



TC03604

Appeal number: TC/2013/08166

PAYE — Employer's year-end return – penalty for late submission – whether submitted on time – no - whether penalty due – yes - whether penalty can be discharged on grounds of unfairness – no – whether HMRC's maintenance prevented submission on time – no - whether penalty proportionate – yes – whether reasonable excuse for late submission – no – penalty confirmed-

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR YAU WING LIU t/a WINGS CHINESE TAKEAWAY Appellant

- and -

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

TRIBUNAL: JUDGE FIONAGH GREEN

The Tribunal determined the appeal on 10 March 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 22 November 2013 (with enclosures), HMRC's Statement of Case submitted on 19 December 2013 (with enclosures) and the Appellant's Reply dated 16 January 2014 (with enclosures).

DECISION

Introduction

5 1. This is an appeal against a penalty of £100.00 for late submission of Employer's Annual Return for the tax year 2012-2013.

2. The appeal is determined without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal having decided that there was sufficient evidence and that it was fair and just to proceed.
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Facts

3. Mr Yau Wing Lau (Mr Lau) was required to file an Employer Annual Return for the year 2012-2013 by 19 May 2013. From 2009 – 2010 onwards this had to be submitted online using an approved method of electronic communication.

15 4. Mr Liu was required to complete an Employer Annual Return for 2012-2013 using the PAYE information.

5. HMRC sent a P35N CSN cessation notice on 19 October 2012 following receipt of a letter from Mr Liu's agent J Fisher (UK) Ltd which provided information that the business had ceased from 5 April 2012. Mr Liu sent a further letter dated 18 June 2013 to amend the cessation date to 31 August 2012.
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6. A P35 return was submitted online on 12 June 2013 together with a nil declaration. The business was trading in the 2012 – 2013 tax year and there were employees who were paid above the Lower Earnings Limit and tax and National Insurance were due.

25 7. On 18 June 2012 a letter was received by HMRC from Mr Liu in which he provided information that the cessation date should be amended from 5 April 2012 to 31 August 2012. HMRC carried out a review and identified that neither the nil declaration nor the P35 had been submitted by 19 May 2013.

30 8. HMRC did undertake system maintenance and there were difficulties in submissions being made on 4 April 2013 and 5 April 2013. From 6 April 2013 to 9 April 2013 a submission could be made but there may have been a delay in the receipt of an acknowledgment from HMRC. Mr Liu's agent intended to submit the P35 around 3 April 2013 to 6 April 2013 but found difficulties in doing so.

35 9. Mr Liu has completed end of year returns since the 2005 – 2006 tax year online

Legislation

10. The obligation to make a year-end return is imposed on an employer by Regulation 73 (1) of the Income Tax (Pay as you Earn) Regulations 2003 (SI 2003/2682) which provides that

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

(2) The information is –

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

10 (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...

15 The Regulation goes on to list the information which must be supplied, and regulation 211 provides that the employer must use two prescribed forms, the P35 and P14 to supply it. Form P35 contains, in essence, a summary, while one P14 must be submitted for each employee, giving the prescribed information specific to that employee. They are still referred to as ‘forms’ even though the requirement now is to file the information on line rather than on paper. Regulation 205 requires the mandatory use of electronic communications by employers who must deliver their
20 P35 and P14 forms online using an approved method of electronic communications from 2009 – 2010 onwards.

.Taxes Management Act 1970

Sections 98A(2) and (3)

25 (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...

30 (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...

Section 118 (2)

(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 Commissioners 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 if he did it without unreasonable delay after the excuse had ceased

Section 100 – Determination of penalties

.....an officer of the Board authorised by the Board for the purposes of this section may make a 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 100B – Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to...the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the first-tier Tribunal

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but-

(a) in the case of a penalty which is required to be of a particular amount, the First-tier 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

(b) in the case of any other penalty, the First-tier Tribunal may-

(i) if it appears...that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears...to be appropriate, confirm the determination,

(iii) if the amount determined appears...to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears ...to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

Issue

11. The issues for the Tribunal to decide were whether –

(i)the submission was on time or made at an earlier date than 12 June 2013

(ii)there were difficulties with maintenance by HMRC preventing the submission being made

(iii)the penalty was correctly charged

5 (iv)when HMRC had sent out the late filing penalty notice and whether they had acted fairly

(v) the penalty was disproportionate

(vi)there was reasonable excuse for the late submission

10 The submissions of the parties

12. Mr Liu –

(i)that there was no penalty until 6 April 2014 and an official complaint would be made regarding the penalty

(ii)the business ceased to trade on 31 August 2012

15 (ii) HMRC's systems had been unavailable from 3 – 9 April 2013 and Mr Liu was unable to complete the submission causing further delay resulting in the P35 becoming late. It was the intention of Mr Liu to submit the year-end return on time.

(iv) HMRC failed to provide a report of its computer system acknowledging that there were delays and inconvenience caused to tax payers by the planned maintenance

20 (v) it was unfair for HMRC to wait 5 months before informing Mr Liu of the penalty charge on 21 October 2013

(vi) a reasonable excuse has been given and continued throughout the period of the return being overdue

(vii) the penalty was disproportionate

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13. HMRC -

30 (i) Mr Liu was required to complete a year-end return for 2012-2013 using the PAYE information as he traded in the 2012 – 2013 tax year and there were employees who were paid above the Lower Earnings Limit. A P35 was due on 19 May 2013.. Mr Liu had submitted year-end returns online since the 2005 - 2006 tax year and was

an experienced employer and fully aware of his tax obligations. Mr Liu had revisited the file after the deadline of 19 May 2013.

5 (ii) there was no evidence to suggest that there was any processing problem or delay caused by HMRC which would have effected Mr Liu's ability to submit a P35 by 19 May 2013 and that HMRC carry out system maintenance at times least likely to inconvenience customers. There were only two days when an employer could not submit a year-end return using the On line Return & Forms Product and these days were 4 and 5 April 2013.

(iii) that Mr Liu has an obligation to account for PAYE

10 (iv) the late filing penalty notice was sent on 19 August 2013 for £100 for the period 20 May 2013 to 12 June 2013 and there was no request for a review of the decision in relation to the late filing penalty until 2 October 2013.

15 (vii) information is published on HMRC website advising employers of what they need to do to fulfil their obligations and advice is also available on the Employer Helpline and from local Employer Centres

(viii) that a prudent employer would have contacted HMRC for advice which would have alerted Mr Liu to the fact that a year-end return was required but that Mr Liu did not do so

20 (ix) that Mr Liu does not have reasonable excuse for the late submission. There was no event that was either unforeseeable or beyond the employer's control which prevented compliance. Mr Liu failed to operate the PAYE scheme correctly and that HMRC had to be consistent with their approach

(x) that there is no obligation to issue a reminder or to notify that a P35 had not been received prior to the issue of a penalty notice

25 (xi) that it is well publicised on HMRC website that penalties can be imposed for the late submission of returns and that a reminder will not necessarily be sent. The penalty notice had been received. The penalty notice was not a reminder but a notification of the penalty due on a particular date.

Discussion

30 14. The first issue was considered. Mr Liu accepted that the year-end return was not submitted by 19 May 2013. Mr Liu did not dispute the fact that the year-end return was submitted on 12 June 2013. The Tribunal decided that the return was submitted and received by HMRC on 12 June 2013.

35 15. The second issue was considered. The Tribunal decided that maintenance was carried out by HMRC to the system. The Tribunal accepted the evidence of HMRC that there were only two days upon which the online return could not be submitted, 4 and 5 April 2013. The Tribunal also accepted that there may have been delays during

the period from 6 April to 9 April 2013 however the year end return could have been submitted between 10 April and 19 May 2013.

16. The third issue was whether the penalty was correctly charged. For the reasons set out above, and the year-end submission not having been submitted until 12 June 2013, the Tribunal decided that the penalty was correctly charged

17. The fourth issue was considered and the Tribunal decided that the penalty notice had been sent out on 19 August 2013 by HMRC following a review when Mr Liu had asked that the records be amended to show that the scheme actually ceased on 31 August 2012 and not 5 April 2012 as originally notified. The appeal against the penalty notice was dated 2 September 2013.

18. The fifth issue was considered. HMRC had sent out the penalty notice on 19 August 2013. The legislation makes it clear that an officer of HMRC may determine what penalty is appropriate or correct and in this case there is only one possible correct penalty namely £100.00 for each month or part of a month for which the return was late and the Tribunal's power on appeal against fixed penalties is limited to correcting mistakes. There is no general power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise. The penalties are a fixed amount by law. Where the total duty on the return is equal to or more than the penalty amount MrLiu is liable to the whole of the penalty, if £100 or less Mr Liu would only have been liable to a penalty of £100. The penalty of £100 is correct and the penalty is proportionate.

19. HMRC do not accept that they have acted unfairly and the Tribunal agrees. There is a statutory obligation on employers to file year-end returns. There is no requirement that HMRC should send reminders or that they should warn employers that they are in default.

20. The Tribunal would be acting in excess of its jurisdiction if it discharged the penalty on the ground that its imposition was unfair. HMRC did not send out the penalty notice until August as their systems were designed to check not only whether a return was due at all, but whether those returns which have been submitted are correct. The penalty is in respect of the period of 20 May 2013 to the submission date of 12 June 2013. Following the Upper Tribunal decision of *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012]UKUT 363 (TCC) although the penalty notice could have been sent out within a month, the fact that it was not sent out until September 2013 was not unfair and the penalty is due. The penalty notice is not a reminder. The penalty did not increase as the submission had been made in June and not at a later date. The Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due

21. The sixth issue was whether there was a reasonable excuse for the late filing of the year-end return. There is no definition in law of reasonable excuse. Case law has determined that reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual (but not exceptional) event. The Tribunal had to consider whether the

failure to submit the year end return was reasonably avoidable and whether Mr Liu exercised reasonable foresight and due diligence and a proper regard to his obligations. There was no event that was either unforeseeable or beyond the employer's control which prevented compliance. It is necessary to consider the actions of Mr Liu from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities. Although there was planned maintenance being carried out by HMRC which prevented the submission being made on 4 and 5 April 2013 and delays during the period 6 to 9 April 2013, Mr Liu could have made a submission of the year-end return during the period 10 April to 19 May 2013. Mr Liu was aware of the obligation to submit by 19 May. The responsibility remains on the employer to ensure that all obligations are met. The fact that there was planned maintenance by HMRC does not amount to a reasonable excuse for the submission not being made until 12 June 2013. Information is available on HMRC website to advise employers of what they need to do to successfully submit a year-end return. The responsibility for the submission of the year-end return is on Mr Liu. Enquiries could have been made and advice sought. Although there had been no intention to disregard the year-end return, it had not been submitted by 19 May 2013. Mr Liu should have taken reasonable care to avoid the failure to submit which he did not do. There were no unexpected or unusual events which prevented Mr Liu from seeking advice and making the year-end return by 19 May 2013. The failure to submit the year end return was reasonably avoidable. There is no reasonable excuse

Decision

22. For the reasons above the appeal is dismissed and the £100.00 late filing penalty is confirmed

23. 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.

FIONAGH GREEN
TRIBUNAL JUDGE

RELEASE DATE: 15 May 2014