



TC06332

Appeal number: TC/2017/08058

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – Real Time Information returns of payments (FPS) – penalties imposed for late FPS during 6 months - whether FPS late – whether evidence of penalty assessments made – appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KHALID BHATTI

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 1 February 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 3 November 2017 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 18 December 2017 and the appellant's reply of 10 January 2018.

DECISION

1. This was an appeal by Khalid Bhatti, trading as Shahi Frozen Foods (“the appellant”) against assessment of penalties made by the respondents (“HMRC”) for his failure, during six consecutive months, to deliver a return of payments of PAYE income by the relevant due dates.

Facts

2. From the bundle I find the following facts. Where I use the expression “is said” it means that I find that this is what HMRC assert: I do not necessarily find that what they assert is fact.

3. The appellant is an employer with fewer than 50 employees.

4. With effect from 6 March 2015 such an employer was required to send HMRC an electronic a return of tax deducted and National Insurance Contributions (“NICs”) due whenever a payment of PAYE income or earnings is made by them. This system is known universally as RTI, which stands for Real Time Information, and the return is known as an FPS (Full Payment Submission).

5. The appellant is said by HMRC to have failed to file an FPS by the due date during the tax months 8/16, 9/16, 10/16, 11/16, 12/16 and 1/17, each being the period of one month ending on the fifth of the numbered month in the numbered year.

6. On 16 November 2016 HMRC assert that they issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date during each of the three months 8/16, 9/16 and 10/16.

7. On 10 February 2017 HMRC assert that they issued a notice informing the appellant that a penalty of £100 had been assessed for failure to file the return by the due date during each of the three months 11/16, 12/16 and 1/17.

8. On 14 May 2017 the appellant, through his accountants, appealed against penalties for the months 6/16, 7/16, 10/16 and 4/17.

9. On 9 June 2017 HMRC told the appellant that the appeal was out of time and would not be treated as given. They informed him that he could request permission from the Tribunal to make a late appeal. The penalties listed in the letter were those for 08/16 to 01/17 inclusive. Only one of periods appealed against is in this period, 10/16.

10. On 1 July 2017 the appellant sent what he described as “an official notice of appeal against the penalty assessment dated 5/08/2016 to 51/2017” and argued, among other things, that this appeal was not late.

11. On 24 July 2017 rejected the appeals on the grounds that no reasonable excuse and the appellant was given the option of requesting a review or appealing to the Tribunal.

12. On 18 August 2017 the appellant repeated the points made in the letter of 1 July 2017. HMRC took that as a request for a review.

13. On 6 October 2017 HMRC wrote to the appellant with the conclusion of the review. The conclusion was that the penalties were upheld

5 14. On 3 November 2017 the appellant notified his appeals to the Tribunal.

The law

15. 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")

10 " (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
15 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)
20 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."

25 16. 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) ...

30 (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.

35 (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

40 (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.”

17. The employer’s obligation to submit an RTI return in relation to NICs is in paragraph 21A of Schedule 4 to the Social Security (Contributions) Regulations 2001 (SI 2001/1004) (“the SSC Regulations”)

“Real time returns of information about payments of ...earnings

21A—(1) Subject to sub-paragraph (1A) on or before making any payment of ... earnings to an employee a Real Time Information employer must deliver to HMRC the information specified in Schedule 4A (real time returns) in accordance with this paragraph unless—

(a) the employer is not required to maintain a deductions working sheet for any employees, or

(b) an employee's earnings are below the lower earnings limit and the employer is required to make a return under regulation 67B(1) ... of the PAYE Regulations.

...

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

(3) Subject to paragraph (4), if payments of ... earnings are made to more than one employee at the same time, the return under sub-paragraph (2) must include the information required by Schedule 4A in respect of each employee to whom a payment of ...earnings is made at that time.

...

(5) The return is to be made using an approved method of electronic communications and regulation 90N(2) (mandatory use of electronic

communications) applies as if the return was a paragraph 22 return within the meaning given by regulation 90M (paragraph 22 return and specified payments).

...”

- 5 18. There is a paragraph which mirrors regulation 67EA of the PAYE Regulations. As to penalties, paragraph 21G provides

10 “(1) Where a Real Time Information employer fails to deliver a return in accordance with paragraph 21A (real time returns of information about payments ... of earnings) ... Schedule 55 to the Finance Act 2009 (amount of penalty: real time information for PAYE) and regulations 67I to 67K of the PAYE Regulations (penalties) apply in relation that failure as if—

15 (a) the return under paragraph 21A (real time returns of information about payments of ... earnings) ... were a return falling within item 4 of the Table in paragraph 1 of Schedule 55, and

(b) references to the PAYE Regulations were references to these Regulations, but this is subject to sub-paragraphs (2) and (2A).

20 (2) Where a Real Time Information employer (P) is liable to a penalty in consequence of a failure to deliver a return (“the tax return”) under regulation 67B (real time returns of information about relevant payments) ... of the PAYE Regulations, P shall not also be liable to a penalty in respect of any failure in relation to an associated return under paragraph 21A (real time returns of information about payments of ... earnings)

25 ...

(3) A tax return and a return under paragraph 21A ... are “associated” if the return under paragraph 21A ... is required to be delivered at the same time as the tax return.

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

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

“Amount of penalty: real time information for PAYE

35 **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.

...

40 (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—

- 5 (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.

10 ...

(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.

15 21. 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)

...”

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

23. 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
25 paragraphs 23 and 16 Schedule 55 respectively.

24. Because this RTI legislation is relatively new, some further explanation is called for. The RTI provisions, especially regulation 67B of the PAYE Regulation, replaced the previous provisions in regulation 73 of the PAYE Regulations which required return on Forms P35 and P14 of the payments and tax deducted of employees who were paid
30 during the year.

25. The major difference is, as the name implies, that RTI information is passed to HMRC in real time, as or before the payments are made. Hitherto the equivalent information about payments was made at the year end.

26. Those end of year obligations were enforced by means of penalty provisions. For
35 Forms P35 and P14 the provisions were in s 98A Taxes Management Act 1970 (“TMA”) (see regulation 73(10) of the PAYE Regulations) and the penalty was, in a case such as this employer, £100 per month for each month up to 12 for which the failure continued, and a single tax geared penalty if the failure continued after that. Both reasonable excuse and mitigation provisions applied (s 118(2) and 102 TMA
40 respectively).

27. RTI obligations also replaced the reporting to HMRC of Forms P45 and P46 of employees leaving and joining the employer. For Forms P45 and P46, the penalties for failure to submit had been in s 98 TMA (Column 2 of the Table) and were £300 for the initial failure and up to £60 a day thereafter. In practice this legislation was not enforced.

28. Some further points need to be made. First, regulation 67B does not require any payments to be made to HMRC. That obligation is in regulation 67G PAYE regulations and for failure to comply there are penalties under Schedule 56 FA 2009, as there were for failure to comply with the previous payment obligations in regulation 68.

29. Second, unlike, for example, item 1 in the Table in paragraph 1 Schedule 55 FA 2009 (a tax return required by s 8 TMA), no tax liability or payment requirement is established by a return under regulation 67B.

30. There is though some very indirect tax effect on the employees concerned. An in time return under regulation 67B may lead to a change in coding under the so called dynamic coding procedures introduced by HMRC in the autumn of 2017. These do not change the liability for the year in which they are applied, but may change the time of collection of the tax to bring it closer in line with the object of the PAYE system which is to ensure that, so far as possible, the tax deducted under PAYE is the tax for which the person concerned is liable for the year.

31. And the RTI information is used by DWP to check on Universal Credit entitlement.

32. Third, unlike the position for an income tax return where HMRC knows that a notice to file the return was issued and that the return required was not filed by the due date, in the case of an RTI return HMRC is in no position to know whether a return should have been made during any tax month until either they receive it or the employer has accounted for PAYE under regulation 67G in respect of the same month.

33. Fourth, the effect of regulation 67EA is difficult to square with a penalty for failing to file an FPS no later than the due date. The due date for filing an RTI return is the date of payment of PAYE income. This is not explicitly set out in the regulations, but must be taken to be the effect of regulation 67B(1). From this it follows that there are as many due dates as there are dates of payment.

34. But regulation 67EA says that if the return is not made on the due date, it must be made in the next FPS for the tax year in question. And if it has still not been made by April 19 following the tax year a return is required under paragraph 67EA. The need for a return to be made no later than 19 April in the following year is wholly understandable as it seeks to enforce the submission of end of year information no later than it did in the old P35/P14 system. But there is no separate sanction for failure to make the regulation 67EA return; no obvious reason for saying that a missed FPS must be filed with the next one and no relief from sanctions if that is in fact done.

35. The penalty legislation for a failure is in paragraph 6C Schedule 55 FA 2009 which imposes a penalty of an amount determined by regulation 67I on an employer

who fails to deliver a return in accordance with regulation 67B, that is by the date of payment of PAYE income¹.

36. Thus there can be more than one (and many more than one) default in any particular tax month. But paragraph 6C Schedule 55 penalises a failure to make an RTI return of payments during a particular tax month, however many there are (see paragraph 6C(6)).

37. Where an employer is liable for a penalty because a return of payments has not been made by the due date, HMRC must assess the penalty to which the employer is liable.

38. It is clear that where there are no payments in a month no return under regulation 67B is required and no penalty is exigible in such a case for a failure to make a return². If there were such a liability the legislation would have said so, as regulation 4 SI 2005/2045 (Income Tax (Construction Industry Scheme) Regulations 2005) said until the revocation of regulation 4(10) in 2015.

39. The NICs legislation for RTI parallels that for income tax. But there is it seems no double penalty. If a return of NICs earnings is required at the same time as a return of PAYE income payments then there is only one penalty under regulation 6C (see regulation 21A(2) SSC Regulations) and that is the regulation 67I PAYE Regulations penalty.

40. In relation to assessments of a paragraph 6C penalty, paragraph 18 Schedule 55 FA 2009 provides:

“(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

...

(3) An assessment of a penalty under any paragraph of this Schedule—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule)”

¹ There is another penalty for a much delayed FPS in regulation 6D. This does not appear to apply in this case and in any event has I believe not yet been enforced

² Paragraphs 5 and 6 of Schedule A1 to the PAYE Regulations, the required content of an FPS, require an indication that a particular FPS is the last one expected to be made in the tax year. Failure to indicate that could lead to HMRC assume that in following periods an FPS should have been submitted and it seems in that situation to be their practice to assess penalties in the absence of an FPS. But that has not happened here and I do not need to consider the validity of any such penalties.

41. Thus it is mandatory to assess but only if P is actually liable. The relevant “assessment to tax” is somewhat difficult to construe. Does it mean a s 29 TMA assessment or an assessment which seeks to establish liability to account for PAYE? The difficulty about the latter concept is that there is no such assessment (the nearest is a determination under regulation 80 of the PAYE Regulations, but this is not an assessment for the purposes of Schedule 55 or paragraph 27(5) of that Schedule would not be necessary. It must then be a s 29 assessment to income tax.

42. However the procedural rules for such an assessment that are not included in paragraph 18(1) or 21(1) (appeals) are it seems to me limited to these parts of s 30A TMA

“(3) Notice of any such assessment ... shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

(4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.”

43. As to appeals the rules are the same as for income tax and so are those in s 31 and Part 5 TMA. The appeal must be made within 30 days after the date of the assessment of the penalty subject to s 49 TMA (late appeals).

20 The appeals

44. The position is that the original appeal concerned only one penalty included in this period, and HMRC said initially that it (and the other assessments) were out of time (which they were – at least in relation to 10/16 the assessment for which was made in November 2016). The “official notice” of appeal was against the two assessments covering the periods in issue in this case, and were also late. But since HMRC conducted a review which they could not do if there was no notice of appeal treated as given to HMRC, they must then have changed their mind on the issue of whether there was a reasonable excuse for the lateness under s 49 TMA, and so there is no need for me to consider that issue further. All the appeals are before the Tribunal.

30 Grounds of appeal & HMRC’s response

45. The grounds of appeal are:

- (1) the appellant’s agent had many technical issues with their IRIS software
- (2) in the case of other clients where this was also the case HMRC accepted that this was a reasonable excuse
- (3) no further submissions have been late.

46. HMRC say in response that

- (1) HMRC records show that FPS were made after the dates the payments were made
- (2) each case is considered on its own merits, and the appellant cannot rely on the same excuse being treated as reasonable in their case, even if it was in others

(3) the same excuse was given and the same promise of future compliance made in relation to late filing of FPS in appeals on 29 August 2015 and 10 November 2015. Those penalties were cancelled as HMRC took a lenient approach then

5 (4) it was unreasonable for the appellant to rely on its payroll provider, its accountants, to file the returns in time given the experience they had had

(5) for a circumstance to amount to a reasonable excuse it must be exceptional

(6) information about what should be done is “well within the public domain” and widely available on the internet.

10 **Discussion**

47. I first make some further findings of fact. At §5 I said that HMRC assert that the appellant failed to file RTI returns for 6 specific months. The evidence for that which they put forward consists of screenshots “Summary of filing failures”. There are five such screenshots showing a payment date for between one and three payments per month in each of the months 09/16 to 1/17 and a receipt date for the RTI return for each such payment which is in each case later than the payment date by between four and six days. In each case of payment the screenshot shows the number of failures as four, but does not explain this (I assume it is the number of employees to whom payments were made). Payment seem to be weekly with some gaps, when I assume the payments was made in time for that week or no payments were made in that week.

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Failures to file – in which months?

48. I find as a fact that the appellant did fail to file the return in time in relation to each of the payments shown on these screenshots, and that there were failures during the five months 09/16 to 1/17 inclusive, but not the month 08/17.

25 *The first assessment*

49. As to the first notice of assessment, there is in the file a screenshot of the screen “View filing penalty notices” showing the issue of a penalty assessment on 16 November 2016 in the sum of £300. There is also a copy of a notice of penalty assessment addressed to the appellant on 16 November 2016.

30 50. The appellant has not disputed receiving it. I find then that the appellant was notified of this penalty assessment.

51. Does the notice correctly state, or state at all, the period in respect of which each penalty is assessed? It shows the three periods of a month ending on 5 August, 5 September and 5 October 2016, so the answer is yes, despite the heading above the relevant table saying “penalties charged *in* the quarter ended 5 October 2016” [my emphasis]. They were charged for, or in relation to, those quarters but were charged *in* the quarter ended 5 January 2017. That is a mistake that can be cured by the application of s 114 TMA.

35

52. No period has been shown as the time within which an appeal may be made, as is required by s 30A(3) TMA.

40

53. I find that a penalty assessment was raised to cover the each of the three months 08/16, 09/16 and 0/16. The assessment was procedurally correct except that it did not state the period within which an appeal may be made. I do not think this vitiates the assessment, but had HMRC not accepted (whether by mistake or not) that the appeals
5 were not late, despite saying originally that they were, I would have granted permission for late appeals to be made to HMRC on the sole basis that the assessment was in error in not indicating the time for appeal. A reference to the appeals part of HMRC's website is not good enough.

54. As a result of these findings I hold that, as HMRC has the burden of proof of
10 showing that the penalties were validly assessed and in the correct amounts, the assessment so far as it related to 08/17 was invalid as there is no evidence produced that an RTI return was required for that period, or, if required, was late.

55. But the assessment was properly made for the months 09/17 and 10/17.

The second assessment

15 56. Turning to the second assessment said to be for the quarter ended 01/17 there is a difference between this and the first assessment as, although there is a screenshot of the date of issue, there is no copy of the notice of assessment.

57. There is however evidence that something referring to penalties of £300 for the quarter ended 01/17 was received because the appellant appealed against "the penalty assessments for "5/08/2016 to 51/2017". The latter date I take to be a typo for 5/1/2017
20 so the appeals is against an assessment for the months 11/16, 12/16 and 1/17. I therefore find that the assessment was notified to the appellant.

58. I infer that, by reference to the copy of the first assessment, it complied with all the requirements of Schedule 55 apart from the requirement to state the time limit for
25 appealing (which is a curable mistake). The second assessment imposed a penalty for each month in the quarter and I have found there was at least one failure in each of those months. The assessment is therefore valid.

Reasonable excuse?

59. In relation to the five months for which a valid notice of penalty assessment as
30 made, in my view there was no reasonable excuse for the failure to file the returns by the respective due dates. The excuses offered are vague and lack necessary detail and the software issues had already been used with broken promises of compliance in previous periods going back to more than two years before.

60. HMRC have addressed the question whether there were special circumstances,
35 but have found none. I cannot say that this decision was flawed.

Decision

61. The penalties of £100 for the months ending 5 September 2016, 5 October 2016, 5 November 2016, 5 December 2016 and 5 January 2017 are upheld.

62. The penalty for the month ending 5 August 2016 is cancelled.

63. 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.

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**RICHARD THOMAS
TRIBUNAL JUDGE**

RELEASE DATE: 9 FEBRUARY 2018

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