



TC03127

Appeal number: TC/2013/06339

PAYE – late submission of Employer’s Annual Return – Whether there was reasonable excuse for late submission of return - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARTIN WINT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AIIIT**

The Tribunal determined the appeal on 2 December 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 5 September 2013 with enclosures, and HMRC’s Statement of Case received 1 November 2013 with enclosures. The Tribunal wrote to the Appellant on 1 November 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. A reply, incorrectly dated 5 September 2013, was received by the Tribunal on 8 November 2013 and was considered by the Tribunal.

DECISION

1. Introduction

This considers an appeal against penalties totalling £1,200 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2010 – 2011. The appeal was made out of time but in the absence of any objection from HMRC the Tribunal has allowed the appeal to continue.

Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

2. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

Rowland v HMRC [2006] STC (SCD) 536.

Anthony Wood trading as Propaye v HMRC [2011] UKFTT 136 TC 001010)

3. Facts

Regulation 73(1) of Income Tax (PAYE) Regulations 2003 and Paragraph 22 of Schedule 4 of Social Security (Contributions) Regulations 2001 require an employer to deliver to HMRC a complete Employer Annual Return (Forms P35 and P14) before 20 May following the end of the tax year. In respect of the year 2010-2011 the appellant failed to submit complete Forms P35 and P14 until 16 May 2013. On 26 September 2011 HMRC sent the appellant a late filing penalty notice for £400 for the period 20 May 2011 to 19 September 2011. On 30 January 2012 HMRC sent the appellant a second late filing penalty notice for £400 for the period 20 September 2011 to 19 January 2012. On 28 May 2012 HMRC sent the appellant a third late filing penalty notice for £400 for the period 20 January 2012 to 19 May 2012.

4. Appellant's submissions

In a letter to HMRC dated 3 May 2013 the appellant's agent writes "We attached a copy of the P35 with submission acknowledgement that this was received by HMRC on 18th April 2012".

In an annotation on one of the papers it appears that the appellant's agent is saying that what was submitted was incorrectly dated 2009/10 when it should have been dated 2010/11.

5. On 16 May 2013 the appellant's agent wrote to HMRC and stated "I have looked back at our records although the return 2010/11 was submitted I have noticed that somehow the computer date of submission was incorrect, I can only think that at the time of submission somehow the computer date was incorrect and hence it may have rejected at your end. (I have attached copy of log in print from sage payroll). I agree that we should have noticed this error).

6. In a letter to the Tribunal dated 5 September 2013 the appellant's agent, APS Accountants (UK) Ltd, lodged a Notice of Appeal against the penalties. The appeal includes the following : "We suggest that if the clients records are checked it will show that he has never been late in filing or submitting any returns to HMRC so there is no reason why this should not have been done."

7. In a letter to the Tribunal, incorrectly dated 5 September 2013, received 8 November 2013 the appellant's agent states that the following letters were not received from HMRC

- i) The first late filing penalty notice dated 26 September 2011
- ii) The second late filing penalty notice dated 30 January 2012
- iii) The third late filing penalty notice dated 28 May 2012

They say the first the appellant knew that an error had occurred was on receipt of the letter from HMRC dated 25 April 2013. When the appellant became aware of this error a correct return was submitted without delay. The remittance had already been made on time.

(The letter starts "Thank you for your letter dated 1st November 2013 received by our office on 6th November...." showing the date to be incorrect - probably unaltered from the earlier letter of that date.)

8. HMRC's submissions

HMRC say that the appellant submitted its Employer's Annual Return for 2010-2011 online but late on 16 May 2013. Therefore the penalty of £1,200 was correctly issued and calculated.

9. HMRC say that no evidence has been provided by the appellant or his agent corroborating their contention that a submission or attempted submission was made to file the 2010/11 return by 19 May 2011.

10. HMRC say that when an employer files their Employer annual return online an identity reference called a correlation ID is attached. This allows HMRC to track progress of the submission. The copy of the log in from sage software referred to in paragraph 4 above is the correlation code for a 2009/10 submission which was for an entirely different employer.

11. HMRC say that the employer scheme for the appellant was created on 21 December 2010 so the first end of year return they required was for 2010/11.

12. HMRC point out that it is the employer's responsibility to ensure that a complete and accurate return is submitted on time. HMRC issued an electronic reminder on 13 February 2011.

13. HMRC contend that although the appellant fulfilled its obligations to pay the liabilities due this cannot provide a reasonable excuse for failing to file a complete end of year return by the statutory due date.

14. HMRC say they have no record of any mail sent to the appellant being returned undelivered.

15. Tribunal's observations

The level of the penalty and whether HMRC's failure to send a prompt reminder was unfair are all covered in the decision of the Upper Tribunal in the case of Hok Ltd. That decision also considers whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states "...the statutory provision relevant here, namely TMA s 100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair."

16. The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by the Taxes Management Act 1970 Section 118(2).

17. The appellant's agent states that a purely technical error occurred which they accept they should have noticed. There appears to have been some confusion by the Appellant's agent over the evidence submitted to support the contention that a return was in fact submitted or an attempt was made to submit the return. The appellant's agent states that the date of 2009/10 on the submission is incorrect and should be 2010/11. However HMRC have checked the correlation ID code and produced evidence to show that the documents submitted do not relate to the appellant but to entirely different traders. These discrepancies have not been explained by the appellant's agent. No other evidence has been produced to establish that the appellant's annual return was submitted at any time prior to 16 May 2013. In addition no record of an attempted submission have been produced. In addition the appellant's agent suggestion that their client's records should be checked is misplaced as no annual return was required by HMRC from the client for 2009/10.

Unfortunately the error of the late submission of the return was not corrected until 16 May 2013. No explanation of this long delay has been given other than that all three late filing penalty notices were not received by the appellant. HMRC have provided ample computer generated documentation which confirms the dates that the late filing penalty notices were issued. Unfortunately they have not produced a copy of any of the late filing penalty notices which would have provided more conclusive evidence. Nevertheless whilst it is entirely possible that one late filing penalty notice was not sent or was lost in the post the Tribunal finds it difficult to accept that all three late filing penalty notices were either not sent or were lost in the post.

Neither the appellant nor the appellant's agent has given any other excuse for failing to submit the Employer's Annual Return (Forms P35 and P14) until 16 May 2013.

A regrettable error or oversight by the appellant's agent does not establish a reasonable excuse for the late submission of an Employer's Annual Return (Forms P35 and P14).

18. HMRC have calculated the penalty of £1,200 accurately for the period 20 May 2011 to 19 May 2012. The appellant has established no reasonable excuse for the failure to submit its employer annual return for the year 2010/11 on time. The appeal is therefore dismissed.

19. 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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 11 December 2013