided and we decided to dismiss the application having regard to all the circumstances of the case and applying the approach set out in *McCarthy and Stone*. However, we are satisfied that, even if we had applied the *Data Select* approach which has now been approved in *Leeds City Council*, we would have reached exactly the same decision on the facts of this case.

17. 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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**ALISON MCKENNA  
TRIBUNAL JUDGE**

**RELEASE DATE: 6 August 2014**

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