



TC05797

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Appeal number: TC/2017/00372

INCOME TAX – Whether reasonable excuse for late submission of self-assessment tax returns – No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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BRADWAY BOWLING CLUB

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
 PETER R. SHEPPARD FCIS FCIB CTA
 AIIT**

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Sitting in public at ETS, 14 East Parade, Sheffield on 7 April 2017

**Joseph Dey of Dey & Co, Chartered Accountants for the Appellant, assisted by
25 W.A. Munroe, Treasurer of the Appellant**

Elizabeth Sidey, HMRC Officer, for the Respondents.

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DECISION

1. Introduction

5 This considers an appeal against a decision of the respondents (HMRC) made in a letter dated 16 August 2016 confirming the imposition of penalties totalling £2,800 under Schedule 55 Finance Act 2009 for the late submission by the appellant of its Employer Annual P35 returns for the tax years 2009-2010 (£1,200) 2010-2011 (£1,200) and 2013-2014 (£400). It was made clear from the outset by HMRC that on 16 March 2017 they had issued an Amended Penalty Determination which reduced 10 the 2013-2014 penalty from £400 to nil.

There was an application for leave to entertain a late appeal. In view of the circumstances of the case, set out below, it was obvious to the Tribunal why the appeal had been made late, and so leave was granted.

2. Legislation

15 Finance Act 2009, Schedule 55
Income Tax (Pay as You Earn) Regulations 2003, regulations 73,205 and 217
The Social Security (Contributions) Regulations 2001, Schedule 4
Taxes Management Act 1970, Sections 31, 49, 98A, 100, 100B and 118(2)

20 3. Case law

BPP Holdings v HMRC [2016] EWCA Civ 121
Crabtree v Hinchcliffe (Inspector of Taxes) [1971] 3 ALL ER 967
Clarks of Hove Ltd v Bakers' Union [1979] 1 All ER 152
Data Select Ltd v Revenue & Customs Commissioners [2012] UKUT 187 TCC
25 David Collis v HMRC [2011] UKFTT 588 (TC)
Hair to Dye for Darling Ltd [2015] UKFTT 0167 (TC)
HMRC v Hok Ltd. [2012] UKUT 363 (TCC)
Romasave (Property Services) Ltd [2015] UKUT 254 TCC
Sibley & District Conservative Club [2014] UKFTT 654 (TC)

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4. Facts

The appellant is a community Crown green bowling and snooker club with about 140 members, many of whom are retired. The club has been established for over 96 years and also provides art and keep fit sessions. It has a small bar for the 35 members. The club has one part-time employee who looks after the bar.

The Rules of the club relevant to this appeal include the following:

40 "4. The Officers of the Club shall be a President.....and Honorary Secretary and an Honorary Treasurer. They shall be proposed, seconded and elected by ballot at each Annual General Meeting. They shall hold office until the next Annual General Meeting when they shall retire but shall be eligible for re-election from year to year.

5. The Committee of Management shall consist of the President, Vice-Presidents, Honorary Secretary, Honorary Treasurer and up to eight other members, and five Members of the committee shall be a quorum.....

5 8. The Committee, in addition to the powers hereinafter specifically conferred on them shall have control of the finances of the Club,,.....

10. The Honorary Treasurer shall keep the Accounts of the Club and shall make up the Annual Statement of Accounts to the 31st December in each year.

10 11. The Auditors for the current year shall be elected at the Annual General Meeting. They shall audit the Annual Statements of Account and prepare Balance Sheet and certify same before it is printed. The Balance Sheet shall then be printed and circulated amongst the Members with the Notice of Annual General Meeting....

20. The Annual General Meeting of the Club shall be held each year in March, at such time and place as the Committee shall determine.....

15 26. There shall be one to four Trustees of the Club who shall be ex officio Members of the Committee. The first Trustees shall be appointed by the Committee and the property of the club (other than cash which shall be under the Control of the Treasurer) shall be vested in them to be dealt with by them as the committee shall from time to time direct by resolution.....”

20 5. The appellants advised that the arrangements for the signing of cheques on the club’s bank account were that there are three signatories. one of which is the Treasurer. Cheques for any amount had to be signed by any two of the three signatories.

25 6. The Income Tax (Pay as you Earn) Regulations 2003 Regulation 73 covers the annual return of relevant payments liable to deduction of tax (Forms P35 and P14)

Regulation 73 (1) provides
“Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information. ...”

30 There follows a number of paragraphs which give details of the information required
Paragraph (10) provides

“Section 98A of TMA (1) (special penalties in case of certain returns) applies to paragraph (1)

7. The Taxes Management Act 1970 Section 98A covers Special penalties in the case of certain returns.

35 Section (2) states

“(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable –

5 (a) To a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and

Section (3) states:-

10 “(3) For the purposes of subsection 2 (a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less is £100, and

8. The Tribunal also notes

Concession B46

15 “The Revenue will waive penalty charges on late employers’ and sub-contractors’ end of year returns, for the year ended 5 April 1995 and subsequent years , where these are received on or before the last business day within 7 days following the statutory filing date (19 May).”

20 9. Prior to the hearing The Tribunal had read through the bundle of papers provided and that the hearing was to consider penalties for the periods 2009-2010, 2010-2011 and 2013-2014 and that the appellants considered that returns for the periods 2008-2016 had not been submitted. The Tribunal had also read that one of the appellant’s contentions was there had been an inconsistent approach to the levying of penalties by HMRC. With that in mind the Tribunal asked what had happened in the periods 2011-25 2012, 2012-2013, 2014-015, and 2015-2016. There was some confusion and the Tribunal accepted Ms Sidey’s suggestion that during an adjournment she would make enquiries to see if she could resolve the matter.

30 10. After the adjournment Ms. Sidey helpfully advised that in respect of 2011-12 the return had been submitted on 20 May 2012 which was one day late and therefore a penalty of £100 was due but no penalty notification had been issued to the appellant. Although it was not mentioned at the hearing the Tribunal presumes that this was because HMRC had applied Concession B46 detailed above. In respect of 2012-2013 the return had been submitted on 17 May 2013 and was therefore in time and no penalty fell to be imposed. In respect of the period 2014-2015 the return had been 35 submitted late but HMRC had made an error (not explained) in issuing the penalty notice and would not now be pursuing a penalty. In respect of 2015-2016 the return had been submitted on time so no penalty fell to be imposed.

11. Mr. Munroe confirmed that he had submitted online in 2016 both the 2014-2015 and 2015-2016 returns.

40 12. The Tribunal asked whether the returns for 2011-2012, 2012-2013, and 2013-2014 had been submitted online. There was then another brief adjournment whilst Ms.

Sidey made a telephone call to check this point. She was able to confirm that they had all been submitted online but she was unable to provide the identity of the submitter.

13. History

5 On 13 July 2016 the new treasurer wrote to HMRC appealing against the penalties. The letter included,

10 “Just prior to my appointment as Treasurer of Bradway Bowling Club at the beginning of May 2016, it was discovered that the previous Treasurer had not been submitting PAYE monthly returns to HMRC on line. In order to rectify the situation I contacted HMRC PAYE Helpline and with their assistance downloaded the HMRC Basic Tools and completed the details going back to 2012-2013. It later came to my attention that P35 submissions had not been made for years 2009-2010 and 2010-2011 and these have now been submitted. We have recently been issued with Notices of Penalty Determinations which total £4,100 in respect of Statutory penalties.....

15The Treasurer prior to me taking over, had been in charge of the club’s finances since 2010. It appears that any previous correspondence from HMRC handed to the treasurer regarding online submissions was not acted on by him. Although he had made proper payments to HMRC for PAYE and NI Contributions, the treasurer, it appears, was not computer literate and, for this reason, he was unable to comply with real time information regulations but, instead of asking for help, it appears he buried his head in the sand. As well as not complying with PAYE regulations, the treasurer had not filed the appropriate VAT returns since June 2012 though these have recently been filed....”

14. On 16 August 2016 HMRC wrote to the appellant saying they had now considered the appeal. The letter included:-

25 “HMRC’s view is that a reasonable excuse is normally an unexpected or unusual event, either unforeseen or beyond your control, that prevented you from sending in an appeal within the time limit.

30 I am not accepting the appeal because I consider that you do not have a reasonable excuse for sending it late. This is because the fact that ‘it appears the treasurer was not computer literate’ cannot be accepted as paper returns were in force in the tax years concerned.”

The letter advised that an appeal could be made to the Tribunal.

35 15. On 5 September 2016 the appellant’s agent, Dey & Co., wrote to HMRC reinforcing the treasurer’s letter of 13 July 2016. The agent complains that earlier intervention by HMRC would have prevented further penalties arising, and also stating that the level of penalty is disproportionate.

16. Appellant's submissions

17. It was evident that at first the appellants had formed the opinion that the Employer's Annual Return Forms P35 from 2008 to 2016 had not been submitted by the due dates. They therefore submitted that the Treasurers behaviour was exceptional and unusual and suggested that this constituted either a reasonable excuse or special circumstances such that the penalties should be cancelled.

The appellant considered that the reasons the forms were filed late were beyond its control.

18. In the Notice of Appeal to the Tribunal dated 20 December 2016 the Appellants give the following as their grounds of appeal:-

"There are exceptional circumstances surrounding this matter.

The responsible person had been misappropriating club funds. The matter is in the hands of the police and over £6,000 is unaccounted for.

The previous treasurer did not file forms P45 and it appears that he genuinely was not aware of the legal obligation to file forms P35. It is clear that there was no intention to avoid paying over the appropriate deductions from the wages of the club's sole employee. Regular payments were made in respect of PAYE & NIC due.

It is of serious concern that the penalties date back to 2010 and remained uncollected until they were recently paid. Earlier intervention or guidance as to the club's responsibilities would have avoided the penalties becoming such a substantial sum. It would appear that HMRC was more than willing for the non-compliance to continue and the penalties to continue to arise.

The penalties levied are totally disproportionate given the size of the club, the fact there is only one employee and there has been no loss to the Treasury.

Since his appointment the new Treasurer has brought the club's affairs up to date and has fully co-operated in ensuring compliance going forward."

19. The appellants said the former treasurer had been appointed on the basis that he had some business background and was familiar with VAT and PAYE. They advised that he been used to submitting manual returns but was unfamiliar with submitting online returns. They submitted that shortly after the former Treasurer had been first appointed legislation was introduced whereby P35 returns and VAT returns had to be submitted online unless an exemption on religious grounds had been obtained from HMRC.

The outstanding returns have now been attended to by Mr. Munro.

20. HMRC's submissions

In addition to the submissions detailed in the above paragraphs HMRC make the following submissions

21. Ms. Sidey pointed out that the previous Treasurer had filed the 2011-2012 P35 forms online on 20 May 2012 (one day late) and the 2012-2013 form before the deadline date. This showed that the former Treasurer knew how to file returns online.

22. Ms. Sidey submitted that the club had relied heavily on its former Treasurer. They had no measures in place to check that his work was being completed. The appellant had reported that all post from the Inland Revenue was passed unopened to the Treasurer so that this enabled him to conceal the notices of penalty.

5 Although an independent audit was done this was carried out by members of the club who were unqualified.

23. In respect of the penalties being disproportionate Ms. Sidey pointed to the decision of the Upper Tribunal in *HMRC v Hok Ltd.*

10 24. HMRC consider the appellant has not provided a reasonable excuse for the late submission of the returns.

15 25. HMRC have considered special reduction under (paragraph 16 Schedule 55 of the Finance Act 2009). They say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*). HMRC say the special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*). HMRC do not accept that these were exceptional circumstances in this case and pointed to the Tribunal decision in the case of *Sibley & District Conservative Club*. HMRC consider that there are no special circumstances which would allow them to reduce the penalties in respect of the 2008-2009 and
20 2009-2010 tax years. HMRC point out that they have cancelled the £400 penalty in respect of 2013-2014.

26. Tribunal’s Observations

It is the Appellant’s responsibility to submit returns on time. The return for the period 2009-2010 was due to be submitted by 19 May 2010. The return for the period 2010-
25 2011 was due to be submitted by 19 May 2011. Both returns were finally submitted on or around 12 July 2016.

Late filing penalties totalling £2,400 are therefore due unless the appellant can establish a reasonable excuse for the delay as referred to in Paragraph 23(1) Schedule 55 Finance Act 2009.

30 27. In considering the appellant’s contention that HMRC have applied penalties inconsistently the Tribunal has set out at paragraphs 6 to 10 above the legislation which relates to the penalties in this case, and how it has been applied to impose the penalties notified to the appellant. However it cannot be considered that an inconsistent application of the penalty rules can in any way provide a reasonable
35 excuse for the appellant submitting a return late.

28. The Tribunal is aware that the phrase “an unexpected or unusual event, either unforeseeable or beyond your control” used by HMRC in their letter of 16 August 2016 in response to the initial appeal is taken from the dissenting judgement of Scott LJ in the case of *Salevon Ltd.* It being from the dissenting judgement the Tribunal

considers it inappropriate for HMRC to use it to consider whether or not the appellant had a reasonable excuse in this case.

29. One of the appellant's main contentions was that the previous Treasurer had hidden from the club that he was computer illiterate and had not submitted the forms P35 for the period 2008 to 2016. He had also hidden from the club that penalties had been incurred. During the hearing it became apparent that the former Treasurer had in fact submitted P35 returns online for the tax years 2011-2012, 2012-2013 and 2013-2014, or had arranged for them to be submitted.

30. As the return for 2011-2012 had been submitted online one day late on 20 May 2012 it was clear that the former Treasurer was capable of filing online. No explanation was offered as to why he had not filed the previous two returns. There was also no explanation as to why having submitted a return online in 2011-2012 why he did not then immediately file the returns remaining outstanding for the two previous years. He also did not submit the earlier returns when making the returns online for both 2012-2013 and 2013-2014.

31. The Tribunal also notes HMRC's comment in their letter of 16 August 2016 where they stated that the fact that the Treasurer was not computer literate did not provide a reasonable excuse for the 2009-2010 and 2010-2011 returns for which paper returns were in force.

32. Under the Club's rules an Honorary Treasurer is to be appointed each year at the Annual General Meeting held every March. The Treasurer is HMRC's point of contact with the Club. It is the club's responsibility to appoint a person who has the necessary skill to fulfil the role and to monitor his or her performance. It appears that this responsibility was given insufficient consideration by the Club. Similar comments apply to the appointment of an auditor.

33. Lack of ability to complete a tax return is not considered a reasonable excuse. It is open to a person to get help or contact HMRC if they have difficulty.

34. For all these reasons the Tribunal considers that the appellant has not established a reasonable excuse for not submitting its Employer Annual P35 returns for the tax years 2009-2010 and 2010-2011 by the due date

35. The appellant claims that the level of the penalties is totally disproportionate. The Tribunal points out that the level of the fines is laid down in legislation and the Tribunal has no power to amend them unless they are incorrectly imposed or they are inaccurately calculated.

In HMRC v Hok Ltd the Upper Tribunal at paragraph 36 said "...The statutory provision relevant here, namely TMA S100B, permits the Tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular neither that provision, nor any other gives the Tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair, or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no

statutory power to discharge, or adjust, a penalty because of the perception that it is unfair.”

5 36. Paragraph 16 (1) of Schedule 55 Finance Act 2009 allows HMRC to reduce the penalty below the statutory minimum if they think it is right because of special circumstances. HMRC have considered whether there any special circumstances in this case which would allow them to reduce the penalty and have concluded that the penalty for the year 2013-2014 should be cancelled. They see no special circumstances which would allow them to consider reduction of the penalties for the years 2009-2010, and 2010-2011. The Tribunal is aware of previous decisions which say special circumstances must be “exceptional, abnormal or unusual” (*Crabtree v Hinchcliffe*) or “something out of the ordinary run of events” (*Clarks of Hove Ltd. v Bakers’ Union*), and that the special circumstances must apply to the particular individual and not be general circumstances that apply to many taxpayers (*David Collis v HMRC*). Whilst the appellants may originally have considered the events are exceptional, it was eventually revealed that the Treasurer had either successfully submitted returns online or made arrangements for them to be done. It is therefore inexplicable why the returns for 2009-2010 and 2010-2011 were not filed online. The Tribunal sees no reason to disagree with the actions of HMRC.

20 37. The Appellant has not established a reasonable excuse for the late submission of his P35 returns for the period 2009-2010 and 2010-2011. HMRC have already notified the appellant that they have cancelled the £400 penalty for the period 2013-2014. The Tribunal has no power to amend the level of the penalty which is laid down in legislation. Therefore the appeal against the late filing penalties for 2009-2010 and 2010-2011 totalling, £2,400 is dismissed.

25 38. 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 30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2017