



[2019] UKFTT 0685 (TC)

TC07458

Appeal number: TC/2019/00362

Income tax - penalties for late payment of PAYE and NIC due under Accelerated Payment Notices (APN's) - appellant maintained that the Company had not received the Notices - previous APN's had been received and actioned - postal address to which Notices sent was partly incorrect - whether notices had been received - no - reasonable excuse - yes - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

D HOOTON T/A KDS REFRIGERATION LTD Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

**Sitting in public at Lincoln County Court, 360 High Street, Lincoln on 30
September 2019**

Ms Leslie Rhodes for the Appellant

Mr Matthew Crawley, Officer of HMRC for the Respondents

DECISION

1. This is an appeal by D Hooton t/a KDS Refrigeration Ltd ('the appellant') against:

- 5 • A first late payment penalty of £2,043.58 dated 5 March 2018 for failure to pay the amount of £40,871.60 due on an Accelerated Payment Notice ('APN') for the year ended 5 April 2014 ('PAYE APN') on or before the last day of the period of 31 days after the date it was due.
- 10 • A first late payment penalty of £1,115.91 dated 5 March 2018 for failure to pay the amount of £22,318.36 due on an APN for the year ended 5 April 2014 ('NICS APN') on or before the last day of the period of 31 days after the date it was due.
- 15 • A second late payment penalty of £2,043.58 dated 5 October 2018 for failure to pay the PAYE APN on or before the last day of the period of 5 months after the date it was due.
- A second late payment penalty of £1,115.91 dated 5 October 2018 issued for failure to pay the NICS APN on or before the last day of the period of 5 months after the date it was due.

2. The accelerated payments of PAYE and NIC were each due for payment no later than 23 January 2018. As payment had not been received by HMRC by the due date, penalties were payable under paragraph 3(2) and 3(3) of Schedule 56 Finance Act 2009.

Points at issue

3. The points at issue are:

- i. Were the penalties correctly issued?
- 25 ii. Is there a reasonable excuse which justifies late payment of the APNs?
- iii. If there is no reasonable excuse, were there any special circumstances?

Appellant's grounds of appeal

4. The appellant's grounds of appeal as stated by their accountants in the Notice of Appeal to the Tribunal are as follows:

30 "HMRC say that they issued the APNs for 2013-14 on 20.10.17, but neither we nor our client received these. We were unaware of the APNs until the penalties were received in March 2018, when the position was queried with HMRC. The APNs for 2011-12 and 2012-13 were served on 26.05.17 and these were received and dealt with. HMRC are adamant those for 2013-14 were issued as they were
35 not returned, but there is no actual evidence that these were ever issued, and they have not allowed the letters of representation to be accepted. Our clients have

made arrangements for settlement under the recent opportunity but HMRC are still asking for these penalties which we do not believe are due.”

Background

5 5. APNs relating to PAYE and NIC payable by the appellant company for the years
2011-12 and 2012-13, were issued on 11 August 2016 (although later withdrawn and
re-issued on 26 May 2017). The Notices stated that the appellant company would be
required to make a payment of PAYE and/or Class 1 NICs, relating to the use of a tax
avoidance scheme being an Employer Financed Retirement Benefits Scheme operated
by the appellant known as “Scheme 1 – EFRBS AKA Clavis Next Generation Sasha
10 11/v10 – (Scheme reference number 57480056)”.

6. On 3 November 2016, Mr Hooton on behalf of the appellant company, using its
letter headed notepaper, authorised Clavis Product Support Ltd (‘CPS’) of 2nd Floor
Hale Place, 229 Ashley Road, Hale, Cheshire WA15 9SX, to act on behalf of the
company and “until further notice communicate and deal with CPS in relation to any
15 matters whatsoever concerning [the APN’s].” The address of the company as stated on
its notepaper is KDS Refrigeration, Unit 4 Humberston Business Centre, Wilton Road
Industrial Estate, N.E. Lincolnshire Grimsby DN36 4AS.

7. The APN’s for 2011-12 and 2012-13 were served on the appellant company on
26 May 2017. The bundle of papers prepared by HMRC for the hearing did not contain
20 a copy of these APN’s, and therefore it was not possible to ascertain whether they had
been correctly addressed to the appellant.

8. The appellant nonetheless acknowledges that the 2011-12 and 2012-13 APNs
were received and states that the requirements of the Notices were complied with.
HMRC do not dispute this.

25 9. An “in time” letter of representation was sent to HMRC on 24 August 2017 and
acknowledged by HMRC on 14 September 2017. At the time discussions were taking
place with regard to settlement.

10. On 13 October 2017, the company was issued with an APN for the tax year ending
5 April 2014 stating that the appellant company would be required to make a payment
30 of PAYE and/or Class 1 NIC’s relating to the use of a tax avoidance scheme, Sasha II
aka Clavis v10 EFRBS 2011 (Scheme reference number 88568781). HMRC’s
Factsheet CC/FS26 ‘Avoidance Schemes - accelerated payments for Income tax and
National Insurance Contributions through PAYE’ accompanied the letter. HMRC
stated that an Accelerated Payment Notice (‘APN’) would be sent to the company
35 within 2 to 4 weeks.

11. The 13 October 2017 letter was addressed to Unit 4 Humberston Business Centre,
but omitted ‘Wilton Road Industrial Estate, North East Lincolnshire’, and instead
referred to Grisby, Grimsby. The correct postal code was given. A copy of HMRC’s
letter was sent to CPS but was also incorrectly addressed. The letter was sent to 2nd
40 Floor, Hale Place, 229 Ashley Road, *Altrincham*, and to an incorrect postal code W15

6SX. The district of Hale is in the town of Altrincham but there was no reference to 'Hale'.

12. The same postal address mistakes were made in all of HMRC's penalty notices and correspondence until early April 2018, when the errors were pointed out and corrected.

9. On 20 October 2017, HMRC issued the following APNs:

- i. An APN dated 20 October 2017 for Income Tax (PAYE) totalling £40,871.60, for the tax year ended 5 April 2014; and
- ii. An APN dated 20 October 2017 for National Insurance Contributions totalling £22,318.36 for the tax year ended 5 April 2014.

13. The APNs specified that the £40,871.60 for PAYE and the £22,318.36 for NIC was due on or before 23 January 2018. Alternatively, if representations were to be made, they had to be made under s 222 of the Finance Act 2014 and received no later than 23 January 2018. The address on the letter contained the same errors as the letter of 13 October 2017.

14. A copy of each APN was sent to CPS, but again to the same incorrect address as stated above.

15. Both APNs contained an explanation of certain conditions that gave rise to the issuing of the APN, and various pieces of information inclusive of:

“Penalties for not paying on time

If you do not pay in full and on time, you will be liable to penalties. Any such penalties would be payable in addition to the amount due. The date on which you become liable to such a penalty is known as ‘the penalty date’. The penalty date is 31 days after the date on which you were due to pay. If you do not pay in full:

- *by the penalty date, you will be liable to a penalty equal to 5% of the amount you still owe;*
- *on or before 5 months from the penalty date, you will be liable to a penalty equal to 5% of the amount that you still owe — this is as well as the 5% explained in the previous bullet;*
- *on or before 11 months from the penalty date, you will be liable to a penalty equal to 5% of the amount that you still owe — this is as well as the 2 previous 5% penalties.*

If we charge you a penalty, we will send you a notice of penalty assessment telling you how much the penalty is and the period to which it relates. You will then have 30 days to pay the penalty. If you disagree with the penalty you will be able to appeal. You can find out more about appeals in factsheet HMRC1, ‘HM Revenue & Customs decisions — what to do if you disagree’. To get a copy, go to www.gov.uk and search for HMRC.”

16. On 23 November 2017, a HMRC officer telephoned the company regarding the APNs. Mr Darren Hooton, a director of the company, confirmed that his accountant was dealing with the APNs. Mr Hooton did not attend the hearing but Ms Rhodes of Pelham Accountants ('Pelham'), on his behalf, said that Mr Hooton was referring to the earlier APNs for the years ending 2012 and 2013, which he acknowledges were received by the company.

17. On 8 December 2017, HMRC issued reminder letters stating the amounts of £40,871.60 and £22,318.36, as specified in the APNs dated 20 October 2017, were due on or before 23 January 2018. The address on the letter contained the same mistakes as those of 13 and 20 October 2017. Copies were sent to CPS but incorrectly addressed.

18. Ms Rhodes says that CPS did not alert the appellant to any of the copy letters relating to the 2013-14 APNs, and both the appellant and Pelham were unaware of the APNs until the penalties were received in March 2018, when the position was queried with HMRC. It was not clear whether in fact CPS had received the copy correspondence. In April 2016 CPS appear to have changed its company name to Clavis Wealth Management Limited and in March 2018 its address to one in Nantwich, Cheshire. According to Ms Rhodes, CPS had no further involvement in matters from around August 2017 and possibly ceased trading in March 2018.

19. On 5 March 2018, HMRC issued a late payment penalty notice as payment of the amount specified in the APNs had not been made within 30 days of the due date, 23 January 2018. Again, the notices of penalty were incorrectly addressed. However, a copy was sent to Pelham, which was when they and the appellant say they first became aware of the 20 October 2016 APNs.

20. On 3 April 2018, Pelham, on behalf of the company, appealed against the penalty assessments dated 5 March 2018.

21. On 13 April 2018, HMRC responded to Pelham and requested that the company provide grounds of appeal. A copy (correctly addressed) was sent to the appellant company.

22. On 18 May 2018, Pelham, on behalf of the company, stated that whilst the company had received the APNs for the years 2011-12 and 2012-13, they had not received the APNs for the year ended 5 April 2014.

23. On 22 June 2018, HMRC wrote to Pelham enclosing copies of the APNs for 2013-14.

24. On 3 July 2018, HMRC 'resent' the APNs to the appellant.

25. On 9 and 10 July 2018, Pelham submitted further representations disputing the validity of the APNs. The letters (one in respect of PAYE and one in respect of NIC) which ran to 16 and 17 pages respectively, appeared to be of a generic nature drafted by CPS (one assumes on behalf of numerous businesses which had used an Employee Retirement Benefit scheme similar to that used by the appellant company).

26. On 30 August 2018, HMRC wrote to Pelham stating that the representations ought to have been made by 23 January 2017; as such the representations were out of time and would not be considered. A copy was sent to the company.
- 5 27. On 3 September 2018, Pelham wrote to HMRC reiterating that the appellant had not received the APN notices of 20 October 2017.
28. On 21 September 2018, HMRC replied to Pelham that their records confirm that the APNs had been validly served on 20 October 2017 and copied to CPS. HMRC said that duplicates had been provided on 3 July as a matter of courtesy and convenience
10 and had not been re-served.
29. On 3 October 2018, Pelham asked HMRC to disclose evidence that the APNs had been sent.
30. On 5 October 2018, HMRC issued the second late payment penalties to the company. The letter sending the penalties was again incorrectly addressed. A copy was
15 however sent to Pelham, which they received.
31. On 15 October 2018, HMRC wrote to Pelham in response to the letter dated 3 October 2018. HMRC said that the notices were sent by ordinary second class post via Royal Mail. A copy was sent to the company.
32. On 23 October 2018 Mr Hooton telephoned HMRC, who re-stated their view that
20 the APNs dated 20 October 2017 were validly served.
33. On 5 November 2018, Pelham, on behalf of the company, appealed against the penalties dated 5 October 2018.
34. On 16 November 2018, HMRC wrote to Pelham reiterating the view that the APNs dated 20 October 2017 had been properly served.
- 25 35. On 19 November 2018, Pelham wrote, on behalf of the company, repeating the request for HMRC's findings to be reviewed.
36. On 7 December 2018, HMRC wrote to Pelham to acknowledge the company's appeal and confirmed a review of the penalty decisions dated 5 October 2018 was underway.
- 30 37. On 12 December 2018, Pelham wrote to clarify that the appeal was against all four penalty decisions.
38. On 14 December 2018, HMRC issued review conclusions and upheld the penalty assessments dated 5 October 2018.
- 35 39. On 16 January 2019, the appellant notified the Tribunal of its appeal against the penalty decisions.

40. Whether or not the APNs were validly issued is not in dispute. The appellant asserts that the APNs for 2014 were not received until ‘re-sent’ on 3 July 2018, after which the appellant had 90 days within which to send written representations. It did so on 9 and 10 July 2018. Accordingly no penalties were payable. For the purposes of this appeal the appellant does not challenge the underlying APNs.

Relevant statutory provisions

41. Schedule 56 (1) Finance Act 2009 states the date after which a penalty will be incurred being the date falling 30 days after the date specified in Section 59B (4) Taxes Management Act 1970 as the date by which the amount must be paid.
- 10 42. Schedule 56 (3)(2) Finance Act 2009 states that the taxpayer is liable to a penalty of 5% of the unpaid tax.
43. Schedule 56 (3)(3) Finance Act 2009 states that if any amount of the tax is unpaid after the end of the period of 5 months beginning with the penalty date, the taxpayer is liable to a penalty of 5% of that amount.
- 15 44. Schedule 56 (9) Finance Act 2009 states that HMRC may reduce a penalty if they think it right because of special circumstances.
45. Schedule 56 (16) Finance Act 2009 states that:
- An insufficiency of funds is not a reasonable excuse unless attributable to the events outside person (s) control.
 - 20 • Where person relies on any other person to do anything, that is not a reasonable excuse unless person took reasonable care to avoid the failure, and
 - Where person has a reasonable excuse for the failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.
- 25 46. The legislation relating to the circumstances in which an APN may be issued are set out on s 219 of Finance Act 2014. That provides relevantly, as follows:
- (1) HMRC may give a notice (an “accelerated payment notice”) to a person (“P”) if Conditions A to C are met.
- (2) Condition A is that--...
- 30 (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been--
- (i) determined by the tribunal or court to which it is addressed, or
 - (ii) abandoned or otherwise disposed of.
- 35 (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements (“the chosen arrangements”).

(4) Condition C is that one or more of the following requirements are met--

(a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2-

- 5 (i) In relation to the same return or claim or, as the case may be, appeal,
and
(ii) By reason of the same tax advantage and the chosen arrangements;

47. Section 222 FA 2014 permits representations, objecting to the notice or the amounts specified in the notice, to be made. That provides relevantly, as follows:

10 (1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).

(2) P has 90 days beginning with the day that notice is given to send written representations to HMRC-

15 (a) Objecting to the notice on the grounds that Condition A, B or C in section 219 was not met,

(b) Objecting to the amount specified in the notice under section 220(2)(b) or section 221(2)(b), or

20 (c) Objecting to the amount specified in the notice under section 220(2)(d) or section 221(2)(d).

(3) HMRC must consider any representations made in accordance with subsection (2).

(4) Having considered the representations, HMRC must—

25 (a) if representations were made under subsection (2)(a), determine whether—

- (i) to confirm the accelerated payment notice (with or without amendment), or (ii) to withdraw the accelerated payment notice, and

30 (b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount (or no amount) ought to have been specified under section 220(2)(b) or section 221(2)(b), and then—

- 35 (i) confirm the amount specified in the notice,
(ii) amend the notice to specify a different amount, or
(iii) remove from the notice the provision made under section 220(2)(b) or section 221(2)(b), and

40 (c) if representations were made under subsection (2)(c) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount (or no amount) ought to have been specified under section 220(2)(d) or 221(2)(d), and then—

- (i) confirm the amount specified in the notice,
(ii) amend the notice to specify a different amount, or

(iii) remove from the notice the provision made under section 220(2)(d) or section 221(2)(d), and notify P accordingly.

5 48. References to service by post. Section 7 Interpretation Act 1978 states:

“Where an Act authorises or requires any document to be served by post (whether the expression “serve” or the expression “give” or “send” or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless
10 the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

49. Delivery and service of documents:

Section 115 TMA 1970 states:

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(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to
20 or on any person [by HMRC] may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment, or

(b) in the case of a company, at any other prescribed place and, in the case of a liquidator of a company, at his address for the purposes
25 of the liquidation or any other prescribed place.

(3) In subsection (2) above “prescribed” means prescribed by regulations made by the Board, and the power of making regulations for the purposes of that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the House of Commons.

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Reasonable excuse

50. Paragraph 16 Schedule 56 FA 2009 provides relevantly as follows:

16 Reasonable excuse

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper
35 Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.

40 (2) For the purposes of sub-paragraph (1)—

- 5 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

HMRC's Submissions

- 10 51. The company has stated that it did not receive the APNs dated 20 October 2017. Within the bundle of documents HMRC included a record from HMRC's Counter-Avoidance Accelerated Payments ("CAAPS") system. The screenshot contains a record stating that the process to issue the APNs began on 16 October 2017.
- 15 52. A HMRC officer noted that the initial calculation of the APNs was conducted on 16 October 2017. Such calculations were then authorised by another HMRC officer on 17 October 2017.
53. A HMRC officer has recorded on the CAAPS that the APNs were issued on 18 October 2017.
- 20 54. HMRC referred to a spreadsheet which contains a record of the following:
- JXH prepared the APN calculations;
 - DM checked and authorised those calculations;
 - OW prepared and printed the APNs dated 20 October 2017;
 - WT conducted quality checks of those APNs;
- 25 • OW issued those APNs.
55. HMRC referred the Tribunal to a screenshot of their 'payment systems'. The screenshot (taken 5 October 2018) contains a record of the APN charges having been manually raised on 20 October 2017 under references XW007287074877 and XD0072874879. These references were inserted on the APNs dated 20 October 30 2017.
56. Copies of the APN indicate that the APNs were posted to the Company. HMRC has no record of any post having been returned as not delivered.
57. *Tinkler v HMRC* [2016] UKFTT 0170 (TC) contains an analysis regarding service. Paragraphs 65 and 67 state:
- 35 "[65] It is obvious the case cannot be authority for such a proposition as that would conflict with the language used by Parliament in s 115 TMA. That permits a notice

of enquiry to be sent to the taxpayer's usual or last known place of residence. If Parliament had meant that a notice of enquiry had to be actually received by the taxpayer, Parliament would not have bothered specifying where it could be sent: as clearly it could only be sent to wherever the taxpayer actually was. By use of the words 'last known', Parliament was clearly contemplating the possibility that the taxpayer might not receive the notice of enquiry as it could be sent to his last known address even though it was not his actual address.

[67] And s 115(2) operates with s 7 Interpretation Act 1978 so HMRC can prove arrival and the item of arrival at that address by relying on the (rebuttable) presumption in that section."

58. The company has not disputed having received HMRC's accelerated payment notification dated 13 October 2017, which stated that APNs were to be issued within 2 to 4 weeks for the year ended 5 April 2014. HMRC submit that the appellant, following receipt of this letter, would have known that APNs for the year ended 5 April 2014 were about to be issued.

59. Also, Mr Hooton spoke to HMRC via telephone on 23 November 2017 and indicated that his accountant was dealing with the matter.

60. Additionally, the company has not disputed having received HMRC's deadline warning letters dated 8 December 2017 which explicitly referred to the APNs dated 20 October 2017. The appellant would have known at this point that APNs for the year ended 5 April 2014 had been issued.

61. The company did not respond until HMRC issued the penalty assessments dated 5 March 2018.

62. The APNs are deemed by s 7 Interpretation Act 1978 to have been delivered if sent to the company's usual or last known place of business in the ordinary course of the post.

63. Liability to a penalty does not arise where a person satisfies HMRC or the Tribunal that there is a reasonable excuse for failing to make the relevant payment, and sets out some specific circumstances which are not a reasonable excuse.

64. There is no statutory definition of reasonable excuse, however, the test is to determine what a reasonable taxpayer in the position of the appellant and wishing to comply with their responsibilities would have done in those circumstances and by reference to that test to determine whether the conduct of the appellant can be regarded as conforming to that standard.

65. The Company has failed to provide a reasonable excuse for the failure to pay the APNs by the due date. The onus is on the Company to provide evidence of their reasonable excuse including all the circumstances.

Appellant's submissions

66. Ms Rhodes for the appellant said that Mr Hooton, as a matter of standard practice, always copied her into any correspondence or documentation received from HMRC. She said that Mr Hooton was adamant he had not received the 20 October 2018 APNs.

5 67. HMRC had sent the APNs for 2012 and 2013 to Pelham, but for reasons which had not been explained, had not sent the APNs for 2014.

68. After Pelham received the APNs in early July 2018 they submitted their client's representations within the necessary 90 day period. Therefore no penalties were due.

Conclusion

10 69. The 20 October 2017 APN notices were not properly addressed to the appellant's last known place of business. They omitted 'Wilton Road Industrial Estate, North East Lincolnshire', and instead referred to Grisby, Grimsby (there is no such place as "Grisby" in the UK, so far as is known). The correct postal code was given. A copy of HMRC's letter was sent to CPS but also incorrectly addressed having been addressed
15 to Altrincham, whereas the address was Hale, Altrincham. The post code was also incorrect.

70. None of the documents were returned to HMRC under the returned mail service provided by Royal Mail.

20 71. The same postal address mistakes were made in all the letters of 13 October 2017 and all other correspondence until early April 2018, when the errors were pointed out and corrected. After that point there were no more reports of problems with post reaching the appellant.

25 72. It cannot be said that HMRC's letters and notices were 'properly addressed' and therefore the deemed delivery provisions of s 7 Interpretation Act 1978 do not apply. The letter and returns were not addressed to the appellant's usual or last known place of business (s 115 TMA 1970). HMRC have not therefore met the required burden of proof that notices to file were properly issued and sent to the appellant company.

30 73. Taking all the evidence into account, on a balance of probabilities, I have to conclude that the appellant did not receive the APNs dated 20 October 2018 and therefore HMRC have not established that the penalties are due.

74. The appeal is therefore allowed and the penalties discharged

35 75. 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.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 08 NOVEMBER 2019