TC01788

Appeal number: TC/2011/04863

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

FIRST-TIER TRIBUNAL

TAX

CRAFTS4KIDS 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 20 January 2012 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 18 June 2011, HMRC's Statement of Case dated 5 September 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against penalties totalling £600, 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—
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> (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, ...
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> (3) For the purposes of subsection (2)(*a*) above, the relevant monthly amount in the case of a failure to make a return—
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> (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
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> (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. The Appellant's notice of appeal states the following. The company has always made its PAYE payments and returns on time with the exception of the P35 for 2009/10, which the company tried to file on time electronically. It was only upon receipt of the penalty notice that the Appellant realised that the electronic filing had not been successful. The company had filed electronically successfully in previous years. There was no financial advantage to the company in not filing on time. Once the penalty notice was received, payment was made within 3 days. The Appellant "fully accept[s] that it is our duty to ensure that electronic filing is successful, but unfortunately in this instance we failed to ensure that we had the appropriate verification". HMRC only issue penalty notices in September and May. By waiting such a lengthy time to notify customers of instances of non-compliance, the penalty is issued not only once, but a further 5 times, resulting in a wholly disproportionate penalty for an innocent omission, given especially the Appellant's previous record of compliance. The European Court of Human Rights has held that penalties must be proportionate to the mischief that they are designed to combat, and there must be a balance between punishment and deterrence on the one hand, and reasonableness on the other. The Appellant has been penalised £600 for not filing a return which showed a nil liability. The Appellant accepts that a penalty of £100 would be appropriate.

7. The HMRC statement of case states amongst other matters as follows. The return was required to be filed online by 19 May 2010. A first penalty notification was issued on 27 September 2010 for £400, for the period 20 May 2010 to 19 September 2010. The return was filed online on 20 October 2010, showing a liability of £6,869.81. A final penalty of £200 was issued on 1 November 2010 for the period 20 September 2010 to 20 October 2010. There is no statutory timetable within which HMRC must follow when issuing penalty notices. They are generally issued automatically 4 months after the due date if the return has not been received, and again after a further 4 months if the return is still not received, and then a final penalty notice is issued when the return is received. A penalty notice is not a reminder and there is no statutory obligation on HMRC to issue a reminder. HMRC have no discretion in setting the level of the penalty which is fixed by statute. There is comprehensive HMRC guidance on how to file online which is issued to employers. The Appellant had filed returns online successfully in previous years and was therefore aware of the process, which is straightforward. The computer system sends the user a message indicating whether submission of the return was successful or not. The penalties are fair, reasonable and proportionate, and the present case cannot be compared to *Enersys Holdings UK Ltd v Revenue & Customs* [2010] UKFTT 20 (TC) ("***Enersys***"). Reliance is placed on *Durnbrae v Revenue & Customs* [2011] UKFTT

280 (TC). A prudent employer exercising reasonable foresight and due diligence would have successfully file online by the due date.

8. In reply, the Appellant places reliance on *Hok Ltd v Revenue & Customs* [2011] UKFTT 433 (TC) ("*Hok*") and *HMD Response International v Revenue & Customs* [2011] UKFTT 472 (TC) ("*HMD*").

The Tribunal's findings

9. The Tribunal finds that the penalties have been imposed in accordance with the applicable legislation. The Tribunal further finds that the Appellant does not have a reasonable excuse for the late filing. The Appellant says that an attempt was made to file online within the deadline, but that "unfortunately in this instance we failed to ensure that we had the appropriate verification". The Tribunal is satisfied that normally an employer exercising due diligence would be capable of filing successfully within the deadline, or of knowing whether an attempted online submission was unsuccessful. Nothing has been advanced to suggest that anything in particular of an abnormal nature had occurred here that prevented the Appellant from filing successfully by the due date, despite the exercise of due diligence.

10. There remains the Appellant's argument that the penalty is disproportionate. The Appellant relies on *Hok* and *HMD*. In *Hok*, the Tribunal said:

> 11. Thus, HMRC deliberately waits until four months have gone by and does not issue the first interim penalty notice until, as in this case, September of the year of default. By that time a penalty of £400, being four times £100 per month, is said to be due. In fact, if the penalty notice operates as a reminder and the taxpayer undertakes the necessary filing forthwith, a further one month penalty arises because the *de facto* reminder is received only after it is too late to avoid a further £100 penalty. Thus, the effect of HMRC desisting from sending out a penalty liability notice very soon after 19 May of the relevant year, and choosing deliberately to delay that penalty notice until four months has gone by, is to result in the taxpayer facing a minimum penalty of £500. We appreciate that HMRC takes the stance that it is the responsibility of the taxpayer to make the necessary filing and that it is its stance that it has no obligation to issue any reminder. However, we have no doubt that any right thinking member of society would consider that to be unfair and falling very far below the standard of fair dealing and conscionable conduct to be expected of an organ of the State.
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> 12. There can be no logical reason whatsoever for HMRC to delay sending out a penalty notice for four months so that, in effect, a minimum penalty of £500 will be levied unless the taxpayer has unilaterally realised that it has failed to undertake the necessary filing.

11. However, *Hok* is not a binding precedent, and in any event does not go so far as to say that a penalty of no more than £100 can be imposed where HMRC waits 4 months before issuing the first penalty notice. For instance, in *Resources for*

Learning Pension Fund v Revenue & Customs [2011] UKFTT 844 (TC) it was said at [11]:

> The case of *Hok Limited v HMRC* is not binding on this Tribunal. It is accepted on behalf of the Appellant that the case is distinguishable on its facts. In considering the principles set out in the case, the Tribunal noted that the view taken in *Hok* was that HMRC had deliberately desisted from sending a penalty notice, which acts as a reminder. The Tribunal agreed that it is unfortunate that HMRC's policy is not to issue first penalty notices until there is already a four month delay, but did not consider that this could provide the Appellant with a reasonable excuse for its delay in submitting the return; even if the Tribunal had taken such an approach, it is noted that the P35 was not submitted until 14 January 2011, over 3 months following the first interim penalty notice being issued. There is no statutory obligation on HMRC to remind taxpayers of their legal duties and it the Tribunal found as a fact that the penalty notice is not intended to be such. The Tribunal did not accept that the delay in notifying the Appellant of the penalty amounted to a reasonable excuse.

12. Again, in *Dent Parish Council v Revenue & Customs* [2011] UKFTT 782 (TC), in which *Hok* had been relied on by the appellant in that case, it was said at [11]:

> The Tribunal takes the view that ordinarily when a penalty falls due HMRC should notify the tax-payer, as a matter of course, so that the default is not repeated and penalties accumulated unnecessarily. However in this particular case, even after imposition of the penalty, there was a further delay from notification of the penalty on 27 September 2010 to 20 January 2011 when the return was finally filed. Consequently it cannot be said that the Parish Council has exercised due diligence and expedition in dealing with the default. Therefore, any reasonable excuse which might have existed did not continue throughout the entire period of default and the Tribunal cannot accept that a reasonable excuse has been shown. Accordingly the appeal is dismissed and the penalty is confirmed.

13. As regards *HMD*, this case also cannot be regarded as settled case law: see for instance *Agar Ltd v Revenue & Customs* [2011] UKFTT 773 (TC) at [50].

14. In the present case, the Tribunal is not persuaded that the Appellant could not have known of the default until the penalty notice was received. The evidence is that the computer system indicates at the time of submission whether the submission has been successful or not, and that this is made obvious to users at the time. The Appellant says that "unfortunately in this instance we failed to ensure that we had the appropriate verification". However, HMRC cannot be faulted for the Appellant's failure to do so. No explanation for the late filing is given other than that the Appellant tried to file online but "failed to ensure" that it had successfully done so. Even after the penalty notice had been issued on 27 September 2010 for £400, the return was not filed until 20 October 2010, by which time a further monthly penalty had been incurred.

15. In the circumstances, the Tribunal is not persuaded that the penalty imposed in this case was, in the language of *Enersys*, "devoid of reasonable foundation" or "not merely harsh but plainly unfair".

16. It follows that the appeal must be dismissed.

Conclusion

17. Under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 27 January 2012