



[2022] UKFTT 00098 (TC)

TC 08428/V

PAYE – regulation 80 determination – penalties for non-submission of returns

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01797

BETWEEN

MR DEAN HEDGES

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
TRIBUNAL MEMBER
CHRISTOPHER JENKINS**

The hearing took place on 25 November 2021. With the consent of the parties, the form of the hearing was V (video) via the Tribunal video platform. The appellant and his representative attended by telephone due to connection difficulties. The panel and the respondents attended by video. A face to face hearing was not held because a remote hearing was more convenient in the current circumstances. The documents to which I was referred were contained in two bundles – the first being 535 page and the additional bundle being 77 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Mario Martinez for the Appellant

Ms Milner, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This case concerned regulation 80 determinations issued to the appellant, Mr Dean Hedges, for unpaid PAYE for tax years 12/13, 13/14, 14/15 and 15/16 in relation to a public house called The Farmhouse in South London; and associated penalties for non-submission of PAYE returns.

2. The PAYE determinations under appeal amount to £11,225.60 made up of the following amounts for the tax years in question:

Tax year 2012/13	£2,995.20
Tax year 2013/14	£2,995.20
Tax year 2014/15	£4,070.40
Tax year 2015/16	£1,164.80

3. The penalties under appeal amount to £4,398.56 and are made up of the following amounts:

Tax year 2012/13	Failing to file a return for 12 months	£1,200
	Tax-gearred penalty for failure to file for more than 12 months	£449.28
Tax year 2013/14	Failing to file a return for 12 months (fixed penalty)	£1,200
	Tax-gearred penalty for failure to file for more than 12 months	£449.28
Tax year 2015/16	Failing to file full payment submission for 11 months	£1,100

4. Although it was not expressed in the paperwork, we note that there were not penalties for 2014/15 and that HMRC exercised their discretion generally in 2014/15 for small employers during the switch over to real time information.

EVIDENCE

5. In addition to the bundles of documents, we heard witness evidence from Mr Dean Hedges and Ms Katinder Khraud, officer of HMRC. Both were cross-examined.

LAW

6. The determinations under appeal were made under Regulation 80 of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682).

7. Regulation 80 applies if 'it appears to HMRC that there may be tax payable for a tax year' under Regulation 67G or 68, which require employers to pay over amounts of PAYE deducted to HMRC.

8. Where it applies:

- (2) HMRC may determine the amount of that tax to the best of their judgment, and service notice of their determination on the employer.
9. Regulation 80(5) provides that a determination under Regulation 80 is subject to the assessment provisions of the Taxes Management Act 1970 (TMA 1970) as if the determination were an assessment and the amount of tax determined were income tax charged on the employer.
10. Sections 34 and 36 of TMA 1970 allow HMRC to raise assessments:
- (1) For any reason within 4 years from the end of the year of assessment to which it relates, and
 - (2) Where the loss of tax is brought about carelessly by the taxpayer, within 6 years of the end of the year of assessment to which it relates
11. Section 98A(2) of TMA 1970 provides that where a person fails to make a PAYE return, he shall be liable to:
- (1) A penalty of £100 for each month during which the failure continues (where there are fewer than 50 employees) for the first 12 months, and
 - (2) Where the failure continues after 12 months, a penalty not exceeding the amount payable by him in accordance with the PAYE regulations for the year of assessment to which the return relates that remained unpaid after the following 19th April.
12. Paragraph 6C of Schedule 55 to Finance Act 2009 applies, from 6 March 2015, to make a person who fails during a tax month to make a return on or before the filing date liable to a penalty of £100 for each real time information return that is not filed (where there are no more than 9 employees).

FACTS

13. We find the following facts from the evidence presented to us:
- (1) Mr Dean Hedges worked in the Farmhouse pub. Although the pub lease was in Mr Hedges' name, it had been acquired for him by his father (Mr Edward Hedges) who was the licensee. Dean Hedges was the designated premises supervisor and conducted the day to day operations behind the bar at the pub;
 - (2) Dean Hedges had engaged a number of individuals (including his mother, father and the woman who subsequently became his wife) to work in the bar and to clean it. Some were regular staff over long periods, others casual. He recorded these costs as 'wage costs' on his self-assessment tax returns;
 - (3) Dean Hedges did not ask for any paperwork or keep any records as to the other or previous employment of these workers;
 - (4) The individuals were paid in case and were handed paper slips to record their pay;
 - (5) HMRC visited the pub on 11 May 2016 as the beginning of its compliance check. On that day Mr Hedges was not there. HMRC met the new licensee of the pub, who explained that she had moved in some weeks earlier and that Mr Hedges had moved out.
 - (6) On 13 May 2016, HMRC issued a letter to Mr Hedges, addressed to him at the Farmhouse pub, explaining that they were conducting a PAYE compliance check into the period 6 April 2013- 5 April 2016.
 - (7) After failing to arrange an appointment with Mr Hedges and his accountant over the course of June due to availability issues, HMRC issues a new PAYE compliance check letter (in very similar terms to the earlier one, save that the period had now been

extended to cover the 2012/13 tax year), this time addressed to another address in South London.

(8) Ms Khraud attended this address on 14 September 2016. It was another pub, run by Mr Edward Hedges, who explained that Mr Dean Hedges had recently moved to Kent. HMRC issued an information notice, addressed to Mr Dean Hedges, asking Mr Edward Hedges to pass it on.

(9) On 31 October 2016, Mr Martinez replied to HMRC stating that his instructions were that no PAYE scheme had ever been operated by his client, Mr Dean Hedges, at the Farmhouse pub and therefore there were no documents to provide to HMRC in response to the information notice.

(10) On 30 November 2016, HMRC issued its first calculation of the tax and interest due from Mr Dean Hedges on account of the non-operation of PAYE. It stated that it was a best assessment based on the wage costs included in Mr Hedges' tax returns for the tax years 2011/12 to 2015/16.

(11) Following a further exchange of correspondence in which Mr Hedges had provided some detail of the workers and their wages, on 14 June 2017, HMRC issued a second, lower computation of the PAYE that should have been deducted, based on this new information.

(12) In March 2018, Mr Martinez sent a letter to HMRC enclosing a PAYE book – we return to the detailed finding of facts relating to this PAYE book later in this decision.

(13) Following further correspondence, on 19 July 2018, HMRC issued a formal regulation 80 determination amounting to £11,225.60 in relation to the years 2012-13 to 2015-16.

(14) In addition, penalties were issued with the determination issued on 21 June 2018 in the amount of £6047.84. These were subsequently adjusted down to the £4,398.56 under appeal on 27 July 2018.

(15) The taxpayer made a late appeal to the Tribunal on 31 May 2019. The application to allow the late appeal was allowed by a differently constituted tribunal on 20 May 2020.

PARTIES ARGUMENTS

14. The taxpayer argues that the determinations should not have been raised. The grounds for this submission can be summarised as follows:

(1) There was a PAYE scheme in operation from 5th April 2013 in relation to the Farmhouse pub, initiated by Mr Edward Hedges;

(2) Nil returns were submitted until approximately November 2013 when HMRC informed Mr Edward Hedges that nil returns were not required unless and until the circumstances changed;

(3) In the alternative, no PAYE scheme was required to be registered because all the employees earned under the income tax threshold and did not have any other jobs.

15. In addition, the taxpayer submits that even if the determinations should be raised, HMRC was not entitled to rely on the extended time limit to 6 years under section 36 of TMA 1970 because Mr Dean Hedges had not been careless. He had dealt with his tax affairs in a reasonable fashion.

16. In relation to the penalties, the taxpayer submits that, on the basis that no determinations should have arisen, no penalties should arise; and that HMRC's delays in dealing with the matter contributed to the size of the penalties.

17. HMRC submits that the taxpayer has not complied with the PAYE regulations because he has not submitted any returns to HMRC either under the old scheme or under real time information.

18. Given that failure, HMRC must issue a determination based on its best judgment. HMRC states that it has used best judgment in its determinations. Its first determination was based on the figures in Mr Dean Hedges' personal tax returns, but these were subsequently adjusted down based on:

(1) Further information provided to HMRC by Mr Hedges of the employees engaged and the pay provided; and

(2) The removal of the 2011/12 tax year from the determination, since HMRC recognised it was out of time to issue such a determination.

19. HMRC further submits that it acted honestly and reasonably in determining the amounts to be assessed and that it is for the taxpayer to displace those amounts with further information, as per the guidance given in *C & E Commons v Pegasus Birds Ltd* [2004] BVC 788, where guidance to the tribunal when considering a best judgement assessment was given:

“The Tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.”

20. With regards to time limits, HMRC submits that it relies on the extended time limit of 6 years for the assessments for 2012/13 and 2013/14; and the normal 4 year time limit for the assessments for 2014/15 and 2015/16.

21. HMRC submits that it is entitled to rely on the extended time limit because the Appellant has stated they did not keep records or file returns and that therefore the Appellant failed to take reasonable care to ensure they were meeting their tax obligations.

22. With regard to penalties, HMRC submit that the conditions for imposing the late filing penalties under the two statutory regimes (pre and post the introduction of real time information) had been met because no PAYE returns or full payment submissions were made.

23. The absence of the returns for the relevant months means that the conditions for the fixed penalties were met.

24. In relation to the tax-g geared penalties, charged in relation to tax years 2012/13 and 2013/14 because the submissions still had not been submitted when 12 months had elapsed, HMRC has charged them on the following basis:

(1) The total amount of tax due for those two years was £5,990.40 (the sum of the two determinations for those years);

(2) HMRC has allowed mitigation of 15% for disclosure, 45% for cooperation and 25% for seriousness, meaning that the penalty was charged at 15%; and

(3) This amounts to £898.56.

DISCUSSION

Regulation 80 determinations

25. In relation to the Regulation 80 determinations, we have the following issues to decide:

- (1) Was HMRC entitled to issue regulation 80 determinations?
- (2) Were the determinations issued according to best judgment?
- (3) Has the taxpayer displaced the figures in the determinations?
- (4) Did HMRC comply with the time limits for these determinations?

26. It was clear from the evidence given that Mr Dean Hedges accepted that he had never made any PAYE returns to HMRC but he also continued to be of the view that no such returns were ever required.

27. The reasons for this conclusion are twofold and the reasons are contradictory. Mr Martinez submitted that Mr Edward Hedges had registered the Farmhouse Pub for PAYE and submitted nil returns until HMRC told him not to; and that HMRC had told him that no further nil returns were required unless there was a change of circumstances.

28. Mr Dean Hedges continued to state, in written correspondence and at the hearing, that no PAYE registration or returns were required because the employees were all earning under the threshold and did not have any other income which would require PAYE to be operated.

29. We will address the second point first. Mr Martinez pointed to HMRC guidance which states that if an employer does not need to register for PAYE, if the employer does not pay any employee in excess of £120/week; does not provide any benefits or expenses to the employee and the employee does not have any pension or other job while working for them. He argues that these facts applied to Mr Hedges' employees at the Farmhouse pub and that no PAYE scheme was ever required.

30. HMRC noted that the same extract also states that "You'll still need to keep records of what you pay them".

31. As noted above, there is some confusion or disagreement about the existence of a PAYE scheme in relation to the Farmhouse pub. HMRC relies on the statement made by Mr Martinez (expressly stated to be based on instructions from his client) in the letter of 31 October 2016 that there was no PAYE scheme in place and never had been. Mr Martinez explains that this was Mr Dean Hedges' understanding of the position at that time, but that it subsequently came to light that Mr Edward Hedges had in fact set up a PAYE scheme from 5 April 2013, but that Mr Dean Hedges had not been aware of it until a chance conversation with his father in 2018. Mr Martinez then provided a copy of the PAYE booklet to HMRC in a letter dated 26 March 2018.

32. There was also some confusion, including at the hearing, as to whether any returns were ever submitted under that PAYE registration. The evidence can be distilled as follows:

- (1) In Ms Khraud's reply to Mr Martinez' letter, dated 24 April 2018, HMRC stated "I have made a search on our HMRC systems relating to Mr Hedges PAYE records. Although this confirms there was a PAYE reference, all returns submitted are Nil";
- (2) In a letter dated 10 December 2020 (from a different HMRC officer), HMRC stated: "I can see Mr Dean Hedges registered for a PAYE scheme at his address on 6/4/2013 but this was cancelled in November 2013. I cannot tell if it was cancelled by Mr Hedges himself or if it was cancelled by us because we had not received any PAYE returns from the start of the scheme";

- (3) HMRC included a print out of its employer record showing that a scheme was in place from 6 April 2013 to 1 November 2013 when it was cancelled;
 - (4) During cross-examination, Ms Khraud was questioned as to whether there were nil returns made (i.e. returns made showing a nil PAYE payment) or no returns were ever submitted. She concluded that no returns had ever been submitted based on the fact that the system suggested that the scheme had been ‘auto-cancelled’;
 - (5) Mr Edward Hedges’ evidence (by means only of a witness statement because he did not attend the hearing) was that HMRC had advised him by telephone that he did not need to continue to submit nil returns unless and until circumstances changed;
 - (6) HMRC submit that there is no evidence on the file of a telephone call in 2013 regarding the PAYE scheme.
33. On the basis of the evidence, we find, as a matter of fact, that there was a PAYE scheme set up in relation to Mr Dean Hedges’ employees at the Farmhouse pub, which operated from 6 April 2013 to 1 November 2013 and that 7 months of nil returns were made. At this point, the scheme was cancelled.
 34. With regard to whether there ought to have been a PAYE scheme and whether HMRC is entitled to raise the determinations, we sympathise with Mr Hedges’ position regarding the low pay of his employees and his belief that there was no tax to deduct. However, when you take on responsibility for employing individuals in your business, it is your duty to establish what you should do with regards to tax. If Mr Hedges had made such enquiries, he would have established that, in order to come to the conclusion that no PAYE registration was required, he needed to make formal enquiries of his employees and keep records of the position. It was evident that he did not do that and he had no evidence to submit to suggest that he had. He admitted during cross-examination that he had not sought the professional advice of Mr Martinez (or anyone else) regarding his PAYE obligations until after the compliance check had commenced.
 35. Even though it may be correct that there would have been no tax to deduct if he had been operating a PAYE scheme, because he did not have evidence to support that conclusion, Mr Hedges should have been deducting basic rate tax from his employees’ pay under a PAYE scheme and keeping records of what he was paying to whom. He did neither and therefore HMRC is entitled to raise PAYE determinations under regulation 80 according to their best judgment.
 36. HMRC’s use of the figures submitted by Mr Hedges in his self-assessment tax return and provided by Mr Hedges in correspondence about his employees are reasonable pieces of information on which to base the assessment of the PAYE that should have been deducted.
 37. The taxpayer has not submitted any evidence to displace the figures used and therefore the determinations stand.
 38. With regards to the time limits, we must decide whether Mr Hedges had been careless, i.e. whether he has taken reasonable care in conducting his tax affairs. There is no further definition of what reasonable care means in the legislation, but it has been considered by this Tribunal and its predecessors in many cases, including, for example *Collis v HMRC* [2011] UKFTT 588 (TC). Our task is to consider whether a prudent and reasonable taxpayer in the position of the taxpayer in question would have done as Mr Hedges had done.
 39. During the course of his evidence, Mr Hedges accepted that he was not a strong business man, in fact went as far as to say that he did not know how to run a business and that reading and writing were not his strong point. He has since left the hospitality industry and is employed

as a security guard, which he says is more suited to him. It was clear that he had been set up in the pub business by his father and did not have much in the way of either experience or guidance to run it in a compliant manner. We must therefore not assess Mr Hedges from the same perspective as an experienced business operator or a large business with huge resources on which to rely. However, on taking on responsibility for running a business and employing people, Mr Dean Hedges should have acknowledged that there were elements of compliance that were not optional, including the operation of PAYE or, if it were not necessary, the keeping of records to reach that conclusion. He had submitted tax returns for the relevant years including employee wages and therefore had engaged, to some extent, with the tax system for the purposes of operating his pub. He also acknowledged that he did not seek the advice of Mr Martinez until after the compliance check had been started and that he did not know that his father had opened a PAYE scheme in his name until several years later.

40. We therefore reach the conclusion that Mr Hedges had not been taking reasonable care in the payment of his employees and the question of the PAYE scheme in running the pub. Therefore, HMRC is entitled to rely on the longer time limit of 6 years for raising the Regulation 80 determinations.

Penalties

41. HMRC submits that it has correctly issued penalties on the following grounds:

- (1) For the periods 2012/13 and 2013/14 it is entitled to charge:
 - (a) fixed penalties of £100 for each month for which a PAYE return was outstanding past its due date under section 98A(2)(a) of TMA 1970 (because Mr Hedges had fewer than 50 employees); and
 - (b) tax-gearred penalties, calculated as a percentage of the total tax due because the returns remained outstanding for more than 12 months;
- (2) The tax-gearred penalty was charged at a rate of 15% after allowing mitigation of 15% for disclosure, 45% for cooperation and 25% for seriousness; and
- (3) For the period 2015/16, it is entitled to charge fixed penalties of £100 for each month for which a full payment submission under real time information remained outstanding, under paragraph 6C of Sch 55 to FA 2009 (because Mr Hedges had fewer than 10 employees).

42. Mr Hedges submits that:

- (1) there should have been no penalties since there was no obligation to file any of the returns; and
- (2) the penalties accrued to a greater extent than was necessary because of the delays in HMRC of dealing with the compliance check.

43. On the latter point, Mr Martinez included a schedule of what he identified as HMRC's delays in dealing with correspondence, amounting to 1963 days, or 5 years and 138 days. The first 1133 days of that were the period from the 5th April 2013 to the first letter regarding the compliance check. The subsequent delays were calculated from the dates of letters or other correspondence between the parties.

Discussion

44. As noted above, there is no dispute here that there were no returns filed (other than those between April and November 2013 as found above) and that therefore the pre-condition for issuing the penalties has been met, provided of course the returns were due in the first place.

45. As we concluded above in relation to the determinations, although there may have been no tax to pay via PAYE, the complete lack of information-seeking and record keeping by Mr Hedges to support his conclusion that no PAYE scheme was necessary, meant that basic rate tax should have been deducted and returns should have been made. Therefore we conclude that the pre-condition for issuing the penalties has been met.

46. We find that HMRC's application of the statutory regime to the facts and circumstances has been correct, other than in relation to the fixed penalties in 2013 when nil returns were submitted between April and November 2013.

47. Mr Martinez did not seek to argue that the mitigation given was inappropriate and we do not disturb it.

48. With regards to the schedule of delays, if Mr Martinez has a complaint about HMRC's handling of this case, then he should pursue this through HMRC's complaints handling procedure since this is not a matter for this tribunal.

49. However, we note that Mr Martinez seems to have adopted a rather strained means of calculating these delays. For example, he suggests that HMRC had introduced a delay of 209 days between 27 September 2017 and 24 April 2018. According to the documents in the bundle, it is correct to state that this represents the gap between letters from HMRC. However, the letter in September 2017 invited Mr Hedges to respond to HMRC's proposed figures for the determinations by 31 October 2017. Mr Hedges did not respond by that date. The next piece of correspondence from Mr Hedges/Mr Martinez, was on 26 March 2018, to which HMRC replied on 24 April 2018. Therefore, the delay in responding to an actual piece of correspondence was in fact less than 30 days, which would seem entirely reasonable; and the much longer delay was from the taxpayer.

50. While the correspondence went on for an extended period and there were some periods of delay during the process from the beginning of the compliance check and the final determinations, the delays were on both sides and these time periods are certainly not long enough to render the whole penalty regime unfair, which is the circumstance in which this tribunal may be able to interfere with a penalty on grounds other than the statutory appeal.

DISPOSITION

51. On the basis of our finding above regarding the operation of the PAYE scheme in 2013, we find that:

(1) The determination for 2013/14 is incorrect and only 5/12 of the unpaid PAYE should have been included in the determination, being £1,248;

(2) HMRC's raising of penalties for non-filing during the 2013-14 year was incorrect. There should have been only £500 of fixed penalties;

(3) The tax-gearred penalties for 2013/14 have been correctly applied but that they should be calculated only by reference to the £1,248 (and not the £2995.20). Therefore the penalty should be £187.20.

52. With regards to the remaining determinations, the taxpayer has not provided any evidence to displace the figures included in the determinations, which had been calculated according to HMRC's best judgment. Therefore, these determinations stand.

53. With regards to the timing, HMRC was entitled to rely on the extended time limit and therefore the issuing of the determinations was valid.

54. With regards to the remaining penalties, they have been validly issued and calculated and should stand.

55. The appeal is therefore allowed in part, in relation to the period from April to November 2013, but dismissed in relation to other periods.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

**ABIGAIL MCGREGOR
TRIBUNAL JUDGE**

Release date: 16 MARCH 2022