



TC06546

Appeal number: TC/2017/09512

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – Real Time Information returns of payments (FPS) – penalties imposed for late FPS during 2 months - whether penalty assessments conformed with paragraph 18(1)(c) Schedule 55 FA 2009: no – whether s 114(1) TMA applies: no – appeals allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

J & L BENSON BUILDING SERVICES LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 11 June 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 28 December 2017 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 March 2018.

DECISION

1. This was an appeal by J & L Benson Building Services Ltd (“the appellant”) against assessment of penalties made by the respondents (“HMRC”) for their failure, during two consecutive months, to deliver a return of payments of PAYE income by the relevant due dates.

Facts

2. I find the matters set out in §§3 to 11 as fact and are derived from the documents exhibited by HMRC with their statement of case (“SoC”).

3. J & L Benson Building Services Ltd (“the appellant”) was an “RTI Employer” in the tax year 2017-18.

4. A document exhibited by HMRC headed “Default, penalty and appeal details” and created on 7 March 2018 has an entry to the effect that:

(1) on 24 August 2017 the HMRC computer system created a penalty charge “at quarter end assessment”.

(2) on 1 September 2017 the system printed a notice of penalty assessment (RTI511)

(3) on 11 September the system sent an appeal for manual review

(4) on 25 September 2017 “user rejects appeal” and an EMP(R)633/634 was issued.

5. This screenshot relates only to the penalty for the period ended 5 July 2017, and does not include details for the penalty for the period ended 5 June 2017.

6. In a letter dated 26 September 2017 Y Wright, an officer of HMRC, write to the appellant (with the salutation “Dear Sir or Madam”) thanking it for its appeals against two penalties which it listed as for the period ending 5 June 2017 and the period ending 5 July 2017. The amounts of each were £0.00 (!) and £100.00 respectively.

7. The letter stated that the appellant did not, in HMRC’s view have a reasonable excuse and explained what it could do if it disagreed, namely requesting a review or going straight to the Tribunal.

8. On Form EMP634 dated by a director of the appellant 8 September (which must be wrong, and should probably be 8 October) 2017 the appellant requested a review.

9. On 1 December 2017 Miss C H Mayfield, a review officer, wrote to the appellant with the conclusion of her review which was to say that the decision to charge the penalties was correct.

10. On 28 December 2017 the appellant notified its appeal to the Tribunal. The taxpayer details are shown as “John Benson, J&L Benson” followed by the address. (I find that J&L Benson was shorthand used by Mr Benson for the name of the appellant company. This shorthand has unfortunately found its way on to the Tribunal records and into HMRC’s SoC.)

11. The document exhibited by HMRC headed “Default, penalty and appeal details” and created on 7 March 2018 has an entry to the effect that:
 - (1) On 2 February 2018 the appeal was deemed settled as the Tribunals Service had not notified HMRC of an appeal so the penalty was released for payment.
 - (2) On 19 February 2018 an appeal was made to the Tribunal Service so “user reopens a rejected and settled appeal”.
12. The documents exhibited by HMRC contains further material as follows.
13. A document exhibited by HMRC headed “View filing penalty notices” shows:
 - (1) “Type of penalty notice”: RTI511 – notice of penalty assessment
 - (2) “Date issued”: 8 September 2017
 - (3) “Charge”: £100
 - (4) “Action”: not applicable.
14. A document exhibited by HMRC headed “Summary of filing failures” has two entries. Both say exactly the same thing, that “receipt date” was 9 July 2017 and payment date” 30 June 2017, the number of failures was one, and the action taken was “view details”, a hyperlink to some other page on the computer. The page has a unique ID which is the number shown as the penalty ID for the period ended 5 July 2017.
15. HMRC’s explanation of this document is that it shows that “Real Time Information for the periods 5 June 2017 and 5 July 2017 were made (sic) after the payments were made and penalties were issued in accordance with the legislation”.
16. HMRC have included what they call “an extract from HMRC’s records for J & L Benson (sic) showing the submissions, a reference to their assertion that J & L Benson frequently make payments to their employees before making Full Payment Submissions (“FPS”).
17. The records purport to show that FPS were received on:
 - (1) 9 July 2017 for payments dated 30 May 2017, 30 June 2017 (two) and 7 July 2017.
 - (2) 11 September 2017 for payments dated 31 July 2017 and 31 August 2017.
 - (3) 7 October 2017 for payments dated 22, 23 and 30 September 2017 and 6 October 2017.
18. The names of the employees paid are redacted for “security reasons” says the SoC. The tax and NIC due in relation to the late returns in (1) and (2) was nil.
19. HMRC also exhibit a letter dated 4 November 2015 from a Mrs L Hutson, a review officer, which says that it is the conclusion of a review of an appeal against failures to file PAYE RTI information on time for period ending 5 June 2015 and 5 July 2015 (ie well before these failures). The review cancelled the penalties because it was the first time the appellant had been charged monthly penalties.
20. From the information set out in §§14 to 20, taken together with the facts found in §§3 to 11, I find, on the balance of probabilities that:

(1) The appellant made payments to its employees in the months ending 5 June 2017 and 5 July 2017 in respect of which it did not make RTI returns until 9 July 2017.

(2) HMRC made an assessment of two penalties, one of £0 for the period ended 5 June 2017 and one of £100 for the period ended 5 July 2017.

(3) Notice of assessment was issued to the appellant on 8 September 2017 and was received by it.

21. Although the notice of appeal is not included in the papers I find on the balance of probabilities that an appeal was made against both penalties.

22. There is a discrepancy in the documents. That referred to at §14 shows two failures involving late payments not made until 9 July 2017. That at §17(1) shows four failures involving late payments not made until 9 July 2017

The law

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

"(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.

...

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

(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."

24. Other relevant regulations include

"Failure to make a return under regulation 67B or 67D

67EA—(1) This regulation applies where an employer does not make a return as required by regulation 67B (real time returns of information about relevant payments) ...

(2) The employer must provide the information in the next return made under regulation 67B ... for the tax year in question.

(3) If the information has not been provided before 20th April following the end of the tax year in question, the employer must make a return under this paragraph.

(4) A return under paragraph (3) must—

(a) include the information specified in Schedule A1,

(b) be made as soon as reasonably practicable after the discovery of the failure to make the return, and

(c) be made using an approved method of electronic communications.

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

67I—(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);

...

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

...

(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.”

25. The law imposing these penalties is in Schedule 55 Finance Act 2009 and in particular paragraphs 6B to 6D.

26. Paragraphs 6B and 6C (paragraph 6D is not relevant to this case) provide:

“Amount of penalty: real time information for PAYE

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.

...

(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.

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

...

(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.

27. The reference in paragraph 6B to item 4 in the Table is to this entry:

“Return under any of the following provisions of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682)—

(a) regulation 67B (real time returns)

...”

28. The reference to the filing date is to the date by which the return under regulation 67B is to be made.

29. The penalties may only 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, or if HMRC’s decision as to whether there are special circumstances was flawed – see paragraphs 23 and 16 Schedule 55 respectively.

Grounds of appeal

30. The grounds of appeal are not included in the document because a copy of the notice of appeal is not included, and the document described at §4 contains only HMRC’s précis of the grounds that must have been given. The letter of 26 September 2017 does not describe them at all.

31. From the SA634 I can see that the appellant’s director admits he was late and says he didn’t know how to file a return when he owed no money. It was a genuine mistake, and the next month, when he did owe money, he made the return on time.

32. In the notice of appeal to the tribunal the director says that he is the only full time employee and does the paperwork in his spare time and occasionally deadlines get missed.

Discussion

33. HMRC have the burden of proof in this case of showing that the penalties are due. In the light of my findings of fact I am satisfied that the penalty for the period ended 5 July 2017 was incurred by reason of a failure to make one or more FPS on or before the date of payment of the earnings, and that a notice of assessment was sent to and received by the appellant.

34. Paragraph 18(1)(c) Schedule 55 FA 2009 requires that the notice of assessment show the period in respect of which the penalty was assessed. I do not however know if the notice showed any period let alone the correct one, as no record of the notice or of the assessment has been provided. However the specimen notice of penalty assessment provided shows that a period is referred to and it is the quarter ended on 5 January year blank. From this I assume that the period here is the quarter ended 5 July 2017 as that is consistent with the dates shown in §4.

35. But in my view a quarter is not the period in respect of which the penalty is assessed. The evidence from the papers is that there were two penalties assessed, one which related to the month ended 5 June and the other 5 July. Those are the periods required to be shown by paragraph 18(1)(c). If there were any doubt about that, they would be assuaged by paragraph 19(2)(a) Schedule 55 and paragraph 13(1ZB) and (1ZC) Schedule 24 FA 2007.

36. There is therefore a failure to give the correct period, so the question arises whether the notices are valid. Such an invalid notice can be cured if s 114(1) TMA applies. I considered s 114(1) at length in my decision in *Scowcroft v HMRC* (TC/2018/02011) in relation to a penalty under Schedule 55 where it was item 2A in the paragraph 1 table that was in issue and where the wrong period had been given. My conclusion there was that s 114(1) did apply because the correct period could readily be ascertained by the recipient and there was no scope for confusion.

37. The problem in this case is that the specimen notice says full details about how HMRC have worked out the penalty are shown on page 3, but page 3 is not included.

38. The only clue I have is in the statements made by the appellant's director. He refers to tax being due of less than £30 at one place but of no tax being due in another. The document which has been redacted suggests that the tax due for payment in respect of the two months was nil. Those redactions may well have been made on good grounds¹ but the mere fact of redaction means that I cannot use this document to assuage my doubts about whether a recipient would be objectively misled by the notice of assessment.

39. I am not satisfied that the error in the notice as to the period is not gross or fundamental. This reflects the statement of Henderson J in *Pipe & others v HMRC* [2008] EWCA Civ 646 at [51]:

“... If the Penalty Notices were the documents which founded liability to the penalties, there would be much to be said for the view, echoing Slade LJ in *Baylis v Gregory*, that specifying the correct dates is something HMRC must get right”.

40. I therefore cancel the penalties for this reason.

41. I add that should I be wrong about this, then I would have found that the appellant did not have a reasonable excuse for the late filing of the FPS. The appellant effectively admits as much, as his plea to the Tribunal is essentially that it is unfair and that he did not know how to make a return when there was no tax due. The review letter from 2015 shows that the appellant has been in this sort of trouble before.

Observations

42. I need to comment on the unexplained and the unforgiveable.

43. There is evidence in the file that for the month ended 5 June 2017 there was a payment of earnings, a payment of £680.00 to employee named [redacted] [redacted]

¹ Though what they are I cannot guess. If it is a concern that s 18 Commissioners for Her Majesty's Revenue and Customs Act applies it is wrong.

made on 30 May, and that the FPS was not submitted until 9 July. But the penalty for the month ended 5 June 2017 was apparently £0.00.

44. It appears as such on the first page of the SoC. No further explanation is attempted about this amount. The SoC carefully shows what the monthly penalty is for an employer with fewer than 50 employees and it is £100. The SoC does refer to two cases where no penalty is payable, but they cannot be the explanation for two reasons. One is that HMRC say they do not apply. The other is that if they did apply there would be no penalty at all capable of being assessed in an amount of nil or any other amount.

45. This is simply inexplicable. But it doesn't seem to be significant, as there is no "points based" or "totting up" calculation with these penalties.

46. The unforgivable is the statement in the letter of 26 September 2017:

"The law doesn't define what a 'reasonable excuse' is. Our view is that a reasonable excuse is normally an unexpected or unusual event, either unforeseen or beyond your control, that prevented you from reporting your PAYE information on time."

47. The review letter does not repeat this formulation. Indeed it hardly mentioned "reasonable excuse" at all and certainly did not attempt to give a definition, merely an assertion that the appellant had none.

48. The SoC gives the appropriate statement that whether a person has a reasonable excuse is to be considered in the light of all the circumstances of the particular case.

49. In *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) the Upper Tribunal said:

"83. It is regrettably still the case that HMRC sometimes continue to argue that the law requires any reasonable excuse to be based on some "unforeseeable or inescapable" event, echoing the dissenting remarks of Scott LJ in *Commissioners for Customs and Excise v Steptoe* [1992] STC 757. It is quite clear that the concept of "reasonable excuse" is far wider than those remarks implied might be the case. In an appropriate case where HMRC base their argument on this unsustainable position, the FTT may well consider it appropriate to exercise their jurisdiction to award costs against HMRC for unreasonable conduct of the appeal. Similar observations apply to the HMRC "mantra" referred to at [109] of the 2014 Decision, to the effect that an "unexpected or unusual event" is required before there can be a reasonable excuse. The statutory phrase is "reasonable excuse", and those are the words that are to be applied by HMRC and the FTT, interpreted as set out above; the addition or substitution of other words beyond those used in the statute can very easily obscure rather than clarify the value judgment as to whether or not a taxpayer has a reasonable excuse, and should be avoided."

50. In this case HMRC did not in their SoC seek to run this discredited argument, so I have no basis for awarding the appellant their costs. But the issue is more serious than a possible misleading of a Tribunal. The "mantra" was trotted out here in the initial HMRC response to the appeal. Any unrepresented person who did in fact have a reasonable excuse that was not of the type that HMRC refer to may well be dissuaded from pursuing their otherwise valid appeal against a penalty, or they may try to rely on an unexpected event etc in a review request or in giving grounds of appeal to the

Tribunal when they would have had a better argument which HMRC had dismissed using the “mantra”.

51. No one would seriously think of starting judicial review proceedings if this happened to them, but I for one would, if faced with a case of that kind, consider carefully whether it would amount to special circumstances. And in an appropriate case I would, as the Upper Tribunal in Perrin suggests, consider awarding costs to the appellant. The difficulty with that remedy in this type of case is that the costs incurred from the start of the proceedings, that is on the notification of the appeal to the tribunal are likely to be small in the case of an unrepresented appellant.

Decision

52. Under paragraph 22(1) Schedule 55 FA 2009, the penalty of £100 for the month ending 5 July 2017 is cancelled. So is the penalty of £0, for what it is worth.

53. 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.

**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 20 JUNE 2018

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