TC01406

Appeal number: TC/2011/02032

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

WESTBEACH APPAREL UK LTD **Appellant**

- and -

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

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 13 July 2011 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 9 March 2011, HMRC's Statement of Case dated 14 April 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against penalties totalling £500, imposed in respect of the late filing of its P35 employer's annual return for the tax year 2009/10. The deadline for filing the return was 19 May 2010.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that Section 98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

> (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
>
> (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, ...
>
> (3) For the purposes of subsection (2)(*a*) above, the relevant monthly amount in the case of a failure to make a return—
>
> (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, ...

4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the Tribunal may

> (i) if it appears ... that no penalty has been incurred, set the determination aside,
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> (ii) if the amount determined appears ... to be correct, confirm the determination, or
>
> (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount.

5. Section 118(2) of the TMA provides as follows:

> (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or

> the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

The arguments of the parties

6. An internal HMRC review dated 9 February 2011 of the penalty determination states as follows. The Appellant appealed on the ground that his agent believed that the return had been filed electronically on 13 May 2010 and received a confirmation, but that HMRC appears to have logged the return as a "test", that the Appellant should not be penalised for this kind of error, and that if the agent had been notified of the problem in May or June 2010 it could have been rectified earlier. The internal review rejected the appeal on the ground that the Appellant's reliance on the agent was not a reasonable excuse, that the agent should have had a robust process in place to ensure that all returns were successfully submitted, that HMRC's own system does not have a "test" facility but that many commercial software packages do, and that the operator has to actively access the "test" mode and the screen clearly shows that it is in the "test" mode. The internal review further stated that HMRC website guidance advises that the e-mail confirmation for a test return is the same as for a live return, so that if a confirmation is received for a test message, it is still necessary to submit a proper return.

7. The Appellant's case as stated in the notice of appeal is that the Appellant's agent, a payroll agency, sent the return online as part of a batch on 13 May 2010, and that a confirmation was received, and that a penalty notice then came out of the blue four months later. Checks revealed that the return was sent accidentally as a test. Had the payroll agency been aware of this, live submissions would have followed and no penalty would have been incurred. The online receipt for test returns is the same as that for live returns, which convinced the payroll agency that a live return had been submitted. The same mistake was made in relation to other returns, and in those cases the penalty has been amended to zero, but in this case the penalty has been maintained. HMRC should have informed the payroll agency or the Appellant promptly, rather than waiting four months and allowing the penalties to accumulate.

8. The HMRC statement of case states amongst other matters as follows. The responsibility for filing the return on time rests solely with the Appellant and this responsibility cannot be transferred to an agent even if the late filing is the fault of the agent. HMRC confirms that a test submission was sent on 13 May 2010, but that a live submission was not made until 12 October 2010. HMRC also confirms that the confirmation message for a test submission is the same as that for a live submission. HMRC "cannot comment" on the statement that penalties in relation to several other returns sent in the same batch were reduced to nil. There is no statutory timetable for issuing penalties. A first interim penalty is issued if the return has not been received after four months. A second interim penalty is issued where the return has still not been received after a further four months. A penalty notice is not a reminder to

submit a return, and HMRC has no statutory obligation to issue reminders. HMRC submits that the Appellant has no reasonable excuse for the late filing of the return.

The Tribunal's view

9. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability.

10. On the basis of the evidence the Tribunal is satisfied that that the Appellant's payroll agent sent the return as a test submission on 13 May 2010, and that a live submission was not made until 12 October 2010. The Tribunal also finds, as conceded by HMRC, that the confirmation message for a test submission is the same as that for a live submission.

11. The Tribunal also accepts the HMRC submission that a penalty notice is not a reminder to submit a return, and that HMRC has no statutory obligation to issue reminders.

12. The HMRC internal review letter stated that HMRC's own system does not have a "test" facility but that many commercial software packages do, and that the operator has to actively access the "test" mode and that the screen clearly shows that it is in the "test" mode. No direct evidence of these matters has been placed before the Tribunal. On the basis of the evidence before it, and the facts stated by one party that have not been disputed by the other, the Tribunal is satisfied that it ought to be apparent to a person submitting a return whether the system is in "test" mode or "live" mode, and that while the confirmation message may be the same in either case, the operator of the system should know whether the submission being confirmed was sent in test mode or in live mode. The Tribunal therefore finds on a balance of probabilities that a payroll agent exercising due diligence would not have made this mistake.

13. In relation to the HMRC argument that reliance on a third party, in this case a payroll agent, does not amount to a reasonable excuse, the Tribunal notes that in *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199 the Tribunal found at paragraph 20 that it had been "reasonable for the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations". That decision concluded at paragraph 23, referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that "reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context".

14. The Tribunal notes that this case concluded that reliance on a third party "can" be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.

15. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable

specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had "relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists". It was further found in that case (at para. 8(q)) that as the appellant "did not have the specialist knowledge and expertise herself she employed and relied upon persons whom she reasonably believed to have such specialist knowledge and expertise".

16. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to pay taxes on time through incorrect advice received by a specialist.

17. The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

18. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet its obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse.

19. The Tribunal finds that the failure to submit the return on time was a mistake that would not have been made with due diligence, and therefore find that the Appellant's claimed reliance on the payroll agent does not amount to a "reasonable excuse".

20. The Tribunal finds that the fact that HMRC did not pursue penalties in respect of other returns submitted in the same batch, even if this were true, would not be a "reasonable excuse" and is not otherwise material to this appeal. However, no evidence has been submitted of the contention that the penalties were not pursued in other cases. On the material before it, the Tribunal is therefore incapable in any event of finding that similar cases have been treated inconsistently by HMRC.

21. The Tribunal finds that the Appellant has advanced no other circumstances that would amount to a "reasonable excuse" for late filing under s.118(2) of the TMA.

Conclusion

22. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

23. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 22 AUGUST 2011