TC02980

Appeal number: TC/2012/03134

INCOME TAX - failure to file P35 by the due date – whether the company has a reasonable excuse – no – whether the penalty is disproportionate – no – whether Tribunal has jurisdiction to consider if the penalty was unfair – no – appeal dismissed and penalty confirmed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MYTTON WILLIAMS LIMITED **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON TRIBUNAL PRESIDING MEMBER

The Tribunal determined the appeal on 18 July 2013 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 15 February 2012 (with enclosures) and HMRC's Statement of Case submitted on 9 March 2013 (with enclosures).

DECISION

1. Mytton Williams Limited ("the company") sought to appealed against a penalty of £900 for late filing of its 2010-11 Employer's Annual Return ("P35"). The amount of £900 is the total possible penalty relating to the whole period when the P35 was not filed. HMRC have only issued a penalty of £400, although they say that further penalties "may be charged following the outcome of this appeal".

2. It is only possible to appeal against penalties which have actually been levied by HMRC. This appeal is therefore only against the £400 charged to the company.

3. The Tribunal decided that **the company's appeal was refused** and confirmed the £400 penalty. A summary decision was issued on 23 July 2013.

4. On 9 August 2013 Ms Christine Barron, Accounts Clerk for the company, sought to appeal the decision. It is however not possible under Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules ("the Tribunal Rules") to appeal against a summary decision. The Rule reads (emphasis added):

> "If the Tribunal provides…summary findings and reasons only, in or with the decision notice, a party to the proceedings may apply for full written findings and reasons, and *must do so before making an application for permission to appeal* under rule 39 (application for permission to appeal)."

5. The Tribunal has therefore treated the company's application as a request for a full decision. If the company wants to appeal this full decision, it must submit a new application for permission to appeal, with reference to this full decision. Further details are given at the end of this decision notice. Permission to appeal can however only be given where there is arguably an error of law in the Tribunal's decision.

The law

6. Regulation 73 of the Income Tax (PAYE) Regulations 2003 is headed "annual return of relevant payments liable to deduction of tax (Forms P35 and P14)." Regulation 73(1) requires that an employer "must deliver to the Inland Revenue" its P35 return on or before 19 May following the end of a tax year.

7. Regulation 73(10) states that Section 98A of Taxes Management Act 1970 ("TMA") applies if the obligation to deliver returns, set out in Reg 73(1), is not complied with.

8. TMA s 98A provides for fixed penalties which apply "where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision." For employers with 50 or fewer employees, these penalties are £100 per month or part month

9. The taxpayer's right of appeal against the penalty and the Tribunal's powers are at TMA s 100B.

10. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2), which, so far as is material to this appeal, provides:

> "…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."

Facts

11. The company had filed its P35 return electronically in 2007-08, 2008-09 and 2009-10.

12. In 2010-11 the company purchased a Sage payroll system, which Ms Barron understood would submit the year end reports to HMRC.

13. On 26 September 2011, HMRC issued a penalty of £400 for failure to file the P35. On 6 October 2011 the company appealed the penalty and attached a paper copy of the P35.

14. On 20 January 2012 the HMRC Review Officer confirmed the penalty decision and advised that penalties were still accruing because of the continuing failure to file the return electronically.

15. Following receipt of that letter, Ms Barron spoke to HMRC and then submitted the P35 electronically using HMRC's own software.

Submissions on behalf of the company

16. In her letter to HMRC dated 6 October 2011, Ms Barron said that the return had been made "in good faith" on 29 March 2011 and that she did not realise "that the Sage system had failed". She said "as you would expect I will be contacting Sage as I had expected this function to be performed correctly."

17. She attached in her support the following:

(1) a P35 substitute deductions working sheet dated 31 March 2011 showing the tax and NICs contributions for tax month 12, together with a P32 summary reconciliation dated 29 March 2011;

(2) a document headed "P35 – Employer's Annual Return (E-file) dated 22 April 2010, the status of which is "not yet submitted".

18. Ms Barron also says that HMRC took five months to tell them that the returns had not been received. Once she was aware of this, she sent a paper return to HMRC, and this should have stopped any further penalties from accruing.

19. Finally, she submits that the penalty is "crippling to a small company struggling in this economic climate".

Submissions on behalf of HMRC

20. HMRC say that:

(1) the company is experienced in online filing, and should have realised that it needed to receive electronic "submission receipts" from HMRC. The relevant guidance was available on the HMRC website;

(2) in the absence of a "successful submission receipt" it was unreasonable for the company to think that it had filed the return.

(3) the second document submitted by the company as an attachment to its 6 October 2011 letter relates to the previous year and so does not constitute relevant evidence for this Tribunal;

(4) the Tribunal cannot take into account whether HMRC behaved fairly in not sending out the penalty notice until September 2011, because the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363(TC) found that the First-tier Tribunal had no power to consider this issue;

(5) the company could have used the HMRC online filing service if they were having problems with Sage.

21. HMRC also note the continuing delay in filing the return electronically, even after the receipt of the penalty notice.

Discussion and decision

Reasonable excuse: reasonable and honest belief

22. The Tribunal is allowed by law to cancel a P35 penalty if there was a "reasonable excuse" for the failure to file the return. I agree with Judge Brannan in *Coales v R&C Commrs* [2012] UKFTT 477(TC) at [25-36], that a person's hones and reasonably belief can provide a reasonable excuse.

23. HMRC do not explicitly challenge Ms Barron's honesty, but they correctly point out that the document she attached in support of her application (which she said related to 2010-11) was in fact for the previous year, and was also in draft. Furthermore, although Ms Barron says she submitted the return on 29 March 2011, she has provided only the deductions working sheets and P32 and no copy of the actual return.

24. The Tribunal notes that Ms Barron had the opportunity to respond to these points by submitting a Reply to the HMRC Statement of Case, and she did not do so. It is thus not clear to the Tribunal whether Ms Barron did, in fact, honestly believe that she had submitted the P35 on 29 March 2011, or was simply confused. However, it is not necessary for me to decide this point, because, as set out below, I find that any such belief was in any event not "reasonable".

25. In *The Clean Car Co Ltd v C&E Commrs* [1991] VATTR 234 Judge Medd gave the following helpful guidance:

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

26. The taxpayer here is the company. I thus consider the company's "experience and other relevant attributes". The company had submitted P35s for a number of years and Ms Barron could reasonably be expected to know that HMRC send a "successful submission" receipt when the return has been filed.

27. Ms Barron is the employee of the company who has been tasked with filing the companies returns. She has not sought to argue that some other person filed the online returns in earlier years, and even had that been the case, I would have held that she should have reviewed what had happened in the past before taking over the task.

28. In my judgment it was not reasonable, given the company's experience of on-line P35 filing, for Ms Barron to believe she had filed the return in the absence of a receipt from HMRC.

Reasonable excuse: problems with the Sage system?

29. Part of the company's case is that there was a fault with the Sage system. In Ms Barron's letter of 6 October 2011 she said she would be contacting Sage. However, she provided no further information to support her case. There is thus no evidence that there was, in fact, a problem with the Sage system.

30. The Tribunal must make its decisions on the evidence provided. On the basis of the evidence in this case, I find that the alleged failure of the Sage system does not provide the company with a reasonable excuse.

Reasonable excuse: reliance on Ms Barron?

31. As I stated above, the taxpayer here is the company, not Ms Barron. It was Ms Barron's task to file the P35 on time.

32. However, a company can only act through its employees and directors, and the company cannot normally avoid its statutory responsibilities by blaming its staff. There may be exceptions to this general rule, such as where the staff member has an illness (such as Alzheimers) which was unknown at the time of the disputed action. But there are no such exceptional circumstances in this case.

33. The company thus does not have a reasonable excuse as a result of its reliance on Ms Barron.

Proportionality

34. Ms Barron also argues that the penalty is "crippling to a small company struggling in this economic climate". Although she has not said so explicitly, the Tribunal has taken this as a submission that the penalty is disproportionate.

35. Proportionality is an important constituent in both EU law and the Human Rights Convention. The company in this case is disputing a penalty for late submission of PAYE returns. This is a domestic legal question and does not engage EU law.

36. The Tribunal can thus only consider whether the penalty breaches the Convention, and in particular Article 1 Protocol 1 ("A1P1") of the Human Rights Convention, incorporated as Schedule 1 of the Human Rights Act 1988, which reads as follows:

> "**Protection of Property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.

37. Whether or not a penalty is disproportionate has recently been considered by the Upper Tribunal in *Total Technology (Engineering) v R&C Commrs* [2012] UKUT 418(TC) ("*Total Technology*"). At [50] to [66] of their decision, the Upper Tribunal comprehensively reviewed the relevant case law on proportionality under human rights law. We gratefully adopt their analysis, which is not repeated here.

38. With reference to the second paragraph of A1P1 the Upper Tribunal said[1]:

> "A1P1 itself provides that the State may enforce such laws as *it* deems necessary. In those circumstances, it is not at all surprising that the State is entitled to a wide margin of appreciation, so wide as to allow imposition of taxes, contributions or penalties unless the legislature's assessment of what is necessary is devoid of reasonable foundation."

39. The phrase "devoid of reasonable foundation" is derived from EU caselaw[2] and also emphasised in UK court judgments[3].

40. Other case law states that a penalty will disproportionate so as to be a breach of an individual's Convention rights, if it is "not merely harsh but plainly unfair, so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted."[4] Both of these tests set a very high threshold before a penalty can be found by a court or tribunal to be disproportionate.

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[1] At [50(c)] of the decision; the emphasis given to "it" in the first sentence is that of the Upper Tribunal
[2] *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands* (Application no. 15375/89) at [60]
[3] See for example *R (Federation of Tour Operators) v HM Treasury* [2008] STC 2524 at [32]
[4] *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26]

41. In this case, given that the P35 return was submitted late, the penalty followed automatically, and was calculated in line with the statute. It does not meet the high threshold before a penalty becomes "disproportionate" under A1P1.

Hok and fairness

42. Also underlying the company's case is an argument that HMRC did not behave fairly in delaying the issuance of a penalty.

43. The Upper Tribunal in *Hok* ruled that this Tribunal does not have the power to consider whether or not HMRC behaved fairly in relation to the delay in issuing a P35 penalty. As HMRC say, the Upper Tribunal decision is binding on this Tribunal, which means it must be followed.

44. The company thus cannot succeed in its appeal on the basis that the delay in issuing the penalty is "unfair".

Conclusion and appeal rights

45. As a result of the foregoing, the company's appeal fails, and the penalty is confirmed.

Further penalties

46. Ms Barron has argued that sending a paper return to HMRC should have stopped the penalties from running. As stated at the beginning of this decision, the Tribunal cannot consider arguments about penalties which have not been issued and thus which are not under appeal.

47. If further penalties are issued, the company will be able to make an appeal to HMRC and if necessary to the Tribunal.

Appeal rights relating to this decision

48. 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 Rules.

49. 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: 15 October 2013