TC01811

Appeal number: TC/2011/04393

Late filing of End of Year return by employer; penalties; s.98A (2) and (3) TMA; difficulty with online filing; "reasonable excuse" under s.118(2) TMA not found; no notice of penalty until 8 months after the filing date; reduction in penalty allowed.

FIRST-TIER TRIBUNAL

TAX

MIDSHIRE DÉCOR LTD **Appellant**

- and -

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

TRIBUNAL: CHRISTOPHER HACKING (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 10 October 2011without 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 7 June 2011, HMRC's Statement of Case submitted on 27 July 2011 and the Appellant's letter by way of Reply dated 9 August 2011.

DECISION

1. This was an appeal against a decision confirmed on review by the Revenue by letter dated 14 April 2011 imposing a penalty of £800 for the late submission of the Appellant's employers return (P35/P14) for the year 2009-10.

2. The filing date for the return was 19 May 2010. An electronic reminder had been sent to the Appellant on 17 January 2010. The return was finally filed online on 18 January 2011 disclosing a liability in respect of tax and National Insurance contributions of £79,609.43. The penalty notification was issued on 21 January 2011 in the sum of £800 covering the period of delay from 20 May 2010 to 18 January 2011.

3. The law relating to the requirement to file annual employer's returns (P35 and P14) is rehearsed by the Revenue in its submission. Regulation 73(1) The Income Tax (Pay As You Earn) Regulations 2003 requires the completion of the returns and Regulation 205 makes it mandatory that the return is filed online. The full return is required to be filed by 19 May following the end of the tax year - in this appeal by 19 May 2010.

4. The imposition of a penalty for delay in filing an employers annual return is to be found in section 98A(2&3) Taxes Management Act 1970 (TMA). This provides for a penalty of £100 per month to be imposed during the period of delay in filing the return down to the date of filing a complete and correct return.

5. Section 118 (2) TMA allows for the penalty to be set aside where there is a reasonable excuse for the failure to file on time. What a "reasonable excuse" might be is not defined. The Revenue considers that any such reason would have to be something exceptional or out of the Appellant's control. The Tribunal does not accept that the Revenue's approach to the question of what constitutes "reasonable excuse" is definitive. The words "reasonable excuse" are ordinary words to be construed according to their ordinary and usual meaning. However the criteria proposed by the Revenue, whilst neither definitive nor exhaustive, do in the view of the tribunal, represent a reasonable starting position for considering what is and what is not a "reasonable excuse". It seems unlikely that it was Parliament's intention that a taxpayer might avoid his duty to file a return on time by reason only of some "ordinary" excuse nor does it seem likely that matters within the taxpayers control would generally found such an excuse.

6. The Appellant says that it filed its 2009-10 P35 and P14 on 18 May 2010 within the time limited for this, that there was an initial typographical error, that no reminders were sent to it regarding re-submission until January 2011 and that there had been no financial loss to the Revenue as a result of the delay. It is also said by the Appellant that its previous payments and submissions have always been within the timescales for these. It is these matters which the Appellant says should be taken into account in a decision to waive the penalties sought. To fail to have regard to these matters is, says the Appellant, unjust, unfair and unreasonable.

7. The filing which the Appellant sought to make online on 18 May 2010 failed the Revenue's data checks as the details on the P35 did not correspond with the figures appearing on the P14. The figures for tax and National Insurance payable had been transposed in the P35. An e-mail communication from the Revenue on 19 May 2010 alerted the Appellant to the fact that there had been a problem with the filing as the data checks made by the Revenue had failed. It was not until 12 January 2011 however that the Appellant learned from the Revenue that the problem had been one of a simple transposition of figures. The return was promptly amended and re-filed by the Appellant on 18 January 2011. A handwritten note on the successful return filed on 18 January 2011 confirms that the values were adjusted that day, An e-mail from the Revenue on the same date confirms the eventually successful filing. The tribunal accordingly accepts, as the Appellant states, that its error was a simple typographical one.

8. The tribunal also accepts as a fact that apart from the e-mail of 19 May 2010 advising that the filing had been unsuccessful no further reminders concerning the need to correct and re-file the returns was sent to the Appellant whether online or otherwise.

9. The tribunal finds that the Appellant had fully accounted to the Revenue for all tax and National Insurance contributions due and was in fact entitled to a refund of £75.22 so that no financial loss was suffered by the Revenue. The tribunal also accepts that the Appellant had a good record of compliance with its tax obligations, the present problem being the only occasion of default noted in the appeal papers.

10. In its Notice of Appeal the Appellant complains that it would have been reasonable for the Revenue to have sent its letter of 12 January 2011 advising as to the problem at the time the error was discovered and to advise as to the fact that the Appellant was in the penalty regime. There was no such reminder and this, says the Appellant, was unfair as it allowed the penalty to increase up to the figure of £800 sought to be imposed.

11. The tribunal has some sympathy with these complaints. The e-mail advice of 19 May 2010 as to the failure of the filing did not provide any details of the problem beyond the fact that the filing did not pass the Revenue's data checks. However the fact that an e-mail was sent must have put the Appellant on notice of the need to further enquire as to the nature of the problem and to remedy it promptly. It did not do so until very much later. This was an oversight by the Appellant. It cannot however amount to a reasonable excuse for the failure. The obligation to file the return by the due date is unqualified. The position is in this respect quite clear. Failure to file on time without a reasonable excuse throughout the period of default will place the taxpayer in the penalty regime. The importance of the return lies in the fact that without it the Revenue is unable to reconcile the payments made on account of tax and National Insurance contributions with the legal obligation of the tax payer in these respects – whether additional payment may be required or, as in this appeal, a refund might be due.

12. It would have been reasonable in the finding of the tribunal for the Revenue to have sent out a penalty notice at an earlier date than January 2011, some 8 months after the original filing. This would have alerted the Appellant to the escalating penalties being attracted by the continuing failure of its filings. In its Notice of Appeal the Appellant states *"We understand that the first penalty notices are issued in September (£400)which perhaps could be considered as a reasonable reminder to enable appropriate action to quickly remedy the situation and reduce further the penalty. September notice was not received resulting in a further unreasonable four months and £400 penalty"*

13. The tribunal agrees that there was no good reason why the Revenue could not have been more proactive in drawing attention to the fact of continuing penalties. That there may be no obligation on the Revenue in this respect does not mean that its delay in notifying the Appellant was reasonable. In this respect the tribunal finds that a just and fair penalty of £400 should be substituted for the penalty of £800 imposed.

14. The Appellant in its submissions to the tribunal has noted that a company with which it has a close connection found itself in a similar situation to its own. In that case the penalty of £1,200 was agreed by the Revenue to be waived. The Appellant seeks parity of treatment. The question whether the Revenue might in any given situation be prepared to waive some part or all of a penalty is one which is peculiarly within the discretion of the Revenue. It is not within the competence of the tribunal to interfere with the exercise of a discretion save where it has been exercised improperly. There are no grounds which would permit the tribunal to oblige the Revenue to exercise its discretion in the Appellant's favour.

15. The appellant has also referred to another first tier-tribunal decision based on similar facts in which the penalty should be set aside. The tribunal is not required to investigate the facts which may have supported such a decision. Its responsibility is to give proper consideration to the facts and the law as it relates to the matter before it. A first-tier tribunal decision does not affect the duty of another such tribunal to make such findings of fact and to apply the law as it thinks fit.

16. It is the decision of this tribunal that the Appellant has not established a reasonable excuse for its delay in filing its employers return for the year 2009-10 and that a penalty of £400 be imposed in place of the penalty of £800 notified by the Revenue. To that extent only this appeal is allowed in part.

17. 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.

CHRISTOPHER HACKING

TRIBUNAL JUDGE

RELEASE DATE: 1 February 2012