



TC03124

Appeal number TC/2012/01955

INCOME TAX – EMPLOYERS ANNUAL RETURN – penalty for late filing – Regulation 73(1) The Income Tax (PAYE) Regulations 2003 and Para 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 – reasonable excuse –proportionality - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL THOMSON

Appellant

- and -

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

Respondents

**TRIBUNAL G. NOEL BARRETT LLB PRESIDING MEMBER
JUDGE DAVID DEMACK**

**Sitting in public at Alexandra House The Parsonage Manchester
on 12 August 2013**

Mr WJF Fairman Accountant, for the Appellant

M/s S Whitley of HM Revenue and Customs, for the Respondents

DECISION

Introduction

5

1. This is an appeal against penalties for late filing of the Appellant's P35 Employers Annual Return for the tax year 2010-11.

10 2. Employers are required to submit their Returns to HMRC no later than 19 May (the due date), following the tax year end.

3. Interim penalties are charged where a return remains outstanding after the due date.

4. Penalties are charged at £100 per month for all or part of a month from the due date of the Return until the date it is received.

15 5. HMRC sent an electronic notification to the Appellant on 13th February 2011, requiring him to file a Employers Annual Return for the tax year 2010/2011

6. The Appellant filed his return online on 18th October 2011, 5 months after the due date.

20 7. Two late filing penalties have been imposed on the Appellant; the first on 26th September 2011 for £400; and the second on 21st October for a further £100.

8. The Appellant appeals on the grounds that he had a reasonable excuse for the late filing of his return and that it was unfair of HMRC not to inform the Appellant of his late filing, (so allowing monthly penalties to accrue) earlier than they did.

The Law

25 9. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 impose a statutory obligation on an employer to deliver an Employer's Annual Return before 20 May following the end of a tax year.

30 10. With regard to the imposition of penalties section 98A TMA 1970 (2) and (3) state;

(2) "...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...."

35

(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, and.....”

5

11. Section 118(2) of TMA 1970 states;

“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”

10
15 12. Regulation 205-205B of the Income Tax (PAYE) Regulations 2003 provides that an employer must use electronic communications to deliver the Employer’s Annual return on-line from the 2009-10 tax year onwards.

13. The Government had first announced in 2002 that small employers would be required to file on-line by 2010.

20 **The Evidence and our Findings of Fact**

14. We were able to read and refer to the Document Bundle and also heard oral evidence from Mr Fairman the Appellant’s Accountant and Ms Whitley for HMRC. Mr Fairman explained that Mr Thompson the Appellant was a sole trader and had decided that he could not afford to attend the hearing.

25 15. There was no dispute between the parties and we accepted that the Appellant had been properly notified by means of a P35N of the need for him to file a P35 return for the tax year 2010-11; that the Appellants P35 return had been filed late on 18th October 2011; and that the penalties totalling £500 (£400 + £100) had been correctly calculated and imposed by HMRC.

30 16. The Appellant had previously filed his Employer’s Annual Returns on time and was regarded by HMRC as an experienced employer who was well aware of his filing responsibilities, having been registered as an employer since 17th September 2003.

35 17. The Appellant appealed against the penalties on the 10th February 2012 on the ground that he had reasonable excuse for filing his P35 return late. Mr Fairman said that the Appellant had thought that his employee, Miss Sarah Jane Whelan (whose duties included filing his P35 returns and who had walked out a few days before the due date, after a dispute with the Appellant), had submitted his P35 return online before walking out and therefore by the due date; and that the first indication that he,

the Appellant had that the P35 had not been submitted, was when he received the penalty notice from HMRC dated 26th September 2011.

18. Mr Fairman explained that prior to the Appellant employing Miss Whelan, he had employed Mr Fairman's firm, WJF Fairman and Co, to undertake his book keeping and to deal with PAYE. But on employing Miss Whelan approximately 12 months prior to her leaving, she was required to look after the Appellant's books and to deal with PAYE and his returns to HMRC.

19. Mr Fairman confirmed that Miss Whelan had attended his offices for training as to her duties and that she led both him and the Appellant to believe that she was competent. As a result Mr Fairman's firm had disclosed the PAYE and CIS computer passwords to her to enable her to prepare the returns.

20. Mr Fairman explained further that as well as being the Appellant's employee, Miss Whelan was also the Appellant's cohabitee. They had enjoyed a short stormy relationship which had begun to founder from the end of March 2011, ending in a physical attack on the Appellant. She had walked out on 10th May 2011 leaving the Appellant in some distress.

21. The Appellant had immediately contacted Mr Fairman and he had attended at the Appellant's premises to find things in an horrendous mess, paperwork having simply been piled up. Mr Fairman said that he had spent two full days preparing the paperwork for the computer. Although some new passwords introduced by Miss Whelan were known neither he nor the Appellant knew the password for the PAYE returns.

22. Mr Fairman said that he had told the Appellant to ask Miss Whelan if she had filled the P35 return online before she left she had told the Appellant that she had so filed them. Given that Miss Whelan had walked out 9 days prior to the due date, it was not unreasonable for Mr Fairman and the Appellant to presume that the P35 return had in fact been filed by the due date.

23. As soon as the Appellant received the first penalty notice, at the end of September 2011, he realised that that the return had not in fact been filed by the due date.

24. Mr Fairman said that had he and the Appellant not been misled by Miss Whelan there would have been sufficient time between the date she walked out on 10th May 2011 and the filing date, (before 20 May), to file the P35 return on time.

25. Mr Fairman submitted that the facts amounted to an unexpected and unusual event and therefore constituted a reasonable excuse.

26. He also submitted that it was unfair of HMRC to know that no return had been filed, and then to delay informing the Appellant of the fact for more than four months. He cited the case of the First Tier Tribunal decision in Hok Ltd v Revenue and Customs [2011] UKFTT 433 in support of his submission. (That decision was subsequently successfully appealed by HMRC and we refer to it below).

27. Little of the direct evidence which Mr Fairman gave, (of which he had first-hand knowledge), nor the information which his client had given him, (which strictly is hearsay), was challenged by HMRC and we accepted it. Though we think it unhelpful that in the Appellant's absence neither the Tribunal nor HMRC had the opportunity to question or test the information provided by Mr Fairman based on what the Appellant told him. Accordingly we attribute less weight to that evidence than we would have done had the Appellant himself given oral evidence to us.

28. Ms Whitley confirmed and we accepted that the burden of proving that the Appellant had a reasonable excuse rested on the Appellant.

29. She further submitted and we accepted that there was no statutory definition of a reasonable excuse.

30. Ms Whitley explained that HMRC considered a reasonable excuse to be an unexpected or unusual event that was neither foreseeable nor beyond the employer's control and which prevented the employer from complying with his obligation. A combination of unexpected and foreseeable events might, when viewed together, be a reasonable excuse. We accepted this.

31. Ms Whitley explained that in HMRC's opinion, the employer's conduct should be considered from the perspective of a prudent person exercising reasonable foresight and due diligence having proper regard for his responsibilities under the Tax Acts. We again accept HMRC's view.

32. She contended that what had been a misunderstanding between the Appellant and Miss Whelan, as to whether the P35 return had been filed did not amount to a reasonable excuse, as at all times it remained the Appellant's responsibility to ensure that his tax affairs were up to date. The legislation does not allow the Appellant to transfer or delegate his responsibility to an employee.

33. Ms Whitley submitted that the P35 N issued on 13th February 2011 clearly informed the Appellant that his 2010-11 Employer Annual Return had to be filed on-line by 19 May 2011 and warned of the consequences if it were filed late. She further submitted that information about PAYE including employer obligations and the submission of an Annual Return including Return filing dates and penalties were within the public domain and widely available on the internet and HMRC's website, and that HMRC also provided a telephone help line for employers. We accepted this.

Reasonable Excuse

34. The burden of establishing reasonable excuse lies on the Appellant.

35. We have weighed the evidence we have heard carefully given the Appellant's decision not to attend the hearing.

36. For the reasons we have already given the Appellant has not succeeded in establishing a reasonable excuse for the late filing of the P35 returns.

37. Given the clear breakdown in the relationship between the Appellant and Miss Whelan, and the state Mr Fairman found the Appellant's tax papers to be in - which took him two full days to sort out - we do not believe that the Appellant as a prudent business man, should have relied solely on Miss Whelan telling him that she had filed the P35 return on line. He should have made further enquiries of HMRC prior to the filing date to ensure that the return had in fact been filed.

38. Furthermore, had the Appellant been unable to obtain confirmation from HMRC that his P35 return had been filed by the due date, or had he been unable to file his return within the 9 days between Miss Whelan walking out and the due date, it would have been open to him to apply to HMRC for an extension of time for filing, provided that he did so before the due date. That would have been the action of a prudent businessman.

Proportionality

39. We do not believe that the total penalties in this case of £500 are "plainly unfair" in the terms of the earlier case of *Enersys HoldingsUK Limited v HMRC* [2010] UKFTT 20, nor in our opinion are the penalties devoid of reasonable foundation. The penalty regime has been imposed by HMRC strictly in accordance with the legislation as enacted by Parliament, and the penalty itself increases proportionally with the length of the defaults. Consequently, we are not satisfied that the penalty imposed is in any way disproportionate or unfair

40. The purpose is to penalise taxpayers for not filing by the due date.

41. As the tribunal in *Dina Foods Ltd v HMRC* [2011] UKFTT 709 (TC) observed at [41] and [42] and which we follow;

"41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, *Dina Foods Ltd* could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.

42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment

obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation.

5 42. Furthermore as recently decided by the Upper Tribunal in *Hok v HMRC* [2012 UKUT 363 (TCC)] at paragraph 41, which we again follow, this tribunal has in any event no judicial review function, nor can it apply principles of common law in determining the penalty. It cannot interfere with the penalties laid down by Parliament simply on the grounds of unfairness. The Upper Tribunal confirmed at paragraph 56 of their decision in *Hok* that;

10 “Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction”

15 43. It is thus plain that we do not have the power to allow this appeal on the grounds of unfairness, (even if we were minded to do so, which we are not).

Decision

44. For these reasons we are unable to allow this appeal on the grounds of either reasonable excuse or unfairness, and we therefore dismiss it.

20 45. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **G NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 10 December 2013