



TC04856

Appeal number: TC/2015/06949

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**JOHN WAIN for D FRANKLIN and
JOHN WAIN t/a THE MALT SHOVEL HOTEL**

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

The Tribunal determined the appeal on 29 January 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 25 November 2015 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 31 December 2015 and the Appellant's Reply dated 11 January 2016.

1. This is an appeal against penalties totalling £1,200 imposed under Section 98A(2) and (3) Taxes Management Act 1970 for the late filing of the employer's annual return for the tax year 2010-11.

Preliminary matter

2. This appeal includes an application to appeal out of time. HMRC considered the late appeal under Section 49 TMA 1970 and refused the late appeal. However, HMRC do not oppose Mr Wain's application to the Tribunal to appeal out of time. The Tribunal has had due regard to The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and in particular Rule 2. In the circumstances the Tribunal has decided that it is in the interests of justice to extend the time limit for admission of the appeal. We therefore proceeded to consider the appeal.

Background facts

3. Mr Wain was trading in two separate businesses. He was in partnership with D Franklin t/a as the Malt Shovel Hotel but he was also trading as a sole trader under a different PAYE reference. The sole trader PAYE reference does not disclose a trading name in HMRC's records but HMRC accept that to be for the business known as "Reams Restaurant".
4. HMRC states that it agrees that both businesses were closed early in the 2011-12 year. That is an understandable statement since the appellant wrote to HMRC in regard to this appeal on 5 May 2015 stating that he had closed those two restaurants in May 2011.
5. However, when the penalty notification was first sent to the appellant on 16 February 2012 he wrote to HMRC on 19 March 2012 enclosing copies of letters found in his archives. Those enclosures were two letters, one for each business, and both dated 16 June 2010 stating that "the company" had ceased trading on 31 May 2010. In each case he confirmed that he would be making the final payments for the periods April-May 2010. In the case of Reams Restaurant he also requested repayment of an over-payment in 2009-10 amounting to £1,108.57. He intimated his change of address.
6. On the balance of probability we find that the businesses closed on 31 May 2010.
7. The letter of 19 March 2012 enclosing those letters confirmed that he had made the payments but had not received the refund. He requested a review of the decision. The reference given on that letter of 19 March 2012 was for Reams Restaurant only.
8. In their Statement of Case HMRC confirmed that that appeal had been received and was considered on 20 April 2012. The penalties totalling £1,200 were cancelled because there were no employees listed for the 2010-11 year and therefore a P35 return was not required. The Tribunal does not have a copy of any of the correspondence relating to that but is aware that Reams Restaurant was recorded by HMRC as having no employees.
9. It is HMRC's position that no appeal was received in March 2012 in respect of the other PAYE reference being the one for the Malt Shovel Hotel. Their records showed that that business had nine employees and so a return was required.

Discussion

10. HMRC concede that they did receive the letters dated 16 June 2010 notifying the closure of both businesses and the change of address. Mr Wain argues that all the correspondence in regard to Reams Restaurant reached him at his new address. He states that nothing was sent to him at the new address for the Malt Shovel Hotel.
11. HMRC state that a reminder was sent electronically on 6 August 2010 and the late filing penalty notices in the sum of £800 and £400 respectively were issued on 16 February 2012 and 28 May 2012. Presumably that reminder may not have been received by Mr Wain as he no longer had the business. It is less than clear why a reminder would have been sent for 2010-11 on 6 August 2010 since the due date for the return was 19 May 2011. For the reasons set out below, in any event, the issue or not of the reminder is not relevant.

12. Mr Wain is adamant that it was only when a debt collection agency pursued him in 2015 (by which time he had moved address again) that he became aware that there was a problem with the appellant and he acted immediately.

13. Mr Wain also argued that he had explicitly asked HMRC on 16 June 2010 “is there anything more I need to do?” and that he spoke by telephone to HMRC on at least three occasions and was told that there was nothing outstanding. In fact, he did not ask if there was anything else that he should do. He simply stated “Should you require any further information, please write to me at the above address...”. Further, the letter of 19 March 2012 makes it explicit that in at least one telephone conversation HMRC had made him aware that a penalty was extant.

14. What happened in 2012? It is the case that because the letter of 19 March 2012 did not include the reference for the Malt Shovel Hotel there was not explicitly an appeal for that business. Had Mr Wain received a penalty for the Malt Shovel Hotel? (In March 2012, the penalty for both businesses would have been £800.) Mr Wain argues that the cause of his problems with HMRC are that his letters of 16 June 2010 “had not been read” but certainly the letter relating to Reams Restaurant must have been read because undoubtedly he got the penalty notice.

15. The Tribunal finds on the balance of probability that the penalty notices were probably received. The fact that the two separate enclosures sent with that letter related to the two different businesses would suggest that it was Mr Wain’s intention that he was appealing in respect of both businesses. Indeed that letter states that “the payments” had been made and that is, of course, one for each business. If he had not received the penalty notice for the Malt Shovel Hotel there would have been no reason to enclose both letters and refer to the payments for both.

16. Mr Wain now argues that Reams Restaurant did have employees and that seems likely since he made a payment for 2010-11. It is therefore understandable that he thought both “companies” would be treated in the same way. Indeed, if by any chance he had not received a penalty for the Malt Shovel Hotel, that should have alerted him to the possibility that he would receive one and it would be expected that that would have been raised with HMRC. As we indicate in the preceding paragraph, the Tribunal finds that it is more likely than not that he did receive the penalty notice and that he thought that matters were subsequently resolved.

17. However, if the decision by HMRC to cancel the penalties for Reams Restaurant was made in error, that is not a matter for this Tribunal and the fact that they did cancel the penalties does not, and cannot, impact on this decision.

18. The issue for this Tribunal is quite simply whether or not Mr Wain had a *reasonable excuse* for failing to file a year end Return for the appellant. Undoubtedly Mr Wain should have filed a return, and timeously. In his letter of 16 June 2010 for the appellant he confirmed that he had “recently submitted the year end ...to complete 2009-10”. He was clearly aware of the need to file the return. No return has ever been filed.

19. The fact that HMRC did not reply to his letters of 16 June 2010 does not absolve him of his obligation to file returns. HMRC had no obligation to remind him so the fact that the reminder was issued electronically is not relevant. No other excuse has been offered.

20. It is noted that Mr Wain argues that the penalty is unfair. The Tribunal cannot consider whether the penalty is fair or not. It is imposed in accordance with the legislation passed by Parliament.

21. Accordingly, since the return has never been filed and no reasonable excuse has been established, the appeal is dismissed and the penalty confirmed.

22. Lastly, Mr Wain has asked the Tribunal to consider the question of the outstanding over-payment for 2009-10 for Reams Restaurant. That is not a matter for this Tribunal and he must take that up with HMRC directly if he so wishes.

23. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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.

ANNE SCOTT

TRIBUNAL JUDGE

RELEASE DATE: 2 FEBRUARY 2016

© CROWN COPYRIGHT 2016