



TC07852

Appeal number: TC/2020/01486

*INCOME TAX – penalty for failure to make returns - Covid-19- whether
“special circumstances”*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHERWELL OPTICAL LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

The Tribunal determined the appeal on 23 August 2020 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 14 February 2020 (with enclosures) and HMRC’s Statement of Case acknowledged by the Tribunal on 1 July 2020. The Tribunal also considered the Document bundle of 52 pages prepared by HMRC and the relevant legislation and authorities.

DECISION

1. The appellant is appealing against penalties that HMRC have imposed under paragraph 6C of Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to file one or more one or more PAYE Real Time Information (RTI) returns on time for the periods ending 5 June 2019, 5 August 2019, 5 September 2019 and 5 October 2019.
2. The Appellant is an RTI employer and is required to make a return under Regulation 67B of the Income Tax (Pay As You Earn) Regulations 2003 (the “Regulations”).
3. Regulation 67B provides, so far as relevant:

“67B Real time returns of information about relevant payments]
[(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...
(4) If relevant payments are made to more than one employee at the same time but the employer operates more than one payroll, the employer must make a return in respect of each payroll.
(5) The return is to be made using an approved method of electronic communications.”
4. The important point in this case is that the return must be submitted on or before the date when the employees are paid.
5. If the return is late, penalties may be charged under Schedule 55. The relevant provisions are as follows:

“6B
Paragraphs 6C and 6D apply in the case of a return falling within item 4 [which relates to RTI returns]... 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.
...
(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.
(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...”
6. The relevant penalty for an employer like the appellant with no more than 9 employees is, under Regulation 67I of the Regulations, £100.

7. The penalty charged for each of the four defaults is £100 so that the total amount of penalties due is £400.
8. HMRC issued a penalty notice for £100 on 2 September 2019 in relation to the default which occurred in the tax quarter ending 5 July 2019. They issued a further penalty notice on 15 November 2019 for £300 for the defaults which occurred during the tax quarter ending 5 October 2019
9. The appellant's grounds for appealing against the penalties, as set out in their appeal to HMRC dated 5 September 2019 and review request dated 28 January 2020 can be summarised as follows:
 - (1) They make irregular payments to employees, one of whom is full time and one part time/casual.
 - (2) They have been trading for ten years and have not previously incurred such penalties,
 - (3) The penalties place an excessive burden on small businesses.
10. In the Notice of Appeal, the appellant stated that they accepted HMRC's review decision and were willing to pay the penalties but requested a "special reduction" because the company was non-operational and in negative cash flow owing to the Covid-19 lockdown.

Findings of fact

11. HMRC's computer records show a payment date for each of the Appellant's employees in each of the periods in question which is before the submission of the RTI returns. This means that the RTI returns were submitted late, that is *after* the employees were paid, contrary to Regulation 67B, so that a penalty is payable.
12. The appellant had previously been charged penalties for late submission of RTI returns, but on each occasion the penalties had been cancelled and HMRC had sent the appellant an "education letter" which explained the correct procedure for submitting RTI returns and in particular, that the return must be made before the employees are paid. The letter also set out links to HMRC's website where further information was available.
13. The first education letter was sent on 27 October 2016 and the second on 7 December 2017. The appellant should therefore have been aware of the correct procedure and, if necessary, should have altered their payroll procedures to comply.
14. HMRC rejected the appeal in a review letter dated 16 March 2020 (just before the start of lockdown) and the appellant appealed to the Tribunal on 14 April 2020.

Discussion

15. I have found that the appellant's RTI returns for the four months in question were submitted late and so, subject to considerations of "reasonable excuse" and "special circumstances", the penalties are due and have been correctly charged.
16. In considering whether there is a reasonable excuse, I must consider whether what the appellant did was a reasonable thing for a conscientious taxpayer, who wanted to comply with its tax obligations, and who was in the position of the taxpayer, to do.
17. Following the previous defaults and the two education letters, the appellant should have been aware of the correct process for submitting its RTI returns and that submitting the returns late could incur penalties. If they were still not sure what to do, they could have looked at HMRC's guidance which was referred to in the education letters or sought help from their agent.
18. The appellants have stated, in their Notice of Appeal that they accept HMRC's decision and are willing to pay the penalties. This implies that they concede they did not have a reasonable excuse. From my consideration of the papers and evidence before me I conclude that the appellant was right to concede that and that they did not have a reasonable excuse for making the returns late.
19. Paragraph 16 of Schedule 55 provides HMRC with discretion to reduce any penalty charged under the Schedule if they think it right to do so because of "special circumstances".
20. Special circumstances are undefined save that, under paragraph 16(2), it does not include:
 - (1) ability to pay, or
 - (2) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
21. HMRC submit that paragraph 16 Schedule 55 may be applied where, in HMRC's opinion, the taxpayer's circumstances are such that the application of a penalty at the statutory level would not be appropriate. This may include circumstances where imposing the penalty would be contrary to the clear compliance intention of the penalty law
22. In *Barry Edwards v HMRC*, [2019] UKUT 137(TCC) the Upper Tribunal decided at paragraphs 68-74 that the meaning of special circumstances should not be given a restrictive interpretation. Special circumstances may include any factor which means that a decision to charge a penalty at the level determined by statute would be contrary to Parliament's intent when the penalty regime was introduced.

23. HMRC submit that to be special, any particular circumstance may or may not be specific to the individual taxpayer but it must be relevant to the issue under consideration. If relevant, the circumstance must be sufficiently special such that HMRC considers it right to reduce a penalty under paragraph 16.
24. At paragraph 86 in *Barry Edwards*, it was confirmed that the Schedule 55 regime was proportionate, and penalties are therefore correctly due even in circumstances where there is no additional tax liability; “In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.”
25. HMRC, having considered the appellant’s circumstances and submissions, submit that a special reduction is not appropriate because the appellant was advised, in the education letters of 27 October 2016 and 7 December 2017, of the correct procedures for filing RTI returns and that penalties may be charged if the returns were made late. The letters also provided details of further guidance available on HMRC’s website. HMRC considers that following receipt of the above letters, a reasonable employer would have put provisions in place to correct their payroll reporting to ensure RTI returns were filed correctly and the appellant would have been aware that penalties would be charged if the returns were filed late.
26. HMRC further submit that the penalties charged are proportionate and the penalty regime is proportionate to its aim.
27. The appellant, in their Notice of Appeal dated 14 April 2020, requested a Special Reduction to the amount of the penalties levied as the business is closed due to the COVID-19 lockdown.
28. HMRC submit that a special reduction is not appropriate because:
 - (1) any consideration of special reduction would apply to the original penalties and the circumstances at the time that resulted in those failures rather than recent events.
 - (2) Under paragraph 16(2), Schedule 55, Finance 2009, ability to pay is not a special circumstance.
29. The Tribunal, under paragraph 22 of Schedule 55 can only interfere with HMRC’s decision on Special Reduction if it considers that HMRC’s decision is “flawed” in the judicial review sense. That is to say, the Tribunal must be satisfied:
 - (1) That HMRC has taken account of all relevant matters

- (2) That they have not taken account of irrelevant matters; and
 - (3) That the decision is not one which no reasonable decision maker of HMRC could have made.
30. HMRC's review letter was dated 16 March 2020, shortly before lockdown started. That decision could not, therefore, have been expected to take into account the consequences of the subsequent lockdown.
 31. It may be that the consequences of the Covid-19 pandemic could justify a Special Reduction in another case.
 32. However, my jurisdiction is limited to considering whether HMRC's decision in the present case was "flawed" in the relevant sense and I conclude that it was not. I cannot identify any relevant matters which HMRC ignored or irrelevant matters that they took into account. The decision is, in my view, within the range of reasonable decisions which the decision maker could make.
 33. HMRC have pointed out, and I repeat here, that if the appellant has been affected by COVID-19 and COVID-19 restrictions they can contact HMRC'S COVID-19 helpline either by phone on 0800 024 1222 or via Webchat to discuss a possible deferment of payment. This information is on HMRC's website at www.gov.uk/difficulties-paying-hmrc.

Conclusion

34. For the reasons set out above I have concluded that the appellant's RTI returns for the relevant periods were submitted late. The appellant did not have a reasonable excuse for their failure to submit on time. I am unable to interfere with HMRC's decision on Special Reduction.
35. Accordingly, I affirm HMRC's decision and dismiss the appeal.

Right to apply for permission to appeal

36. 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.

MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2020