TC04263

Appeal number: TC/2011/05562

INCOME TAX – late submission of employer's year end return - reasonable excuse - lack of web literacy - misunderstanding HMRC website - alleged lack of clarity of site – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UK PORTRAITS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

DECISION

Preliminary Matters

1. I decided and signed this appeal on 30 January 2012 having considered the Notice of Appeal dated 19 July 2011 and HMRC's Statement of Case submitted on 13 October 2011. It was therefore a default paper case in terms of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). Unfortunately, due to an administrative error, in fact, the Decision was only issued on 15 October 2014. On 7 November 2014 the appellant wrote to the Tribunal requesting that the decision be set aside on the basis that HMRC is responsible for the "long and unacceptable delay", which failing the appellant sought permission to appeal to the Upper Tribunal.

2. Firstly it was the administration in HM Courts and Tribunal Service that was responsible for the delay and not HMRC.

3. Secondly, in terms of Rule 38 of the Rules a decision can only be set aside if one of the following conditions are met, namely:-

> "38(2) The conditions are:-
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

In this instance, since this was a Default Paper case and by definition, neither party would or could be present, none of those conditions are satisfied.

4. Thirdly, in terms of Rule 39 of the Rules an application for permission to appeal to the Upper Tribunal can only be considered where there are full written reasons for the decision and the application for permission to appeal identifies the error or errors in law in the decision. I am therefore treating the letter of 7 November 2014 as an application for full written reasons for the decision.

5. Fourthly, the said letter indicates that the appellant was asking HMRC to regard the letter as a Freedom of Information request from HMRC and raises other issues

which all relate to HMRC. This Tribunal has no jurisdiction in that regard. A copy of said letter has been sent to HMRC.

6. Lastly in regard to the said letter, it advances further arguments namely that (a) the appellant had been living in temporary accommodation in 2009-2010 and almost all her papers had been destroyed, (b) her staff member was "web-savvy" but the problem was the poor design of the website and because she herself was not web literate she had been unable to check what had or had not been done, (c) HMRC had failed to notify the failure to file and therefore the penalties had "run up" and (d) that the penalty is disproportionate. This Decision including full findings and reasons can only include arguments and information that were available at the time the original decision was made. Therefore to the extent that these are new grounds of appeal they can form no part of this decision.

7. However, after the original decision was signed, this appeal was "stayed" until the Upper Tribunal released their decision in *HMRC v Hok Ltd*[1]. The Decision in *Hok* is binding on me. It did not change my original decision. That case looked at a number of issues in relation to the late submission of an employer's year end return. In particular it re-affirmed the First-tier Tribunal's limited jurisdiction in respect of penalty appeals, and it emphasised that the Tribunal had no power to adjust a penalty on the grounds of fairness. In that context it also found that the fact that the issue of a £400 penalty was the first notification to the taxpayer could not be challenged. Therefore, even if arguments (c) and (d) had been before me I could not have taken them into account.

8. The Tribunal has limited jurisdiction in penalty appeals and that reflects the purpose of the legislation, which is to ensure that employers file their returns online and on time. The Tribunal has no power to mitigate the penalty. The Tribunal can either confirm the penalty or quash it if satisfied that the appellant has either filed the return on time or has a reasonable excuse for its failure. The onus is upon the appellant to prove, on the balance of probabilities, that there was a reasonable excuse for late filing.

9. Since this was a decision made in the absence of the parties, I am setting out the detail of the documentation and legislation before me at greater length than normally, so that the appellant can have as full an understanding of the position as possible.

The substantive appeal

Background facts

10. This is an appeal against a penalty imposed under section 98A(2)(a) Taxes Management (TMA) 1970 for the late submission of the 2009-2010 Employers Return being a P35.

[1] [2012] UKUT 363(TCC)

11. The filing date for the said return was 19 May 2010 and it is a statutory requirement that that had to be filed online. On 17 January 2010 the appellant was sent a reminder (P35PN) which included the following wording namely:-

> "**Notification to complete form P35 Employer Annual Return**
>
> Your Employer Annual Return (P14 and P35) for the tax year 2009-10 must be filed:
>
> - On line, and
> - By 19 May following the end of the tax year 2009/10.
>
> We will charge a penalty if any part of your Return is received late and/or not filed on line.
> … Further information is available to help you on our website, go to www.businesslink.gov.uk/payeonline".

12. On 27 September 2010 a first penalty notification in the sum of £400 was issued for the period 20 May 2010 to 19 September 2010.

13. The Return was filed online on 18 October 2010 showing a total liability of £300.69.

14. The penalty was reduced to £300 on 21 October 2010. That reduction was a concession granted by HMRC to small employers allowing the penalties to be mitigated to the amount of duties on the Return.

15. Following correspondence the appellant requested a review on 13 May 2011 indicating that no payments were due, she had misunderstood the website and could not find an expert to help, the activation PIN had arrived late with no instructions and when filing the 2010-11 Return the website is different to the previous year and much clearer. HMRC did review the decision and on 21 June 2011 HMRC confirmed the decision rejecting the appeal on the basis that there was extensive information on the HMRC website, a dedicated helpline for employers and an online services helpdesk.

16. On 18 July 2011 the appellant appealed that decision to the Tribunal. The stated ground of appeal was that "We did file the forms but the website at that stage was not user friendly…". The appellant went on to explain that other people had also failed to file timeously because of the problems with electronic filing and subsequently the website had been changed.

17. On 12 May 2010, the appellant registered for online filing and activated that. She again logged in and activated it on 23 May 2010, which was after the date of filing.

The relevant legislation provisions and what they mean

18. Regulation 73 of the Income Tax (PAYE) Regulations 2003/2682 imposes an obligation on an employer to submit an annual return and the relevant sections read:

"(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.

(2) The information is—

(a) the tax year to which the return relates,

(b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and

(c) the total net tax deducted in relation to those payments.

(3) The return must be supported by the following information in respect of each of the employees mentioned in paragraph (2)(b).

(4) The supporting information is—

(a) the employee's name,

(b) the employee's address, if known,

(c) either—

(i) the employee's national insurance number, or

(ii) if that number is not known, the employee's date of birth, if known, and sex,

(d) the employee's code,

(e) the tax year to which the return relates,

(f) the total amount of the relevant payments made by the employer to the employee during that tax year, and

(g) the total net tax deducted in relation to those payments.

(5)…

(6)…

(7) The return must include—

(a) a statement and declaration containing a list of all deductions working sheets which the employer was required to prepare or maintain at any time during that tax year; and

(b) a certificate showing—

(i) the total net tax deducted or the total net tax repaid in the case of each employee, and

(ii) the total net tax deducted or repaid in respect of all the employees,

during that tax year.

(8) The statement and declaration and the certificate must be—

(a) signed by the employer, or

(b) if the employer is a body corporate, signed either by the secretary or by a director.

(9) Paragraph (8) is subject to regulation 211(5) (authentication in approved manner if return sent electronically).

(10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1)."

19. The information specified in Regulation 73(2) is in effect the information contained in Form P35 and the information specified in Regulation 73(3) is that required in respect of each employee on Form P14. It stipulates that an employer must therefore file Form P35 (which gives aggregate tax details for all employees) and a Form P14 in respect of each employee.

20. HMRC has no statutory obligation to issue reminders for Employer Annual Returns. The obligation to submit a Return by the due date lies with the employer in accordance with Regulation 73. A failure to submit any of this information by the due date (19 May in any year) renders an employer liable to a penalty because Regulation 73(10) applies the penalty provisions of Section 98A Taxes Management Act 1970 ("TMA"), to which I now turn.

21. Section 98A TMA contains penalty provisions in respect of a failure to file an employer's annual return as required by Regulation 73 and reads as follows:

"(1) PAYE regulations … may provide that this section shall apply in relation to any specified provision of the regulations.

(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—

(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, and

(b)…

(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

(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty."

22. It will be seen therefore that section 98A TMA provides for a fixed penalty at £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees.

23. Section 118(2) TMA provides for the "reasonable excuse" defence for the penalties specified in Section 98A TMA 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."

Accordingly, if there is a reasonable excuse for failure to do something then the penalties would not be imposed.

24. Regulation 205 of The Income Tax (Pay As You Earn) Regulations made it mandatory to file the employer's annual return electronically:

"Mandatory use of electronic communication for delivering relevant annual returns

205. An employer (as to which see regulation 206) must deliver a relevant annual return by an approved method of electronic communications to HMRC.

General provisions relating to this Chapter

205B.–(1) The Commissioners for Her Majesty´s Revenue and Customs may make a general or specific direction requiring an employer or a specified employer to deliver any relevant annual return or specified information by a particular approved method of electronic communications.

(3) …

(4) …

(5) References in this Chapter to information and to the delivery of information must be construed in accordance with section 135(8) of the Finance Act 2002 (mandatory e-filing).

25. Regulation 206A provided that :

"(1) In this Chapter 'relevant annual return' means the return and accompanying information required by regulation 73 (annual return of relevant payments liable to deduction of tax (Forms P35 and P14)."

26. Regulation 210 provided for a penalty for failing to deliver relevant annual returns in accordance with Regulation 205A:

(A1) An employer who fails to deliver specified information or any part of it in accordance with Regulation 205 is liable to a penalty.

(1) …

(2) Where paragraph (A1) applies the penalty must be determined in accordance with Regulation 210A.

27. Regulation 210A sets out penalties for the tax year ending 5 April 2010. The penalties for the year ending 5 April 2011 are set out in Regulation 210AA. In both cases the penalty for failure to comply with Regulation 205 is £100 for an employer with five or fewer employees.

Reasons for the decision

28. There is no doubt that the Return was late. The calculation of the penalty in that situation is correct.

29. As can be seen from paragraph 23 above, the legislation provides that if the appellant can establish that there was a reasonable excuse for the late filing then the appeal would succeed.

30. The legislation does not define a reasonable excuse. Reasonable means exactly that and has to be "considered in light of all the circumstances of the particular case". That is the test set out in *Rowland v HMRC*[2]. It is also well established law that taxpayers are expected to act with reasonable prudence and diligence in attending to their tax affairs. A reasonable excuse is normally thought to be an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise would have been complied with.

31. The notice of appeal to which I referred to in paragraph 16 above focused purely on the appellant's problems with the website. However, I took into account the various

[2] [2006] SPC (SCD) 536

issues which had been raised in correspondence with HMRC in case those would amount to a reasonable excuse.

32. The formal application to HMRC for a review dated 13 May 2011 read:

> "This situation that arose out of a single incident where there was a misunderstanding on how to use your website, not with any aspect of how to apply PAYE rules. I could not reasonably find an expert to help me file online as it was the first year of its implementation. No instructions were supplied when the activation PIN arrived in the post. The director is not web literate."

33. The director also wrote to HMRC on 13 May 2011 and that letter included further information:

> "… I am not confident with modern internet technology. I therefore had to rely on a staff member to help me file online. The staff member was experienced with payroll, but not filing online."

34. As I indicate at paragraph 17 above, the director (or her staff member) did activate online filing on 12 May 2010 but did so again on 23 May 2010, which was after the due date for filing. It would seem therefore that she must have known that the return had not been filed on time, albeit it might only have been a few days late in which event there would still have been a penalty even if it had been properly filed.

35. Quite apart from the fact that the P35N reminder was issued on 17 January 2010, the February and April 2010 Employer's Bulletins covered online filing, deadlines and penalties. There is comprehensive guidance on both the HMRC and Business Link websites. There is an online help desk which is open 8 AM to 8 PM Monday – Friday and 8 AM to 4 PM on Saturday. There was no contact with the help desk by the appellant in May 2010.

36. I accept the evidence from HMRC that there had been no changes to the layout of the online forms or to the secure HMRC Portal that precedes it (the Portal is the part of the site from the login screen the page selects access to the forms) between 2010 and October 2011, albeit there may have been changes to the website.

37. There is no doubt that some taxpayers did encounter problems filing online and that can be seen from other decisions of this Tribunal. However, that in itself does not amount to a reasonable excuse, as those decisions make clear. The vast majority of employers complied with their statutory duty and successfully filed online.

38. I do not accept that a "misunderstanding" of the website can amount to a reasonable excuse. It is incumbent upon all taxpayers to ensure that where they are required to file online then they do so successfully. Further, the HMRC website makes it very clear that acceptance and rejection messages will be sent in relation to filing online. Accordingly, if neither were received, the appellant should have been aware that nothing had been filed. In that event, a prudent taxpayer, mindful of the obligation to file on time, would be expected to seek assistance from the helpdesk or indeed someone else. That did not happen.

39. It is not a reasonable excuse to claim that an expert could not be found to assist with online filing. There was a plethora of information and assistance freely available at that time, including the helpdesk. In any event substantial numbers of taxpayers to not employ experts to assist them with filing returns.

40. The facts that the director was not web literate and the member of staff was not conversant with online filing cannot amount to a reasonable excuse. The change in the law to make online filing mandatory had been very widely publicised. A prudent and diligent taxpayer, in the knowledge of that, would be expected to ensure that it had the relevant resources to enable it to comply with its statutory obligations.

41. For all of these reasons, this appeal cannot succeed.

42. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 3 February 2015