



TC03240

Appeal number: TC/2011/10136

*Income tax – penalty for late end of year return– whether reasonable excuse
– held, no – appeal dismissed and penalty confirmed*

**FIRST-TIER TRIBUNAL TAX
CHAMBER**

ASSOCIATED MANAGEMENT LTD

Appellant

-and

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

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

The Tribunal determined the appeal on 18/10/13 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 Notices of Appeal dated 20/11/11 and 15/12/12 (with enclosures), and HMRC's Statement of Case 28/01/13 (with enclosures).

DECISION

1. This is an out of time appeal against the £1000 penalties imposed for the late submission of the Employer's Annual Return for the tax year ending 5 April 2010.
- 5 2. The first issue is whether the appeal is out of time. If it is I need to consider whether to grant permission to proceed out of time.
3. The review conclusion letter was dated 19 July 2011. The appeal to the Tribunal was made on 20 November 2011. The statutory time limit to appeal is 30 days from the date of the review conclusion letter. The appeal is therefore made out of time. However it was only upon receiving HMRC's letter of 24/09/11, which stated that
10 Associated Management Ltd "the company" had not appealed that the company realised they had not received the review conclusion letter from HMRC. They then appealed within 30 days of HMRC's letter of 24/09/11. HMRC have no objection to the appeal being made out of time.
- 15 4. The Tribunal considered the overriding objective as set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and also the case law on late appeals, and decided to allow the company to make a late appeal.
5. As it is accepted by the company that they filed the Employer Annual Return late the only issue before me is whether the company had a reasonable excuse and whether they submitted their Employer Annual Return without unreasonable delay after the
20 excuse ended.
6. The Tribunal issued a summary decision which was a summary of my reasons for deciding that the company did not have a reasonable excuse. I dismissed the appeal and confirmed the penalty of £1000.
7. However, after receiving the summary decision, the company asked for full written
25 findings of fact and reasons for the decision (a "full decision"), as they are entitled to do. This is that full decision.

The legislation

8. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires that
30 P35s are filed on or before 19 May following the end of a tax year.
9. Taxes Management Act 1970 ("TMA") s 98A sets out the liability to fixed penalties for non-compliance.
10. The taxpayer's right of appeal against the penalty and the Tribunal's powers are at
35 TMA s 100B.
11. 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:
40 "…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."
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The issues

12. Although not bound by *Coales v Revenue and Customs Commissioners* [2012] UK FTT (477) (TC) I find that case is a helpful analysis of reasonable excuse with which I agree. I therefore follow the approach taken in *Coales*.
- 5 13. This means that the question I must ask myself in relation to whether there is a reasonable excuse is the following:
- 10 “... 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?”.
14. Insufficiency of funds cannot amount to a reasonable excuse unless attributable to factors outside the taxpayer’s control for example unforeseen or unexpected events.

Undisputed facts

- 15 15. The following facts are not in dispute:
- a) The Employer Annual Return for 2009-10 was due to be filed online by 19 May 2010.
- 20 b) On 27 September 2010 a first interim penalty notice of £400 was issued. This was calculated for the four months from 20 May 2010 to 19 September 2010.
- c) On 24 January 2011 a second interim penalty notice of £400 was issued. This was calculated for the four months from 20 September 2010 to 19 January 2011.
- 25 d) The return was delivered electronically on 6 March 2011. The period of default was 291 days.
- e) On 9 March 2011 a final penalty notice of £200 was issued. This was calculated for the period 20 January 2011 to 6 March 2011.
- f) An amendment to the return was received on 13 May 2011.
- 30 16. The legislation provides that an employer failing to make an end of year return on time is liable for a fixed penalty of £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees.

Summary of the company’s arguments

17. Essentially the company’s arguments break down into two strands:
- a) The company has a reasonable excuse for the default;
- 35 b) It was not fair of HMRC to impose the penalty without any prior warning that it was building up.

Discussion

18. Although the company has attached various correspondence to their Notice of Appeal in relation to the Construction Industry Scheme penalties, their VAT liability, and software problems associated with the filing of their 2010-11 Employer Annual Return, the only issue before me is in relation to the Employer Annual Return for the year ending 5 April 2010.
19. I cannot take into account any of these other matters unless they are relevant to whether there was a reasonable excuse as to why the company filed their 2009-10 return late.
20. In my view the company has not explained how any of these other issues relate to the Employer Annual Return I am looking at. For instance I cannot take into account any issues relating to the company's CIS returns unless it was the same issues which led to the late submission of the 2009-10 Employer's Annual Return. There is no evidence before me that this was the case. There is no evidence that the problems with HMRC's computer software associated with the filing of the company's 2010-11 Employer Annual Return also led to the late submission of the 2009-10 return. As such I find these other issues are not relevant to the issue of whether there was a reasonable excuse for the company's failure to file their 2009-10 Employer Annual Return on time.
21. In essence the company states in relation to the late filing of the 2009-10 Employer Annual Return that:
- a) They weren't aware of the requirement to file online, and they attempted to file in paper form.
 - b) Once they realised they had to file online (presumably when they received the first penalty notice), they experienced many difficulties which were not their fault, which delayed the actual filing.
22. The statutory obligation is on the employer to submit the return by the proper method by the due date. The legislation provides that an employer must file their 2009-10 Employer Annual Return online. The company may genuinely have believed that they could submit their Employer Annual Return manually to HMRC but it was for the company to check that this was the case.
23. In any case information about the submission of the return is readily available on HMRC's website, and by way of HMRC's telephone helpline. Further HMRC state they have issued various correspondence informing employers about this including a letter sent directly to employers in November 2008, November 2009, and November 2010. The P35PN 'notification to complete form P35 employer annual return' issued on 17 January 2010 clearly states that the 2009-10 Employer Annual Return must be filed on line by 19 May and warns of the consequences if it is filed late or not online.
24. The company states that they did not receive any information from HMRC about filing online. However HMRC state that all the letters were sent to the last known address and they have not had any correspondence returned undelivered. The company has not given any reasons as to why they have not received numerous documentation sent by HMRC to their address.

25. Given the company has been at the same address since 1 August 2005 I do not accept that that the company did not receive any of the numerous correspondence HMRC sent in relation to the online filing of the 2009-10 Employer Annual Return.
- 5 26. I therefore conclude that even if the company did not know they had to file online, they should have known. In any case they received ample warning of the requirement to file on line.
27. The burden lies on the company to establish that they had a reasonable excuse for the late filing.
- 10 28. In my view they have not provided any evidence to support their bare assertion that they attempted to file on paper and therefore I accept HMRC's evidence that no paper return was received.
29. The company have not provided any convincing evidence of exactly what problems they experienced even once they tried to file online after receiving the first penalty notice.
- 15 30. I therefore find the company has not established that they have a reasonable excuse for any part of the delay. This means the appeal must fail.

Unfairness

- 20 31. *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) makes it clear that this tribunal does not have jurisdiction to supervise the conduct of HMRC and thus has no power to determine whether the imposition of the penalty was unfair. This decision is binding on this tribunal. This means that issues relating to whether HMRC should have issued reminders to file on line are not a matter this tribunal can consider.

Conclusion and appeal rights

- 25 32. In conclusion I do not therefore find there was a reasonable excuse for the late filing of the Annual Employer Return for 2009-10. Issues as to whether HMRC should have issued reminders to the company that their Employer Annual Return had to be filed on line are not for this tribunal. I dismiss the appeal and confirm the penalty of £1,000
- 30 33. 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.
- 35 34. 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.

PAULENE GANDHI

TRIBUNAL JUDGE

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RELEASE DATE: 16th January 2014