



TC03761

Appeal number: TC/2011/07676

PAYE – employer’s annual return – penalty for late submission – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AIDAN MCPARLAND LTD – BUILDING CONTRACTOR Appellant

- and -

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

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 23.06.2014 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 16.08.2011 (with enclosures) and HMRC’s Statement of Case submitted on 21.11.2011 (with enclosures).

DECISION

1. The Tribunal admits the late appeal.
- 5 2. The Tribunal decided that the Late Filing Penalty Notice dated 27.09.2010 (amended on 26.01.2011) in the (amended) sum of £300 was properly issued by the Respondents.
3. The appeal is dismissed.
4. The Tribunal decided that the filing date for the Appellant's Employer Annual
10 Return for the year 2009-2010 (forms P35 and P14) was 19.05.2010. The Return was submitted on paper on 02.08.2010, i.e. over two months late.
5. The Tribunal further found that there was no reasonable excuse for the failure to file the Employer Annual Return on time. In particular it is found that, contrary to the assertion in a letter from the Appellant to the Respondents dated 13.07.2011, no
15 Annual return was submitted by the Appellants in May 2010.
6. It is noted that Mary McParland, a director of the Appellant Company, telephoned the Respondents on 03.02.2011 saying that she had proof that form P35 was posted to the Respondents on 18.05.2010. No such proof of posting has ever been received.
- 20 7. On 04.08.2011 the Appellant advised the Respondents, in a telephone conversation, that the Return had been filed electronically before the due date in May 2010. This was inconsistent with telephone conversation mentioned in paragraph 6 above and demonstrates a lack of certainty on the part of the Appellant about the circumstances of the alleged timely submission of the Return. The Respondents have
25 no record of receipt of an electronic submission.
8. The Respondents' records indicate that the Appellant enrolled for PAYE for Employers on 12.05.2010; they activated the system on 08.06.2010, some three weeks after the due date for the Return.
9. If the Appellant had submitted the 2010-2011 Return online they would have
30 automatically received a successful submission receipt. They have been unable to produce any such receipt. If the Return had been submitted online and was defective the Appellant would have automatically received a rejection message. The absence of any such messages leads the Tribunal to conclude that no attempt to file the 2010-2011 Return online was made prior to 19.05.2011 or, indeed, at all.
- 35 10. It is noted that a form P35N was issued by the Respondents to the Appellant on 24.01.2010; this clearly stated that a penalty would be imposed if the Return was received late. This will have served as a reminder for the Appellant to attend to the matter promptly.

11. The test applied by the Tribunal in considering the matter of reasonable excuse is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the Return would become due on a particular date would not have avoided the default. The facts and chronology of events, set out in the Notice of Appeal and the Respondents' Statement of Case, disclose that such foresight and diligence by the Appellant would have avoided the default.

12. In so far as the appellant may suggest that the imposition of the penalty is disproportionate, unjust or unfair, those arguments have already been disposed of by the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC) and *HMRC v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC). In the former it was made clear that the First-tier Tribunal has no jurisdiction to determine the fairness of a penalty imposed by statute. It is plain from a perusal of the latter that a penalty of the magnitude of that imposed in this case could not be described as disproportionate even if there were jurisdiction to deal with that argument.

13. 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.

**WDF COVERDALE
TRIBUNAL JUDGE**

RELEASE DATE: 26 June 2014