



TC03157

Appeal number: TC/2013/06451

PAYE – late submission of Employer’s Annual Return – Whether there was reasonable excuse for late submission of return - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HELEN LYNE GARDNER t/a NORTHFIELD HOUSE

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AIIT**

The Tribunal determined the appeal on 4 December 2013 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 10 September 2013 with enclosures, and HMRC’s Statement of Case received 23 October 2013 with enclosures. The Tribunal wrote to the Appellant on 28 October 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. A reply dated 11 November was received and considered by the Tribunal.

DECISION

1. Introduction

This considers an appeal against penalties totalling £600 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2009 – 2010. The appeal was made out of time but in the absence of any objection from HMRC the Tribunal has allowed the appeal to continue.

Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

2. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

Rowland v HMRC [2006] STC (SCD) 536.

Anthony Wood trading as Propaye v HMRC [2011] UKFTT 136 TC 001010)

A & G Jeffers v HMRC [2010] UKFTT 22 (TC) TC00337

Trimex Investments Ltd v HMRC TC2013/03529

3. Facts

Regulation 73(1) of Income Tax (PAYE) Regulations 2003 and Paragraph 22 of Schedule 4 of Social Security (Contributions) Regulations 2001 require an employer to deliver to HMRC a complete Employer Annual Return (Forms P35 and P14) before 20 May following the end of the tax year. In respect of the year 2009-2010 the appellant failed to submit complete Forms P35 and P14 until 9 November 2010. For employers of 50 persons or less Sections 98A(2) and (3) of The Taxes Management Act 1970 provide for a penalty of £100 for each month or part of a month that the return has not been made. On 27 September 2010 HMRC sent the appellant a first late filing penalty notice for £400 for the period 20 May 2010 to 19 September 2010. On 12 November 2010 HMRC sent the appellant a final late filing penalty notice for £200 for the period 20 September 2010 to 9 November 2010.

4. Appellant's submissions

A letter from the appellant to HMRC dated 24 July 2013 includes the following:

“...I also now understand that our final return was sent in late and that we have a penalty for this. I have contacted the company responsible for making this return who assured me that the return was made but was sent in again in the November when HMRC were unable to trace it.

5. On 8 August 2013 the appellant wrote to HMRC and stated;

“We sold the business on the 1st June 2009

The letter dated the 27th September 2012* was not received by me; I suspect that it had the incorrect address on it. This was finally rectified today and you now have the correct address I believe that I received the second letter, 12th November, because by then the local postman was recognizing the name and delivered by the name not the address.

We employed a company, Complete Office Solutions of Stroud, to run our payroll and do all our accounts.

On the sale of the business all the P45's for the employees were completed and, according to complete Office Solutions, all the appropriate forms and paper work was submitted to HMRC at that time as part of the process of closing the business down. When I became aware that HMRC had not received the required paperwork I contacted Complete Office Solutions and it was sent again in November 2010 if I remember correctly.

I do feel rather stuck in the middle over this as HMRC say they did not receive it and the Company concerned are adamant that it was sent as part of their normal process for closing a business. Indeed our accountant at the time thought it had been sent."

*The Tribunal has assumed that this is meant to be a reference to the first late filing penalty notice dated 27 September 2010.

6. In the Notice of Appeal against the penalties dated 10 September 2013 the appellant refers to her letters of 24 July 2013 and 8 August 2013. She adds "I don't believe that the penalty should be applied as "the fault" in this case is unclear.

It seems strange that all other paperwork regarding the ending of the business was received by HMRC but not the P35. They were all sent at the same time by the company working for us."

7. In a letter to the Tribunal dated 11 November 2013, received 18 November 2013 the appellant repeated some of the points in the above letters but also made the following comments

"Complete Office Solutions still maintain that the P35 was sent in with the P45s of all the staff when they closed the business down in June 2009. This is normal procedure and one would not be done without the other. HMRC received the P45's but say they have no record of the P35.

There had never been any intention to withhold the required forms or to submit them late.

I still feel that is a situation of no ones making but a set of circumstances that was rectified as soon as we were aware of the problem.

For this reason I still feel that it is unfair that we are being fined for a problem that was not of our making."

8. HMRC's submissions

HMRC say that the appellant's agent submitted an Employer's Annual Return for 2009 - 2010 late on 9 November 2010. Therefore the penalties totalling £600 were correctly issued and calculated.

9. HMRC say that no evidence has been provided by the appellant or his agent showing that the return was submitted by post or online. HMRC say they hold no records showing receipt of the P35 before the 19 May 2010.

10. HMRC say that each employer is responsible for dealing with and adhering to their obligation to file their employer returns by the due date – this obligation cannot be transferred to another person. Even if someone engages someone to assist with that obligation, the responsibility for submitting the personal tax returns rests squarely on the shoulders of the employer. It was Northfield House’s choice to allow their agent – Complete Office solutions – to file the return on their behalf. Northfield House still had a legal duty to ensure that their tax return was filed by the due date.

11. HMRC submit that the appellant should have sought confirmation from the agent that the P35 had been submitted and have asked for a copy and /or a submission receipt. HMRC say such a request would either have prompted the agent to ensure the return had been filed or made the agent aware that the P35 was outstanding.

12. HMRC quote from the First-tier tribunal decision case of A & G Jeffers v HMRC where the then Chamber President Sir Stephen Oliver QC stated “There may be circumstances in which the taxpayer’s failure, through his agent, to comply with, e.g. the obligation to make the return on time can amount to a “reasonable excuse”. To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional.”

13. HMRC also quote from the First-tier tribunal decision in the case of Trimex Investments Ltd v HMRC where Judge Manuell states

“The appellant was unable to produce any evidence to show the 2008/2009 Employer’s annual return had been filed. The onus fell on him. The fact that he had relied on a third party, i.e. an accountant to file the return is irrelevant. The fact that no tax was due to HMRC is similarly irrelevant because the filing option stands separately. No evidence has been provided that HMRC had caused or contributed to any misunderstanding or oversight.”

14. HMRC submit that both penalty notices were issued to the same address given by Northfield House.

15. Tribunal’s observations

The Upper Tribunal in the case of Hok Ltd considered whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states “...the statutory provision relevant here, namely TMA s 100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair.”

16. The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by the Taxes Management Act 1970 Section 118(2).

17. No evidence has been produced to establish that the appellant's annual return form P35 was submitted at any time prior to 9 November 2010. Neither the appellant nor the appellant's agent has given any other excuse for failing to submit the Employer's Annual Return until 9 November 2010. It is the appellant's responsibility to ensure the Employer's annual return Form P35 is sent on time.

A regrettable error or oversight by the appellant's agent does not establish a reasonable excuse for the late submission of an Employer's Annual Return.

The Tribunal considers that the quotes from the decisions in the cases of A & G Jeffers and Trimex Investments Ltd are relevant in considering this case.

18. HMRC have calculated the penalties totalling £600 accurately for the period 20 May 2011 to 9 November 2010. The appellant has established no reasonable excuse for the failure to submit its employer annual return for the year 2009/10 on time. The appeal is therefore dismissed.

19. 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.

**PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 4 December 2013