



TC06801

Appeal number: TC/2018/03959

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – PAYE & Class 1 NICs – Penalties for late returns by employer of payments of earnings to employees in “real time” – whether returns for dates in two tax months delivered late: held no, HMRC failed to prove returns were late – appeals allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VASCO PROPERTIES LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 29 October 2018 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 30 May 2018 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 9 August 2018.

DECISION

1. This was an appeal by Vasco Properties Ltd (“the appellant”) against penalties
5 imposed under Schedule 55 Finance Act (“FA”) 2009 by the respondents (“HMRC”) for the appellant’s alleged failure to deliver returns of payments of earnings made to two employees at the latest on the date on which the payments were made. The failures alleged cover two (or it may be three) consecutive tax months, the last of which was the month from 6 December 2017 to 5 January 2018.

10 **Facts**

Basic facts and chronology

2. I first set out basic undisputed facts about the appellant and a chronology of events which I take from the bundle of papers I had. These papers include HMRC’s statement of case and 82 documents attached to that statement, as well as the appellant’s Notice
15 of Appeal to the tribunal.

3. Vasco Properties Ltd (“the appellant”) was an “RTI Employer” in the tax year 2017-18 and was accordingly required to make a return (“RTI return”) to HMRC every time they made a payment of earnings to an employee on or before the date of payment (ie in “real time”, hence the abbreviation RTI, or Real Time Information).

20 4. The return is of information relating to the employer and the employees to whom a payment is made, and two returns are required in relation to each payment, one for income tax (PAYE) and one for Class 1 National Insurance Contributions (“NICs”).

5. The appellant appealed against penalties of £200 on 14 February 2018.

6. On 20 March 2018 HMRC replied. The copy of the letter in the file shows:

25 Period ending 5 November 2017: [Unique ID 10 digit number]: Amount
£0.

Period ending 5 December 2017: [Unique ID 10 digit number]: Amount
£100.

30 Period ending 5 January 2018: [Unique ID 10 digit number]: Amount
£100.

Total: £200

7. The letter stated that the appellant did not, in HMRC’s view, have a reasonable
excuse for failure to make returns of payments to employees by the due date and
explained what it could do if it disagreed, namely request a review or go straight to the
35 Tribunal.

8. On 26 March 2018 the appellant requested a review.

9. On 8 May 2018 the review officer, Miss Mayfield, sent the conclusion of her review which was to uphold penalties of £0, £100 and £100.

10. On 30 May 2018 the appellant made further points to HMRC in reaction to the conclusion letter and also notified their appeal to the Tribunal.

5 *The computer generated output*

11. Because this appeal depends very heavily on the computer systems and software used by the appellant and by HMRC and interpreting the outputs, I need to set out or at least describe the various documents showing the outputs that are relied on.

10 12. To their appeal letter of 14 February 2018 the appellant attached a letter they sent to HMRC in October 2017. In that letter the appellant referred to HMRC's statement to them that they had submitted several returns as "month 12 with no figures", whereas the appellant said that their Basic PAYE Tools" ("BPT") (software produced by HMRC for use by employers) showed that the correct information was submitted for the correct periods, and that they had done the same for 2016-17 but with no issues raised by
15 HMRC. They attached to the letter copies of the information they had "at our end", as follows.

(1) An "employee year to date" summary printout for the tax year 2017-18 for Mrs Dolly Daswani showing figures for earnings to date for NICs purposes and pay to date for PAYE purposes of £8,160 as well as figures for certain NICs
20 thresholds showing the earnings to be above the Lower Earnings Level for NICs purposes. I infer that the figures are for the entire tax year.

(2) A printout of "employee payments" which shows "Basic PAYE Tools" in the top right. The page explains that to add a payment for the employee named (also Mrs Daswani) the employer has to follow the "Add employee payment"
25 link, and that payments that have been added will be displayed in the table below.

That table is in four columns: (1) Date of payment (2) Pay for tax purposes (3) Submission Status and (4) Actions (which are either "View", "Change" or "Export to CSV").

There are 12 rows:

30 (a) The dates in column (1) each fall in a separate month starting with April 2017 and ending with March 2018. Each date falls between the 23rd and 30th of the month.

(b) The pay in column (2) is £680.00 each month. This totals £8,160 (and so agrees with the first document).

35 (c) The submission status in column (3) shows for the first 11 rows "Expired" and for the 12th row "Success".

(d) In column (4) the option "Export to CSV" is shown only in the 12th row.

(3) The same documents showing the same figures and dates for Mr Deepak Daswani (with a very minor difference of £4 in the NICs threshold figures).

13. With the form for a request dated 26 March 2018 for a review of the decision to assess penalties, the appellant attached another printout from BPT for 2017-18. This was headed “Manage employees”. It says that “Details of your employees and their last submission if applicable are shown below”. The table “below” shows (1) the names of the two employees (Mr and Mrs Daswani) (2) their National Insurance numbers, the last payment date as 30/3/2018 and (3) the submission status as “Success”. The menu at the side contains a link to “Outstanding submissions” which shows “(0)”.

14. There was also attached to the review request another BPT printout headed “Successful submissions”. This had a very lengthy table with the column (1) showing “Date/Time submission sent” and column (2) “Date/Time of submission response”. The entries covering the period for which the penalties appealed have been charged (the three months ended 5 January 2017) are for 25/10/17, 24/11/17 (two entries 9 minutes apart) and 29/12/17 (“the relevant rows”). The dates in the “Employee payments” document (see §12(2)(a)) are 27/10/2017, 24/11/2017 and 29/12/2017 respectively, that is before or on the dates of submission.

15. In column (3) headed “Submission ID” it can faintly be seen that there is in each relevant row a lengthy number under subheading “Correlation ID” and another under “IRMark”. In each relevant row under column (4) headed “Submission status” is the word “Success”.

16. The appellant also attached further copies of the “Employee Year to date” summary for both employees (see §12(1)) and also attached the “Employee pay and decisions record” for each employee, which shows the monthly amounts of pay at £680.00.

17. The appellant also included two further BPT printouts:

(1) “Failed submissions” for 2017-18. There were no entries.

(2) “Expired submissions” for 2017-18. There were two entries both on 12/4/2017.

18. The third set of documents were sent in by the appellant on 30 May 2018 following the review conclusion letter of 8 May 2018 from Miss Mayfield. These were:

(1) The “Employee payments” printout (see §12(2)), but this time with the difference that in the “Actions” column the first 11 entries were “View” only, not “View” and “Change” and the 12th was “View” and “Export to CSV”. I infer that this is because the time in which changes could be made had expired.

(2) The “Successful submissions” printout again (see §14).

19. HMRC’s computer generated documents were:

(1) A printout showing along the top the “Employer reference” 914/V6112, a Unique ID and “Tax period end date: 05 Jan 2018”. The printout is headed “View

filing penalty notices”, and below shows (1) the type of penalty notice as “RTI511 – Notice of penalty assessment”, (2) the date issued as 09 Feb 2018, (3) the “charge (£)” as 200.00 and (4) under “Action” “Not applicable”. It doesn't show the name of the employer concerned.

5 (2) A proforma “Notice of penalty assessment”, showing “Quarter ended [blank]” under that wording. It is headed “Penalties for failure to file PAYE returns on time” and then “The penalty amount you need to pay for not filing in time is £[blank]”. Below that it says “Our records show that, for the quarter ended on 5 January [blank] you did not file one or more of your returns on time.”

10 (3) It also shows on a separate page “What to do if you disagree with this notice” which is to appeal within 30 days.

(4) Another separate page headed “How we calculated this penalty”. This says:

“Every time you:

- Send us your PAYE return late, or
- 15 • Don't send us the expected number of PAYE returns

We will consider charging you a penalty”

This page also shows the amount of the penalty, which varies according to the number of employees. For an employer with between 1 and 9 employees the penalty is £100. After that table the page says “we won't charge you a penalty the first time do not send a return in on time or you don't send us the number of returns we expect from you.”

20 (5) A printout with the same details as in §19 (1), save it is for “Tax period end date 05 Dec 2017”. It is headed “Summary of filing failures” and shows:

“Number expected 1

25 Number received 0

Status: Active.”

(6) An identical one to that in (5) save the period is “05 Jan 2018”.

(7) A copy of a notice of penalty assessment on the appellant for the quarter ended 5 July 2017 in the sum of £200.

30 (8) A table headed “Vasco Properties Ltd” with three columns, (1) GNF Penalty Warning Notice Type”, (2) “GNF Penalty Warning Notice Requested Date” and (3) “S Derived Scheme Reference”.

In column (1) the first 13 entries are “Late filing notification” and the dates in Column (2) run from 2 December 2013 to 2 March 2015. The remaining 32 entries in column (1) are “Non Filing Notification” and the dates in column (2) run from 15 May 2014 to 11 March 2018. From 11 June 2015 there is an entry for every month except September 2015, February 2016, April 2016, May 2016 and April 2017. Column (3) shows 914/V6112 (see §19(1)).

20. I find that all these documents relate to the appellant for whom HMRC's
40 employer reference is 914/V6112 and that they show accurately what the respective

computer screens showed at the time they were captured. What that date was is not apparent from some documents, but in some cases the date or a range of possible dates can be worked out from the content and in the case of the appellant's documents, the date it was sent to HMRC.

5 21. The appellant, though Mr Deepak Daswani, has stated their view of the significance of the various documents they supplied and HMRC has given their view in their letters and the SoC which I infer has benefitted from input from IT specialists in HMRC. I weigh up this evidence together with the documentary evidence set out above and draw inferences from it in the discussion section of this decision.

10 **The law**

22. The employer's obligation to submit an RTI return in relation to PAYE tax is in regulation 67B of the Employments (Pay As You Earn) Regulations 2003 (SI 2003/2682) ("the PAYE Regulations")

15 (1) Subject to paragraph (1A), on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation unless the employer is not required by regulation 66 (deductions working sheets) to maintain a deductions working sheet for any employees.

20 ...

(2) The information must be included in a return.

25 (3) Subject to paragraph (4), if relevant payments are made to more than one employee at the same time, the return under paragraph (2) must include the information required by Schedule A1 in respect of each employee to whom a relevant payment is made at that time.

...

(5) The return is to be made using an approved method of electronic communications."

30 23. The equivalent obligation for Class 1 NICs is in paragraph 21A of Schedule 4 to the Social Security (Contributions) Regulations 2001 (SI 2001/1004) ("SSCR") which refers to the information in Schedule 4A to the SSCR in place of Schedule A1 to the PAYE Regulations.

24. The law imposing these penalties is in Schedule 55 FA 2009, the relevant parts of which are:

35 "1—(1) A penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

...

(4) In this Schedule—

“filing date”, in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;

...

	Tax to which return etc relates	Return or other document
4	Income tax	Return under any of the following provisions of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682)— (a) regulation 67B (real time returns) ...

Amount of penalty: real time information for PAYE

5 **6B** Paragraphs 6C and 6D apply in the case of a return falling within item 4 in the Table.

6C—(1) If P fails during a tax month to make a return on or before the filing date, P is liable to a penalty under this paragraph in respect of that month.

10 (2) But this is subject to sub-paragraphs (3) and (4).

...

(4) P is not liable to a penalty under this paragraph in respect of a tax month falling in a tax year if the month is the first tax month in that tax year during which P fails to make a return on or before the filing date

15

(5) In sub-paragraphs (3) and (4) “the initial period” means the period which—

(a) begins with the day in the first tax year on which P is first required to make a return, and

20 (b) is of such duration as is specified in regulations made by the Commissioners,

and for this purpose “the first tax year” means the first tax year in which P is required to make returns.

25 (6) P may be liable under this paragraph to no more than one penalty in respect of each tax month.

(7) The penalty under this paragraph is to be calculated in accordance with regulations made by the Commissioners.

30 (8) Regulations under sub-paragraph (7) may provide for a penalty under this paragraph in respect of a tax month to be calculated by reference to either or both of the following matters—

(a) the number of persons employed by P, or treated as employed by P for the purposes of PAYE regulations;

(b) the number of previous penalties incurred by P under this paragraph in the same tax year.

(9) The Commissioners may by regulations disapply sub-paragraph (3) or (4) in such circumstances as are specified in the regulations.

5

...

(11) Regulations made by the Commissioners under this paragraph may—

(a) make different provision for different cases, and

(b) include incidental, consequential and supplementary provision.

10 25. The relevant regulations under paragraph 6B(7) are regulations 67I and 67J of the PAYE Regulations:

“67I Penalty: failure to comply with regulation 67B or 67D

15 (1) For the purposes of paragraph 6C of Schedule 55 to the Finance Act 2009 (amount of penalty: real time information for PAYE), a Real Time Information employer which fails to deliver a return falling within item 4 in the Table in paragraph 1 of that Schedule in accordance with—

(a) regulation 67B (real time returns of information about relevant payments);

20

...

as the case may be, is liable to a penalty of the amount set out in paragraph (2).

25 (2) Where a Real Time Information employer fails to deliver such a return and the number of persons employed in the period to which the return relates is—

(a) no more than 9, the penalty is £100;

(b) at least 10 but no more than 49, the penalty is £200;

(c) at least 50 but no more than 249, the penalty is £300; and

(d) at least 250, the penalty is £400.

30

67J Penalty: initial period

For the purposes of paragraph 6C(3), (4) and (5) of Schedule 55 to the Finance Act 2009 (initial period), the duration of the initial period is thirty days.”

26. The NICs provisions about penalties are in regulation 21G SSCR:

35

“Penalty: failure to comply with paragraph 21A or 21D

40 **21G**—(1) Where a Real Time Information employer fails to deliver a return in accordance with paragraph 21A (real time returns of information about payments of ... earnings) Schedule 55 to the Finance Act 2009 (amount of penalty: real time information for PAYE) ... regulations 67I to 67K of the PAYE Regulations (penalties) apply in relation that failure as if—

(a) the return under paragraph 21A (real time returns of information about payments of ... earnings) ... were a return falling within item 4 of the Table in paragraph 1 of Schedule 55, and

5 (b) references to the PAYE Regulations were references to these Regulations, but this is subject to sub-paragraphs (2) and (2A).

(2) Where a Real Time Information employer (P) is liable to a penalty in consequence of a failure to deliver a return (“the tax return”) under regulation 67B (real time returns of information about relevant payments) ... of the PAYE Regulations, P shall not also be liable to a penalty in respect of any failure in relation to an associated return under paragraph 21A ...

10 ...
15 (3) A tax return and a return under paragraph 21A [is] “associated” if the return under paragraph 21A ... is required to be delivered at the same time as the tax return.”

27. In this case the returns under regulation 21A SSCR were associated with those under regulation 67B PAYE Regulations, so no penalty could have been due under Schedule 55 FA 2009 as applied by regulation 21G(1)¹.

28. The relevant provisions relevant to assessments and appeals are:

20 “ASSESSMENT

18—(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

- (a) assess the penalty,
- (b) notify P, and
- 25 (c) state in the notice the period in respect of which the penalty is assessed.

...
(3) An assessment of a penalty under any paragraph of this Schedule—

- 30 (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
- (b) may be enforced as if it were an assessment to tax, and
- (c) may be combined with an assessment to tax.

35 **19**—(1) An assessment of a penalty under any paragraph of this Schedule in respect of any amount must be made on or before the later of date A and (where it applies) date B.

(2) Date A is—

¹ Fortunately I do not therefore have to decide whether penalties can validly be assessed for NICs return failures, as I cannot see where Schedule 55 FA 2009 have been brought into force for NICs purposes.

(a) in the case of an assessment of a penalty under paragraph 6C, the last day of the period of 2 years beginning with the end of the tax month in respect of which the penalty is payable,

...

- 5 (3) Date B is the last day of the period of 12 months beginning with—
- (a) the end of the appeal period for the assessment of the liability to tax which would have been shown in the return, or returns (as the case may be in relation to penalties under section (*sic*) 6C ... or
- 10 (b) if there is no such assessment, the date on which that liability is ascertained or it is ascertained that the liability is nil.
- (4) In sub-paragraph (3)(a) “appeal period” means the period during which—
- (a) an appeal could be brought, or
- 15 (b) an appeal that has been brought has not been determined or withdrawn.

...

APPEAL

- 20 **20**—(1) P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.
- 25 **21**—(1) An appeal under paragraph 20 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).
- (2) Sub-paragraph (1) does not apply—
- (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
- 30 (b) in respect of any other matter expressly provided for by this Act.
- 22**—(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—
- 35 (a) affirm HMRC's decision, or
- (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—
- 40 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.”

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29. Paragraph 16 provides:

“Special reduction

16—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

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(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

15

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.”

20

30. The penalties may also be cancelled, assuming they are procedurally correct, if the appellant had a reasonable excuse for the failure to file the return on the due date (see paragraph 9 Schedule 55) but in this case the appellant is not putting forward an excuse for failure to file.

Grounds of appeal

31. The grounds of appeal are:

25

(1) The appellant’s “Basic PAYE Tools” show that that the appellant submitted the correct information by the correct dates and for the correct months, and they enclosed relevant copies of entries.

30

(2) They did their submissions in exactly the same way in 2016-17 with no issues, so it seemed that the current software update may have caused the problem as the status now shows “expired” rather than “success” which it previously showed.

(3) They cannot see how to solve the problem as the information shown at their end is correct and the system does not allow them to do anything different or change the status from “expired” to “success”.

35

(4) They have only 2 employees and they are paid the same with standing orders going out in accordance with the figures and times submitted.

32. Further detailed information was given in the appeal notification to the Tribunal, including that Mr Vaswani, the appellant’s accountant, tried calling the helpline several times but the waiting times were too long and he gave up. They added:

(1) The appellant made several attempts from 20 September 2017 onwards to correct the “expired” status but all resubmissions were posted to period 12.

(2) No witness statement from HMRC’s IT department has been made about the issues.

5 (3) No tax or NI was due, and there had been no effect on either the employees or HMRC.

33. It is clear from what was said that there have been more penalties than those for the three months subject to appeal.

HMRC’s response

10 34. HMRC say in response that:

(1) The appellant failed to file one or more returns (they don’t say how many) under regulation 67B PAYE Regulations and paragraph 21A of the Contributions Regulations (they give no more precise details about the regulations than that).

15 (2) When a submission is made to HMRC using Basic PAYE Tools then the submitting person should received confirmation as to whether the submission was received successfully or not.

20 (3) When a submission has a status of “success” it means the submission has reached HMRC and has been provided with a correlation ID, HMRC has validated the data, and a successful (sic) response had been returned by the Gateway. The Gateway then deletes its record of submission. After “success” status has been awarded to the submission it is “logged” in “View successful submissions” and the software makes no further changes to it.

25 (4) When a submission has a status of “expired” it means the submission has reached HMRC and has been provided with a correlation ID, but when the Basic PAYE Tools polls for a response from the gateway it no longer has a record of it. Basic PAYE Tools therefore applied the status of “expired” as the software will never received a “success” or “failed” response to the submission.

30 (5) This “expired” status is very rare but can happen when the submission response has already been returned to the software (ie a previous successful submission).

(6) An update to Basic PAYE Tools would not change the status.

(7) HMRC expects regular filers to be aware that a copy of software generated messages showing successful submission should always be kept, and if not received the technical helpline should be contacted.

35 35. They also point out that the appellant appealed on 15 September 2017 against penalties for the quarter ended 5 July 2017 of £200 (£0, £100 and £100) using the same reasons as are given in this appeal. HMRC took a lenient approach and accepted the appeal and issued an educational letter. A reasonable employer would have sought advice to ensure that future RTI submissions were made correctly.

36. Their submission to the tribunal is that no reasonable excuse exists for the failure.

Reasons for my decision

37. HMRC have, as they accept, the burden of proof of showing that the penalties are due.

5 38. The failure alleged is that:

“The appellant filed one or more late returns of information required by Schedule A1 to the PAYE Regulations in the periods of a month ending on 5 December 2017 and 5 January 2018”

39. The SoC under a heading “Facts” says:

10 “HMRC’s records show that Vasco Properties Ltd filed one or more late returns during the tax months ended 5 December 2017 and 5 January 2018.”

40. The evidence that HMRC have produced to show that the returns due in those two months were made or delivered late is the two printouts described in §31(1):

15 “Number expected 1
Number received 0
Status Active”

41. These printouts were dated 1 August 2018.

20 42. By producing this evidence HMRC have set up a presumption that the return had not received as of 1 August 2018. This presumption arises from regulation 196 of the PAYE Regulations.

“196 Proof of delivery of information sent electronically

25 (1) The use of an approved method of electronic communications is presumed, unless the contrary is proved, to have resulted in the delivery of information—

(a) to the Inland Revenue, if the delivery of the information has been recorded on an official computer system;

...

30 (2) The use of an approved method of electronic communications is presumed, unless the contrary is proved, not to have resulted in the delivery of information—

(a) to the Inland Revenue, if the delivery of the information has not been recorded on an official computer system;

...

35 (3) The time of receipt or despatch of any information delivered by an approved method of electronic communications is presumed, unless the

contrary is proved, to be the time recorded on an official computer system.”

43. That presumption, as is shown by the opening words of paragraphs (1) and (2) and by paragraph (3) is rebuttable, so the evidential burden shifts to the appellant to prove the contrary, ie that they had delivered the returns in time.

44. The evidence that the appellant puts forward is at §§12 to 18. From that evidence I find that they have proved to the contrary that the returns were not made late. I do so from the following pieces of evidence:

(1) The evidence at §13 in particular the submission status as “Success” in column and menu link to “Outstanding submissions” which shows “(0)”.

(2) The evidence at §§14 and 15 showing the dates of successful submission of returns in the two months on or before the dates of payment, a lengthy number under subheading “Correlation ID” and another under “IRMark” and under column (4) headed “Submission status” the word “Success”.

(3) The evidence at §16 showing there were no “failed” submissions for 2017-18.

45. I have however weighed in the balance the submissions made by HMRC at §34 (2) to (6). I cannot see anything in what is said that shows that there was not a successful “submission” in each month. HMRC have explained the “expired” messages that the appellant says (and shows in the printout mentioned at §12(2)(c)) they received, but in terms that seem to show that the returns were actually delivered to HMRC but that for a mysterious reason, not connected with receipt or not, only the month 12 entry showed “success” when the appellant examined BPT.

46. HMRC’s SoC refers to a third status “failed”. They do not suggest that the appellant’s BPT would have shown such a message, which then changed to “expired”.

47. I therefore cancel the penalties for the month ended 5 December 2017 and the month ended 5 January 2018.

Further observations

The relevance of “reasonable excuse”

48. As outlined at §36 HMRC’s final contention to the Tribunal was:

“It is the contention of HMRC that in order for Vasco Properties Ltd.’s appeal to succeed, they must demonstrate that a reasonable excuse existed which prevent them from complying with their Income Tax obligations. HMRC have concluded, based on the evidence held, that no reasonable excuse exists and as a consequence the penalties were correctly charges in accordance with legislation (*sic*).”

49. I agree no reasonable excuse “existed” because this was simply because none was put forward and that was because the appellant’s case was that there were no failures to

be excused. HMRC's SoC assumed that there was a failure and spent many paragraphs explaining why the appellant's actions or inaction did not excuse the failures.

50. The SoC was of course only reflecting the same attitude taken by the officer initially dealing with the appeal and the review officer. The first officer was using a standard letter in which HMRC express their disagreement with the grounds of appeal ("rejecting" the appeal as they erroneously call it²). They would not have had a stock letter that dealt with an appellant whose ground of appeal against a penalty was not that they had a reasonable excuse but that there was no failure.

51. There is no excuse for the review officer taking the same view and not appreciating that this was not a reasonable excuse case.

52. These failures led the unfortunate compiler of the SoC to put forward the wholly incorrect statement quoted at §48.

The penalties – non-filing or late filing?

53. There are some puzzling aspects to the penalties imposed in this case. Given that there is no notice to file an RTI return, how can HMRC impose a penalty for failure to make a timely return until it has been made? There is no requirement to make a nil return as there is for the return by employment intermediaries under regulation 84F of the PAYE Regulations. In a company like this one with a single director and one employee, the wife of the director, there may be very many reasons why a return is not made in a particular tax month. There is nothing in the papers to show that HMRC made enquiries when they say they did not receive any returns in a tax month.

54. The clue may be in the printouts quoted at §40 which refer to "returns expected". HMRC's PAYE Manual gives the answer at PAYE 5065:

"Filing failures

There are two types of filing failures, late filing failures and non-filing failures.

Non-filing failure

A non-filing failure is created if an employer

- fails to file the expected number of unique payment dates for a tax month (6th of the month to the 5th of the following month)
- has not submitted an Employer Payment Summary (EPS) to tell HMRC that no employees were paid in a tax month
- has not declared a period of inactivity covering that tax month

(This content has been withheld because of exemptions in the Freedom of Information Act 2000)

² HMRC's Appeals, Reviews and Tribunal Guidance (ARTG) limits the use of the term "reject" to case where the grounds of appeal are "invalid" – see ARTG 2171.

Late filing failure

A late filing failure will be created when an employer

- (sic) Fails to file their return on or before any payment date in the Full Payment Submission (FPS)

5 Late filing failures are created and sent to PAS on a daily basis. On the following day employers will be sent a late filing GNS message and HMRC users will be able to view the failures.

10 From 06 March 2015 until 05 April 2017 a late filing failure will not be created where the employer sends in the RTI return within 3 days of the payment date.

A late filing failure will not be created if the employer sends their return late with a ‘late reporting reason’ claimed against the payment providing the return is submitted within the extended time scale that the late reporting reason allows. See PAYE5055.

15 Multiple late filing failures can be created for a tax month but only 1 filing penalty will be charged.”

55. HMRC may find it helpful to classify failures in this way. But Schedule 55 FA 2009 penalises late submission of returns that *are* required. It doesn’t penalise the non-filing of returns that may not be required.

20 56. It is a precondition of a “non-filing failure” that the employer who fails to make the expected number of returns has not filed an EPS or a period of inactivity. Failure to do either of those things might lead to a penalty because they may be required by the PAYE Regulations, but such a penalty would and could not be a Schedule 55 FA 2009 penalty³. It seems that it is regulation 67F of the PAYE Regulations that covers the two
25 types of information that HMRC require to be missing before a non-filing penalty is declared:

“67F Additional information about payments

(1) A Real Time Information employer may send to HMRC a notification if—

30 (a) for a tax period, the employer was not required to make any returns in accordance with regulation 67B or 67D because no relevant payments were made during the tax period, or

(b) the employer has sent the final return under regulation 67B or 67D that the employer expects to make—

35 (i) in the circumstances described in paragraph 5 of Schedule A1 (real time returns), or

(ii) for the tax year.

(2) A notification under paragraph (1)(b) must—

³ Having typed this remark I did quickly look back at item 4 in the table in paragraph 1 Schedule 55. This also refers to regulation 67D failures. Regulation 67D is however the equivalent of regulation 67B for the digitally excluded and so not relevant to this point.

...

(b) be sent within 14 days of the end of final tax period of the tax year,

5 (c) the notification is under paragraph (1)(b)(i), include the date on which the PAYE scheme ceased.”

57. This return, which is what HMRC call an EPS, rather than FPS which is the regulation 67B return, is not mandatory – “A[n] ...employer *may*”. Even if it was mandatory failure to give it would be penalisable under s 98 Taxes Management Act 1970⁴, not Schedule 55.

10 58. The use of the term “Expected returns” in the HMRC printout at§19(5) suggests that the penalties here were imposed for non-filing failures. It seems to me that there is a good case for saying that such a non-filing failure cannot be penalised under Schedule 55 until they become late filing failures, ie until the return is actually filed⁵, and that all such penalties imposed in these circumstances are invalid. But I do not
15 need to decide that in this case.

Penalties – two penalties or three?

59. I am perplexed by the fact that while the SoC refers to penalties for the two months to 5 January 2018, the letter of 20 March 2018 from HMRC shows three penalties each with its unique ID including a penalty of £0 for 5 November 2017. This
20 third penalty also appears in the heading of the review letter of 8 May 2018. Neither letter commented on this fact or suggested that the November return had been successfully submitted in time, so that for some reason no penalty was due.

60. A further oddity is that exactly the same thing happened in the quarter to 5 July 2017. This would suggest either than there is something wrong with HMRC’s penalty
25 software or is another manifestation of HMRC’s inability to understand what the appellant was saying to them.

61. The appellant refers only to two penalties in their response to the review conclusion letter, but their earlier appeals were against all penalties for the quarter. For
30 the avoidance of doubt I am also cancelling the penalty of £0 for the month ended 5 November 2017.

Cancellation of earlier penalties in the tax year

62. I am also at a loss to understand why HMRC cancelled the £200 penalties imposed for the quarter to 5 July 2017. The SoC says HMRC were being lenient. The letter of 26 September 2017 that the appellant enclosed simply says:

⁴ Section 98 TMA penalises, inter multa alia, failures to furnish information required by the PAYE Regulations.

⁵ That is how those penalties for other items in the table where no notice to file a return or other trigger is given, eg NRCGT returns (item 2A) and ATED returns (item 11A).

“We’ve accepted your appeal and cancelled your penalties however please refer to point 6”

63. Point 6 says:

5 “If an employer hasn’t paid any employees in a tax month, they need to file an [EPS] instead of [an FPS]. When they file an EPS they must confirm which period it is for. ...”

64. It is impossible to see from this or any other documents why these penalties were imposed or cancelled. There is no suggestions that the officer thought the appellant had a reasonable excuse for late filing.

10 65. I do not understand then why it was thought that HMRC were being lenient, unless it was because there were special circumstances. They do not say so, nor did HMRC explain why, if there were special circumstances, they did not apply for the quarter to 5 January 2018 if the problem was the same, unless they thought that it was curable by the appellant.

15 66. Nor is there any explanation for the apparent absence of penalties for the quarters to 5 October 2017 and 5 April 2018. Of course there may not have been penalties or they may not have been appealed, but this seems unlikely. If there are other open appeal proceedings for these quarters then I would expect this decision to be applied.

Decision

20 67. Under paragraph 22(1) Schedule 55 FA 2009 I cancel the penalties for the tax months ended 5 November 2017, 5 December 2017 and 5 January 2018.

25 68. 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.

30

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 6 November 2018

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