



TC03468

Appeal number: TC/2013/09619

TYPE OF TAX – PAYE – Employer’s year-end return – penalties for late submission – whether submitted on time – no - whether penalties due – yes - whether penalties can be discharged on grounds of unfairness – no – whether finding that HMRC’s failure to send prompt reminders unfair – no whether penalties proportionate – yes – whether reasonable excuse for late submission – no – penalties confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAXONBECK LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE FIONAGH GREEN

The Tribunal determined the appeal on 28 February 2014 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 18 December 2013 (with enclosures), HMRC’s Statement of Case submitted on 23 January 2014 (with enclosures) and the Appellant’s Reply dated 31 January and 10 February 2014.

DECISION

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Introduction

1. This is an appeal against penalties of £500.00 for late submission of Employer's Annual Return for the tax year 2012-2013.

2. The appeal is determined without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal having decided that there was sufficient evidence and that it was fair and just to proceed.

Facts

3. Saxonbeck Limited ('the Company') was required to file an Employer Annual Return for the year 2012-2013 by 19 May 2013. From 2009 – 2010 onwards this had to be submitted online using an approved method of electronic communication.

4. The Company was required to complete an Employer Annual Return for 2012-2013 using the PAYE information.

5. HMRC sent an electronic reminder P35N to the Company on 24 March 2013, two months before the filing date.

6. HMRC sent an ARIN filing reminder on 28 April 2013.

7. The Company submitted monthly payment information to HMRC and made a genuine mistake in failing to submit the year-end return by 19 May 2013. An attempt had been made to submit on 28 May 2013.

8. HMRC sent a P35 Interim Penalty letter between 31 May 2013 and 5 June 2013 to the correspondence address for the Company which is the same address as the appeal documents informing the Company that it had incurred a penalty and needed to submit the return by 19 June 2013 in order to avoid a larger penalty.

9. HMRC sent the Company a late filing penalty notice on 23 September 2013 for £400.00 for the period 20 May 2013 to 19 September 2013.

10. The Employer Annual Return was filed online on 2 October 2013.

11. HMRC sent a final late filing penalty notice on 7 October 2013 for £100 for the period 20 September 2013 – 2 October 2013

12. The Company had been submitting returns on line for two years and was familiar with the end of year procedure although the software version of 12 Pay was updated each year.

5 13. The Company is small with one employee and sells musical instruments and equipment. Monthly returns had been completed satisfactorily and it was a genuine mistake that the Company had not submitted the year-end return

Legislation

10 14. The obligation to make a year-end return is imposed on an employer by Regulation 73 (1) of the Income Tax (Pay as you Earn) Regulations 2003 (SI 2003/2682) which provides that

(1) Before 20 May following the end of a tax year, an employer must deliver to the Inland Revenue (HMRC) a return containing the following information

(2) The information is –

15 (a) the tax year to which the return relates,

(b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and

(c) the total net tax deducted in relation to those payments...

20 The Regulation goes on to list the information which must be supplied, and regulation 211 provides that the employer must use two prescribed forms, the P35 and P14 to supply it. Form P35 contains, in essence, a summary, while one P14 must be submitted for each employee, giving the prescribed information specific to that employee. They are still referred to as ‘forms’ even though the requirement now is to
25 file the information on line rather than on paper. Regulation 205 requires the mandatory use of electronic communications by employers who must deliver their P35 and P14 forms online using an approved method of electronic communications from 2009 – 2010 onwards.

15.Taxes Management Act 1970

30 Sections 98A(2) and (3)

(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
35 twelfth or for which a penalty under this paragraph has already been imposed, and...

(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...

5 16. Section 118 (2)

(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 Commissioners 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 if he did it without unreasonable delay after the excuse had ceased

17. Section 100 – Determination of penalties

.....an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

18. Section 100B – Appeals against penalty determinations

(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

(b) in the case of any other penalty, 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 appropriate, confirm the determination,
- (iii) if the amount determined appears...to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or
- 5 (iv) if the amount determined appears ...to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

Issue

19. The issues for the Tribunal to decide were whether –

- (i) the submission was on time or made at an earlier date than 2 October 2013
- 10 (ii) there were difficulties with new software being used
- (iii) the penalties were correctly charged
- (iv) HMRC had acted fairly in not sending out the late filing penalty notice until 23 September 2013 and the final penalty notice until 7 October 2013
- (v) the penalties were disproportionate
- 15 (vi) there was reasonable excuse for the late submission

The submissions of the parties

20. The Company –

- 20 (i) the year-end return was submitted in good faith nine days late on 28 May 2013. Nick Fowler on behalf of the Company was trying hard to make the business work and had made one simple unintentional error
- (ii) the penalty should be £100
- (iii) had not been submitting online year end returns using the 12Pay software since
25 2010, the software package was new and the Company believed that it had submitted everything required online
- (iv) HMRC had received a full electronic record of monthly returns for 2012- 2013 and all monies due
- 30 (v) it was unfair for HMRC to wait five months before informing the Company of the penalty charges

(vi) a reasonable excuse has been given and continued throughout the period of the return being overdue

(vii) the penalty was disproportionate to the offence, the size of the Company which had one employee and its ability to pay

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(viii) the Company was loss making and cannot afford the penalty and would have to close making the employee redundant

(ix) there must be a discretion to reduce the penalty

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21. HMRC

(i) the Company was required to complete a year-end return for 2012-2013 using the PAYE information. The company had submitted year-end returns online since the end of the 2010 tax year and was an experienced employer and fully aware of its tax obligations

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(ii) a P35N electronic reminder was sent to the Company on 24 March 2013 advising that a year-end return needed to be made and filed by 19 May 2010 and explained how this can be achieved and warned of the consequences if the return was filed late

(iii) that the Company has an obligation to account for PAYE

(iv) the Company accepted that the year-end return was not submitted by 19 May 2013 but believed it had done so on 28 May 2013

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(v) HMRC records showed that the software package 12 Pay had been used to file the 2009 – 2010 and 2011 – 2012 returns, the versions being updated each year and that the Company was familiar with the general operation of 12 Pay software

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(vi) the submission was not made until 2 October 2013 and there had not been an earlier submission or test submission made. In the absence of receiving any notification in May 2013 the Company had not taken any action to ensure that the submission was made and received.

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(vii) information is published on HMRC website advising employers of what they need to do to fulfil their obligations and advice is also available on the Employer Helpline and from local Employer Centres

(viii) that a prudent employer would have contacted HMRC for advice which would have alerted the Company to the fact that a year-end return was required but that the Company did not do so

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(ix) that the Company does not have reasonable excuse for the late submission. There was no event that was either unforeseeable or beyond the employer's control which prevented compliance. The Company failed to operate the PAYE scheme correctly and that HMRC had to be consistent with their approach

(x) that there is no obligation to issue a reminder or to notify that a P35 had not been received prior to the issue of a penalty notice

(xi) that it is well publicised on HMRC website that penalties can be imposed for the late submission of returns and that a reminder will not necessarily be sent. The penalty notices had been received. The first penalty was issued four months after the due date which was the general period of issue to employers. The penalty notice was not a reminder but a notification of the penalty due on a particular date. The final penalty notice was issued on 7 October 2013 5 days after the submission had been received

10 Discussion

22. The first issue was considered. The monthly payroll information had been made for which the Company received email notification of successful submission. Pay as you Earn was then paid by cheque each month. Nick Fowler on behalf of the Company realised on 28 May 2013 that the year end return should have been submitted and made a submission which he understood had been received. There was no evidence regarding any acceptance or error messages regarding the submission process or the actual date when a test or submission was attempted. An instant message would still have been sent confirming whether a submission had been successful or not. None had been sent. No submission was successfully made by the Company until 2 October 2013. If the Company had believed that the year-end return had been successfully submitted in May 2013 then the issue of the penalty notices should have alerted the Company that something had gone wrong with the submissions.

23. The second issue was considered. The Tribunal accepts that the version of the software 12 Pay was updated each year and that the Company had some difficulties with its use. The software had been used for the 2009 – 2010 and 2010 – 2011 submissions and the Company should have checked to ensure that the 2012 – 2013 submission was correctly made and received by HMRC.

24. The third issue was whether the penalties were correctly charged. For the reasons set out above, and the year-end submission not having been made until 2 October 2013, the Tribunal decided that the penalties were correctly charged

25. The fourth and fifth issues were considered. Although the return was due by 19 May 2013 it was not until 23 September 2013 that HMRC sent the Company a late filing penalty notice for the period 20 May 2013 to 19 September 2013 and by then the Company had accumulated four monthly penalties of £100.00 each. HMRC then sent the final penalty notice on 7 October 2013 for the further part one month period 20 September 2013 to 2 October 2013. The notice had prompted the filing of the return on 2 October 2013. An electronic reminder P35N was sent by HMRC to the Company on 24 March 2013 almost two months before the required submission date of 19 May 2013. A P35 Interim Penalty Letter was issued to the Company between 31 May 2013 and 5 June 2013.

26. Although there is now a change of practice by HMRC and taxpayers are informed within a month of a failure to file the P35 this does not mean that HMRC acted unfairly in sending out the penalty notice on 23 September 2013. The legislation makes it clear that an officer of HMRC may determine what penalty is appropriate or correct and in this case there is only one possible correct penalty namely £100.00 for each month or part of a month for which the return was late and the Tribunal's power on appeal against fixed penalties is limited to correcting mistakes. There is no general power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise. The penalties are a fixed amount by law. Where the total duty on the return is equal to or more than the penalty amount the Company is liable to the whole of the penalty, if £100 or less the Company would only have been liable to a penalty of £100. As a concession to small employers HMRC limits the penalties charged to an amount not in excess of the actual liability. The liability for 2012 – 2013 was £653 and as the liability was more than the £500 penalties charged no reduction by HMRC was made. The penalties are proportionate.

27. HMRC do not accept that they have acted unfairly and the Tribunal agrees. There is a statutory obligation on employers to file year-end returns. There is no requirement that HMRC should send reminders or that they should warn employers that they are in default.

28. The Tribunal would be acting in excess of its jurisdiction if it discharged the penalties on the ground that their imposition was unfair. HMRC did not send out the penalty notice until September as their systems were designed to check not only whether a return was due at all, but whether those returns which have been submitted are correct which remains the practice following the procedural changes which now include the sending of two reminders where before there were none. It remains the case that a penalty notice is not sent out by HMRC until September. An improvement in practice does not however mean that before the improvement the practice was unfair. There is no evidence that by sending out the penalty notice in September that this was a deliberate act to ensure that £400.00 would be due in penalties. Following the Upper Tribunal decision of *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012]UKUT 363 (TCC) although the penalty notice could have been sent out within a month, the fact that it was not sent out until September and the final penalty on 7 October 2013 was not unfair and the penalties are due. The penalty notice is not a reminder. The Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due.

29. The sixth issue was whether there was a reasonable excuse for the late filing of the year-end return. There is no definition in law of reasonable excuse. Case law has determined that reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual (but not exceptional) event. The Tribunal had to consider whether the failure to submit the year end return was reasonably avoidable and whether the Company exercised reasonable foresight and due diligence and a proper regard to their obligations. There was no event that was either unforeseeable or beyond the employer's control which prevented compliance. It is necessary to consider the

actions of the Company from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities

5 30. Although the Company was using a new version of 12 Pay software the Company had successfully made online year end submissions for the two preceding
10 tax years. However for the tax year 2012 – 2013 no submission was made until 2 October 2013. The attempted submission on 28 May 2013 was not successful and this was accepted by the Company and a genuine mistake had been made. The Company was aware of the obligation to submit by 19 May. The responsibility remains on the employer to ensure that all obligations are met. The fact that the
15 Company assumed all Pay as you Earn matters were dealt with does not amount to a reasonable excuse. A reminder to file was sent out by HMRC on 24 March 2013 almost two months before 19 May 2013. The Company also knew that year-end returns were due by 19 May. Information is available on HMRC website to advise employers of what they need to do to successfully submit a year-end return. The
20 responsibility for the submission of the year-end return is on the Company. Enquiries could have been made and advice sought. Although there had been no intention to disregard the year-end return, it had not been submitted. The Company should have taken reasonable care to avoid the failure to submit which he did not do. The Company is small and the penalties will cause financial difficulties but this is not a reasonable excuse for the failure to submit the year-end return by 19 May 2013. There were no unexpected or unusual events which prevented the Company from seeking advice and making the year-end return by 19 May 2013. The failure to submit the year end return was reasonably avoidable. There is no reasonable excuse.

25 **Decision**

31. For the reasons above the appeal is dismissed and the £500.00 late filing penalties are confirmed.

30 32. 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
35 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

40 **FIONAGH GREEN**
TRIBUNAL JUDGE

RELEASE DATE: 4 April 2014