TC01541

Appeal number: TC/2011/00396

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

FIRST-TIER TRIBUNAL

TAX

INTELLIGENT MANAGEMENT UK LTD **Appellant**

- and -

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

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 20 October 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 7 January 2011, HMRC's Statement of Case dated 25 March 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against penalties totalling £400, imposed in respect of the late filing of its P35 employer's annual return for the tax year 2009/10. The deadline for filing the return was 19 May 2010.

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 Section 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. The penalty notice imposing penalties of £400 (4 monthly penalties of £100 each) was dated 27 September 2010. The notice stated that "You have been charged penalties from 20 May 2010 to 19 September 2010".

7. A letter from UKmigrate.com dated 8 October 2010 stated that the Appellant was no longer trading, and stated that the return was filed online but that the author of the letter had no confirmation letters stating that the return had been accepted. The letter requested HMRC to confirm that this was the case and to withdraw the penalty.

8. A further letter from UKmigrate.com in November 2010 stated that the writer of that letter personally did the return online. It stated that being a first-time user, he did not keep a printout of the submission "as I did not know how to and assumed as there were no warnings of any transmission failure, the submission had been successful". It further stated that the first that was known that the submission had not gone through was when the penalty notice was received, that the Appellant had encountered problems with the online filing system, and that the Appellant would not have gone to all the trouble of registering online for it then to not submit the return.

9. There were further exchanges of correspondence between UKmigrate.com and HMRC, in which the former provided further documents, and in which the latter maintained the position that these documents did not establish that the return had been filed.

10. The Appellant's notice of appeal to the Tribunal dated 9 January 2011 states, in the grounds for appeal, that the Appellant updated its P14 submissions on 17 May 2010, and having done this, received an online P35 summary, which stated that there was no tax liability to HMRC. It is stated that this "was regarded as completion of the matter", and that the levy of a penalty in the circumstances was unjust. It is added that "We will be submitting further documentary evidence at the time of the hearing". The notice of appeal adds that "We submit that we have complied with the provisions, therefore there is no justification for levying a penalty on us".

11. The HMRC statement of case states amongst other matters that "HMRC's Online Services have confirmed that although the appellant accessed the system on 12 May 2010, 14 & 17 May 2010 and 21 December 2010 they did not submit the return until 12/01/11". HMRC submit that filing a P35 online is a straightforward process, that HMRC provides guidance on how to file online and what to expect if the submission is not completed correctly, and that a large number of employers have filed their returns online successfully since 2004/05.

12. As observed above, the Appellant's notice of appeal stated that "We will be submitting further documentary evidence at the time of the hearing". However, the Appellant was notified by the Tribunals Service by letter of 18 February 2011 that the case had been assigned to the "default paper" category, which meant that the case would be considered on the papers unless the Appellant requested an oral hearing. That notification was in accordance with Rule 23(1)(b) of the Tribunal's Rules, and made clear that it was still open to the Appellant to request a hearing if the Appellant so desired. Under Rule 26(3), it was open to the Appellant to request a hearing within the time limit for submitting a reply to the HMRC statement of case. After the HMRC statement of case was filed, the Tribunals Service sent the Appellant another letter dated 28 March 2011, advising the Appellant that it could within 30 days submits a reply, in which the Appellant could request an oral hearing. No reply or request for a hearing was submitted by the Appellant.

13. On 25 August 2011, the Tribunal of its own motion issued the following further directions:

1. Within 21 days of the date of release of these directions, HMRC may file with the Tribunal and serve on the Appellant any further evidence and/or submissions on which HMRC wish to rely in this appeal, in particular any evidence in support of the contention on page 4 of the HMRC statement of case that "HMRC's Online Services have confirmed that although the Appellant accessed the system on 12 May 2010, 14 & 17 May 2010 and 21 December 2010 they did not submit the return until 12/01/2011".

2. Within 21 days of the date of service of any HMRC evidence or submissions in accordance with Direction 1, the Appellant may file with the Tribunal and serve on HMRC any further evidence and/or submissions on which the Appellant wishes to rely in this appeal, in particular, clarification of the date on which the Appellant says that the return was filed and clarification of the reasons why the Appellant says no penalty should be imposed.

3. The Tribunal will thereafter proceed to give its determination in this appeal.

14. A further submission was received from HMRC pursuant to those directions on 6 September 2011. No further submissions or evidence have been received from the Appellant.

15. The HMRC submission contains an e-mail from the HMRC PAYE Service Management Team, containing printouts from its "Event Query" system, which is said to give details of times of log-ins, submissions and other events. This printout, read with the accompanying explanations from the PAYE Service Management Team, indicates that the Appellant registered and was issued with an activation code on 5 and 6 May 2010, logged into the online system and activated the service on 12 May 2010 and then logged out again, logged in on 14 May 2011, 17 May 2011, 21 December 2011, 22 December 2011, and that on 12 January 2011 the Appellant logged in twice, submitted a return and then logged in again on the same day. The system records only a single return being filed, on 12 January 2011, at 15:57.

The Tribunal's view

16. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability. The Tribunal is satisfied that the parties have been the opportunity to present all evidence on which they wish to rely to the Tribunal.

17. If a return is submitted late and a late filing penalty is imposed, the burden of proof is on the Appellant to establish a reasonable excuse. However, the Appellant is only put in the position of having to establish a reasonable excuse if HMRC discharges the initial burden of establishing that the return was submitted late.

18. On the evidence provided, the Tribunal is satisfied on a balance of probabilities that the return was not filed until 12 January 2011.

19. In respect of the issue of reasonable excuse, the information provided by the Appellant is not clear or detailed as to what exactly occurred. The letter from UKmigrate.com in November 2010 stated that the writer at least attempted to submit the return online, and was unaware that the attempted submission was unsuccessful until the penalty notice was received. The Appellant's notice of appeal states on the other hand that the writer updated its P14 submissions on 17 May 2010, and that having received an online P35 summary which stated that there was no tax liability, the writer regarded this as "completion of the matter". This suggests that the Appellant did not in fact file a P35 online because the Appellant assumed, rightly or wrongly, that the Appellant did not need to do so in the light of the fact that an online P35 summary indicated that there was no tax liability.

20. The Tribunal has had regard to *HMD Response International v Revenue & Customs* [2011] UKFTT 472 (TC) ("*HMD*"). The primary finding in that case was that there was no default in that case. The main alternative finding was that even if there was a default, the appellant had established a reasonable excuse for the entire period of the default given that its agent honestly and genuinely believed that the filing had taken place within the deadline. At paragraph 34 of that case, the Tribunal then reached a further alternative finding that "*we do not consider that any penalty would be recoverable over and above the £100 penalty for the first month, unless HMRC proves (the onus being upon it) that even if such a penalty notice, which would have acted as a reminder, had been issued, the default would nonetheless have continued*".

21. In the present case, the Tribunal is satisfied that there was a default.

22. If honest and genuine belief that the filing had taken place within the deadline can be a reasonable excuse, the Tribunal considers that there must be some reasonable basis for the honest and genuine belief. The Tribunal does not consider that that an irrational or unreasonable belief, even if honest and genuine, would suffice.

23. The Tribunal also considers that there is an onus on the person obliged to submit a return, if filing online, to make reasonable and diligent efforts to obtain the necessary information on the procedure for filing online, and reasonable and diligent efforts to follow that information fully and carefully.

24. On the basis of the limited information provided by the Appellant, the Tribunal is not satisfied that the Appellant attempted to file the P35 online within the time limit (the notice of appeal, as indicated above, suggests that the Appellant did not). Even if the Appellant did attempt to file the P35 online within the time limit, the Tribunal is not satisfied on the limited information provided by the Appellant that the Appellant made reasonable and diligent efforts to obtain the necessary information on the procedure for filing online, and/or reasonable and diligent efforts to follow that information fully and carefully.

25. As to the further alternative finding in paragraph 34 of *HMD* quoted above, it is considered that this was an *obiter dictum*. On the basis of the primary finding and main alternative finding in that case, the issue of whether a penalty in excess of £100 could be imposed simply did not arise.

26. In any event, the penalty notice in the present case was issued on 27 September 2010. The Appellant responded to it in a letter dated 8 October 2011, so it had clearly been received it by then. Even then, the P35 was not filed online until January 2011. Thus, in the present case, even after the penalty notice *had* been issued, the default *did* continue for more than an additional two months.

27. The Tribunal therefore finds that the Appellant has not established circumstances that would amount to a "reasonable excuse" for late filing under s.118(2) of the TMA. The Appellant has not challenged the amount of the penalty imposed, in the event that there is no reasonable excuse.

Conclusion

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

29. 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: 2 NOVEMBER 2011