



TC02981

Appeal number: TC/2013/03638

APPEAL — extension of time — appeal made over 5 months late — whether extension of time to be granted — no — appeal not admitted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**KIERAN GUTHRIE and NORA WALSH
t/a THE RAILWAY TAVERN**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE COLIN BISHOPP
MR DAVID BATTEN**

Sitting in public in London on 5 September 2013

**The appellants did not appear and were not represented
Ms Karen Weare, presenting officer, for the Respondents**

DECISION

1. The appellants have carried on business as tenants of a public house since 2003. It is not in dispute that they failed to operate a PAYE scheme for certain of
5 their employees, and in consequence failed to deduct income tax and national insurance contributions (“NICs”) from the wages paid to those employees, and pay the sums deducted to HMRC. On 17 July 2012 HMRC made a number of determinations, in accordance with regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003, to the effect that, in all, income tax of £39,372.90 should
10 have been deducted and accounted for. On the same day they made several decisions, in accordance with section 8 of the Social Security Contributions (Transfer of Functions etc) Act 1999, to the effect that the appellants had failed to deduct and account for NICs totalling £9,932.47. On 19 July 2012 penalties totalling £13,644 were imposed, in accordance with section 98A(4) of the Taxes Management Act 1970 (“TMA”) for the years to 2007-08, and in accordance with
15 Schedule 24 to the Finance Act 2007 for the years thereafter. The unpaid tax and NICs additionally attract interest, and the total amount in issue is about £80,000.

2. The letter, also dated 17 July 2012, accompanying the determinations and decisions correctly stated that an appeal, or request for review, must be made
20 within 30 days: see TMA section 31A(1). The letter of 19 July 2012 sent with the penalty determination made the same statement. We were also shown a note of a telephone conversation between the agent then acting for the appellants and the officer who made the various decisions on 14 August 2012, when the time limit for making an appeal was again mentioned.

25 3. As no appeal was made, the officer wrote to the appellants again on 3 September 2012, pointing out that the time for making an appeal had expired, that the various decisions were accordingly final, and that HMRC’s debt management department would take steps to enforce payment.

30 4. The next development of present significance was a letter to HMRC from the appellant’s present agents, dated 7 February 2013, in which they stated that they had recently been instructed and that the appellants felt they had been let down by their previous agent. They went on to say that the appellants did not dispute the wages figures on which the various decisions were based, but argued that the tax and NICs HMRC were attempting to recover went back for more than
35 six years and that no account had been taken in HMRC’s calculations of the employees’ personal allowances, or of the 10% tax rate when that was in force.

40 5. In a reply of 13 February HMRC declined to accept a late appeal, as no reasonable excuse for the delay had been put forward, but advised the agents of the appellants’ right to apply to this tribunal for a direction that a late appeal be accepted. The writer added that the tax and NICs to be recovered went back for more than six years as the appellants had admitted they knew that they should have been deducted and paid over at the time, with the consequence that the usual time limit of six years was overridden, and that the basic rate of tax had been used
45 as that is the only applicable rate when the employer has not obtained and used the employee’s form P46, which was the case here. The agents did not immediately follow the advice to apply to the tribunal, but instead wrote again to

HMRC, though not until 19 March, to ask for a review. That request too was declined, by letter of 25 March, as no punctual appeal had been made. A notice of appeal was thereafter sent to the tribunal, but even then not until 20 May. It set out the grounds of appeal foreshadowed by the agents' letter of 7 February, and included an application for a direction that a late appeal be admitted.

6. That application was listed to be heard on 5 September. On 30 August the agents wrote to the tribunal stating that they had received the bundle produced for the hearing by HMRC only on 16 August but that the writer of the letter had been on holiday at the time and had only just returned, and that he needed to seek advice from chartered accountants; he therefore asked for a postponement. There was nothing in the letter to suggest that the agents had hitherto been unaware of the hearing, notice of which had been sent out on 18 June. The requested postponement was refused. On the day of the hearing the agent sent a further request for a postponement by email, on this occasion saying that they had not been aware there was to be a hearing until they received the bundle from HMRC, that they had also not realised when they wrote on 30 August that it was to be of the application for admission of a late appeal, and that (for unspecified reasons) they were not able to attend. They blamed the lateness of the appeal on staff changes in April 2013, and asked, albeit with some ambiguity, that the application be dealt with on written submissions.

7. We decided that it was appropriate we should deal with the matter in the agents' absence, and on the basis of their written submissions. No good reason for the agents' absence had been provided. The requests for a postponement were unconvincing, and would have been unconvincing even if they had been made earlier. The hearing had been listed for some time, as we have said, yet nothing appears to have been done about it until a week beforehand. As the chronology set out above shows, the matter has been dealt with by the would-be appellants and their representatives with no apparent sense of urgency. HMRC had prepared for the hearing and were in attendance, by Ms Karen Weare, a presenting officer. We could see no good reason for further delay.

8. Our jurisdiction to admit a late appeal is conferred by section 49 of TMA. Although HMRC must admit a late appeal if certain conditions are satisfied, we may do so whenever we think it an appropriate course. But in deciding whether or not it is an appropriate course, we must pay heed the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which govern the procedure in this Chamber. Rule 20(1) and (4) provide that

“(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal.

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal—

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.”

9. There is nothing in those provisions which limits the scope of our discretion. It is, however, a well-established principle that time limits are not to be extended without good reason, and where the justice of the case demands it. The only reason offered for the delay is the staff change within the agents’ office which, even if it were the only cause of the delay, would in our view be insufficient. Any professional office should be able to cope with staff changes without missing the time limits which apply to their clients. But we have no explanation at all of the interval between the expiry of the time for appealing in August 2012 and the new agents’ letter of February 2013, nor of the delays which occurred between February and April. There is simply no material on which we could conceivably exercise our discretion in the appellants’ favour. Even in a penalty appeal, as this is in part, a would-be appellant who takes no action at all for months, despite clear statements pointing out the need to mount a challenge promptly if the relevant decision is disputed, is undeserving of indulgence.

10. For those reasons we refuse the application, and do not admit the appeal. We should add, although it is not one of our reasons for refusing the application, that it seems to us that the appeal against the determinations had no prospect of success. As HMRC correctly stated during the course of the correspondence, and as the PAYE Regulations make clear, an employer who has not been provided with an employee’s code is obliged to deduct tax from the employee’s wages or salary at the basic rate. The determinations are designed to recover what should have been deducted. That the employee may have some unused reliefs, or liability to tax at a lower (or, conversely, higher) rate, is immaterial.

11. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for permission to appeal against it on a point of law to the Upper Tribunal. 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.

35

COLIN BISHOPP
TRIBUNAL PRESIDENT
RELEASE DATE: 15 October 2013