



TC03783

Appeal number: TC/2011/08320

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIQUID MARINE LTD

Appellant

- and -

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

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 27.06.2014 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 10.10.2011 (with enclosures), HMRC’s Statement of Case submitted on 28.11.2011 (with enclosures) and the Appellant’s Reply dated 22.12.2011 (with enclosures).

DECISION

- 5 1. The Tribunal decided that the Late Filing Penalty Notice dated 26.05.2011 in the sum of £100 was properly issued by the Respondents.
2. The appeal is dismissed.
3. The Tribunal found that the filing date for the Appellant's Employer Annual Return for the year 2010-2011 (forms P35 and P14) was 19.05.2011. The Return was filed online on 23.05.2011 i.e. four days late.
- 10 4. The Tribunal further found that there was no reasonable excuse for the failure to file the Employer Annual Return on time.
- 15 5. The appellants have at all material times acted through their agents John D Kilby & Co. It is not in dispute that reliance upon a third party cannot constitute a reasonable excuse. The Respondents have correctly observed, in the Statement of Case, that the responsibility for filing the Return on time rests solely with the employer and this responsibility cannot be transferred to an agent working on his behalf.
- 20 6. The Appellant Company was incorporated on 29.07.2010. An Employer PAYE scheme had a date of commencement of 29.07.2010; the Respondents say that the PAYE scheme itself was set up "on or before 18.05.2011" whereas the Appellant says that it was not set up by the Respondents until 23.05.2011 which made it impossible to have completed a Return by the deadline of 19.05.2011.
- 25 7. The Appellant argues that a form CT41G (New Company details) was completed in September 2010 and as a result a PAYE Reference number should have been issued by the Respondents; no such Reference number was issued.
- 30 8. A copy of the form CT41G is reproduced in the Tribunal submission bundle. It is noted that on the form the Appellant's agent has provided no information in Box 15 indicating the name of the HMRC office dealing with the Company's PAYE.
9. There is no obligation upon the Respondents to ensure that a PAYE record is set up upon receipt of a form CT41G. In this case no PAYE record was set up and the absence of information about the appropriate HMRC office would in any case have been a hindrance to the Respondents.
- 35 10. The Tribunal accepts the Respondents' argument, in the Statement of Case, that a prudent employer and/or agent would have taken steps to ensure that a PAYE scheme was set up from the inception of the business in order to ensure that all relevant literature was issued including a payslip booklet or reference number to enable payments to be correctly allocated to the correct account.

11. The Appellants could have availed themselves of telephone or email facilities to undertake the registration process for employers (HMRC literature reproduced at folio 15 of the Respondents' Statement of Caser refers).

5 12. As mentioned in paragraph 6 above the Appellant argues that the PAYE scheme was not set up by the Respondents until 23.05.2011 which was too late for the Appellant to comply with its obligations. The Respondents contend that the scheme start date has been recorded as 29.07.2010 but only being set up on 17.05.2011 on the Employer Business Service because the date of 18.05.2011 is recorded for the new employer. In addition a P35 was issued on 20.05.2011. In so far as there was
10 insufficient time for the Respondents to process the setting up of the scheme any earlier the Tribunal finds that no blame can be attached to the Respondents in this respect. The Tribunal concludes that a PAYE scheme should have been registered on or about 29.07.2010 (deductions for National Insurance being recorded on Form P14 from this date) rather than waiting until May 2011 to register. More timely action by
15 the Appellant or their agents would have avoided the default that eventually occurred.

13. Ultimately it is the responsibility of the employer to ensure that Annual Returns are filed on time. In this case the Appellant has failed to meet its statutory obligations.

14. 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
20 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, the Respondents' Statement of Case and in the Appellant's Reply, disclose that such foresight and diligence would have avoided the default.

15. The Appellant's agent has submitted, in their letter dated 22.12.2011, that the
25 imposition of the penalty is disproportionate, unjust and 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) Limited* [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
30 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 the argument.

16. This document contains full findings of fact and reasons for the decision. Any
35 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**

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RELEASE DATE: 7 July 2014