TC01434

Appeal number: TC/2011/03496

Late filing penalty – HMRC review conclusion addressed to individual unconnected with Appellant – Tribunal jurisdiction over HMRC procedures – Call centre advised return had been received but was "blocked" – appeal allowed and penalty discharged.

FIRST-TIER TRIBUNAL

TAX

KEY INTERIORS CREATIVE ASSOCIATES LIMITED **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 26 August 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 1 May 2011 and HMRC's Statement of Case submitted on 15 June 2011.

DECISION

1. This is the appeal of Key Interiors Creative Associates Limited ("the company") against a penalty of £400 for late filing of its 2009-10 P11D(b) return. The company's appeal was accepted.

2. The issues in the case were whether the return had been filed on time, and if not, whether the company had a reasonable excuse for late filing.

3. The relevant legislation and regulations are set out in the Appendix to this Decision.

The evidence

4. The Tribunal was provided with the correspondence between the parties.

5. HMRC also provided extracts from their web-based guidance and a page from their internal records. Mr Verzariu, the company's director, provided printouts of the P11D(b) form dated 30 June 2010.

The facts

6. From that evidence I find the following facts.

7. The company believed it had filed the 2009-10 P11D(b) by internet on 30 June 2010 - well before the due date of 6 July 2010. It used HMRC software, and printed out a copy of the return.

8. By letter dated 15 November 2010 HMRC issued a penalty of £400 for the late filing of the return, being £100 for each the four months from 7 July 2010 to 6 November 2010.

9. By letter dated 22 November 2010 Mr Verzariu wrote to HMRC saying that the return had been filed on 30 June 2010, enclosing the printout in support, and asking for "confirmation that this matter is now closed and that the penalty will immediately be rescinded."

10. On 4 February 2011 HMRC rejected the appeal and offered a review. The letter says:

> "My records show that you are not registered online and no attempts were made to file. The return is still shown as outstanding."

11. On 18 February Mr Verzariu called the HMRC helpdesk and spoke to Mr Scott Sommerville. The content of that call is disputed, and is discussed below.

12. On 22 February Mr Verzariu again called the HMRC helpline and was told to try sending the return again. The return was successfully filed online on the same day, using HMRC software.

13. By letter dated 6 April 2011, HMRC sent a letter headed "Conclusion of Review" addressed to "the Company Secretary". The letter began "Dear Mr Martin."

14. This letter makes no reference to the documents sent by Mr Verzariu to HMRC, and says: "No evidence has been provided to show that the return was filed on or before its filing date."

15. By letter dated 3 May 2011, Mr Verzariu replied to HMRC saying:

> "You wrote to a Mr Martin, but there is no such person in the Company. I am writing to you as Company Director.
>
> Your review does not address the fact that we received confirmation by email that the return had been received in good time. Please let me know how we were to know that it had not? Why should we doubt the website? There is no system other than that of HMRC's own confirmation to go by. In the past, the confirmations have been reliable. We sent you documentation about this with our appeal, but you appear to have completely ignored it in your conclusion."

16. By letter dated 11 May 2011, the HMRC Appeal Review Officer replied to Mr Verzariu, saying:

> "I apologise for my error in the review conclusion letter dated 6 April 2011, by addressing a Mr Martin. I can appreciate that my mistake may have given the impression that a correct and proper review was not completed. However this was not the case as a full and comprehensive review was completed of the decision made by HMRC on 4 February 2011 in relation to your appeal."

17. The letter also reminded Mr Verzariu of the company's right to appeal to the Tribunals Service should he not agree with the outcome of the internal review. Mr Verzariu, on the company's behalf, appealed to the Tribunal on 1 May 2011.

Submissions by Mr Verzariu on behalf of the company

18. Mr Verzariu says he submitted the P11D(b) on 30 June 2010 using HMRC's software. He then printed out a copy for his records, and received an email confirming successful submission.

19. Soon after he received HMRC's letter dated 4 February 2011, he called the helpline and spoke to "Scott". He says (emphasis in original):

> "Scott checked the system and advised that he was seeing the return and he could not understand why it was being <u>blocked</u>. His comments were that maybe there was a problem with the P35. Confirmed with him that the P35, P14, P60 filed OK. He advised that he would refer the matter and gave ref number []"

20. Mr Verzariu spoke to the HMRC helpline again on 22 February 2011 and was advised to resubmit the return. Mr Verzariu says that the resubmitted return was identical to that submitted on 30 June 2010, and that both filing attempts were carried out using HMRC software. He asks "why was 22/2/11 accepted and not 30/6/11?"

Submissions by HMRC

21. HMRC say that its records "demonstrate" that no P11D(b) was filed until 22 February 2011. They say that the printouts are for the company's records and "do not indicate that the form was filed successfully online."

22. They further say that:

> "When the form P11D(b) has been successfully submitted the Employer will get an acceptance or rejection message through the software or service they use. If they have provided HMRC with an email address, they will also get an email message. HMRC contend that the employer has failed to produce these to confirm that the return was successfully submitted online."

23. In relation to the call made by Mr Verzariu on 18 February, HMRC produce as evidence an internal document. headed with a reference number which is identical to that on the company's P35. The next line reads: "Company Name: RAH Associates Ltd".

24. The document states that on 18 February 2011 a call was taken by Mr Scott Sommerville at 11.15.51, but it records only that "a full security check was completed with the caller." No further details of the call are given.

25. The document continues as follows:

> "18/02/2011 14.29.51 Phil Knight: OSH. There is no online 2010 P11D submission showing on gateway tools or GSIS tracking for this emp/ref. The customer will still be able to submit using their third party or the HMRC software. Thanks"

26. The next three entries are from separate HMRC employees, each of whom say they have left a message on the customer's answering machine. The final record, dated 22 February 2011, and timed as 10.39.29, concludes: "Case closed as 3 attempts made."

27. In reliance on this document, HMRC submit that "HMRC did not confirm that the P11D(b) form and been received, rather advised that the customer would still be able to submit using their third party or HMRC software."

28. They further submit that the customer has no reasonable excuse for the late submission and that HMRC "have no discretion in the calculation of the penalty amount as it is set in statute."

The review process

29. The nature of the review process is prescribed by Taxes Management Act 1970 ("TMA") s 49E, set out the Appendix to this Decision. Section 49E(4) requires that HMRC "must take account of any representations made by the appellant."

30. In the instant case, the review decision was addressed to a Mr Martin, who was identified as "Company Secretary". There is no Mr Martin holding office at the Appellant company. The review decision also fails to refer to the documentation and representations put forward by the company, but rather says that "no evidence had been provided."

31. In their letter dated 11 May HMRC assert that "a correct and proper review" was carried out.

32. The extent of the Tribunal's jurisdiction over HMRC's internal procedures is currently uncertain, see *Oxfam v HMRC* [2009] EWHC 3078 (Ch) at [68]. Were it to be clear that the Tribunal had jurisdiction to consider this matter, bearing in mind the incorrect addressee and HMRC's failure to refer to the evidence submitted by the company, I would have concluded that, on the balance of probabilities, HMRC had failed to take account of the representations made by the Appellant and so had failed to comply with its statutory obligation under TMA s 49E(4). As a result, I would have decided that the review decision was void, and remitted the case back to HMRC for them to make a fresh decision.

33. If the review decision was void, no decision would have been "notified" to the company within the time period specified by TMA s 49E(6). Where no review decision is notified, the default position is that HMRC's view of the matter is treated as having been upheld (see TMA s 49E(8).

34. if "HMRC have not given notice of the conclusions of the review", an Appellant can notify its appeal directly to the Tribunal, see TMA s 49G(1)(b).

35. Because of the uncertainty surrounding the Tribunal jurisdiction, and taking into account the right of an Appellant to notify the appeal to the Tribunal if HMRC failed to notify its review decision, I am not remitting this case back to HMRC for it to reperform the review process. Instead, I have gone on to consider the company's appeal before the Tribunal.

Discussion and findings of fact on the calls between the parties

36. Mr Verzariu has provided evidence, in the form of the printout, that the return was submitted. In his letter of 3 May 2011 he also says that he received a copy of the email confirming successful submission. Furthermore, he documented a call with Mr Sommerville, in which the latter said that the return had been submitted, was visible on the system, but was "blocked."

37. HMRC say that:

(1) the printout is not sufficient evidence;

(2) no email receipt was provided by the company; and

(3) HMRC did not advise that the return had been received, but rather that the return could be resubmitted.

38. The document on which HMRC seek to rely has the correct company reference but a different company name: RAH Associates Ltd rather than Key Interiors Associates Ltd.

39. Given that the reference on the document agrees to that on the company's P35, and in the absence of submissions by Mr Verzariu on this point, I find, on the balance of probabilities, that this record relates to the company.

40. The document is, however, an incomplete record of the conversation between Mr Verzariu and Mr Sommerville. Some communication occurred in addition to the security check. How else would Mr Knight know what issue he was required to consider?

41. HMRC have provided no record of this conversation, and I thus accept Mr Verzariu's account as to the content of the call he made to HMRC on 18 February 2011.

42. The HMRC document makes it clear that Mr Knight did not call Mr Verzariu on 18 February; rather he simply put his observations on this record and it was left for someone else to tell Mr Verzariu.

43. The document records nothing after 10.39am on 22 February, when the case was closed without any information regarding the refiling of the return being passed to Mr Verzariu.

44. Mr Verzariu states that he called HMRC on that day, was advised to refile the return, and did so. HMRC have not disputed that this call occurred; they have also confirmed that the return was filed on that day. I therefore accept Mr Verzariu's evidence as to the content of that call.

45. On the basis of the foregoing, I make the further findings of fact that:

(1) Mr Verzariu was told by Mr Sommerville on 18 February that his P11D(b) form was visible but "blocked" on the HMRC system; and

(2) no further communication took place between HMRC and Mr Verzariu until 22 February, when the company was advised by HMRC to refile the return.

Decision

46. The legislative requirement is that the P11D(b) return be "delivered" to "an official computer system" by the due date, see Social Security (Contributions) Regulations 2001, Reg 80(1A)(1)(b), set out at the end of this Decision.

47. On the facts of this case, the P11D(b) return was visible to HMRC and could be seen by Mr Sommerville when he checked the system on 18 February 2010. Because it was visible to Mr Sommerville, it must have been delivered to the HMRC computer. Neither party has suggested that this "blocked" return was filed on any date other than 30 June 2010, and I thus find that it was delivered to HMRC before the due date.

48. The company's appeal therefore succeeds and the penalty is discharged.

49. 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 Redston

TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 12 SEPTEMBER 2011

APPENDIX

The legislation and regulations

Regulation 71(2) Social Security (Contributions) Regulations 2001 ("SSCR") sets out the employer's liability to make a P11D(b) return:

> (1) …an employer who is liable to pay a Class 1A contribution to the Board shall pay that contribution to them not later than 19th July or, where payment is made by an approved method of electronic communications in respect of earnings paid after 5th April 2004, not later than 22nd July in the year immediately following the end of the year in respect of which it is payable.
>
> (2) A Class 1A contribution paid to the Board in accordance with paragraph (1) shall be shown in a return made to them in accordance with regulation 80(1).

SSCR Reg. 80 sets out the requirements for the return which has to be made under Reg. 71(1):

> (1) Where a Class 1A contribution is payable to the Board in accordance with regulation 71(1)…the employer shall render to them a return, not later than 6th July following the end of the year…
>
> (1A) The employer must render the return required by paragraph (1)—
>
> (a) by sending it to the Board; or
>
> (b) arranging for the information which it would contain to be delivered to an official computer system by an approved method of electronic communications.

SSCR Reg. 81 provides for penalties if the return is not submitted by the due date:

> (1) Schedule 24 to the Finance Act 2007 (penalties for errors) applies to the return of contributions referred to in regulation 80(1) (return by employer) as if—
>
> (a) Class 1A contributions were a tax; and
>
> (b) that tax and the return of contributions in relation to it were listed in the table in paragraph 1 of that Schedule.
>
> (1B) ….
>
> (2) Any person who fails to make a return referred to in paragraph (1) by the date which applies to him under regulation 71(1)…may be liable—
>
> (a) within 6 years after the date of that failure, to a penalty 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;
>
> (b) …

(3) …

(4) For the purposes of paragraph (2), "the relevant monthly amount" in the case of a failure to make a return is—

(a) where the number of earners in respect of whom particulars of the amount of any Class 1A contribution payable should be included in the return is 50 or less, £100; or

(b) where that number is greater than 50, £100 for each 50 such earners and an additional £100 where that number is not a multiple of 50.

TMA s 100B sets out the law relevant to the company's right of appeal, and the Tribunal's powers:

(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.

TMA s 49E sets out the nature and requirements of a HMRC review:

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(7) In subsection (6) "relevant day" means—

(a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,

(b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.

(9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached.

TMA s 49G sets out how an appeal is notified to the Tribunal after a review:

(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question.

(5) In this section "post-review period" means—

(a) in a case falling within subsection (1)(a), the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(6), or

(b) in a case falling within subsection (1)(b), the period that—

(i) begins with the day following the last day of the period specified in section 49E(6), and

(ii) ends 30 days after the date of the document in which HMRC give notice of the conclusions of the review in accordance with section 49E(9).