



**TC07886**

*Employer's Annual Return – penalties for late filing of completed return – whether to give permission for late appeal to be made to HMRC – permission refused*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/00717**

**BETWEEN**

**THREE SIXTY INSURE LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JEANETTE ZAMAN**

The Tribunal determined the appeal on 5 October 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 3 February 2020 (with enclosures), HMRC's Statement of Case acknowledged by the Tribunal on 1 August 2020 and an e-bundle of papers that had been prepared by HMRC, the contents of which are referred to in this decision notice.

## DECISION

### INTRODUCTION

1. HMRC imposed penalties under s98A(2) and (3) Taxes Management Act 1970 (“TMA 1970”) for the late filing by Three Sixty Insure Limited (“Three Sixty”) of its Employer’s Annual Return for the tax year 2008-2009, which had been due on 19 May 2009. The penalties were monthly penalties of £100 each, imposed as follows:

- (1) £400 on 28 September 2009,
- (2) £400 on 25 January 2010, and
- (3) £400 on 24 May 2010.

2. Three Sixty appealed to HMRC against these penalties on 11 April 2011. On 27 April 2011 HMRC wrote to Three Sixty to state that they did not agree to late notice of the appeal being given. There has been further correspondence between the parties over the years, and on 3 February 2020 Three Sixty applied to the Tribunal for permission to make a late appeal to HMRC. (I note at this stage that, as considered further below, Three Sixty maintains that an earlier appeal had been made to HMRC that was in time but to which no response was received.)

3. The grounds for appeal set out in the Notice of Appeal to the Tribunal and the appeal to HMRC on 2 January 2020 are:

- (1) Three Sixty were under the impression that the penalty had previously been appealed and removed. At inception of their business in 2008 their accountant was Mark Lomax, and when this issue first came to light he assured them that it had been dealt with and everything was in order. Subsequent correspondence was then received which Mr Lomax also dealt with.
- (2) Periodically over the last ten years they have received correspondence relating to this matter - each time they have replied or spoken to HMRC to reiterate that this had been dealt with.
- (3) They have changed their accountants (for various reasons) and now engage NJ Grindrod & Co. Mr Lomax has been taken ill and is no longer practising and they have no way of ascertaining if the P35 return in question was ever actually submitted correctly.
- (4) The cumulative penalty of £1,200 is grossly unfair given that this relates to a paper error and the tax was paid on time
- (5) They are a small business and have always paid taxes in full and on time

4. HMRC maintain their objection to a late appeal being made. HMRC’s Statement of Case also deals with the substantive appeal against the penalties.

5. I have considered all of the evidence and submissions to decide whether to give permission for a late appeal to be made. Even though procedurally the next step (if I do decide to give permission) would be for HMRC to consider the appeal, I consider that in such situation I should treat HMRC as having rejected that appeal for the reasons set out in their Statement of Case and Three Sixty as having notified their appeal against that decision to the Tribunal in order that I could determine the matter.

6. For the reasons set out below, I have decided to refuse permission for a late appeal to be made to HMRC.

## **FINDINGS OF FACT RELEVANT TO THE LATE APPEAL**

7. At the outset I note the following in respect of the evidence:
  - (1) HMRC state that the original assessment paperwork has been destroyed in line with their document retention policy.
  - (2) I had before me copies of correspondence from 2009 onwards. All of the correspondence prior to HMRC's letter of 29 November 2019 had been provided by Three Sixty to HMRC (largely by way of enclosures to letters which it sent at various times).
  - (3) Many of these items have manuscript notes on them, which I infer to have been made by or on behalf of Three Sixty. Where notes have been made of telephone conversations with HMRC, I accept that such conversations did occur - indeed, this is not challenged by HMRC.
  - (4) HMRC have produced copies of their computer records – there is a short entry showing the date they say the return was received by them, and several pages of “Action History” recording contact with the taxpayer (both actual and automatically generated). The first items in the Action History are from October 2009, with a few in the period from July to September 2010. However, most items relate to matters after July 2011.
8. With the exception of two issues, much of the chronology set out below is common ground between the parties. These two issues are:
  - (1) the date on which an amended (complete) return was re-submitted by Three Sixty – the company says this was re-submitted on 27 May 2009 (but go on to note in their letter of 2 January 2020 that given Mr Lomax's illness they cannot ascertain whether the P35 was ever submitted correctly); HMRC say this was not re-submitted until April 2011; and
  - (2) whether Three Sixty appealed against the penalties on 25 September 2009. Three Sixty produced a copy of this letter, saying it was sent, whereas HMRC state they have no record of having received it.
9. As to the date of re-submission, I make no finding in relation thereto at this stage, save to record what each party has submitted. This would need further consideration if permission were to be given for a late appeal to be made and the substantive appeal needed to be considered. I refer to the letter of 25 September 2009 at the relevant point in the chronology below, and assess it further – and make findings in relation thereto - in the Discussion.
10. I make the following findings of fact based on the evidence before me.
11. The Employer Annual Return for 2008-2009 (form P35) was completed by Mr Cowen, a director of Three Sixty, and dated 18 May 2009. The due date for filing was 19 May 2009.
12. The return was rejected by HMRC on 21 May 2009 as it was incomplete. The reason listed for the failure is “Missing P14's. I have enclosed the Orange and Green copies for completion. The P60 blue copies must be given to the employee's.”
13. The copy of HMRC's letter of 21 May 2009 has a date stamp of 26 May 2009 (showing this is a copy of the letter that was received by Three Sixty) and a manuscript note on it saying “Returned 27/5/09”. As noted above, it was stated by Mr Lomax on behalf of Three Sixty that the return had been re-submitted on that date (albeit that they do not deny that it was re-submitted (possibly again) in April 2011). HMRC produced a screenshot of a page of their records stating that the return for the tax year was received on 11 April 2011.

14. There is a copy of a letter dated 25 September 2009 from Mr Lomax to HMRC which is written further to the “recent penalty notice received” regarding the non-submission of the end of year return, and explaining that the original submission was made on time on 18 May 2009, but due to an error was returned to the company on 21 May, received by them on 26 May and returned to HMRC on 27 May 2009. I make findings in relation to this in the Discussion.

15. HMRC Debt Management sent letters chasing payment on 13 September 2010 and 14 March 2011. Manuscript notes on both of these letters indicate that someone from the company called HMRC on receiving each of these letters.

16. On 30 March 2011 HMRC Debt Management wrote to Three Sixty about the penalties, saying Three Sixty had “chosen to ignore” HMRC’s efforts to resolve the matter, and the debt had been transferred to the distraint department to schedule a visit to seize goods.

17. On 7 April 2011 Mr Lomax wrote to HMRC Debt Management, attaching a copy of the letter dated 25 September 2009. That said:

“We wish to dispute the penalties raised on our company based on the enclosed information. We have as yet not had a response to our letter now some eighteen months ago.

In fact your letter of 30 March 2011 is the first communication we have had on the matter. Please once again accept an appeal against the penalties charged.”

18. There was a second letter of that same date, 7 April 2011, from Mr Lomax (describing himself as director) on Three Sixty letterhead to HMRC saying they wished to appeal against the penalties. They attached what they described as a letter acknowledging receipt of the original return, which “contained some paperwork in error. This was received back to us on 26<sup>th</sup> May 2009 and then returned to you corrected on 27<sup>th</sup> May.” I infer this was HMRC’s letter of 21 May 2009.

19. On 19 April 2011 Mr Cowen called HMRC, speaking to Arthur Cawdrey. The file note of that call was made by Mr Cowen, and refers to “Mark + I” having spoken to HMRC the previous week to resolve and Mr Lomax having asked for duplicate documents. The note states:

“He said we may need to appeal charges if payment made for that period? If no payment made then OK?”

20. On 27 April 2011 HMRC wrote to Three Sixty rejecting the penalty appeal as late. That letter states that they have the right to apply to the Tribunal to see if they will accept the late appeal, but must do so within 30 days of the date of the letter.

21. On 6 September 2013 HMRC Debt Management wrote to Three Sixty chasing payment of the penalties, stating that HMRC had now written to them three times.

22. On 20 September 2013 Mr Lomax wrote to HMRC Debt Management saying that the director of Three Sixty had received a telephone call chasing payment of penalties of £1,200. That letter attached correspondence which was described as going back to 2009 and said “We have had at no time any communication back on the matter of our appeal against the penalties raised.” Mr Lomax adds that this is becoming a ridiculous situation and urgent action is needed.

23. On 18 November 2013 HMRC wrote to Three Sixty saying that they had received contact from Mr Lomax regarding these penalty notifications, but HMRC did not have authority to deal with him. HMRC referred to the three penalties and the time limit for

making an appeal. That letter said that HMRC had examined Three Sixty's PAYE records and note that they had already appealed against the penalties, and HMRC had issued a late appeal letter on 27 April 2011 advising them to contact the Tribunal to see if they would accept a late appeal. That letter of 18 November itself also states that Three Sixty has the right to apply to a tribunal to see if they will accept the late appeal, and they should write to the Tribunal within 30 days.

24. On 22 January 2014 HMRC responded to a letter of 12 December 2013, stating that the submission of the return had not been accepted – for a return to be considered complete HMRC must receive all parts before the 19 May deadline. HMRC did not receive the submission on 27 May 2019. The copy of that letter which was provided with Three Sixty's appeal to HMRC on 2 January 2020 includes a manuscript note made on 30 January 2014, that "SC" had spoken to "Gillian" at HMRC, explained the situation and she had said it was best to write again and explain further that they are a small business, paying on time, etc, to see if they can get the fine reduced.

25. HMRC Debt Management wrote to Three Sixty chasing payment of the penalties on 29 November 2019.

26. On 2 January 2020 Three Sixty appealed to HMRC against the penalties, enclosing all the correspondence that they had been able to find.

27. On 17 January 2020 HMRC rejected the appeal against the three penalties as late, stating that there was no reasonable excuse for the lateness of the appeal. That letter set out Three Sixty's right to appeal to the Tribunal by 16 February 2020.

28. Three Sixty gave Notice of Appeal to the Tribunal on 3 February 2020 applying for permission to make a late appeal to HMRC.

#### **RELEVANT LEGISLATION**

29. Section 31A TMA 1970 requires that notice of an appeal is given in writing to the relevant officer of the Board within 30 days of the date of the penalty.

30. Section 49 TMA 1970 then applies where a notice of appeal is given late. This provides:

##### **"49 Late notice of appeal**

- (1) This section applies in a case where—
  - (a) notice of appeal may be given to HMRC, but
  - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if—
  - (a) HMRC agree, or
  - (b) where HMRC do not agree, the tribunal gives permission.
- (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.
- (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.
- (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
- (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.
- (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
- (8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

## DISCUSSION

31. In *Martland v HMRC* [2018] UKUT 178 (TCC) the Upper Tribunal gave guidance as to how this Tribunal should approach an application to allow the notification of a late appeal. That case concerned an application by the taxpayer to make a late appeal to the Tribunal (rather than HMRC) but the Upper Tribunal described the statutory provisions for these different appeal rights as being very similar. It said:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal...

47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: ... Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

32. In addition, the Upper Tribunal in *HMRC v Katib* [2019] UKUT 0189 (TCC), which concerned an appeal by HMRC against a decision of the Tribunal to give permission for the

taxpayer to make late appeals, emphasised the importance of adhering to statutory time limits at [17]:

“We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee’s point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the *BPP Holdings* case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed.”

### **Application of Martland**

33. I have applied the three-stage process set out in *Martland*. In considering the length of the delay as part of the first stage I also assess the arguments and evidence provided by Three Sixty that its appeal had been made in time, and note that if I were to accept this argument then there is no need to go any further – the appeal was not late, and the second and third stages are irrelevant.

### ***Length of the delay***

34. The penalties were issued on 28 September 2009, 25 January 2010 and 24 May 2010.

35. Under s100B TMA 1970 an appeal against a penalty charged under s98A TMA 1970 is to be treated as an appeal against an assessment to tax. Section 31 TMA 1970 provides that a person may appeal against a tax assessment and s31A then provides that the appeal must be made within 30 days of the date that the notice of penalty assessment was issued. The last date on which an (in-time) appeal could be submitted against each penalty was therefore 28 October 2009, 24 February 2010 and 23 June 2010 respectively.

36. An appeal was made on 7 April 2011, and on this basis HMRC state that the appeals were between 288 and 526 days late. This delay is clearly serious and significant.

37. Whilst Three Sixty agree that they made such appeal, they also state that they had appealed earlier, on 25 September 2009. They provided a copy of a letter of this date with their Notice of Appeal (and had previously referred to it in their appeal of 7 April 2011 and sent a copy of it to HMRC with their letter of 20 September 2013).

38. HMRC state that:

- (1) their records from 2009 are no longer available for inspection, and so it is not possible to check if or when this was received; and
- (2) in any event that it is dated before the date on which any of the three penalties were issued.

39. There are difficulties with treating Three Sixty as having appealed against the penalties of £1,200 on 25 September 2009:

- (1) The first penalty was not issued until 28 September 2009, and the second and third were issued several months later (in January 2010 and May 2010).
- (2) The letter of 25 September refers to the recent penalty notification which does not fit with the dates before me, and there is no submission by Three Sixty that this letter was incorrectly dated. HMRC do not have specimens of their penalty notifications from 2009, but based on this Tribunal’s experience of HMRC’s processes regarding

penalties, particularly those which address ongoing defaults, I consider it is possible that HMRC had issued a warning letter noting that the return was late and penalties were accruing (and would continue to accrue until action was taken to submit the return). This might help to explain what had prompted the letter being sent – it is not otherwise apparent from the evidence before me that there had been any written communication from HMRC to Three Sixty between the rejection of the return on 21 May 2009 and this letter.

(3) HMRC cannot confirm whether or not this was received, as their records from 2009 are not available. Section 7 of the Interpretation Act 1978 can apply to deem the letter as having been received one day after the posting of a properly addressed, pre-paid and posted letter, unless the contrary is proven. There is no evidence from Mr Lomax to confirm that this letter was indeed posted at that time, other than his subsequent statement of the same in the letter of April 2011. HMRC's lack of record of receipt in 2009 does not of itself prove the contrary, particularly because HMRC are clear that they do not have access to any of the records at all from that time. I do note that the receipt of this letter is not mentioned in the Action History - but the first entry therein is dated 23 October 2009.

(4) More importantly, HMRC did not reply to this letter in 2009 or afterwards. When rejecting the late appeal in April 2011 HMRC did not mention this letter, even though Mr Lomax had referred to it as going unanswered in his appeal.

(5) The first time HMRC denied having ever received it was in their letter of 22 January 2014. I do not have any evidence as to the steps which HMRC took in 2014 to check their records from 2009, or any confirmation that their records from 2009 would have been available for inspection in 2014.

40. Having considered the evidence before me, I have concluded that no appeal was made by Three Sixty against the penalties prior to the letter of 7 April 2011. The penalties accrued monthly and a letter from September 2009 cannot constitute a valid appeal against penalties for which no liability had yet arisen nor had penalties been assessed or notified – for this reason that letter did not constitute an appeal against the penalties issued on 25 January 2010 or 24 May 2010. The position as regards the penalty issued on 28 September 2009 is less clear but nevertheless Three Sixty have not satisfied this Tribunal that, on the balance of probabilities this letter was sent to HMRC or that it constituted a timely appeal against penalties that were issued on 28 September 2009.

41. The appeals were therefore, as HMRC submit, between 288 and 526 days late.

#### ***Reasons for the delay***

42. In their appeal to HMRC of 2 January 2020 and the Notice of Appeal Three Sixty explain that:

(1) Mr Lomax had assured them that an appeal had been submitted at the relevant time but he is now ill and it is not possible to confirm what happened, and

(2) over the past ten years they received correspondence which they followed up and presumed this would have resolved the issue.

43. Three Sixty explain that they had corrected the mistake promptly (re-submitting the return on 27 May 2009), appealed to HMRC in their letter of 25 September 2009 and then didn't hear anything – in the letter of 7 April 2011 Mr Lomax says that HMRC's letter chasing payment dated 30 March 2011 was the first they'd heard since from HMRC.



44. Whilst a belief that a penalty had already been appealed might have been a good reason initially for not taking further action, having sent a letter in September 2009 cannot reasonably have been thought to be sufficient to deal with further penalty notices being received several months later.

45. Furthermore, the evidence before me includes:

(1) the Action History contains an entry for 24 October 2009 stating “EOY Return Reminder Issued”. This is after the date on which Three Sixty state that they consider they had re-submitted the return and should have put them on notice that there remained a problem; and

(2) letters from HMRC were sent to Three Sixty chasing payment dated 13 September 2010 and 14 March 2011 – these letters were provided by Three Sixty for the purposes of their appeal, and they had manuscript notes on them indicating they had in fact been received by the company. The note on the letter dated 13 September 2010 reads “Tele 20/9/10 overpayment wrongly allocated and missing 08/9 return [File 08/09]”. It should have been abundantly clear at this stage that the various calls to HMRC were insufficient and further action was required.

46. There is no explanation as to why, given that the correspondence from HMRC at the end of 2009 indicated they had not received a return which Three Sixty thought had been re-submitted by Mr Lomax, and penalties were continuing to be charged in both January 2010 and May 2010, no appeal was made to HMRC until 7 April 2011. I accept that Three Sixty did not ignore the correspondence. However, whilst HMRC have not been able to produce (due to passage of time) copies of the specimen penalty notices, I accept that such notices (which Three Sixty does not deny having received) would have included an explanation of the time limit for making an appeal and how to appeal.

47. It is striking that HMRC rejected the appeal dated 7 April 2011 as being late on 27 April 2011, and did so again on 18 November 2013 in response to a further attempted appeal. Both letters stated that Three Sixty had the right to appeal to the Tribunal within 30 days to see if they would accept an appeal. It should have been clear from these letters that HMRC were refusing to consider the substance of Three Sixty’s arguments against the imposition of the penalties and that the next step should have been to appeal to the Tribunal. Whilst it is not clear to me why HMRC did not take steps to collect the debt due shortly after this, in any event Three Sixty did not appeal to the Tribunal until 3 February 2020. However, at this stage I am considering the reason for the delay in appealing to HMRC against the penalties (ie the period from, in respect of the first penalty, October 2009 until 7 April 2011). Events subsequent to that may well be relevant to a wider consideration of all the circumstances, but do not explain the initial delay.

48. On the basis of the evidence before me, I do not consider that there was a good reason for the time it took to appeal against the second and third penalties. As regards the first penalty that was issued, given the initial confusion as to whether an appeal had been submitted by Mr Lomax in September 2009 there is a moderate explanation for the first few months of delay. The status of this as a “good” reason weakened from January 2010 (when the second penalty was issued and there was no response from HMRC referring to any communication from 2009) and by September 2010 (when HMRC was chasing for payment of the full £1,200 and denying having received the return) had fallen away completely.

*All the circumstances*

49. The final stage in the process is to evaluate all the circumstances of the case, which includes weighing up the length of the delay, the reasons for the delay, the extent of the

detriment to Three Sixty which would be caused by my not giving permission and the extent of the detriment to HMRC which would be caused by my giving permission. I also note, as set out in the Upper Tribunal decision in *Martland*, that the starting point is that permission should not be granted unless this Tribunal is satisfied on balance that it should be.

50. In conducting that process, I am required:

- (1) to take into account the particular importance of the need for litigation to be conducted efficiently and at a proportionate cost and for the statutory time limits to be respected; and
- (2) without descending into a detailed examination of Three Sixty's case, to have regard to any obvious strength or weakness in that case because that is highly relevant in weighing up the potential prejudice to the parties of my decision.

51. There is no doubt that Three Sixty would be prejudiced if I refuse to grant them permission to notify the appeal to HMRC after the time for doing so has passed because there will be no appeal. However, giving permission would prejudice HMRC and the public interest - there is a public interest in ensuring that time limits set by Parliament in legislation are observed and are not extended without good reason, albeit that HMRC have addressed the merits of the appeal in their Statement of Case such that no additional work would be required from them at this stage if I were to give permission.

52. In the present instance it is notable that Three Sixty were first informed by HMRC that HMRC were treating the appeal as late in April 2011 and that they would need to apply to the Tribunal - this was re-iterated two years later, and yet no appeal was made to the Tribunal until February 2020. HMRC should have been entitled to treat the matter as final after this extended period of time.

53. Three Sixty relied on their adviser, Mr Lomax, to deal with the appeal. HMRC contend that reliance on an adviser is not a sufficient justification for the delay – it was the company's responsibility to check and ensure that an appeal was lodged. There is clearly a question as to how Mr Lomax dealt with matters. However, it is clear that the directors did receive correspondence from HMRC from 2013 onwards from which it was apparent that the matter was unresolved.

54. As to the merits of the appeal, the penalties were imposed under s98A TMA 1970 for late submission of the Employer's Annual Return. The completed return for 2008-2009 – ie the P35 and a P14 for each employee – must be received by HMRC by 19 May 2009. Where an employer does not file a return on time then a penalty is charged at the rate of £100 per month up to a maximum of 12 months. HMRC charged the maximum penalty of £1,200 as their position is that the return was more than 12 months' late. Three Sixty's position is that HMRC did return the P35 to them shortly after they had filed it, and Three Sixty promptly completed it correctly and re-submitted it on 27 May 2009. This was explained to HMRC in one of the two letters from Three Sixty dated 7 April 2011.

- (1) If Three Sixty is found to have re-submitted the return correctly on 27 May 2009, then this would seem to provide a good argument that the penalty should only have been £100 for a one month delay (not the maximum of 12 months).
- (2) HMRC challenge this by pointing to two aspects of the correspondence supplied by Three Sixty – the note on the penalty chasing letter dated 13 September 2010 shows that Three Sixty were told on 20 September that HMRC had not received the return, and another note on the penalty chasing letter dated 14 March 2011 states that the appeal and the form P35 were sent to HMRC at the same time, ie on 7 April 2011.

(3) The passage of time since these events would present difficulties for both HMRC and Three Sixty. HMRC are not able to exhibit specimen documentation showing what would have been issued, and the original assessment paperwork has been destroyed. In their appeal to HMRC on 2 January 2020 Mr Cowen states that given Mr Lomax's illness "We therefore have no way of ascertaining if the P35 return in question was ever actually submitted correctly."

55. Neither party is in a particularly strong position as regards the merits of the appeal itself, such that I do not consider this factor should be given any weight when assessing whether to exercise my discretion to allow a late appeal to be made. Taking everything together, I am not persuaded that the reasons for the delay and prejudice to Three Sixty of refusing permission outweigh the principle that, after a period, there should be certainty as to the liability created by an assessment or penalty notice. I therefore refuse to give permission for these appeals to be brought late.

#### **CONCLUSION**

56. Permission to make a late appeal to HMRC is refused.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

57. 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.

**JEANETTE ZAMAN**

**TRIBUNAL JUDGE**

**RELEASE DATE: 14 OCTOBER 2020**