



TC06786

Appeal number: TC/2018/00468

INCOME TAX – obligation on “specified employment intermediaries” to file returns – whether or not the Appellant was a “specified employment intermediary” – no – whether or not, had it been a “specified employment intermediary”, it would have had a reasonable excuse for its failure to file the returns – no – appeal upheld

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LEVERTON SEARCH LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE TONY BEARE
MS JANE SHILLAKER**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on
12 October 2018**

Mr Raj Shah of Litchfields for the Appellant

**Mr Gareth McKinley, Officer of Her Majesty’s Revenue and Customs, for the
Respondents**

DECISION

Introduction

- 5 1. This decision relates to an appeal against four penalties which have been imposed by the Respondents pursuant to Section 98(1)(b) Taxes Management Act 1970 (the “TMA”) for the late submission of returns which are required to be filed by certain employment intermediaries. The penalties in question, and the bases given by the Respondents for the imposition of the penalties, are as follows:

<u>Period</u>	<u>Return due date</u>	<u>Return received date</u>	<u>Amount</u>
6 April 2016 to 5 July 2016	5 August 2016	20 July 2017	£250
6 July 2016 to 5 October 2016	5 November 2016	20 July 2017	£500
6 October 2016 to 5 January 2017	5 February 2017	20 July 2017	£1,000
6 January 2017 to 5 April 2017	5 May 2017	20 July 2017	£1,000

10 Preliminary point

2. Notification of the appeal in this case was made on 18 January 2018 in response to a review decision by the Respondents dated 11 December 2017. The notification was slightly outside the 30 day time limit within which the Appellant was entitled to appeal and the reason given for the delay was the occurrence of the Christmas
15 holidays and the fact that Mr Shah, the Appellant’s representative, had been required to go abroad as a result of a family illness. The Respondents raised no objection to the appeal on the basis of the slight delay and, given the brevity of, and the reasons given for, the delay, we were content to give permission for the appeal to proceed.

Background

- 20 3. The background to this appeal is that, as is suggested by its name, the Appellant was incorporated on the basis that it would carry on the business of a recruitment agency. However, over time, its business changed to include the provision of one or more individuals to work for its clients, with the result that it potentially came within
25 the ambit of the rules relating to employment intermediaries. In broad terms, those rules require that a “specified employment intermediary” must file a quarterly return within one month of the end of each quarter setting out specified information in relation to itself and each of the individuals whose services it is providing.

The relevant law

- 30 4. Section 716B Income Tax (Earnings and Pensions) Act 2003 (“ITEPA”) was introduced by Section 18(1) Finance Act 2014 with effect from 17 July 2014 and provides as follows:

“716B Employment intermediaries to keep, preserve and provide information etc

(1) For purposes connected with Chapter 7 of Part 2 (treatment of workers supplied by agencies) or Part 11 (PAYE), the Commissioners for Her Majesty's Revenue and Customs may by regulations make provision for, or in connection with, requiring a specified
5 employment intermediary—

- (a) to keep and preserve specified information, records or documents for a specified period;
- (b) to provide Her Majesty's Revenue and Customs with specified information, records or documents within a specified period or at specified times.

(2) An “employment intermediary” is a person who makes arrangements under or in
10 consequence of which—

- (a) an individual works, or is to work, for a third person, or
- (b) an individual is, or is to be, remunerated for work done for a third person.

(3) For the purposes of subsection (2), an individual works for a person if—

(a) the individual performs any duties of an employment for that person (whether or not the
15 individual is employed by that person), or

(b) the individual provides, or is involved in the provision of, a service to that person.

(4) In subsection (1) “specified” means specified or described in regulations made under this section.

(5) Regulations under this section may—

20 (a) make different provision for different cases or different purposes, and

(b) make incidental, consequential, supplementary or transitional provision or savings.”

5. The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2015 were enacted pursuant to the enabling power in Section 716B ITEPA and took effect on 6 April 2015. The regulations made certain amendments to The Income Tax (Pay
25 As You Earn) Regulations 2003 (the “PAYE Regulations”), the effect of which was to impose an obligation on “specified employment intermediaries” (as defined in Regulation 84E of the PAYE Regulations) to file returns in respect of each tax quarter setting out specified information no later than the end of the tax month following that quarter.

30 6. Regulation 84E of the PAYE Regulations defines a “specified employment intermediary” for this purpose as follows:

“An employment intermediary is a specified employment intermediary if at any time during a tax quarter—

- (a) the employment intermediary is an agency;
- (b) more than one individual provides services to a client under or in consequence of a contract between the employment intermediary and one or more clients;
- (c) those services are not provided exclusively on the United Kingdom continental shelf; and
- 5 (d) the employment intermediary makes one or more payments in respect of, or connected with, the services provided by one or more individuals that—

- (i) is required by regulation 67B to be included in a return delivered to HMRC by the employment intermediary when the payment is made but has not been (“a reporting failure”); or
- 10 (ii) is not required by regulation 67B to be included in a return delivered to HMRC by the employment intermediary when the payment is made because the individual is not an employee or treated as an employee under regulation 10 (“no reporting requirement”).”

7. Regulation 2 of the PAYE Regulations, as amended by The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2015, defines “agency” as having the meaning given in Section 44 ITEPA and “agency worker” as meaning a worker who is treated by Section 44 ITEPA as holding an employment with the agency for income tax purposes.

8. Section 44 ITEPA provides as follows:

20 “44 Treatment of workers supplied by agencies

- (1) This section applies if—
 - (a) an individual (“the worker”) personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person (“the client”),
 - 25 (b) the services are supplied by or through a third person (“the agency”) under the terms of an agency contract,
 - (c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and
 - (d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.
- (2) If this section applies—
 - (a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and
 - 35 (b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment.”

9. Section 98(1)(b) TMA provides that, where any person fails to furnish any information, give any certificate or produce any document or record in accordance

with any of the provisions specified in the second column of the Table set out in Section 98 TMA, that person shall be liable to, inter alia, a fixed penalty. The regulations enacted pursuant to Section 716B ITEPA are set out in the second column of that Table. Section 98(4F) TMA provides that, where a failure falling within
5 Section 98(1)(b) TMA relates to any information, document or record which is required to be provided by regulations enacted pursuant to Section 716B ITEPA, the fixed penalty shall not exceed £3,000.

10. Section 100(1) TMA provides that an officer of the Board of the Respondents who has been authorised for the purposes of that section by the Board may make a
10 determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate. Section 100(3) TMA provides that notice of a determination of a penalty under Section 100 TMA “shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.”

15 11. Section 118(2) TMA provides as follows:

“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 Commissioners or officer concerned may have allowed; and where a person had
20 a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased...”

12. It is clear from the decided cases in relation to what constitutes a reasonable excuse, such as *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 (“*Clean Car*”), that the test to be applied in determining
25 whether or not an excuse is reasonable is an objective one. One must ask oneself whether what the taxpayer did was a reasonable thing for a responsible person, conscious of, and intending to comply with, his/her obligations under the tax legislation but having the experience and other relevant attributes of the taxpayer and placed in the situation in which the taxpayer found himself/herself at the relevant time, to do.

30 13. Finally, at the hearing Mr McKinley confirmed that:

(a) although the obligation to file employment intermediary returns came into effect on 6 April 2015, the Respondents had allowed all of those taxpayers who were affected by the new regime a 12 month honeymoon period to familiarise themselves with the new regime before
35 the Respondents began to issue penalties for late filing and therefore the quarter commencing on 6 April 2016 was the first quarter in respect of which penalties under the new regime had been imposed; and

(b) although the Respondents were technically entitled by Section 98(4F) TMA to impose a penalty of £3,000 in respect of each failure to
40 file a return under the regulations enacted pursuant to Section 716B ITEPA, their practice was to impose penalties on the escalating scale shown in the table set out in paragraph 1 above.

Discussion

14. In the present case, it is common ground that, if the Appellant was a “specified employment intermediary” (as defined in Regulation 84E of the PAYE Regulations) in respect of a quarter specified in paragraph 1 above, then:

- 5 (a) the Appellant failed to file an employment intermediary return in respect of the relevant quarter until after the date on which the relevant return was due;
- (b) the Appellant is therefore liable to the penalty which has been imposed on it in respect of the relevant quarter unless it can establish that
10 it had a reasonable excuse for its failure; and
- (c) the penalty notice which has been served on the Appellant in respect of the relevant quarter complied with the requirements of Section 100 TMA.

15 15. At the start of the hearing, Mr Shah accepted that the Appellant had been a “specified employment intermediary” (as defined in Regulation 84E of the PAYE Regulations) throughout each of the four quarters in question. However, upon our going through with the parties the various conditions comprising the definition of a “specified employment intermediary”, it became clear that the Appellant did not satisfy the condition set out in Regulation 84E(b) of the PAYE Regulations at any
20 point in the period to which the penalties relate. Regulation 84E(b) of the PAYE Regulations requires that, in order for a person to be a “specified employment intermediary” in respect of a particular quarter, there needs, at some point within that quarter, to be more than one individual who provides services to a client under or in consequence of a contract between the employment intermediary and one or more
25 clients. In this case, given that the Appellant had been incorporated for the purpose of carrying on business as a recruitment agency and had become an employment intermediary only after the passage of time and on a gradual basis, the Appellant did not provide the services of more than one individual at any time within any of the quarters to which the penalties relate.

30 16. Mr McKinley conceded that, if that was the case, then the Appellant was not obliged to file the returns in question and the appeal was bound to succeed, a view with which we agree.

17. Accordingly, we hereby uphold the appeal and direct that the penalties should be vacated.

35 18. For completeness, we would observe that, had the Appellant been required to file the relevant returns, we are not persuaded that the Appellant would have had a reasonable excuse for its failure to do so. Mr Shah gave two reasons in support of his argument in that respect. These were that:

- 40 (a) first, it was reasonable for the Appellant to have relied exclusively on its adviser - the predecessor to Mr Shah – to keep it informed of its various obligations under the tax legislation and therefore the fact that its

adviser had failed to make it aware of the requirement for specified employment intermediaries to file quarterly returns meant that it had a reasonable excuse for not doing so; and

5 (b) secondly, and more significantly, it was reasonable for the Appellant to have been unaware of the obligation on specified employment intermediaries to file returns because the Respondents had given inadequate publicity to that requirement.

10 19. As regards the first of those reasons, Mr Shah conceded that the advisor in question, although experienced, had no formal accountancy qualifications and, as regards the second of those reasons, Mr McKinley provided us with plentiful evidence - in the form of an extract from the Employment Status Manual and various Employer Bulletins - to show that the obligation on specified employment intermediaries to file returns had been well-publicised by the Respondents.

15 20. We consider that, taking all of the above into account, the failure by the Appellant to be aware of the obligation on specified employment intermediaries to file returns did not meet the objective test set out in *Clean Car*.

21. As regards the first of Mr Shah's reasons, we think that, given:

20 (a) that the obligation in question was simply an obligation to file returns and not something obscure which required the specialist knowledge of an advisor; and

(b) that, in any event, the Appellant's advisor had chosen to use an advisor with no formal accountancy qualifications,

25 this is not a case where a taxpayer can fairly claim to have met the objective standard set out in *Clean Car* by relying entirely on its advisor and not taking any steps itself to ascertain the extent of its obligations under the tax legislation.

22. As regards the second of Mr Shah's reasons, we think that, given:

(a) the extent of the publicity to which we were directed by Mr McKinley; and

30 (b) the fact that there has been considerable press comment on this area of the tax legislation – ie circumstances where agencies provide the services of individuals to their clients,

35 the Appellant ought to have taken greater steps than it did to ascertain the extent of its filing obligations. A rudimentary check of the Respondents' website by the Appellant would have revealed the existence of the obligation on specified employment intermediaries to file returns.

23. Accordingly, were it not for the fact that the Appellant is not within the scope of the legislation by virtue of the number of individuals whose services it provided over the period in question, we would have been inclined to dismiss the appeal.

24. 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.

10

**TONY BEARE
TRIBUNAL JUDGE**

RELEASE DATE: 25 OCTOBER 2018

15