TC01430

Appeal number: TC/2011/03489

Penalty for late submission of P35 – whether the return was filed in "test" mode – on the balance of probabilities, return filed by the due date – appeal allowed and penalty discharged

FIRST-TIER TRIBUNAL

TAX

GLOBAL LEGALISATION SERVICES LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 26 August 2011 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 5 May 2011, HMRC's Statement of Case submitted on 14 June 2011 and the Appellant's Reply dated 24 June 2011.

DECISION

1. This is the appeal by Global Legalisation Services Limited ("the company") against a penalty imposed for late filing of the 2009-10 end of year return of payments due under Pay As You Earn ("P35").

2. The Tribunal decided that the appeal was allowed.

3. The issues in the case were whether the company had delivered the P35 return to HMRC by the due date; if not, whether it had a reasonable excuse for its late filing, and if not, whether the penalties of £800 for the period from May 2010 to January 2011 were disproportionate.

4. The legislation and regulations, so far as relevant to this appeal, are set out in the Appendix to this Decision.

The facts

5. The company registered as an employer in March 2010, so only one month fell within this P35 return period.

6. The company's agent, Louw & Company ("the agent"), submitted a number of 2009-10 P35s for other clients without encountering any problems.

7. On 26 April 2010 the agent believed the company's P35 had been filed successfully. They printed out a copy of the return, and received the following email from the HMRC website:

> "**Successful receipt of online submission for Reference []**
>
> Thank you for sending the PAYE End of Year submission online.
>
> The submission for reference [] was successfully received on 26-04-2010. If this was a test submission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed."

8. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the P35. It charged the company a penalty of £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The penalty was therefore £400.

9. By letter dated 19 January 2011, the agent appealed the penalty on the company's behalf, stating that the return had been filed on 26 April 2010 and including a copy of the "successful receipt" email set out above.

10. On 24 January HMRC issued a further penalty of £400, for the four month period from 20 September 2010 to 19 January 2011.

11. By letter dated 17 February 2011 HMRC rejected the company's appeal, saying "please note that the response to your online submission states that the submission may be a test."

12. The agent filed the return online on 18 February 2011.

13. By letter dated 24 February, the agent requested a review of the HMRC penalty decision, and said:

> "We have checked all our records and could not find any record that this was a test. In fact we never use the test function and the system would prompt us that this is not the actual return. I would request that you send us some confirmation from your side to prove this was indeed a test."

14. The HMRC review officer confirmed the penalty and said that "according to my records, 2 online submissions were made, a 'test' on 26 April and the 'live' return on 18 February". He enclosed a document entitled "summary search results" as confirmation.

15. A further penalty of £100 for the period from January 20 2011 through to 18 February 2011 has been suspended pending the outcome of this Appeal.

The agent's submissions on the company's behalf

16. In the Notice of Appeal submitted on the company's behalf, the agent says they were surprised to learn that the return might be a test; that they submitted several returns for other clients on the same basis and all appeared to have been accepted. They say:

> "the only reason may be that the test function may have been activated accidently on our software. Unfortunately once the test return is filed which is exactly the same process as filing the normal return there is no way to know that the return is a test. In fact as it is our normal procedure we printed the confirmation email from HMRC which clearly stated 'this was a successfully [sic] test' This makes it very difficult for us then to know that the return was actually never received."

17. In their reply to the HMRC Statement of Case, the agent is more robust in their rejection of HMRC's assertion that they filed a test submission, saying:

> 'We are agents and very experienced with the online filing process – we have no need for the test function. We are adamant that we used the normal system in the same way that we did for dozens of other annual returns filed at the same time."

18. They submit that if HMRC offers a test function then it:

> "has a responsibility to ensure that at ALL stages of the process it is clear that the test function has been used. It is very simple for their software to be designed so that it clearly states that the submission was made a as a 'test' only. It isn't good enough that they infer that a submission might have been a test."

19. The agent also submits that the penalty is unreasonable and "entirely disproportionate." They particularly draw attention to the fact that the company had only been registered as an employer for the month of March 2010.

HMRC's submissions

20. HMRC say as follows:

> "HMRC highlight that the email generated is generic for both test and live submission. The email clearly states that 'if this was a test submission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.' HMRC would like to advise that for an employer to submit a 'test submission' they have to actively access test mode on the system."

21. As a result, they say that the company did not have a reasonable excuse. In relation to quantum, they say this is fixed by statute. The return had been outstanding for eight months and so the fixed penalty was rightly charged at £800.

Decision

22. My first task is to weigh the conflicting evidence.

23. Although in their Notice of Appeal the agent raises the possibility that they could have "accidentally" submitted the return in test mode, in their Reply to the HMRC Statement of Case they state that the return was filed in "live" mode, in exactly the same way as the returns they had submitted for other clients.

24. This is a difficult evidential decision: is it more likely that an experienced firm accidentally switched on test function despite the fact that HMRC say had to be "actively accessed"? Or is it more likely that the HMRC computer system suffered from a glitch so that, although the return was correctly submitted and thus "delivered" to HMRC, it was then recorded, incorrectly, as a test submission?

25. In my judgment these two possibilities are evenly balanced. Since the onus of proof in a penalty case is on HMRC (*Jussila v Finland* (73053/01)

ECtHR (Grand Chamber)), I find that the company succeeds on this evidential point.

26. As a result I find that the company' return was "delivered" to HMRC on 26 April 2010, notwithstanding the fact that, for whatever reason, it was not stored as a "live" submission in the HMRC computer.

27. It follows that the company's appeal against the penalties also succeeds. It is thus not necessary to consider the further issues. However, had it been necessary I would have found that it was reasonable for the company, through its agent, to rely on the "successful submission" receipt as evidence that the return had been delivered to HMRC.

28. The appeal is allowed and the penalties of £800 are set aside.

29. 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.

Anne Redston

TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 9 SEPTEMBER 2011

APPENDIX

The legislation and regulations

The Income Tax (PAYE) Regulations, SI 2003/2682 reg 73 set out the P35 filing requirements:

> (1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.
>
> (2) The information is—
>
> (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.
>
> (3) - (9) …
>
> (10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).

As provided in Reg 73(10) above, Taxes Management Act 1970 ("TMA") s 98A sets out the liability to penalties for non-compliance with those regulations:

> (1) PAYE regulations…may provide that this section shall apply in relation to any specified provision of the regulations.
>
> (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 twelfth or for which a penalty under this paragraph has already been imposed
>
> (b) …
>
> (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…

The taxpayer's right of appeal and the Tribunal's powers are at TMA s 100B::

> (1) An appeal may be brought against the determination of a penalty under section 100 above and…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…

(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…

TMA s 118(2) provides that:

…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.