TC01405

Appeal number: TC/2011/01987

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

KALONG LAU **Appellant**

- and -

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

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 13 July 2011 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 8 March 2011, and HMRC's Statement of Case dated 8 April 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against a £400 penalty imposed in respect of the late filing of his P35 employer's annual return for the tax year 2009/10.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

> (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, ...
>
> (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, ...

4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the Tribunal may

> (i) if it appears ... that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears ... to be correct, confirm the determination, or
>
> (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount.

5. Section 118(2) of the TMA provides 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.

The arguments of the parties

6. An internal HMRC review dated 2 March 2011 of the penalty determination states as follows. The Appellant appealed on the ground that his agent believed that the return had been filed electronically on 29 March 2010, but that on checking the agent discovered that the return had been generated on 29 March 2010 but had not been filed, and that the employee who deals with the payroll was under tremendous stress at the time. HMRC considered that this did not amount to a reasonable excuse for purposes of s.118(2) of the TMA, as the obligation to file the return on time was on the Appellant, and reliance on a third party is not a reasonable excuse.

7. A letter from the Appellant's accountant dated 29 November 2010 states that the employee in question was under stress as her daughter was diagnosed with cancer and was seriously ill in hospital, and that the Appellant was completely blameless.

8. The Appellant's case as stated in the notice of appeal is that the Appellant is a chip shop owner who has no knowledge or experience of running a payroll, and who is totally reliant on his accountant for this. Reliance is placed on *RW Westworth Ltd v HMRC* [2010] UKFTT 477 (TC). The Appellant adds that the return was filed as soon as his accountants realised the problem, and that HMRC had accepted that the error was genuine.

9. The HMRC statement of case states amongst other matters as follows. It is the responsibility of the employer to ensure that their tax affairs are up to date, and reliance on a third party cannot be treated as a reasonable excuse. It was the Appellant's choice to use an accountant, and if the accountant failed to follow instructions from the Appellant then the Appellant should seek redress from the accountant. The particulars of the *Westworth* case differ from those in the present case, and each case must be decided on its own merit. HMRC rely on *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC) for the proposition that an honest mistake by an accountant is not a reasonable excuse for late filing.

The Tribunal's view

10. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability.

11. The Tribunal notes that the Appellant has not disputed that the return was filed late, and the Appellant's accountants have accepted that this was due to one of their employees being under stress at the time. HMRC have in turn not sought to dispute the accountants' explanation for the reason why the return was filed late.

12. The *Westworth* case concerned an appeal against cancellation of gross payment status under the Construction Industry Scheme. The Tribunal said in that case at paragraph 13 that "In view of Mr and Mrs Westworth's lack of experience and expertise in accounting, administration and tax matters we consider that it was reasonable for the Company to retain the services of a consultant", and at paragraph 14 that "the Company had a reasonable excuse for the late PAYE payments".

13. The Tribunal has also considered *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199. That case similarly concerned an appeal against cancellation of gross payment status rather than an appeal against a penalty for late filing of P35 returns, although the "reasonable excuse" test in both contexts may be materially similar. In that case, the appellant company which had no knowledge of tax or VAT matters had relied on a company secretary to ensure compliance with tax obligations. However, various tax obligations were not complied with. The Tribunal found in that case at paragraph 20 that it had been "reasonable for the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations". That decision concluded at paragraph 23, referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that "reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context".

14. The Tribunal notes that this case concluded that reliance on a third party "can" be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.

15. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had "relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists". It was further found in that case (at para. 8(q)) that as the appellant "did not have the specialist knowledge and expertise herself she employed and relied upon persons whom she reasonably believed to have such specialist knowledge and expertise".

16. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to pay taxes on time through incorrect advice received by a specialist.

17. Although the Appellant in the present case is said to be a chip shop owner who knows nothing about payroll matters, the Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require

any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

18. In the *Schola* case, on which HMRC relies, the Tribunal said at paragraph 7 that mistakes by an agent did not amount to a reasonable excuse, in circumstances where "The mistake could have been avoided if the agent had exercised proper care" and where "The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts".

19. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet its obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse.

20. As each case turns on its own particular circumstances, the Tribunal does not consider it necessary to draw detailed comparisons with the cases referred to above.

21. The Tribunal notes that the mistake in this case was made by an employee of the accountants. A letter from the accountants dated 29 November 2010 states that "The member of staff who deals with the payroll was under a considerable amount of stress at the time due to her daughter being diagnosed with cancer and being seriously ill in hospital". The Tribunal is naturally sympathetic to this employee's circumstances, but for purposes of this appeal, no further details or evidence of this claimed circumstance have been provided. The Tribunal is therefore unable to form its own view of how this circumstance might reasonably have affected the ability to file the return on time. The accountants, as employer of this particular employee, must have been aware of the stress that she was under, and presumably could or should have exercised appropriate supervision or made alternative work arrangements, to prevent the employee's unfortunate personal situation from affecting the accountants' obligations towards their client. The Tribunal is unable to conclude on the basis of the evidence that has been presented that all reasonable efforts were made to file the return on time.

22. Every case turns on its own circumstances. In the present case, the Tribunal is not satisfied on the evidence that that the Appellant's claimed reliance on his accountants, and the claimed circumstances of an employee of the accountants, amounts to a "reasonable excuse".

23. The Tribunal finds that the Appellant has advanced no other circumstances that would amount to a "reasonable excuse" for late filing under s.118(2) of the TMA.

24. The Appellant has not sought to dispute the amount of the penalty, in the event that there is no reasonable excuse.

Conclusion

25. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalty and dismisses the appeal.

26. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 22 AUGUST 2011