



TC02915

Appeal number: TC/2013/01503

Late filing of P35 return – reliance on dishonest agent – inadequate postal arrangements - reasonable excuse - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YELLOW CROWN LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MS ELIZABETH BRIDGE MA**

Sitting in public at 185 Dyke Road, Brighton on 16 August 2013

Ms Jane Mason for the Appellant

**Ms Gloria Orimoloye of HM Revenue and Customs Solicitor's Office for the
Respondents**

DECISION

1. This appeal now relates to penalties assessed for the late filing of P35 end of
5 year returns by the appellant company for 2008-09 and 2009-10; for 2008-09 the
penalty is £134 and for 2009-10 it totals £1,200.

2. The history of the matter is a sad one. On 22 June 2011 Ms Mason's husband,
a Mr D'Alessio, was killed in a car accident. Mr D'Alessio effectively ran company's
business, which was that of a garage repairing cars, and after his untimely death the
10 business was closed for six months, thus to the end of 2011. In January 2012, bailiffs
arrived at the premises to distrain for unpaid penalties and Ms Mason says she was
thereby alerted to the fact of their existence. In fact the penalties in question had been
assessed in September 2009, January, May and September 2010 and January and May
2011, on six occasions therefore before Mr D'Alessio's death.

3. Ms Mason thereupon turned to the business's accountant, a Mr X, who had
been acting for the company in relation to all its tax affairs, including the payroll,
since 2008, and she contacted him in February 2012 to ask what was happening. Mr
X apparently did not deny that the P35 returns had not been filed; it is then said that
he dragged his feet in dealing with the situation and did not disclose at first that he
20 needed passwords to do the filing online. Ms Mason says that she had to get them
from HMRC herself and that "eventually" the returns were filed, Mr X telling her that
the penalties had been cancelled. By April 2012 Ms Mason had lost patience with Mr
X, whom she described as casual and unreliable, and instructed a firm of chartered
accountants in his place. (Mr X's stationery does not indicate that he has any
25 professional qualifications.)

4. Ms Mason's evidence was that after that point she had had nevertheless to
contact Mr X about the return for 2010-11, which he did not deny that he had failed to
file, and various overpayments and underpayments for the whole period from 2008,
when Mr X began to act, until 2011 when the business collapsed. In short, Ms Mason
30 said that Mr X's failure to attend to the company's tax business covering the whole of
this period was at fault and that he frequently claimed to have done things which it
turned out that he had not done. Mr X is not before the tribunal and we have no
evidence from him to respond to these allegations, but we have no reason to
disbelieve Ms Mason whom we regarded as a credible and straightforward witness,
35 and we accept – as did Ms Orimoloye for the Crown - that what she told us had
happened was indeed the case.

5. Ms Mason conceded that when he was alive Mr D'Alessio had mentioned once
that Mr X "had let him down" and that the company had incurred a penalty, but he
had not mentioned anything more. HMRC's records show that all the penalties at
40 issue were sent to the company's correct address, but the evidence is that this was a
central point in the industrial unit where the garage was located and that post had to
be collected from there; at times, this arrangement led to Yellow Crown getting the
post meant for other traders, and it is likely that the reverse happened as well.

6. In practice, Ms Mason - who is a nurse and has five children - and had little spare time to involve herself with the business, would send one of the children to fetch the post from the central point, and this practice probably led to some items being misplaced or lost. While we are satisfied that all the penalty notices were duly served by the Revenue, we also consider that it is probable that some of them would have miscarried due to the system adopted for collecting them; in that respect, the fault plainly did not lie with the Revenue but was the responsibility of the taxpayer. Though it is not possible on the evidence to determine which penalty notices would have miscarried, we must assume that many or most of them were received by Mr D'Alessio and passed on to Mr X to deal with – indeed, the Revenue say that he would have received copies in any event.

7. Given the evidence about Mr X, it is reasonable to conclude that his dealings with Mr D'Alessio mirrored those with Ms Mason in being “casual and unreliable”. Our conclusion therefore is that, except in one instance, Mr D'Alessio would have believed that the company's tax affairs were essentially in order because Mr X would have misled him in the same way he later misled Ms Mason, when in turn she came to deal with him. A busy man, responsible alone for the conduct of a small business, relying in good faith on a tax agent who let him down and was inclined to be less than frank about the way things were.

8. Did Mr D'Alessio nonetheless have a reasonable excuse for believing that the returns had been made in time? Should he have been alerted to the deficiencies of his agent, as Ms Mason later was, by penalty notices arriving at his business? Section 118(2) of the Taxes Management Act 1970 provides:-

9. (2) 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.

10. In this provision, the phrase “reasonable excuse” is not defined further and each case has to be considered on its merits. It is unlikely that a businessman who had gone to the trouble and expense of having his tax affairs handled by someone who held himself out as being competent to do so would have been indifferent to repeated penalty assessments arriving at his premises. On the other hand, it is likely that Mr X misled Mr D'Alessio into thinking that his payroll affairs were in order.

11. This is a borderline case: it is always the responsibility of the taxpayer to ensure that his obligations are discharged and reliance on another to discharge them is not in itself capable of amounting to a reasonable excuse. There are, however, cases in which if the taxpayer is positively misled by a dishonest and unreliable agent it may be justifiable for him to rely on this defence; much will depend on the circumstances of each case. On balance, we consider this to be such a case and that it was in the

circumstances reasonable for Mr D'Alessio to believe that his company's obligations were being discharged. The appeal therefore succeeds.

5 **12.** 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.

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**MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE**

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RELEASE DATE: 30 September 2013