TC04046

Appeal number: TC/2011/06168

PAYE – penalty for late submission of annual return – application to set aside decision – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

LEGGETT, PORTER & HOWARD EXECUTIVE PENSION FUND — **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Full findings of fact and reasons for summary decision issued on 4 July 2014

DECISION

Introduction

1. This is a decision on an application to extend the time limit for applying to set aside a decision of the Tribunal dismissing an appeal against the issue of penalties totalling £2,400, £1,200 being in respect of the late delivery of the Appellant's employer's annual return for the tax year 2008-09 and £1,200 being in respect of a similar default for the tax year 2009-10.

Factual history

2. The Appellant's notice of appeal was received by the Tribunal on 8 August 2011. It was allocated as a default paper case and HMRC's written submission was received by the Tribunal on 5 October 2011.

3. Following receipt of a reply from the Appellant, the appeal was referred for judicial determination and a decision was issued on 13 January 2012.

4. The Appellant applied for the decision of 13 January 2012 to be set aside, essentially on the basis that the full picture had not been put before the Tribunal by HMRC. The application was granted by decision released on 20 March 2012 and the matter was, on the instructions of the Judge, listed for an oral hearing.

5. The oral hearing was delayed to await the outcome of the Upper Tribunal's consideration of HMRC's appeal in the case of *HMRC v Hok* [2012] UKUT 363 (TCC) and subsequently took place on 14 August 2013.

6. On 25 October 2013 the Tribunal's decision dismissing the appeal was issued.

7. On 21 January 2014 the Tribunal received from the Appellant an email which asked the Tribunal to check with HMRC on the Appellant's registered address as the Appellant had not heard from HMRC since the issue of the Tribunal's decision on 25 October 2013. The Tribunal replied by email on the same date, stating that the Tribunal had no access to HMRC records and telling the Appellant that if it wished to appeal against the 25 October 2013 decision, it should make an application (out of time) for permission to appeal.

8. On 12 April 2014 the Tribunal received a further email from the Appellant, stating that a letter had just been received from HMRC which indicated that they held another address for the Appellant in Amersham. The Appellant maintained that HMRC's presenting officer had misled the Tribunal at the hearing in August 2013 when stating that correspondence had been sent to the Appellant at its "registered address" (which the Tribunal had taken to mean the current address at Cadnam in Hampshire, whereas the latest letter demonstrated this actually referred to an out of date address in Amersham). The Appellant sought confirmation from the Tribunal that the fine would now be "rescinded".

9. The correspondence was referred to me for consideration. It seemed to me that the Appellant's letter should be treated as a late application to set aside the 25 October 2013 decision on the basis that material evidence as to the address at which correspondence had been sent to the Appellant might have been withheld from the Tribunal, however inadvertently. On 8 May 2014 the Tribunal wrote to HMRC on my instructions, asking for their representations on the question of setting aside the 25 October 2013 decision on this basis.

10. Following the receipt of written representations from HMRC dated 11 June 2013, I considered the application in detail and on 4 July 2014 my summary decision dismissing the application was released. This decision contains full findings of fact and reasons for the summary decision issued on 4 July 2014.

Consideration

11. The first issue to consider is that Rule 38(3) of the Procedure Rules requires that any application to set aside a decision of the Tribunal is to be received by the Tribunal no later than 28 days after the date on which the decision in question was issued to the relevant party. In this case, that time limit expired on 22 November 2013.

12. The Tribunal has power to extend this time limit, but will only do so for good reason. As part of its decision as to whether to allow an extension of time, it is appropriate for the Tribunal to consider the underlying strength of the substantive application – if the application clearly has great merit, then the Tribunal is much more likely to grant an extension of time than if it clearly has very little merit.

13. I therefore consider it appropriate to review the strength of the application itself before deciding whether or not to allow an extension of time for it to be made.

14. Rule 38 provides that the Tribunal has power to set aside and re-make a decision in certain specific situations. These are:

> "(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
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> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing relating to the proceedings."

15. If one of these situations arises, then there is power to set aside the decision "if the Tribunal considers that it is in the interests of justice to do so".

16. In the present case, the Appellant's application for a set-aside must be taken to be based on an assertion that either:

(1) "a document relating to the proceedings *(namely, the detailed evidence now available in or as a result of HMRC's representations dated 11 June 2014)* was not sent to, or received at an appropriate time by" the Appellant and/or the Tribunal (conditions (a) and (b) above); or

(2) the failure of HMRC to produce that evidence at an earlier stage amounted to "some other procedural irregularity" (condition (c) above).

17. I leave open for this purpose the question of whether the Appellant has made good either of these assertions (though I doubt it), and I consider whether it would be "in the interests of justice" to set aside the decision even if it has been established that HMRC did send the reminders to deliver the employer's annual returns which are the subject of this appeal to an old representative of the Appellant (rather than to the Appellant direct) in a situation where HMRC had never been informed that the old representative was no longer authorised to receive correspondence.

18. The fundamental underlying point here is that the obligation to deliver the employer's annual returns was not dependent on any notice being sent to or received by any person (the Appellant or an advisor) requiring such delivery. The obligation existed entirely independently of any such notice (which was sent by HMRC purely as a reminder). Thus, although the decision records that the "relevant notices were sent and under section 7 of the Interpretation Act 1978 are deemed to have been received", that finding cannot have had any more than peripheral significance to the decision itself. The fact is that the Appellant was under an obligation to deliver the returns irrespective of whether HMRC had provided a specific reminder to that effect each year.

19. I therefore consider that the underlying substantive set-aside application has no merit in any event; in those circumstances, I consider it would not be appropriate for me to extend the time limit within which it had to be notified to the Tribunal. For that reason, the application is REFUSED.

20. I should also say that even if I had granted an extension of time and gone on to examine the application on its merits, I would have refused it in any event for the reasons referred to above, namely that I consider it to be completely without merit.

21. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 30 September 2014