TC01826

Appeal number: TC/2011/02516

Employer's penalty for late return – reasonable excuse – whether penalty can be mitigated –delay in notification of penalty – fairness - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

STEPHEN BOYD **Appellant**

- and -

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

TRIBUNAL: J. BLEWITT (JUDGE)
J. ADRAIN (MEMBER)

Sitting in public at Belfast on 21 July 2011 and 7 November 2011

Mr Boyd, the Appellant

Mr Chapman, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against the imposition of penalties in the total sum of £400 for the late submission of the employer's annual return (P35) for the period 2009/2010.

Background

2. The Appellant was required to file online the end of year return by 19 May 2010. HMRC issued a penalty notice in the sum of £400 on 27 September 2010 and accepted that the return was subsequently filed online on 23 February 2011.

3. The Appellant, through the bookkeeper Mrs Shepherd, appealed against the penalty imposed to HMRC by letter dated 14 October 2010 in which it was submitted that the return had been submitted online on 18 May 2010. By letter dated 24 December 2010 HMRC upheld the penalty on the basis that the return was still outstanding.

4. A review of HMRC's decision was requested by the Appellant on 16 January 2011, submitting that:

(a) Mrs Shepherd had filed the return to the best of her knowledge on 18 May 2010 and it looked like the return had been submitted;

(b) It should not take 5 months for HMRC to contact the Appellant regarding the outstanding return;

(c) There is only one employee of the company.

5. By letter dated 2 March 2011, HMRC upheld the penalty and advised the Appellant that:

(a) HMRC's records show that an attempt was made to file the return online on 18 May 2010;

(b) The return was not received until 23 February 2011;

(c) If filed successfully, a message would have been received by the Appellant showing acceptance or rejection;

(d) Lack of knowledge in respect of filing online is not considered to be a reasonable excuse;

(e) The onus of submitting the return rests on the employer; HMRC do not issue reminders and penalty notices are not reminders.

6. By Notice of Appeal dated 31 March 2011 the Appellant appealed to the Tribunal Service. The grounds of appeal relied upon can be summarised as follows;

(a) It was the first occasion on which the bookkeeper had filed online and she thought she had done so on 18 May 2010;

(b) It took 5 to 6 months before the Appellant was contacted about the outstanding return;

(c) At the point that the Appellant was contacted, the penalty of £400 had already been imposed;

(d) The Appellant cannot afford to pay the penalty given that it is a small business and bearing in mind the poor economic climate;

(e) Rules for filing should be made more easy to understand;

(f) A very simple mistake was made.

Submissions

7. The appeal was adjourned part heard on 21 July 2011 for reasons that will become clear in this decision. We heard evidence from Mr Chapman for HMRC and Mr Boyd, the Appellant on both 21 July 2011 and 7 November 2011 and we will outline the submissions made by each in turn.

Preliminary matter

8. The Tribunal directed, following the adjournment on 21 July 2011, that HMRC were to notify the Tribunal Service by 1 September 2011 whether another hearing was required. Mr Boyd submitted that the Tribunal Service was not notified until 9 September 2011 and as a result the hearing should not take place.

9. We considered this issue, and Mr Chapman's explanation, given with apologies, that the delay was due to the fact he was working alone.

10. The hearing had already been heard in part and the purpose of the adjournment was to assist the Appellant and the Tribunal as to why the figure of tax/NICs of £2,892.48 was registered on HMRC's system as payable (double the correct amount) and whether this could assist the Appellant's case. We accepted Mr Chapman's explanation as to why notification was delayed, and took the view that the delay was not excessive. We observed that the Appellant had approximately 2 months from being notified of the request for a further hearing in which to address the clarification given by HMRC and in our view no prejudice was caused to the Appellant. We bore in mind the overriding objectives and concluded that in order to deal with the case fairly and justly, the hearing should continue.

Submissions of HMRC

11. It was submitted on behalf of HMRC that if a return is successfully filed online, confirmation messages are received to the software and email address. Mr Chapman explained that information about online filing is readily available to the public, for example on HMRC's website, and a CD Rom is available to provide further assistance. We were shown a typical example of such a message which confirmed that a return "has been processed and passed full validation".

12. It was submitted by Mr Chapman that in the absence of ensuring that such confirmation was received, the Appellant did not have a reasonable excuse for the late submission of the return.

13. As a result of the query raised as to why HMRC's system showed double the correct amount of tax/NICs payable, we adjourned the case in order that clarification could be sought as to whether this could be a result of the return having been filed, as submitted by Mr Boyd, on 18 May 2010, or whether there was another explanation.

14. At the resumed hearing on 7 November 2011, Mr Chapman explained that he had made inquiries into the concerns raised by the Tribunal and in a letter dated 9 September 2011 to the Tribunal Service he had set out his findings:

> (a) There is no evidence to suggest that the Appellant's PAYE was filed on 18 May 2010;
>
> (b) There is a record that the Appellant filed the employee's pay and tax/NICs details (P14) for 2009/2010 twice on 23 February 2011, so instead of £1,446.24 tax/NICs being shown as the amount payable before payments, £2,892.48 was registered on the system as payable (exactly double the correct amount.)
>
> (c) There is no record of the P35 being filed twice;
>
> (d) The Appellant tried to make an amendment to his P35 on 12 April 2011 to correct the mistake at (b) above. This was unsuccessful as the correct boxes were not filled in;
>
> (e) The HMRC Online Services Helpdesk has no record of any incoming calls from the Appellant.

15. It is right to note that in respect of (e) above, the Appellant produced telephone records at the hearing on 7 November 2011 showing telephone calls made to HMRC numbers. Mr Chapman, properly in our view, accepted that he did not dispute that telephone calls were made, but that there was no record of telephone calls made to the Helpdesk. We had no reason to doubt Mr Boyd's evidence that the telephone calls were made, and we accepted it as fact. However in our view this provided little assistance in determining the issue before us given that, on Mr Boyd's own evidence, the telephone calls took place after he was notified of the penalty imposed and was therefore of limited use in deciding whether a reasonable excuse existed for the late filing of the P35 for the period May to September 2010.

16. In response to Mr Boyd's oral query during the hearing as to whether the Appellant's details had been dormant on HMRC's system since 18 May 2010 only to be reactivated by the filing on 23 February 2011, Mr Chapman submitted that there was no evidence to support such a contention.

17. Mr Chapman confirmed to us that the only P35 caught on HMRC's system was that filed on 23 February 2011 and that although he did not dispute the fact that Mr Boyd and Mrs Shepherd had held a genuine belief that the return had been filed on 18 May 2010, this did not, in HMRC's submission, amount to a reasonable excuse.

18. In the absence of any evidence that the P35 had been filed on 18 May 2010, and on the basis of the conclusions reached after further inquiries were made, Mr

Chapman submitted that there was no reasonable excuse for the late submission of the return.

Submissions of Mr Boyd

19. Mr Boyd presented as a genuine and credible witness and we were greatly assisted by his clear and concise submissions.

20. He explained that he had been self-employed for over 20 years, during which time he had never been late with any self-assessment payments to HMRC. He stated that the company had one employee and Mrs Shepherd who assisted with the bookkeeping.

21. Mr Boyd explained that Mrs Shepherd is a highly competent office manager with significant experience in addition to being computer literate. It was the first time that Mrs Shepherd had filed a return online, and having registered on the system on 7 May 2010 she filed the return on 18 May 2010. Mr Boyd said that he checked the return had been filed the following day and to the best of both his, and Mrs Shepherd's knowledge, everything was up to date.

22. Mr Boyd submitted that the P35 had been captured twice on HMRC's system; first on 18 May 2010 and second on 23 February 2011, resulting in the demand for additional payments. An amendment was requested by Mrs Shepherd however over the course of the weeks following this request, no amendment was made although the request was shown on HMRC's system.

23. Mr Boyd set out the three points upon which he relied as follows:

> (a) Significant doubt as to whether or not the return was captured on 18 May 2010;
>
> (b) Whether, if the return was not captured on 18 May 2010, there was a reasonable excuse for its late submission; and
>
> (c) If the return was not filed on 18 May 2010 and no reasonable excuse exists, then the level of the fine is disproportionate to the amount of tax and NIC for the year.

24. Mr Boyd stated that it was only in September 2010 that he was made aware that the return was outstanding and that between September 2010 and February 2011 he was in constant contact with HMRC. It was not until 23 February 2011 that Mrs Shepherd spoke to an employee of HMRC who was helpful, at which point she was informed that the return was not captured on HMRC's system.

25. A demand for payment was received on 20 April 2011, which appeared to show twice the amount due and which led Mr Boyd to believe that the P35 had been captured on HMRC's system twice.

26. We were told that since, and as a result of this incident, Mrs Shepherd had resigned.

27. At the hearing on 7 November 2011, Mr Boyd submitted that the penalty imposed was a criminal matter. We were provided with cases relied on in support of this submission, to which we will turn in due course.

28. Mr Boyd observed that filing two P14s could not be done accidentally and queried whether the information had been dormant on HMRC's system, having been filed on 18 May 2010 and then again on 23 February 2011.

29. Mr Boyd reiterated the number of telephone calls made to HMRC to clarify the matter and submitted that the lack of records held by HMRC to support this assertion was indicative of the poor system.

30. Mr Boyd invited us to mitigate the penalty imposed on the basis that he has never before been late in filing returns or making payments to HMRC and that the penalty as it stands is an injustice bearing in mind his diligent behaviour as a prudent employer over a substantial number of years.

Legislation

31. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

32. Under sections 98A (2) and (3) of the Taxes Management Act 1970 the Appellant was liable to a fixed penalty of £100 for each month or part month that it was in default with the return.

33. Reasonable excuse is provided for by section 118 (2) of the Taxes Management Act 1970:

For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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.

Case law

34. We were referred to the following cases:

(a) *Anthony Leachman T/A Whiteley and Leachman v HMRC* [2011] UKFTT 261 (TC)

(b) *Walton Kiddiwinks Private Day Nursery v Revenue and Customs* [2011] UKFTT 479 (TC)

(c) *Hok Limited v HMRC* [2011] UKFTT 433 (TC)

(d) *Key Interiors Creative Associates Limited v HMRC* [2011] UKFTT 591 (TC)

(e) *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC)

35. We bore in mind the fact that each of the cases relied upon by the parties were decisions from the First Tier (Tax) Tribunal and consequently are not binding upon us.

36. Mr Boyd relied on the case of *Anthony Leachman T/A Whiteley and Leachman v HMRC ("Leachman")* in support of his case. In the *Leachman* case there had been what was deemed to be a "genuine mistake of fact...capable of amounting to a reasonable excuse" in that the taxpayer believed his accountant would file the P35 and the accountant believed that the taxpayer would attend to it. We considered this case carefully, and noted that the Tribunal in that case was careful to decide it on the specific facts. We concluded that the case was distinguishable on the basis that there had not been the same mistake of fact in the case before us; neither Mrs Shepherd nor Mr Boyd believed the other would take responsibility for filing the return. Furthermore we took the view that even if a mistake of fact can, in law, amount to a reasonable excuse, each case must be decided on its own facts; in this case there was no evidence before us upon which we could be satisfied that there was a mistake of fact between the genuine beliefs held by Mrs Shepherd and Mr Boyd and therefore we did not find that there was a reasonable excuse in that respect.

37. We were referred to the case of *Walton Kiddiwinks Private Day Nursery v Revenue and Customs* in which Judge Jones QC took the view that following the European Court, HMRC must bear the burden of proving a default and that default penalties and surcharges levied against a taxpayer were analogous to criminal penalties.

38. We considered the view held by the Tribunal in the case of *Walton Kiddiwinks Private Day Nursery v Revenue and Customs.* We were satisfied from Mr Chapman's evidence that there was no record on HMRC's system of anything more than an unsuccessful attempt to file the P35 prior to 23 February 2011 and in the absence of any evidence to support the Appellant's assertion we could not be satisfied that the P35 had been dormant on the system. We found as a fact that neither Mr Boyd nor Ms Shepherd had received confirmation that the return had been successfully submitted, which, in our view supported our finding that the P35 had not been submitted. Having found as a fact that there was a default, we were satisfied that a penalty became due and went on to consider whether the Appellant had a reasonable excuse. We did not find the discussion by the Tribunal in the case of *Walton Kiddiwinks Private Day Nursery v Revenue and Customs* as to criminal penalties assisted us in assessing whether, on the facts of this particular case, there was a reasonable excuse

39. In *Hok Limited v HMRC* the Tribunal considered the issue of common law duty of fairness where the Appellant, having overlooked or forgotten to file the end of year

returns, had not been notified of the imposition of penalties until the penalty notice was received. The Tribunal in that case took the view that HMRC had deliberately desisted from sending a penalty notice, which acts as a reminder. As we observed earlier, decisions of the First Tier (Tax) Tribunal are not binding upon us and we had doubts as to whether HMRC's conduct could be described as wilful desistance where there is no breach of statutory obligations on their part. Even if we were to follow the approach taken in *Hok Limited v HMRC*, we found that the case is distinguishable on its facts; in *Hok* the Appellant believed he did not have to file the returns as the only employee had ceased employment part way through the year. The Tribunal took the view that HMRC had not proved that the default would have continued had a reminder been issued earlier by HMRC to the Appellant. In the case before us, Mr Boyd was well aware of his responsibilities and we accept that Mrs Shepherd, on his behalf, attempted to fulfil the obligation of filing the return. The error, one we accept to have been an honest mistake, was that neither Mr Boyd nor Mrs Shepherd ensured that confirmation of successful submission was received.

40. The case of *Key Interiors Creative Associates Limited v HMRC* wholly differed on the facts; the Appellant provided evidence in support of his assertion that the return had been submitted, which was subsequently confirmed in a telephone call to HMRC, in which the Appellant was told that the return had been received but was "blocked". We considered Mr Boyd's submission to us that perhaps the P35 had been successfully submitted by Mrs Shepherd but lay dormant on HMRC's system, which may, depending on the facts, be analogous to the situation in *Key Interiors Creative Associates Limited v HMRC.* We found as a fact that there was no evidence to support Mr Boyd's submission, as there had been in the case cited to us. In our view the case of *Key Interiors Creative Associates Limited v HMRC* provided little assistance in determining the issue before us.

41. HMRC relied on the case of *Schola UK Ltd v HMRC* in support of their case. In our view, this case was comparable to the case before us; in the *Schola* case the Appellant entrusted the filing of its 2008/2009 return to its accountants. The accountants believed they had filed the return by the due date and only became aware of its non-receipt by HMRC when the first penalty notice was issued. After inquiries were made, the accountants accepted that they had made an honest mistake. Judge Tildesley referred to the "*limited jurisdiction"* of the Tribunal "*which reflects the purpose of the legislation of ensuring that employers file their returns on time. The Tribunal has no power to mitigate the penalty."* Judge Tildesley went on to state:

"in considering reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having proper regard for his responsibilities under the Tax Acts."

It was held that the reason for the late filing was the honest mistake of the Appellant's agent; a mistake which could have been avoided if the agent had exercised proper care and consequently the appeal was dismissed.

42. In our view the case of *Schola* reflects the situation in the appeal before us; Mr Boyd had relied on Mrs Shepherd to file the return within the due date, and an attempt

had made to do so by Mrs Shepherd. Regrettably, the attempt was not successful and there was no evidence before us that Mrs Shepherd had ensured that the acknowledgment of receipt of the return had been received. We accepted that Mr Boyd had made enquiries of Mrs Shepherd and that both genuinely believed that the return had been filed, however in the absence of ensuring the receipt of acknowledgment by HMRC, we found as a fact that the actions of Mrs Shepherd and therefore the Appellant had not been those of a prudent person exercising reasonable foresight and due diligence.

Decision

43. We were sympathetic to Mr Boyd's situation and fully accepted his evidence that he had always fulfilled his tax obligations. We accepted that he had attempted to so do on this occasion and that Mrs Shepherd had attempted to file the P35 on 18 May 2010, prior to the due date.

44. We were impressed by Mr Boyd's ability to present his arguments with clarity and we considered his submissions carefully. We were assisted by the authorities referred to above; in our view there is a stark contrast between the approaches adopted by Judge Jones QC in *Anthony Leachman T/A Whiteley and Leachman v HMRC, Walton Kiddiwinks Private Day Nursery v Revenue and Customs* and *Hok Limited v HMRC* as compared with Judge Tildesley in *Schola UK Ltd v HMRC.*

45. We are not bound by the authorities cited by the parties. In the absence of a ruling by a higher court addressing the wider issue of common law fairness, in our view the correct approach was that taken by Judge Tildesley in *Schola*.

46. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the 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.

47. Whilst we agree it is unfortunate that HMRC's policy is not to issue first penalty notices until there is already a four month delay, we do not consider this can afford a reasonable excuse to the Appellant for its delay in delivering the return. The legislation gives the Tribunal no power to mitigate the prescribed penalty simply as a result of the delay in its issue.

48. There is power to quash a penalty as disproportionate if it is "not merely harsh but plainly unfair" and no doubt the facts in the cases relied upon by Mr Boyd caused the Tribunals concern in assessing what could be in certain cases "plainly unfair." The penalty of £400 might be considered harsh in the circumstances, but on the facts of this case we are unable to agree that it was "plainly unfair" and therefore do not interfere with it on grounds of proportionality or common law fairness.

49. The only issue remaining is whether there was a reasonable excuse for the late submission of the return.

50. There was no evidence before us upon which we could be satisfied that there was a mistake of fact between the genuine beliefs held by Mrs Shepherd and Mr Boyd and we did not find that there was a reasonable excuse in that respect.

51. We were satisfied that there was no record on HMRC's system of anything more than an unsuccessful attempt to file the P35 prior to 23 February 2011 and that there was no evidence upon which we could be satisfied that the P35 had been dormant on the system. In the absence of any evidence to the contrary, we accepted that the employee's pay and tax/NICs details (P14) for 2009/2010 was filed twice on 23 February 2011, which provided an explanation as to why the tax/NICs shown as the amount payable was registered on the system as double the correct amount.

52. Having found as a fact that the P35 had not been filed on 18 May 2010, or indeed any date prior to 23 February 2011, thus triggering the imposition of a penalty, we concluded that the issue as to whether or not the penalty imposed as a result falls within the general criminal sphere, did not assist us in determining whether there was a reasonable excuse.

53. The error, one we accept to have been an honest mistake, was that neither Mr Boyd nor Mrs Shepherd ensured that confirmation of successful submission was received. In our view, ignorance, inadvertence or oversight in ensuring that the tax obligations had been fulfilled, cannot amount to a reasonable excuse. We noted that even once the initial penalty notice had been received in September 2010, the P35 was not submitted until 23 February 2011. Whilst we accepted Mr Boyd's evidence that he had been in constant communication with HMRC to clarify and rectify the problem, the fact remains that there was a significant delay before the P35 was filed and as such we found as a fact that even if the Appellant had been notified of the error earlier, we were not satisfied that the return would have been submitted without any further delay.

54. We accept the submission of Mr Chapman that there is no statutory obligation on HMRC to issue reminders, and that penalty notices are not intended to serve as such. There are vast numbers of persons who are required to submit tax returns and make payments of tax. In our view the system would become unworkable if every taxpayer were relieved of their obligation to file returns until they received information from HMRC in a form convenient to them. We are satisfied that sufficient information is available to enable taxpayers to find out how to ensure their obligations are met and apply themselves diligently to the processes involved. In this case, we found as a fact that there was no evidence upon which we could be satisfied that Mrs Shepherd or Mr Boyd had seen confirmation that the P35 had been submitted and consequently there was a lack of diligence and care to ensure that the procedure had been correctly followed.

55. We found as a fact that the P35 was not submitted by the due date and that there was no reasonable excuse lasting the duration of the period of default.

56. Under section 100B (2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

57. 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.

TRIBUNAL JUDGE
RELEASE DATE: 23 November 2011