



TC06713

Appeal number: TC/2018/03728

*INCOME TAX – Application for admission of a late appeal – late payment penalties – PPN
– Martland applied – application refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Dr NAVEED KHALED

Appellant

-and-

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

Respondents

TRIBUNAL: Judge Peter Kempster

Sitting in public at Centre City Tower, Birmingham on 3 September 2018

The Appellant did not appear and was not represented

Mr Matthew Cawley (HMRC Solicitor's Office) for the Respondents

DECISION

1. The Appellant (**Dr Khaled**) applies for permission to bring a late appeal against late payment penalties.

5 2. Prior to the hearing Dr Khaled's representative ("**the New Agent**") wrote to the Tribunal to explain that due to financial constraints the New Agent would not be appearing, but listing a number of points which the Tribunal was asked to take into consideration in its deliberations. Dr Khaled supplied a witness statement and asked for the hearing to take place in his absence, but without any reason given for why he
10 would not appear in person.

Background

3. In February 2013 the Respondents ("**HMRC**") opened an enquiry into the tax return of Twofold First Services LLP. The firm was involved in a tax avoidance scheme registered under the DOTAS provisions (pt 7 Finance Act 2004 refers), and
15 Dr Khaled was a member of the firm.

4. In August 2015 HMRC wrote to Dr Khaled informing him of their intention to issue to him a partner payment notice ("**PPN**") in respect of his participation in the scheme for the tax years 2011-12 and 2012-13 (ch 3 pt 4 and sch 32 Finance Act 2014 refers). An appendix to the letters set out in detail the requirements for payment of
20 the notice and the penalties chargeable for late payment.

5. In September 2015 HMRC issued the PPNs to Dr Khaled for the tax years 2011-12 and 2012-13. The notices set out in detail the requirements for payment and the penalties chargeable for late payment.

6. In November 2015 HMRC wrote to Dr Khaled reminding him that payment was
25 due in December; again, the letter set out in detail the requirements for payment and the penalties chargeable for late payment.

7. Dr Khaled objected to the PPNs and HMRC informed him how to make formal representations (s 222 FA 2014 refers), which he did in December 2015 stating "I
30 believe the tax calculations have been miscalculated, ie as per your letter I object to the amounts specified in the notice".

8. On 15 February 2016 HMRC issued their formal review, upholding the PPNs but in reduced amounts (£44,455.41 for 2011-12 and £40,470.72 for 2012-13) and stating the payment date as 21 March 2016.

9. On 7 April 2016 HMRC issued penalty notices for non-payment of both PPNs:
35 £2,222.77 for 2011-12 and £2,023.53 for 2012-13 ("**the First Penalties**").

10. On 24 April 2016 Dr Khaled appealed against the First Penalties stating:

“Please accept this letter as a formal appeal against late penalties in respect of accelerated payment notice re years ended 5 April 2012 and 2013

The appeal is based on two grounds:

- 5
1. I believe that the payment is wrong in law and advise that I shall be seeking a judicial review in the correctness of the assessment issued and
 2. I have previously advised that I am unable to make this payment at this time even if it were correct and have sought
- 10

I should be grateful if collection proceedings be postponed whilst this matter is resolved.”

11. On 10 May 2016 HMRC refused the appeal stating:

15 “I do not agree that the fact that a judicial review claim, to which you are not a party, has not yet been determined is a reasonable excuse for failing to pay the PPN or prevents HMRC from issuing the penalty notice .

20 You also state you sought a time to pay arrangement. There is no record of you having made a proposal for a payment arrangement for the PPN. You provided HMRC with Financial Statement: Form e1 on 9 November 2015 but did not make or request a payment arrangement Lastly, not having the funds available is not a reasonable excuse for not paying the PPN.

25 The law does not define reasonable excuse. Our view is that a reasonable excuse will only apply when an unexpected or unusual event, either unforeseeable or beyond your control, occurs that prevents you making the payment on time. If you think you have a reasonable excuse we will consider these.

30 There are some things that we will not normally accept as being a reasonable excuse, for example:

- pressure of work
- lack of information
- HMRC did not send a reminder
- Ignorance of basic law.

35 As I have not changed my view the late payment penalty ... remains chargeable.

If you do not agree with my view, you can either

- ask to have my decision reviewed, or
- notify your appeal to an independent tribunal

within 30 days of the date of this letter.”

12. Dr Khaled did not request a review nor file an appeal to the Tribunal.

5 13. All the above communications to Dr Khaled were copied to his then agents (“**the Old Agent**”).

14. On 1 March 2017 HMRC issued further penalty notices for non-payment of both PPNs:

10 (1) £2,222.77 for 2011-12 and £2,023.53 for 2012-13, for non-payment after five months (“**the Second Penalties**”).

(2) Identical amounts for non-payment after eleven months (“**the Third Penalties**”).

15. The notices charging the Second Penalties and Third Penalties were not copied to the Old Agent.

15 16. During March and April 2017 HMRC’s debt management section (“**the DMB Team**”) made five attempts to contact Dr Khaled by telephone and requested call-backs but none were returned by Dr Khaled. On 1 June 2017 the DMB Team wrote to Dr Khaled requiring payment by 15 June and warning of possible enforcement action.

20 17. On 3 November 2017 HMRC issued a letter before action for proceedings in the county court for the PPNs, the penalties, and interest; the amounts due were itemised in a statement of liabilities.

18. On 12 January 2018 the New Agent wrote to HMRC stating inter alia,

25 (1) The PPNs were the subject of judicial review proceedings (sub nom *Barrett & others v HMRC*) and interim relief had been granted to the taxpayers pending the outcome of that application.

(2) Neither Dr Khaled nor the New Agent had received the notices charging the Second Penalties and Third Penalties.

(3) Dr Khaled wished to discuss a payment by instalments.

30 19. HMRC replied that they did not hold authority to deal with the New Agent and on 19 February 2018 a Form 64-8 authority form was supplied. HMRC also stated (on 31 January 2018) that they understood Dr Khaled was not a party in the judicial review proceedings; they could trace no submission of payment proposals (other than a statement that time would be required); and the county court proceedings continued.

20. On 19 February 2018 the New Agent wrote asking for copies of the penalty notices dated 1 March 2017; requesting permission for a late appeal against those; and making an instalment payment proposal. On 9 March 2018 HMRC provided the requested copies. On 3 April 2018 the New Agent submitted a late appeal against the
5 Second Penalties and the Third Penalties:

“Please accept this letter as an appeal against the aforementioned penalties.

The grounds for appeal are that our client had a reasonable excuse for not paying the APN because:

- 10
- He had received no response to his representation made
 - He had commenced correspondence in respect of agreeing a time to pay arrangement
 - He is aware that the legality of the decision to issue APN in this case is currently being challenged by way of judicial review.”

15 21. The late appeal was refused by HMRC on 26 April 2018, stating:

“Reasonable excuse

The law says that when you appeal to HMRC you must do so within the time limit. We may accept a late appeal if you had a reasonable excuse for not appealing within the time limit, and you appealed as soon as you could after the excuse ended
20

The law does not say what a reasonable excuse is. However our view is that you have a reasonable excuse only where some event beyond your control has prevented you from sending in an appeal within the time limit. Each case is considered on its own facts.

25 The reasons you have given do not appear to me to satisfy these requirements because:

- We received representations in regards to your PPNs on 14 December 2015. We issued a conclusion letter dated 15 February 2016 confirming the PPNs are due and payable.
- You advise that you commenced correspondence for a payment arrangement (PA). However no PA was agreed, due to the PPNs being still due and payable you became liable for late payment penalties
- You advise that the legality to issue PPNs is currently being challenged by the way of judicial review (JR). Our systems
35 advise you are not in a JR.

HMRC maintains the Accelerated Payment legislation governing the issue of an APN notice is legal. There is no requirement for HMRC to

put the APN process on hold pending the outcome of a judicial review. Therefore the payment of the APN amount remained due in full by 21 March 2016.”

5 22. On 24 May 2018 Dr Khaled applied to this Tribunal for permission to bring a late appeal against the Second Penalties and the Third Penalties, pursuant to s 49 (2)(b) Taxes Management Act 1970.

Law

10 23. Paragraph 7 sch 32 Finance Act 2014 applies the penalty provisions in s 226 FA 2014 to late payments of sums assessed by PPNs, and s 226 provides (so far as relevant):

“226 Penalty for failure to pay accelerated payment

15 (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.

20 (3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

(4) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

25 (5) “The penalty day” means the day immediately following the end of the payment period. ...”

24. A taxpayer may appeal a late payment penalty: s 226(7) FA 2014 and sch 56 FA 2009. The deadline for an appeal is 30 days after issue of the penalty notice: ss 31 & 31A TMA 1970. A late appeal may be admitted by HMRC or, if HMRC refuse, the Tribunal: s 49 TMA 1970.

30 Respondents’ case

25. Mr Cawley submitted as follows for the Respondents.

35 26. HMRC opposed the application. After HMRC’s letter of 10 May 2016 refusing the appeal against the First Penalties HMRC had no contact from Dr Khaled until the DMB Team issued a letter before action on 3 November 2017, despite several attempts to contact him by telephone. HMRC believed that the request for a late appeal was really just an attempt to delay the county court debt enforcement proceedings. The amounts due under the PPNs (total in excess of £84,000) were still unpaid despite a due date of 21 March 2016, quite apart from the disputed penalties.

The Tribunal in *Beadle* [2017] UKFTT 0829 (TC) stated that a taxpayer's belief that a PPN is incorrect does not entitle him to choose not to pay the amount due:

5 “[202] ... Even if the appellant had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the underlying understated partner tax liability, this could not form a reasonable excuse for failure to pay the PPN within the payment period.

10 [203] ...a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN within the payment period and make whatever challenges (whether statutory or extra statutory) to the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot
15 reasonably excuse making a payment on the sum due under the PPN that Parliament has required should be made in the interim.”

27. The notices for the Second Penalties and Third Penalties had been validly issued to Dr Khaled at the address known to HMRC. Those notices were not copied to the Old Agent; the New Agent had not been notified to HMRC when the notices were
20 issued (1 March 2017). No explanation had been provided by Dr Khaled as to why he had “no record of receiving the penalty notices” (in his words), nor why he did not respond to HMRC's several requests for a call back on his debt management, or the DMB Team's letter dated 1 June 2016.

28. Dr Khaled would have been aware of the prospect of penalties for late payment
25 because (i) he had been charged the First Penalties but had chosen not to appeal them to the Tribunal; and (ii) the letters in August to November 2015 clearly stated the penalties chargeable on late payment.

29. The period of lateness was considerable; the deadline for appeal against the Second Penalties and the Third Penalties was 31 March 2017 but the appeal was not
30 made until 19 February 2018. In *Romasave (Property Services) Limited* [2016] UKFTT 0793 (TC) the Tribunal stated (at [96]): “In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant.”

35 30. HMRC would be severely prejudiced by a late appeal at this time, when county court proceedings had already reached the stage of a judgment in their favour.

31. The grounds on which Dr Khaled proposed to challenge the Second Penalties and the Third Penalties (if permitted) were unmeritorious. It was not correct that he had not received a response to his representations on the PPNs – see HMRC's letter dated
40 15 February 2016. It was not correct that Dr Khaled had commenced correspondence in respect of a time-to-pay arrangement – in fact, he dodged repeated calls from the DMB Team trying to make contact about his debt. It was not correct that Dr Khaled was a party to any judicial review proceedings.

Appellant's case

32. The points submitted by the New Agent may be fairly summarised as:

(1) HMRC have not proved that the notices for the Second Penalties and Third Penalties were issued.

5 (2) Even if they were issued, neither Dr Khaled nor the New Agent received them until copies were provided in March 2018.

33. In his witness statement Dr Khaled confirms that he has no record of receiving the notices for the Second Penalties and Third Penalties, nor any indication from Royal Mail that they unsuccessfully attempted to deliver them, and if he had received them
10 then he would have handed them to his agents.

Consideration and Conclusions

34. I deal first with the contention that the notices for the Second Penalties and Third Penalties were not issued. Copies of the 1 March 2017 letters were in the trial bundle; I also had a witness statement by the HMRC case officer (Ms Liz Brown) describing
15 the office procedures followed when issuing penalty notices. I am satisfied that the notices were validly issued.

35. The Tribunal has discretion to permit a late appeal. In the recent case of *Martland* [2018] UKUT 0178 (TCC) the Upper Tribunal gave the following guidance:

20 “44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton and others v TH White Limited and others* [2014] EWCA Civ 906, [2014]
25 1WLR 3926]:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being “neither serious nor significant”), then the FTT “is unlikely to need to spend much time on the second and third
30 stages” – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

35 (3) The FTT can then move onto its evaluation of “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. ...

5 46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. ...

10 47. Shortage of funds (and consequent inability to instruct a professional adviser) should not, of itself, generally carry any weight in the FTT's consideration of the reasonableness of the applicant's explanation of the delay: see the comments of Moore-Bick LJ in [*R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 at [43]]. Nor should the fact that the applicant is self-represented – Moore-Bick LJ went on to say (at [44]) that “being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules”; HMRC's appealable decisions generally include a statement of the relevant appeal rights in reasonably plain English and it is not a complicated process to notify an appeal to the FTT, even for a litigant in person.”

25 36. On the length of the delay, the appeal was made almost eleven months late - due before 31 March 2017 but not made until 19 February 2018. That is clearly a significant delay.

37. I note that when the New Agent received the requested copies of the notices on 9 March 2018 they acted reasonably promptly to set out to HMRC their grounds of appeal (on 3 April).

30 38. On the reason for the delay, Dr Khaled maintains that he did not receive the notices. It is unfortunate that he chose not to attend the hearing so that he could explain the position in more detail than in his brief witness statement, and answer questions from HMRC and the Tribunal. I do not understand the reference to the New Agent not having been copied on the notices as it seems that firm were not acting (or at least, not authorised to act) for Dr Khaled in March 2017. In any event, HMRC confirmed that the notices were sent only to Dr Khaled. There is an oblique suggestion by the New Agent that an incorrect address may have been used but no details are given and there is nothing in the correspondence in the trial bundle to suggest that HMRC used anything but the address notified to them. What is clear is that after HMRC refused to withdraw the First Penalties on 10 May 2016 Dr Khaled ceased to engage with the process. He took no further action to dispute the First Penalties, thereby apparently accepting that they were due. The correspondence leading up to that point can have left him in no doubt that continued failure to pay would result in further 5% penalties for both years. If he had chosen to respond to the DMB Team's letter of 1 June 2017 or had returned any of the phone messages left with him in March and April 2017, then an explanation of his liabilities would have alerted him to the fact that further penalties had been charged. Instead, he seems to have chosen to ignore the inconvenient fact that he owed HMRC around £89,000 (not

including the Second Penalties and Third Penalties) and was only prompted into belated action when HMRC issued a county court letter before action.

39. I accept Mr Cawley's submission that to allow in the late appeal would severely prejudice HMRC. HMRC have done everything required of them under the legislation, have dealt with the legitimate protests of Dr Khaled (his representations on the PPNs, which resulted in a reduced charge, and his appeal against the First Penalties), and have attempted to maintain contact with the taxpayer to ensure compliance. All that has progressed to the stage of enforcement proceedings in the county court, and only at this late stage does Dr Khaled choose to dispute certain matters, out of time.

40. I am obliged to consider the strength of Dr Khaled's case if he were permitted to make a late appeal. His grounds are as set out above at [20]. He has no real case. Each of his three arguments is factually incorrect – I agree with the clear refutations put forward by Mr Cawley (see [31] above), all of which are supported by the documentation in the trial bundle. For completeness I would add:

(1) The fact that a taxpayer considers he has a good chance of success in judicial review proceedings in connection with advance payment notices (including PPNs) provides no reasonable excuse for non-payment: see *Sheiling Properties Ltd* [2018] UKFTT 247 and *Kieran O'Donnell* [2016] UKFTT 743. A fortiori, a taxpayer in a similar position but who is not a party to the judicial review proceedings cannot use that hope as a reasonable excuse for failure to pay. The whole point of the advanced payments legislative scheme is to require payment first and dispute later: *Beadle* (cited above).

(2) A taxpayer's lack of funds cannot usually constitute a reasonable excuse for non-payment: para 16 sch 56 FA 2009.

41. Taking all the above together in a balancing exercise, I am satisfied that it would not be just and fair to admit a late appeal against the Second Penalties and Third Penalties. Thus I must refuse the application for admission of a late appeal.

30 **Decision**

42. The application is REFUSED.

43. 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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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 11 SEPTEMBER 2018