TC01553

Appeal number: TC/2011/04463

Penalty for late filing of P35 return – whether genuine belief a reasonable excuse – yes – whether default remedied "without unreasonable delay" – no – appeal allowed in part and penalty reduced.

FIRST-TIER TRIBUNAL

TAX

J W HARDY t/a BENWELL GARAGE **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 21 October 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 6 May 2011 and HMRC's Statement of Case submitted on 8 August 2011.

DECISION

1. This is the appeal by JW Hardy (trading as Benwell Garage) against two penalties totalling £800 imposed for late filing of the 2009-10 end of year return of payments under PAYE ("P35").

2. The appeal was allowed in part and the total penalty reduced to £400.

The law

3. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires that P35s be filed before 20 May following the end of a tax year.

4. Taxes Management Act 1970 ("TMA") s 98A(2)(a) sets out the liability to fixed penalties for non-compliance, which are £100 per month or part month during which the failure continues.

5. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2), which, so far as is material to this appeal, provides:

> "…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."

6. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal that "an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act", see *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14]. It has also been held to be "a matter to be considered in the light of all the circumstances of the particular case", see *Rowland v HMRC* [2006] STC (SCD) 536 at [18].

7. TMA s 100B(2)(b) gives the Tribunal the power, in relation to a penalty which is "required to be of a particular amount" to set it aside "if it appears that no penalty has been incurred"; to confirm it, if it appears to be correct, and to increase or reduce it to the correct amount if it appears to be incorrect.

8. The Interpretation Act 1978, s 7, which deems certain documents to be delivered, is as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The facts

9. Submissions were made on the Appellant's behalf by Ms Victoria Palmer ("Ms Palmer"), the Appellant's book-keeper.

10. Ms Palmer logged on to the HMRC online filing system for PAYE on 2 May 2010, in good time for the deadline of 19 May 2010.

11. The main issue in dispute is whether Ms Palmer submitted the return on that day. The submissions of the parties on this issue are set out below.

12. The Appellant had one employee during 2009-10, and the PAYE and NICs for the year were overpaid by £372.

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

14. On 12 January 2011 the return was successfully filed online.

15. By letter dated 17 January 2011 a further penalty of £400 was levied for the period from 20 September 2010 to 12 January 2011. This penalty was addressed to a Mr Doig, at the Appellant's address.

16. Ms Palmer appealed the penalty on 24 January 2011. She also asked whether HMRC could have been "duplicating the records by mistake", as the penalty had been addressed to Mr Doig and he "has not been connected to Benwell Garage for a number of years now."

17. Sometime before 28 February 2011 HMRC rejected the Appellant's appeal. Neither party provided the Tribunal with this letter.

18. By letter dated 28 February Ms Palmer asked for a review of HMRC's rejection of the Appellant's appeal.

19. By letter dated 15 April Mr Robinson, an HMRC Appeals Review Officer, confirmed the penalties. He said that:

> "although you may have attempted to file the return on 2 May you failed to proceed fully to the successful transmission stage...the fact that you were able to submit a return on 12 January means that you did not successfully file one prior to this because a return can only be filed once."

20. In relation to Ms Palmer's questions about Mr Doig, he says that the penalty is for the Appellant's PAYE scheme and "the fact that it shows Mr Doig's name is possibly because he may have been listed as the person who dealt with the returns in previous years."

The parties' submissions on the filing date

21. Ms Palmer says that she "definitely submitted" the return online on 2 May and was "prepared to sign an affidavit to that effect."

22. She printed out a copy of the completed return and included this with her submissions to the Tribunal. The return is headed "P35 – Payment Summary" and is dated 2 May 2010. At the foot of the document is the following printed message: https://online.hmrc.gov.uk/paye-file-eoy/0910/org/120/B32079/p35/payment-summary 02/05/10.

23. HMRC provided the Tribunal with an email from Mr Matthews, of their PAYE Services Management Team. This says:

> "We've got them logging in and activating on 02 May 2010 but no submission attempts show until 12 January. There are no events at all between these two dates. I think this is another case of someone completing the online forms but not getting all the way through to submitting them. When they logged back in on 12 January they submitted just four minutes later – pretty clearly their EOY form was already completed and ready go. It's likely that their status page currently shows the submission with a 'Last Updated' date of 2 May 2010. This is, of course, just the date the return was last updated, not the date of submission."

The parties' other submissions

24. Ms Palmer drew the Tribunal's attention to the overpayment of PAYE and NICs for 2009-10. HMRC say this is irrelevant to the penalty determination, which is charged for not submitting the P35 by the due date.

25. HMRC further say that had Ms Palmer filed successfully on 2 May 2010, she would have received an acceptance message through the Appellant's filing software. If she had provided HMRC with an email address, she would also have received an email message. The information about these messages is on the HMRC website. Ms Palmer has not said that any such messages were received, and their absence should have "drawn the Appellant to the fact that a successful submission may not have taken place."

26. They submit that the Appellant did not have a reasonable excuse, which they consider to be "an exceptional event beyond the person's control which prevented the return from being filed by the due date, for example severe illness or bereavement."

27. Finally, they say that the Appellant did not take any action between receipt of the first penalty notice in September 2010 and the online filing in January and that "had there been a reasonable excuse it is unlikely that it would have continued throughout this entire period."

Discussion and decision

28. HMRC say that the fact that the Appellant managed to file in January 2011 means that, as a question of fact, the return could not have been filed on the HMRC system on 2 May 2010, because the HMRC computer allows only one filing for each scheme per year. I accept this. As a result, I find that the return was not, as a question of fact, filed online on 2 May 2010.

29. However, I also accept Ms Palmer's evidence that she genuinely believed the return had been filed online. I am supported in my finding by the following:

(1) The contemporaneous and complete record of the Appellant's P35, together with the printed message at its foot which could reasonably have been taken as indicating that the HMRC computer had accepted the return.

(2) HMRC's own evidence that the return was refiled in January 2011 within four minutes of logging on to the system, indicating that "the EOY return was already completed and ready to go."

Reasonable excuse

30. TMA s 118(2), set out at the beginning of this Decision, makes it clear that if the Appellant has a reasonable excuse for late filing, there is no default either for the period covered by that excuse, or for the period after that, as long as the Appellant acts without "unreasonable delay" in remedying the position once the excuse ceased.

31. HMRC say that the Appellant does not have a reasonable excuse, based on their understanding of that term. In the recent decision of *N A Dudley Electrical Contractors Ltd v R&C Commrs* [2011] UKFTT 260 (TC) ("*Dudley*"), the Tribunal said:

> "HMRC argues that a 'reasonable excuse' must be some exceptional circumstance which prevented timeous filing. That, as a matter of law, is wrong. Parliament has provided that the penalty will not be due if an appellant can show that it has a 'reasonable excuse'. If Parliament had intended to say that the penalty would not be due only in exceptional circumstances, it would have said so in those terms. The phrase 'reasonable excuse' uses ordinary English words in everyday usage which must be given their plain and ordinary meaning."

32. I too consider that HMRC's formulation of the "reasonable excuse" defence is too narrow, reflecting neither the normal and natural meaning of the term (per *Dudley*), nor the earlier *dicta* of this Tribunal quoted earlier in this Decision.

33. In *RMD Response International v R&C Commrs* [2011] UK FTT(472) at [27] the Tribunal found that the taxpayer's "honest and genuine belief" was a reasonable excuse, "at least until such time as it was put on notice that the honest and genuine belief was incorrect."

34. I agree, with the further proviso that the "honest and genuine belief" should be a reasonable belief.

35. In deciding whether Mrs Palmer's belief that the return had been filed online was reasonable, I have weighed in the balance HMRC's online guidance about email and other submission messages. They say that the absence of these messages "should have drawn the attention of the Appellant to the fact that a successful submission may not have taken place". They do not say that the absence of these messages means that a successful submission "has not taken place", only that this "may" have happened.

36. More importantly, they do not say that online filers are clearly told, at the inception of the process and perhaps at other stages, that a failure to receive these messages may indicate that the filing has failed. In other words, it was reasonable for Ms Palmer not to have realised the importance of failing to receive these messages.

37. I thus find that the Appellant had a reasonable excuse for the period from May 19 2010, the due date for filing the return, until the penalty notice sent out by HMRC in September 2010 was received.

38. Had the Appellant remedied the failure to file online "without unreasonable delay", this reasonable excuse would been effective for the period after the receipt of the Notice.

39. However, this isn't what happened. I agree with HMRC that the Appellant's failure to take remedial action until 12 January 2011 means that the reasonable excuse was not remedied "without unreasonable delay".

40. The wording of TMA s118(2) only allows for an extension of the reasonable excuse to "**if**" the taxpayer remedies the default without unreasonable delay. The extension is thus conditional on the taxpayer meeting this test.

41. In the Appellant's case I find that the test was not met, and its reasonable excuse defence therefore does not extend beyond the receipt of the Notice.

42. The Tribunal has not been told when the Notice was actually received. It is however deemed to be served on the Appellant (under the Interpretation Act s 7) when it is delivered "in the ordinary course of post". Allowing for second class post, the Notice is thus deemed to be delivered at or around 24 September 2010.

43. The Tribunal can reduce a penalty which appears to it to be incorrect. Since I have found that the Appellant had a reasonable excuse for the period to 24 September 2010, it is not correct to levy a penalty for that period.

44. The period from 24 September to 12 January is three whole months and one part month, and the penalty for each month or part-month is set by statute at £100. The Tribunal thus allows the appeal in part, and reduces the penalty from £800 to £400.

Other points

45. For completeness I record that I agree with HMRC that the Appellant's overpayment of its 2009-10 PAYE and NICs is not a factor the Tribunal can take into account when calculating the penalties.

46. I also record that I considered whether HMRC's addressing of the second penalty Notice to Mr Doig was a relevant factor. However, this second Notice was issued after the return had been filed online: even if the wrong name had delayed delivery, it would not change the overall penalty position. The position might have been different had the first penalty Notice been wrongly addressed, but no evidence or submissions about this first Notice were before the Tribunal. As a result, it was not something that could be taken into account in making this Decision.

47. 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 NOVEMBER 2011