



TC03818

Appeal number: TC/2014/02686

PAYE – employer’s annual return – penalty for late submission- whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WHITELEY & CREASY (CAMBRIDGE) LTD Appellant

- and -

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

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 18.07.2014 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 13.05.2014 (with enclosure), HMRC’s Statement of Case submitted on 16.06.2014 (with enclosures) and the Appellant’s Reply dated 25.06.2014 (with enclosures).

DECISION

1. The Tribunal admits the late appeal; it is apparent that there has been some changeover of staff within the Appellant Company and there may have been communication problems.
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2. The Tribunal decided that the Late Filing Penalty Notice dated 23.09.2013 in the sum, of £400 was properly issued by the Respondents.
3. The appeal is dismissed.
4. The Tribunal found that the filing date for the Appellant's Employer Annual Return for the year 2012-2013 (forms P35 and P14) was 19.05.2013. The Return was to be filed electronically. On 16.06.2014, some 13 months after the due date, it had still not been filed electronically.
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5. The Tribunal further found that there was no reasonable excuse for the late filing of the Employer Annual Return.
6. While the Appellant alleges that the Return was sent electronically to the Respondents on 05.04.2013 the Respondents have no record of receiving it. The Appellant has no evidence that it was sent. If it had been successfully submitted electronically the Appellant would have received, and would now be able to produce, an acknowledgment message via the software or service used and if the Respondents had been provided with an email address an email message would also have been sent. The absence of such acknowledgments from the Respondents should have alerted the Appellants to the fact that something was wrong with any attempted electronic submission and they could have communicated promptly with the Respondents for help or advice. They did not do so.
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7. The Appellant has evidence of the successful submission of form HMRC-PAYE-RTI-EAS but this is an Employer Alignment Submission and is not the same thing as an Employer Annual Return.
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8. There is no evidence from the Respondents that there were any problems with the PAYE online filing system which is evidently active 24 hours a day, 7 days a week.
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9. The payment of tax due from the Appellants has no bearing on the issue of reasonable excuse and cannot be used in mitigation of the penalty in this case.
10. The submission of hard copies of the Annual Return does not meet with the statutory requirement for the Appellant to make an online submission.
11. The Appellant's good record of compliance with the Respondents with regard to tax matters does not assist them in this appeal.
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12. Notwithstanding allegations by the Appellant that they have not received a number of communications from the Respondents the Tribunal noted that the

Respondents sent them a P35N electronic reminder on 24.03.2013 and a further AR1N reminder on 28.04.2013. These will have served as reminders for the Appellants to carry out their legal responsibilities, with regard to the Return, in a timely manner. Furthermore a P35 Interim Penalty letter was sent to the Appellant at the end of May 2013 and the late filing penalty notice was sent to them on 23.09.2013. The Tribunal has difficulty accepting the Appellant's contention that there was no knowledge of the default until a letter from the Respondents dated 12.12.2013.

13. The Appellant's assumption that the Return had been filed before the deadline proved to be incorrect.

14. The test applied by the Tribunal in considering the matter of reasonable excuse is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the Return would become due on a particular date would not have avoided the default. The facts and chronology of events, set out in the Notice of Appeal and the Respondents' Statement of Case, disclose that such foresight and diligence by the Appellant would have avoided the default.

15. In so far as the Appellant may suggest that the imposition of the penalty is disproportionate, unjust or unfair, those arguments have already been disposed of by the Upper Tribunal in *HMRC v Hok* UKUT 363 (TCC) and *HMRC v Total Technology (Engineering) Limited* UKUT 418 (TCC). In the former it was made clear that the First-tier Tribunal has no jurisdiction to determine the fairness of a penalty imposed by statute. It is plain from a perusal of the latter that a penalty of the magnitude of that imposed in this case could not be described as disproportionate even if the Tribunal had jurisdiction to deal with the issue.

16. 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.

**WDF COVERDALE
TRIBUNAL JUDGE**

RELEASE DATE: 21 July 2014