



TC05431

Appeal number: TC/2016/01230

*INCOME TAX–PAYE- penalty for failure to file Real Time Information
return on time-whether reasonable excuse-no-appeal dismissed and penalty
confirmed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ELITE HAND CAR WASH

Appellant

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

The Tribunal determined the appeal on 3 October 2016 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 26 February 2016 (with enclosures) and HMRC's Statement of Case (with enclosures) dated 9 May 2016. The Tribunal wrote to the appellant on 24 August 2016 indicating that if it wished to reply to HMRC's Statement of Case it should do so within 30 days. No reply was received by the Tribunal.

DECISION

Introduction

5 1. This is an appeal against penalties of £400 imposed by HMRC in respect of the appellant's failure to file its Real Time Information return ("RTI final return") reporting the final payments and deductions made under PAYE for the tax year 2013/2014 before the due date of 20 May 2014.

10 2. The appellant did not dispute that the return had not been made on time. In fact, it has still not been made. Neither does the appellant dispute the amount of the penalty. The issue is whether the appellant had a reasonable excuse for not filing the return.

15 3. The appeal was made out of time. The appellant says the reason for the delay was due to the appellant's principal being hospitalised. HMRC did not oppose the appellant's application to make the appeal out of time. Accordingly, I have extended time and admitted the appeal.

The legislation

20 4. The legislation relevant to this appeal is summarised and explained below. The full text of the legislation referred to as set out at HMRC's Statement of Case, pages 6 to 9.

25 5. The Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") set out the responsibilities of employers to deduct and repay tax to their employees when making payments of earnings to those employees. The PAYE Regulations also contain detailed provisions as to the payment of tax so deducted to HMRC and the making of returns to HMRC as to the deductions and payments made. It is now mandatory for many of these returns to be made by an approved method of electronic communication. Employers are now required to make returns of tax deducted by an approved method of electronic communication in "real-time", that is on before making the relevant payment.

30 6. The requirement to make returns in real-time has been introduced in stages. The obligation was dependent upon the employer being a "Real Time Information employer" at the relevant time. By virtue of Regulation 2A of the PAYE Regulations, the appellant became a Real Time Information employer on 6 April 2013 as a result of a direction made by HMRC on 24 September 2012 generally to employers who were not at that time already Real Time Information employers. That direction was made under the authority contained in Regulation 2A (1) (b) and (2) of the PAYE Regulations and was published on HMRC's website on 4 October 2012.

35 7. Consequently, from 6 April 2013 the appellant was required to deliver Real Time Information about employee payments and deductions to HMRC under

Regulation 67 B of the PAYE regulations but an approved method of electronic communication in “real time”.

5 8. Regulation 67EA of the PAYE Regulations deals with the situation where an employer does not make a return as required by Regulation 67B. If the return was not made before 20 April following the end of the tax year in question, then the employer must submit a return before 20 May following the tax year in question as soon as reasonably practicable after the discovery of the failure to make the return using an approved method of electronic communication.

10 9. Regulation 67EA (6) provides that if the return is not made within the time specified then the employer becomes liable to late filing penalties pursuant to section 98A of the Taxes Management Act 1970 (“TMA”).

15 10. Pursuant to s 98 A (2) and (3) TMA the amount of the penalty for the failure to make a return is £100 for each month or part of a month during which the failure continues in a case where the number of persons in respect of whom particulars should be included in the return is 50 or less.

11. Pursuant to s 118 (2) TMA there is no liability to a penalty if the person assessed to the penalty satisfies the tribunal that he had a reasonable excuse for not filing the return or, if the excuse ceased, the return was filed without unreasonable delay after the excuse had ceased.

20 **The evidence**

12. The Tribunal was provided with the following evidence:

(1) The correspondence between the parties.

25 (2) Extracts from pages on the GOV.UK website containing guidance from HMRC to employers on running a payroll which essentially gives practical advice on how to produce the returns which need to be filed electronically pursuant to the Regulations. The guide warns of penalties which can be assessed if returns are made late.

30 (3) Extracts from HMRC’s computer records for the appellant showing details of the penalty assessed, recording the fact that the appellant had appealed to HMRC against the penalty on the grounds of reasonable excuse and also recording the fact that HMRC had rejected that appeal.

Findings of fact

13. On the basis of the evidence provided, I find the following facts.

35 14. HMRC say in their Statement of Case that as part of a campaign to make employers aware of the new requirements for real-time payments and returns a letter was issued to all employers during October 2012 encouraging them to get ready for the new way of reporting PAYE information from April 2013. They say the letters included a help sheet setting out what employers needed to do to prepare their

business for reporting PAYE in real-time and that the help sheet also included links to further information, including guidance on HMRC Internet pages. Although it would have been helpful to have been provided with copies of this material, the appellant does not dispute this statement and accordingly I accept it. The material provided by
5 HMRC in relation to what is now available on the GOV.UK website indicates that detailed information is available as to how to deal with running a payroll and annual reporting under the new real-time reporting system.

15 15. The appellant does not dispute that it did not file a final return for the year 2013/2014 tax year as required by Regulation 67EA of the PAYE Regulations and accordingly I find that it did not make such a return.

15 16. HMRC say that between 11 and 16 June 2014 it sent a warning letter to all employers who had not submitted their final return for the 2013/2014 tax year as required by Regulation 67EA of the PAYE Regulations. HMRC have provided no evidence that such a letter was sent to the appellant, but there is no contention from
15 the appellant that it had not received such a letter and accordingly I find that such a letter was sent to the appellant. The warning letter was described as a “pre-interim Penalty warning letter” and although I have not seen its text I assume that it warned the appellant that its return had not been made and that it was liable to be assessed for a penalty.

20 17. On 6 October 2014 HMRC sent the appellant a notice of penalty determination of £400. The penalty had been calculated on the basis that the return had been outstanding for the period from 20 May 2014 to 19 September 2015. Accordingly, the return had been outstanding for a period of between 3 and 4 months at this point and therefore the penalty had been calculated, according to the terms of s 98A (2) and (3)
25 TMA at the rate of £100 for each month and part of a month for which the return remained outstanding.

18. HMRC say, and the appellant does not dispute, that the outstanding return had not been delivered by the date of HMRC’s statement of case. Accordingly, I find that to be the case.

30 19. On 2 November 2015 the appellant appealed against the penalty to HMRC. This appeal was made almost a year after the statutory period for making an appeal to HMRC had expired. The ground stated for the appeal was that during the year ended 5 April 2014, the appellant employed only four people and that according to the instructions sent in regards to PAYE in real-time it considered that it was not
35 supposed to file returns online since it employed less than nine employees. The appellant stated that in April 2014 it contacted HMRC and requested standard paper forms to complete the year-end return such as a form P 35 but had never received them.

40 20. On 18 January 2016 HMRC wrote to the appellant refusing to admit the appeal out of time. HMRC did not accept the appeal because it considered that there was no reasonable excuse for it having been made late. The letter informed the appellant of

its right to apply to the Tribunal to see whether the Tribunal would accept a late appeal.

21. On 26 February 2016 the appellant notified its late appeal to the Tribunal. In support of its appeal, the appellant quoted the following text taken from HMRC's website:

“Temporary relaxation of reporting arrangements for small businesses

HMRC has announced that existing employees with nine or fewer employees, who need more time to adapt, can report PAYE information on or before the last pay day in the month until April 2016. This means that micro-employers who are still finding it difficult to report PAYE information on before the date they pay their employees will have more time to adapt to their arrangements so that their business is ready for real-time reporting from April 2016.

This support for existing micro-employers means micro-businesses and their agents have up to a further two years to change their processes and their arrangements to enable them to adapt to reporting in real-time. HMRC recommends employers to change their processes as soon as they can to ensure they are ready, in time for April 2016, when all employers must report PAYE information each time they pay their employees.”

22. Although I was not provided with a copy of the web page containing this text or link to it, HMRC appear to accept in their Statement of Case that this was an accurate reflection of a waiver of the strict terms of the PAYE Regulations that they granted for the benefit of small employers for a transitional period up to 6 April 2016.

23. HMRC elaborated upon this relaxation in the Statement of Case. They stated that to use the relaxation in the 2013/2014 tax year, employers must have been operating a PAYE scheme at 5 April 2014 and had nine or fewer employees at 6 April 2015. The appellant does not dispute this and accordingly I accept this statement.

24. Having been notified of the appellant's appeal to the Tribunal, on 5 April 2016 HMRC wrote to the appellant stating that even though the appellant was running a business with less than nine employees, from 6 April 2014 all employers regardless of the number of employees were required to report PAYE via Real Time Information and that a paper P 35 was no longer applicable. There is clearly an error in this letter because the Regulations show that the operative date for the new system was 6 April 2013 and not 6 April 2014.

25. The letter went on to say that under the new rules the appellant still needed to report PAYE monthly online and to a Full Payment Submission by 19 April 2014 to finalise the 2013/2014 tax year. It stated HMRC's view that the relaxation referred to in the appellant's notice of appeal permits employers who pay their employees on a more frequent basis than monthly to report their PAYE on or before the last pay day in the tax month, rather than on or before each time they pay their employees. The letter then stated that as HMRC had not received the return for 2013/2014 the penalties had been correctly charged. The letter also gave the appellant the necessary links to enable the appellant to register with HMRC so as to report its PAYE online

and requesting that it now registered with HMRC and make the outstanding returns for the 2013/2014 and 2014/2015 tax years.

26. The letter concluded by stating that if the outstanding return for 2013/2014 was effected within the next 30 days HMRC would review the penalties with a view to cancelling them.

Submissions

27. The appellant denies that it had any obligation to file its PAYE returns online during the tax year 2013/2014. It says the terms of the relaxation set out at [21] above mean that because it only employs five people it considers that it should be exempted from filing the reports online. It has asked for paper forms to complete the year-end report, but was never provided with the same. The appellant also asks for the penalty to be waived because the business is going through a “difficult period” and any additional expense such as the penalty may determine the future of the business.

28. HMRC says that there is no right to file a paper return in respect of the year in question and the effect of the PAYE Regulations summarised at [5] to [7] above is that it is mandatory to file the return online.

29. The effect of the relaxation was merely to permit the appellant to report on a monthly rather than real-time basis for the period for which it applied, namely up to 6 April 2016. It did not relieve the appellant from the obligation to file online. There was sufficient information available to the appellant for it to be aware of what was required of it. The Appellant had received all the requisite notification regarding the new system and had access to HMRC website information and public information on the tax system and the tax is being applied. Furthermore, HMRC’s letter of 5 April 2016 gave the appellant a chance to bring its affairs up to date and avoid the penalties but the return is still outstanding.

30. As far as reasonable excuse is concerned, HMRC submit that this is a matter to be considered in the light of all the circumstances of the particular case. They consider reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the employers control, and which prevents the employer from complying with the obligation to file on time. A combination of unexpected and foreseeable events may, when viewed together, be a reasonable excuse.

31. HMRC’s view is that the actions of the employer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the tax legislation. If the employer could reasonably have foreseen the event, whether or not it is within their control, HMRC would still expect them to take steps to meet their obligations.

32. HMRC’s conclusion is that none of the circumstances that are capable of amounting to a reasonable excuse for the failure to file the return exist in this case.

Discussion and decision

33. In my view HMRC are clearly right in their interpretation of the relaxation given to small businesses. Its terms are clearly confined to allowing a small firm meeting its conditions to file its returns monthly rather than in real-time until April 5 2016. The first sentence of the terms of the relaxation cannot be read as indicating a complete waiver from the requirement to file online. No mention is made of such employers having a continuing right to file paper returns until April 2016. The relaxation makes it clear that the relaxation is designed to assist those small employers who are still finding it difficult to report in real-time.

10 34. Accordingly, as HMRC submit, it is clear from the PAYE Regulations that the appellant was obliged to make monthly returns and then an end of year return online in respect of the year in question and no provision is made for filing to be made in any other manner.

15 35. As it is also clear that the return has not been filed, subject to the question of reasonable excuse, HMRC had the necessary authority to assess a penalty and the amount assessed has been correctly calculated.

36. I therefore turn to the question as to whether the appellant had a reasonable excuse for not filing the return.

20 37. The case law shows, as HMRC submit, that whether there is a reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case. I do not, however, accept HMRC's submission that this is to be determined by reference as to whether an unexpected or unusual event that is either unforeseeable or beyond the employer's control has occurred which prevents the employer from complying with the obligation to file on time. There is no suggestion 25 in this case that the failure to file arose because of the occurrence of such an event.

38. In this case, it is clear that the failure arose because of the appellant's misunderstanding of the legislation due to the way that it read the terms of the relaxation which appeared on HMRC's website.

30 39. In those circumstances, in my view the test articulated by Judge Medd in *The Clean Car Company Limited v CEE* [1991] VTTR 234 should be applied. Judge Medd said:

35 "the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?"

40. Applying this test to the facts, the question is whether a reasonable taxpayer, in the appellant's position reasonably understood the terms of the relaxation as it

appeared on HMRC's website to mean that he did not have to file his PAYE returns online until April 2016 and that in the meantime he could file a paper return.

41. In my view a reasonable taxpayer in the appellant's position would not have taken that view. As I have found above, the wording of the relaxation is clear and there was sufficient guidance available to the appellant for it to have established that the terms of the relaxation were limited and that it was required to file the necessary returns online from April 2016. The appellant made an honest mistake, but in my view it was not a reasonable one.

42. Moreover, the appellant was given the opportunity by HMRC to remedy his mistake when it was pointed out to him in HMRC's letter of 5 April 2016 but there is no evidence from the appellant that it took any action in response to that letter.

43. Accordingly, I find that the appellant had no reasonable excuse not to have filed the return.

44. As far as the appellant's submission that financial difficulty will result if the penalty is not cancelled, the legislation does not permit a penalty to be cancelled on the grounds of inability to pay.

Disposition

45. The appeal is dismissed and the penalty is confirmed.

46. 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.

**TIMOTHY HERRINGTON
TRIBUNAL JUDGE**

RELEASE DATE: 21 OCTOBER 2016