TC01756

Appeal number:TC/2011/04338

Late filing of End of Year return by an unincorporated association; penalties; s.98A (2) and (3) TMA; "reasonable excuse under s.118(2) TMA not found

FIRST-TIER TRIBUNAL

TAX

ANNE-MARIE WADE
T/a ADEL PLAYGROUP ASSOCIATION **Appellant**

- and -

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

TRIBUNAL: JUDGE: CHRISTOPHER HACKING

Determined 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 2 June 2011, HMRC's Statement of Case submitted on 25 July 2011 and the Appellant's Reply dated 6 September 2011.

DECISION

1. This was an appeal against a decision confirmed on review imposing fixed penalties under Section 98A(2)(a) and (3) Taxes Management Act 1970 (TMA) following the late submission of the Employers Annual End of Year Return for the tax year ending 5 April 2010.

2. The return was due to have been filed online by 19 May 2010. It was submitted late on 25 March 2011. A first interim penalty notice was issued on 27 September 2010 in the sum of £400 with a second such notice on 24 January 2011 again in the sum of £400. The issue of further penalties has been suspended pending this appeal.

3. HMRC's Statement of Case rehearses the relevant provisions of the tax legislation requiring a return to be submitted. Also detailed in the HMRC Statement of Case are the provisions of Section 98A TMA dealing with the calculation of the fixed penalties payable when a return is filed late. These statutory provisions are not in issue between the parties.

4. Section 118 (2) TMA allows for the penalty to be set aside where there is a reasonable excuse for the failure to file on time. What a "reasonable excuse" might be is not defined. The Revenue considers that any such reason would have to be something exceptional or out of the Appellant's control. The Tribunal does not accept that this approach is definitive. The words "reasonable excuse" are ordinary words to be construed accordingly. However the criteria proposed by the Revenue whilst neither definitive nor exhaustive, do in the view of the tribunal, represent a reasonable starting position for considering what is and what is not a "reasonable excuse". It seems unlikely that it was Parliament's intention that an employer could avoid the duty to file a return on time by reason only of some "ordinary" excuse nor does it seem likely that matters within the taxpayers control would generally found such an excuse.

5. The appellant's case as stated in its Notice of Appeal is that the error made in the failure to file online was *"a simple IT related error from a concern with a previous unblemished record in submitting end of year returns as validated by HMRC records"*

6. The appellant goes on to say *"When I realised, from the HMRC Decision letter of 24th February that it was I who was in the wrong and not HMRC (!) then I rectified the error within a few weeks – which I suggest satisfies the 2nd leg of s.118(2) TMA1970 which requires that ------"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 if he did it without unreasonable delay after the excuse had ceased" "*

7. The letter of 24 February 2011 was the Revenue's letter containing its decision on review of the appellant's appeal. Whilst the appellant was awaiting this review decision a 2nd fixed penalty was imposed (on 24 January 2011). For the avoidance of doubt this decision deals with both of these fixed interim penalty notices. Together they total £800.

8. Although the Appellant has in its Notice of Appeal clearly stated that the appeal is not made on the footing that it is a small playgroup, subsequent correspondence and submissions to the tribunal do refer to the essentially local and community aspects of the playgroup pointing out that those dealing with the running of the group change from time to time. Mention is also made of the fact that the title to the appeal wrongly, in the view of the Appellant, states that the group "trades as" Adel Playgroup Association. The tribunal understands that the Appellant may think that this wrongly suggests that the Group is a profit making enterprise and thus different in character from its true nature. The tribunal agrees that in this respect the words "trades as" are not particularly apposite. In law the Association would appear to be an unincorporated association registered as a charity and as such its principal officers (Chairman, Treasurer, Secretary etc) are responsible for compliance with legal obligations including the obligation to file tax returns and to account to the Revenue for tax and National Insurance contributions for its employees (if any) in just the same way as would an individual or a company. The tribunal understands that this is not a matter in issue between the parties.

9. What is in dispute is the question whether the facts supporting the reasons for the Appellant's delays in filing its end of year return constitute a reasonable excuse.

10. Apart from the fact that the failure to file was the result of a "simple IT related error" little more is said as to the circumstances giving rise to this error in the Notice of Appeal.

11. Following the submission by the Revenue of its Statement of Case on 25 July 2011 letters by way of reply dated 1 and 6 September 2011 were received from the Appellant. These were then followed by a further letter dated 15 September (enclosing a statement from the Playgroups leader Mrs Lesley Williams). In this last mentioned statement Mrs Williams describes the way in which post for the Playgroup is dealt with. In particular Mrs Williams says that she and a Mrs Isle dealt with incoming mail at the time the letter dated 24 January 2011 should have been delivered to the Appellant but that "*we did not receive the penalty notice*". This letter and statement was before the tribunal when it made its decision on 10 October 2011 and was considered.

12. In addressing the matters raised by this appeal the tribunal must first consider whether the "simple IT related error" affords to the Appellant a "reasonable excuse" such as to justify the setting aside of the penalty. Whilst the Revenue's description of what it regards as a "reasonable excuse" is not binding on the tribunal, the tribunal is not persuaded that the reason advanced by the Appellant in this appeal can properly be considered to amount to a "reasonable excuse". The preparation and filing of the end of year return is a matter which was wholly within the control of the Appellant. The arrangements for electronic filing of returns have been well publicised by the Revenue and the appellant must have been aware that a successful filing will in all cases be acknowledged either by an automatic confirmation on the Revenue intranet or by a separate e-mail sent very shortly after the filing. Absent either of these the Appellant must be considered as on notice that the attempt to file has not been

successful. That was the time when action needed to be taken to set the matter straight. Simply assuming that all was well was not satisfactory.

13. Mrs Wade as Treasurer wrote to the Revenue on 1 February 2011 (the letter is wrongly dated 2010) explaining that she had been doing the Playgroup's payroll for a couple of years and had installed a CD rom on her laptop. Passwords had gone astray and she needed to make contact (presumably with the Revenue) before she was able to file on line. She continued *"I followed the on screen instructions to complete the return and it did ask for my log on details and clicked ok, I assumed that this was it as I was then able to print the p 60's off the CD rom and as far as I was concerned that was it done for another year."* In this case it was precisely because there had been problems that Mrs Wade should have been careful to check the return intranet message or e-mail from the Revenue confirming successful receipt of the transmission of the return.

14. In the finding of the tribunal the circumstances described concerning the attempted filing of the return do not constitute a reasonable excuse. The tribunal is aware that in other published First-Tier Tribunal decisions circumstances similar to the above may have been considered as constituting a "reasonable excuse". However each case must be considered on its facts. First-Tier Tribunal decisions are not of binding authority for this tribunal which having considered the particular facts must make its own decision based on those facts.

15. Much of the Appellant's appeal concerns the fact that the penalty was not made known to it until receipt of the second fixed interim penalty notice on 24 January 2011. The Revenue state that the first of such notices was sent to the Appellant on 27 September but the Appellant's evidence is that this was not received. That the mistake was that of the Revenue in failing to post the letter seems unlikely given its procedures for recording and effecting the despatch of communications such as this. It is possible that the letter was lost in the post or mis-delivered. It is also possible that despite its best efforts the letter was in some way overlooked by the Appellant. The tribunal cannot make a finding about this as there is insufficient evidence. It is in acknowledgment of that fact that the tribunal has been prepared to reduce the first fixed interim penalty to £100 only.

16. Even when the imposition of the first penalty was made known to the Appellant on 24 January 2011 it took until 25 March 2011 for the Appellant to regularise the position by filing the return. For this reason the second fixed interim penalty is confirmed.

17. For the reasons stated above the appeal is allowed in part.

18. 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.

TRIBUNAL JUDGE CHRISTOPHER HACKING
RELEASE DATE: 17 January 2012