



TC 04893

Appeal number: TC/2015/05114

INCOME TAX – PAYE – penalties for late submission of P35 End of Year Returns for tax years 2009-10, 2010-11 and 2011-12 – whether a reasonable excuse for late appeal to be allowed - No – Sections 49 and 98A Taxes Management Act 1970 - Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PERTH AND DISTRICT FIVE-A- SIDE LEAGUE Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
IAN SHEARER**

**Sitting in public at George House, 126 George Street, Edinburgh on
25 January 2016**

James Kennedy for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

DECISION

1. Perth and District Five-a-Side League (“PD”) appealed against a decision by Her Majesty’s Revenue & Customs (“HMRC”) to refuse a right to make a late appeal against penalties for the late submission of the P35 End of Year Returns or late payment of tax for the tax years 2009-10, 2010-11 and 2011-12. Penalties were issued on 29 September 2010 for £400 and on 4 November 2010 for £200, in respect of the 2009-10 tax year; on 26 September 2011 for £400 and 5 January 2012 for £243, in respect of the tax year 2010-11 and on 10 January 2013 for £200 in respect of the tax year 2011-12.

2. PD were required to file their returns by 19 May each year for the previous tax year but the actual dates for submission of the returns were 1 November 2010, for the 2009-10 tax year, on 31 December 2011 for the 2010-11 tax year and on 10 July 2012 for the 2011-12 tax year.

3. On 3 July 2015 HMRC received a late appeal against the penalties charged and on 28 July 2015 HMRC wrote to PD advising that they would not accept the late appeal as they consider that PD had not provided a reasonable excuse as to why the appeals were made late.

20 **Background and Facts**

4. PD is a club with a small membership which organises five-a-side soccer matches usually on Sunday evenings. PD are required to pay for referees and administrators. For the tax year 2009-10 an electronic system for filing returns was introduced and caused problems at the first and subsequent filing dates. On each occasion, when they were advised that they had filed a return late, they contacted HMRC.

5. A copy of a Notice of Penalty Determinations was submitted to the Tribunal dated 26 September 2011 for an amount payable of £400 as an example of the notices that PD would have received. The notice states “You are required by law to make an end of year return by 19 May each year. As you have not made your return by 19 May 2011 you are liable to a penalty. This notice gives details of that penalty.... If you do not understand why you have received this notice please ask me about it..... Penalties are £100 for each month (or part-month) for every 50 (or up to 50) employees. You have been charged penalties from 20 May 2011 to 19 September 2011. This means that the statutory penalties you must pay are £400”.

6. On the rear of this Notice was a paragraph entitled “Appeals”. This stated “If you want to appeal you should write to us within 30 days of the date the original Notice of Penalty Determination was issued, stating the grounds for the appeal. If you think you have a reasonable excuse for failing to make the return on time, please explain this. If you think there are good reasons to reduce the penalty amount please say why.”

7. PD said that they were not clear what the “original Notice of Penalty Determination” was and when viewing their online HMRC account they observed that the penalties did not appear.

5 8. PD contacted HMRC who said that earlier penalties would not show on the account and PD thought they had been waived or cancelled.

9. PD kept a list of the telephone conversations with a number of employees of HMRC which included a call to Mrs Saunders on 12 January 2011 which PD say related to the first notices they received. They were aware, however, that there were calls prior to November 2011 but had no note of these. During this and subsequent
10 telephone calls HMRC were helpful and appreciated that PD were having problems with their online P35 returns. An HMRC note of a call on 7 December 2011 showed discussion to the effect that PD were “appealing the penalties for late filing”.

10. After a call noted on 30 August 2012, there was a gap of almost 11 months until July 2013 at which point it was noted that the penalties were showing on PD’s HMRC
15 account. PD were told that they must appeal in writing but were not told that this had to be within 30 days of the penalty notice.

11. HMRC wrote to PD on 7 October 2013 in respect of a telephone complaint dated 12 September 2013 which had been made by PD to the debt management telephone centre in Livingston. This letter referred to a recording of the telephone conversation
20 on 16 July 2013 with Mr Nixon-James whom HMRC said gave a full breakdown of the debt and also advised of the interest accruing per day. Mr Nixon-James then explained how to access information regarding submitting returns on the HMRC website and that PD would need to appeal in writing against any penalties for late payment or returns.

12. The 7 October 2013 letter continued to describe a conversation with Stephanie of HMRC on 2 September 2013 which was “of a similar nature” and in which Stephanie advised that any appeal against penalties or late filing charges would need to be made in writing. This letter acknowledged and apologised that Stephanie had given an incorrect telephone number to contact as she had mistakenly thought that the penalties
30 referred to a different tax scheme. The letter stated that the author, Mr Nigel Carr, was not aware that any appeal had been received. At that stage PD believed that they had sent HMRC a formal written letter of appeal on 5 September 2013, and a copy of a letter bearing this date was produced to the Tribunal. HMRC, however, said that they had no record of receiving this, that the wording of Mr Carr’s letter to PD of
35 7 October 2013 made clear that they had not received any such appeal at that date, and that, in any event, any such appeal would also have been significantly outside the original 30-day appeal period referred to on the penalty notices.

13. Mr Carr explained that only one of the penalties incurred, for £243, was for late payment. The other penalties were for late submission of PD’s P35 end of year
40 returns. The letter pointed out that the return for 2009-10, due on 19 May 2010, had been received on 1 November 2010 and incurred a £400 penalty; that the return for 2010-11, due on 19 May 2011, was received on 31 December 2011 and incurred a

£400 penalty and that the return for 2011-12, due on 19 May 2012, was received on 10 July 2012 and incurred a £200 penalty.

14. The letter continued “As you can see your P35s were considerably late and that is the reason you have incurred the penalties..... Any appeal should be sent to the
5 address below (which was then given as) Late Filing Penalty, Chillingham House, Benton Park View, Newcastle, NE98 1ZZ.... In the meantime I will request that the penalties are removed from the Debt Collection Agency. However, we will be requesting that the penalties are paid in full or you will need to make a Time to Pay proposal to pay off the penalties over a period of months.”

10 15. James Kennedy, a qualified management accountant who acts in his spare time as volunteer Treasurer for PD, wrote on 28 June 2015 to appeal against the fines of £1,443, imposed for late filing and said “I have written previously but understand this was never received”. The letter outlined the difficulties PD had had with the electronic payroll systems and that they did not have an active payroll system in place
15 to collect all the necessary information on employees and that, as a result, PD often missed deadlines.

16. The letter continued “Last year I was informed that if we clear the outstanding tax due the fines will be reviewed and looked on favourably. I personally paid this at that time and believed the fines would be cleared or at least significantly reduced. I was
20 then notified this would not be happening. I appeal again to have these fines cancelled. The fines are not for non-payment of tax but for late filing of returns. While I appreciate the filing of returns is important, I feel the severity of the fines greatly outweighs our errors. We have less than five employees but have still been fined in line with much larger employers. We also simply do not have the level of
25 funding to pay £1,443”.

17. HMRC responded on 28 July 2015 setting out the tax year, the penalty references, the date the penalty notifications were sent and the total penalty amount stating that “You are allowed 30 days from the date of each penalty to appeal. As we received the appeal after the time limit this is a late appeal.... The law says that when you appeal
30 to HMRC, you must do so within the time limit. We may accept a late appeal if you had a reasonable excuse for not appealing within the time limit and you appealed as soon as you could after the reasonable excuse ended. The law does not say what a reasonable excuse is. HMRC’s view is that a reasonable excuse is normally an unexpected or unusual event, either unforeseen or beyond your control, that prevented
35 you from sending in an appeal within the time limit. We consider each case on its own facts”.

18. The letter continued “I am not accepting the appeal because I consider you do not have a reasonable excuse for sending it in late. This is because prior to the introduction of RTI, End of Year Returns were due by 19 May, following the Tax
40 Year End, you submitted late returns for 2019-10, 2010-11 and 2011-12. You have not provided a reason for not appealing the penalties within the 30 days’ time period following the issue of them”.

19. James Kennedy replied on 5 August 2015 pointing out that after each penalty he had telephoned and appealed and as calls were recorded he thought this could be verified. He continued “I believed that the penalties had been cancelled until demands for payment in September 2013. The penalties did not show on our online account.
5 When I queried the online account, I was told that earlier penalties did not show. How was I then supposed to know the penalties had not been removed. In September and October 2013 I was told to appeal in writing.... No one told me this had to be within a specified time scale. I was also given an incorrect telephone number which was acknowledged in the letter of 7 October 2013. I have now also been told that the
10 Newcastle address provided in that letter for appeals was wrong. That may perhaps explain why my letter was never received”.

20. James Kennedy continued “You have stated I do not appear to have a reasonable excuse for a late appeal. I hope it is clear now that my recent letter was in fact the last in a series of appeals against the penalties. I have also been supplied with incorrect
15 telephone numbers and addresses which have not helped the situation and I have never been informed that the appeal was out of time. In the circumstances, I hope you can reconsider the appeal”. Mr Kennedy then lodged an appeal to the Tribunal on 26 August 2015.

21. On 3 November 2015, Matthew Mason wrote to HM Courts and Tribunal Service
20 objecting to PD’s application for permission to make a late appeal to HMRC on the grounds that PD believed the penalties to be cancelled, as they did not show on their online account, and that HMRC had not informed PD of the time limit by which appeals were to be made. The letter set out the dates the penalty notices were issued and noted that on two occasions, 16 July 2013 and 2 September 2013, PD was
25 verbally advised by HMRC officers that appeals against penalties must be made in writing to HMRC. The letter stated “HMRC also confirmed the action required by the appellant, in their letter of 7 October 2013, if the appellant wished to appeal the penalties charged. However, no written appeal was made to HMRC until 3 July 2015. The appellant has not provided HMRC or the Tribunal with any reasonable excuse as
30 to why it has taken him between two and five years in which to make appeals to HMRC”.

22. James Kennedy wrote on 9 November 2015 to Matthew Mason of HMRC stating that he was not informed that the appeals must be in writing until July 2013 and that, after speaking to Mr Nixon-James, he thought that if PD cleared tax arrears which
35 were due at the time then the penalty situation would be looked on more favourably.

Submissions by the Parties

23. PD says that being a small organisation they had difficulties with electronic filing and appealed by telephone against each penalty notice. The penalties did not appear
40 on PD’s account when checked online and they assumed that the verbal appeals had been successful. It was only much later they were informed that early penalties did not show electronically on their account.

24. PD say they were not informed that appeals had to be in writing until October 2013 and at this point they did appeal in writing but, unfortunately, were not given the correct contact number and address for the Department that dealt with appeals. This they say was later acknowledged by HMRC.
- 5 25. PD heard nothing further from HMRC until a telephone call in July 2015 at which point it was stated that no appeal had been received and PD were told that they could still make an appeal but not that it was too late to do this.
26. PD say they again made their written appeal in July 2015 and were then told in HMRC's written response that it was too late and that they had not provided a reasonable excuse as to why.
- 10 27. PD say that in September 2015 they received confirmation of the penalties which added further confusion to the matters as it stated on those notices that appeals must be made within 30 days. PD questioned how their appeal could be late when the appeal was on 3 July 2015.
- 15 28. PD say that the whole matter has been compounded by a lack of communication from HMRC; that it was confusing the penalties did not initially show online; that they were given incorrect telephone numbers and addresses and that they were told they were too late to appeal in July 2015 in respect of notices issued in September 2015 with an option to appeal.
- 20 29. HMRC say that PD has no reasonable excuse as to why the appeals were made late. The original notices that PD were sent clearly stated that an appeal must be made in writing 30 days from the date of the original notice and that the notices issued in September 2015 were simply a confirmation of the original penalty notices, and did not trigger a new 30-day appeal period.
- 25 30. HMRC say that Section 49 of the Taxes Management Act 1970 allows HMRC to accept a late appeal where it is made in writing; if they are satisfied that there was a reasonable excuse; and that the appeal was made without unreasonable delay after the reasonable excuse ceased. They further consider that the excuse must have existed throughout the period between when the appeal should have been made in time and when it was actually made late and that the appeal should be lodged as soon as the excuse has ended.
- 30 31. HMRC says that the law does not say what a reasonable excuse is but their view is that it is some event beyond the taxpayer's control that prevented the taxpayer from sending in his/her appeal within the time limit set by the legislation.
- 35 32. HMRC do not consider that their failure to advise PD of the time limits and making an appeal constitutes a reasonable excuse. HMRC say they verbally advised PD on 16 July 2013 and 2 September 2013 that appeals against the penalties charged must be made in writing to HMRC but acknowledge that no comment was made in respect of the time limits for appealing. HMRC, however, say that the notices of penalty clearly advised PD of their appeal rights and state the period by which an appeal to HMRC must be made.
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33. By letter of 7 October 2013, HMRC confirmed that any appeal against penalties charged would be considered to be late and advised PD that any appeal must also state why the returns were late and why PD were unable to send the returns on time. HMRC say that the only written appeal they received was on 3 July 2015.

5 34. HMRC reminded the Tribunal of its overriding objective to deal with cases fairly and justly and to do so when considering whether to permit an extension of time for filing an appeal. This power, they state, should be granted only exceptionally and, when doing so, the Tribunal should ask itself the following questions (1) what is the purpose of the time limit? (2) how long is the delay? (3) is there a good explanation
10 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?

15 35. HMRC say that the time limits are set by Parliament and as a matter of public policy should be respected. The time limits exist to provide finality to both sides which is something that is in the general public interest. In this case, the delays in submitting appeals to HMRC are not minimal being between 896 and 1710 days late.

20 36. HMRC say that PD states that they previously appealed the penalties charged in September and October 2013 but heard nothing further from HMRC from October 2013 until a telephone call in June 2015. HMRC noted that PD contacted HMRC on several occasions between October 2013 and June 2015 but did not refer to the submitted appeals until the telephone conversation on 2 December 2014.

25 37. During that call, PD advised that they had made a written appeal to HMRC's debt management section but did not state when the appeal was made. The HMRC officer had advised PD that if post was received at an incorrect office it would have been forwarded to the correct one and that if PD wished to send a copy of the appeal to Benton Park View, Newcastle, they could do so. HMRC say that no appeal was then made to HMRC until the one received on 3 July 2015.

30 38. HMRC question why, if PD submitted two appeals to HMRC, they did not contact HMRC to ascertain whether or not the appeals had been received or whether or not a response had been made. HMRC say that a prudent employer exercising reasonable foresight and due diligence to their tax affairs would have contacted HMRC to query why no response to an appeal had been received. HMRC say that PD did neither.

35 39. HMRC noted that any written appeals in September/October 2013 would also have been significantly late, considering the dates of the original penalty notices, although they did acknowledge that telephone discussions had been taking place in the run-up to that period.

40 40. HMRC reminded the Tribunal that in law the concept of "fairness" of the statutory framework of the regime itself was not a matter that fell within the jurisdiction of the First-tier Tribunal.

Conclusion

41. The Tribunal considered and sympathised with PD in their difficulties in dealing with the electronic filing system introduced in 2009-10 at a time when it did not have an active payroll service and was a small organisation.

5 42. The Tribunal also noted that the telephone conversations that PD had with HMRC had not always produced clear or satisfactory guidance, including an incorrect telephone number and/or address for further communication.

43. The Tribunal noted that PD did receive each penalty notice which is explicit in its terms as to why a penalty has been incurred and the amount of the penalty and states on the reverse of each notice the process for appeals. It also quite clearly states that appeals must be made in writing and within 30 days of the date of the notice. The only ambiguity, referred to by PD, is the term “original” notice and it became clear during the hearing that this wording is used by HMRC as a matter of convenience so that the same restriction can be publicised to taxpayers but in circumstances where they wish to make it quite clear that it is the original, not a confirmation of a notice of penalty, that can be appealed.

44. The Tribunal considered that either the word original must be interpreted in its normal usage, meaning the initial or earliest or the one existing from the first, or if this was unclear to PD, by contacting HMRC to clarify this.

20 45. The definition of what constitutes a reasonable excuse is not set out in statute although it has often been covered in case law. The Tribunal did not consider that (i) the lack of notification of the penalties on PD’s online account, (ii) the failure of HMRC to remind PD of the requirements for appeals to be in writing within 30 days of the date of each notice during telephone calls and (iii) making verbal appeals instead of written ones, in circumstances where no reason was provided why written appeals could not have been made, could amount to a reasonable excuse. PD received the notices and the conditions for making the appeals for each penalty were quite clear, that they had to be in writing and within 30 days.

30 46. When PD received notification of all the penalties by means of a series of Confirmed Penalty notices dated 15 September 2015, the period for each individual notice had expired. Whereas this was, confusingly, after they had made a written appeal on July 2015, these were merely confirmations of the previous notices and the 30 day limit referred to on the rear of all those notices referred to the *original* [emphasis added] notices, that is to say 29 September 2010, 4 November 2011 and so on, and not to the date of the Confirmed Penalty notices, all of which were dated 15 September 2015.

47. The application for permission to make a late appeal is refused and the appeal is dismissed.

40 48. 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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**W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE**

RELEASE DATE: 17 FEBRUARY 2016

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