TC02942

Appeal number: TC/2012/08836

INCOME TAX – PAYE – P35 annual return – electronic submission – whether HMRC's email message amounted to confirmation of filing – no – no effective filing until after due date – penalty imposed – penalty confirmed
PROCEDURE – appropriate steps after receipt of summary decision – requirement to make request for full facts and findings before considering any possible further appeal
NATURE OF TRIBUNALS – independence from parties

FIRST-TIER TRIBUNAL
TAX CHAMBER

TL WATSON T/A KIRKWOOD COACHES **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

The Tribunal determined the appeal on 8 May 2013 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 17 September 2012 (with enclosures), and HMRC's Statement of Case submitted on 5 February 2013 (with enclosures).

DECISION

1. In a summary decision issued on 21 May 2013, I dismissed the Appellant's appeal against a penalty for late submission of its P35 return for the year 2011-12. For the reasons set out below, it is necessary to set out my findings in a full decision. As the process of dealing with the outcome has raised questions of wider interest concerning procedure and also the nature of the evidence required in such cases, this decision is being published.

The procedural issues

2. Following the release of the summary decision, the Appellant's adviser, Derek McDowell of Pennybridge Accounting, wrote on 14 June 2013 to the HM Courts & Tribunals Service ("HMCTS") office in Birmingham to raise questions as to the difference between the decision in the present case and that in an appeal relating to another of his firm's clients, which had been allowed. His letter contained no request for full facts and findings, as specified in the final standard paragraph of the summary decision:

> "9. This document contains a summary of the findings of fact and reasons for the decision. A party wishing to appeal against this decision must apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons. When these have been prepared, the Tribunal will send them to the parties and may publish them on its website and either party will have 56 days in which to appeal. 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."

3. In his letter, of which I have only very recently been provided with a copy as a result of the subsequent correspondence relating to this appeal, he asked that I should reconsider my position in relation to the decision.

4. As he had not received any response from the Birmingham office, Mr McDowell wrote on 16 July 2013 to the HMCTS Upper Tribunal office of the Tax and Chancery Chamber in London. He enclosed a completed form of "Application for Permission to Appeal and Notice of Appeal" addressed to the Upper Tribunal. He explained that his application was delayed, as he had never received a response to his letter dated 14 July 2013 to the Birmingham office of HMCTS. He raised several points in the form concerning the distinction between the two appeal decisions and the nature and effect of receipts in relation to on-line submissions. I consider these questions below.

5. In an email dated 19 July 2012 from the Upper Tribunal office to the HMCTS Birmingham office of the First-tier Tribunal, two applications were mentioned; one was unrelated to the present appeal, but the other concerned the present appeal. The relevant correspondence in each case was sent as an attachment. The email stated that the Appellant had 28 days from 21 May 2013 to apply for full written reasons; it

appeared that he had not done so. It also referred to the Appellant saying that he had sent an FTC 1 form to the Birmingham office some time ago.

6. On 2 August 2013, a copy of the Upper Tribunal's message was sent to me with a message asking for full written findings, but in a form rendering it impossible for me to open the attachment relating to this appeal. I requested further information from the Birmingham office, in particular whether a request for full written findings and reasons had been made and refused. As I had not had a response, I sent a further email to the Birmingham office on 16 August 2013.

7. In a message dated 13 September 2013, the Birmingham office informed me that there had been no refusal of a request for full written reasons. The form received from the Upper Tribunal office was being treated as such a request. The attachments to that email were the message from the Upper Tribunal, Mr McDowell's letter to the Upper Tribunal dated 16 July 2013, the form FTC 1 as sent to the Upper Tribunal, a copy of Mr McDowell's letter dated 14 June 2013 to the HMCTS Birmingham office, a copy of the summary decision as released on 21 May 2013, and a copy of a summary decision of the First-tier Tribunal (Geraint Jones QC) in the appeal of R & A Logan.

8. Thus the current position is that I am requested to set out my full written reasons and findings in this decision. Before I do, I find it necessary to set out the proper sequence of steps required to raise questions in respect of a summary decision.

9. All summary decisions contain the wording set out at paragraph 2 above. Anyone considering making an appeal against a summary decision *must* first ask for full written findings and reasons. This is required by Rule 35(4)-(6) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273 (L.1) (which I refer to in this decision as "the Tribunal Rules"). Under Rule 35(5), an application for full written findings and reasons must be made in writing and sent in time for it to be received within 28 days of the release of the summary decision.

10. The Tribunal Rules do not specifically state what the position is if an applicant fails to make the application within the time limit. It therefore becomes a matter of the Tribunal's discretion whether a late application will be accepted. The exercise of that discretion must balance the strict time limit requirement contained in the Tribunal Rules against the principle of dealing with cases fairly and justly. It may not be appropriate to refuse the application, and thus prevent any further appeal, if there has not been undue delay beyond the time limit, or if there are good reasons for the delay. An application would be far more likely to be refused if there had been a delay of many months or even years, as providing a full decision after such a delay might well prove impractical or even impossible. As a late application will always require the exercise of the Tribunal's discretion, potential applicants should always seek to apply within the time limit.

11. The Practice Statement issued on 8 May 2013 by the Presidents of the First-tier Tribunal Tax Chamber and of the Upper Tribunal Tax and Chancery Chamber states

that, in order to apply to the First-tier Tribunal for permission to appeal against a decision of that Tribunal,

> ". . . an applicant MUST first have received full reasons for the First-tier Tribunal's decision".

The effect of this requirement is that the essential first step after receiving a summary decision is to make an application to the First-tier Tribunal under Rule 38(5); as I have explained, this should be made within the time limit.

12. The next step is to await the full decision before considering whether any further appeal is appropriate. Whatever initial impressions the parties may have from the summary decision, they need to review in detail the findings and reasons set out in the full decision in order to decide on the prospects of any possible further appeal. In particular, they need to identify anything amounting to an error of law in the decision. An appeal may only be made to the Upper Tribunal on a point of law.

13. If a party decides to apply for permission to appeal to the Upper Tribunal, that application *must* be made to the First-tier Tribunal; the time limit for such applications is 56 days from the release of the full decision. It was therefore incorrect in the present case for an application to be made first to the Upper Tribunal. The form FTC 1 sent to the Upper Tribunal stated clearly at the top of the first page, below the heading:

> "You must apply to the First-tier Tribunal for permission to appeal before you fill in this form."

14. The Upper Tribunal office referred in the email to Birmingham dated 19 July 2013 to the Appellant (presumably Mr McDowell as the Appellant's agent) having sent a form FTC 1 to the Birmingham office. If this was the case, the use of that form was incorrect. There is a specific First-tier Tribunal form to be used when making an application to the First-tier Tribunal for permission to appeal.

15. If the First-tier Tribunal decides to refuse the application for permission to appeal, that is the point at which an application for permission to appeal may be made to the Upper Tribunal. That application must be made within one month of the First-tier Tribunal's refusal.

The facts

16. I now turn to the facts of the present appeal. The Appellant's Employer Annual Return (ie form P35 and related P14 forms) for 2011-12 was due to be filed by 19 May 2012. From 2009-10 onwards, such returns have been required to be filed using an approved method of electronic communication. On 25 March 2012 HMRC sent a P35N electronic reminder to the Appellant.

17. Following receipt of that message, Pennybridge Accounting contacted HMRC to ask whether it was acceptable to file the return before the end of the 2011-12 tax year. I accept, and find accordingly as fact, the statement in correspondence made by

Pennybridge Accounting that they made this approach and that they were told that it was acceptable to file at that stage.

18. On 30 March 2012, Pennybridge Accounting made an on-line submission on behalf of the Appellant. The nature of that submission is at the heart of the dispute in this appeal, and is considered below.

19. HMRC's response to that submission was an email dated 30 March 2012 (timed "11.40") addressed to Derek (at Pennybridge Accounting) in the following terms:

> "Thank you for sending the PAYE End of Year submission online.
>
> The submission for reference 916/WA14943 was successfully received on 30-03-2012. If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.
>
> PAYE End of Year Online is just one of the many online services we offer that can save you time and paperwork. For the latest information on all of our Online Services please visit www.hmrc.gov.uk
>
> This is an automatically generated email. Please do not reply as the email address is not monitored for received mail."

20. On 29 April 2012, HMRC sent an "AR1N" reminder to the Appellant. HMRC subsequently issued a "P35 Interim Penalty Letter" advising that the Appellant had incurred a penalty, and explaining what action had to be taken to prevent the penalty from increasing.

21. On 12 June 2012 the Appellant's P35 Employer Annual Return was successfully filed electronically with HMRC.

22. On 18 June 2012 HMRC issued a penalty determination to the Appellant; the amount of the penalty was £100, calculated as £100 per month for every 50 (or up to 50) employees; the penalty period in the Appellant's case was from 20 May 2012 to 12 June 2012.

23. Mr McDowell responded in a letter dated 18 July 2012 (see below). That letter was treated by HMRC as an appeal against the penalty. On 21 August 2012, HMRC replied; they rejected the appeal, as it had been made late. They did not consider that there was any reasonable excuse for the lateness of the appeal. They gave details of the procedure for applying to HMCTS for acceptance of a late appeal.

24. On 17 September 2012, Pennybridge Accounting gave Notice of Appeal to HMCTS. Thus the Notice of Appeal was served in time, despite the late notification of the appeal to HMRC. The requirement to give notice of appeal to HMRC within 30 days of the penalty notice has in effect been waived. In my view it is appropriate and in the interests of justice for the appeal to proceed.

25. On 26 October 2012, HMCTS wrote to Pennybridge Accounting to inform them that this appeal had been stayed pending the outcome of HMRC's appeal to the Upper Tribunal in the *Hok Limited* case.

26. Following the release on 23 October 2012 of the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Hok Limited* [2012] UKUT 363 (TCC), the appeal in the present case was resumed after the stay period expired.

Arguments for the Appellant

27. In his letter to HMRC dated 18 July 2012, Mr McDowell referred to the on-line submission having been made on 30 March 2012. He stated that he could understand penalties being charged for late filing, but commented that his submissions for the Appellant and for other clients had actually been made early. He was sure that this had been a minor oversight, and indicated that he would appreciate a full refund of what he described as "the fee" to each of the individual clients.

28. In the Notice of Appeal, Mr McDowell referred to the return having been filed before it was due. He indicated that his firm was only a small accountancy firm and could not afford to pay out £100 penalties. He emphasised that the return had been filed on line and that he had a submission receipt. The HMRC assistant had told him that this had been a test. Mr McDowell commented that all submission receipts said the same thing whether filed on 30 March 2012 or 30 April 2012. It was not his fault if computers could not deal with the return being filed early. He submitted that if his claim was rejected, it made a mockery of the whole on-line filing system.

29. In his letter dated 14 June 2013 to HMCTS commenting on the summary decision issued on 21 May 2013, Mr McDowell made a number of points. I have treated this letter as being a further submission on behalf of the Appellant, and (to the extent appropriate) I take into account the points made in that submission. I considered whether to refer it to HMRC and request their further comments in reply, but concluded that this was not necessary or appropriate in the circumstances.

30. Mr McDowell's major point in his letter was that he had a receipt from HMRC. So far as he was concerned, HMRC had received the return: what had they done with it?

31. Other points in his letter are best dealt with under "Discussions and Conclusions" below.

Arguments for HMRC

32. HMRC did not dispute the fact that Pennybridge Accounting attempted to file the Appellant's Employer Annual Return on 30 March 2012. However, HMRC records showed that a successful submission was not received until 12 June 2012. The submission received on 30 March 2012 was a "test" submission.

33. HMRC would expect Pennybridge Accounting in their professional capacity to be experienced and familiar with the procedure of filing on line, including acceptance and rejection messages.

34. As Pennybridge Accounting had provided HMRC with an email address, an email would have been sent to confirm that a successful submission had been received by HMRC. A return can only be filed once; thus the fact that the agent was able to file the Employer's Annual Return on 12 June 2012 indicated that a previous attempt had not been successful.

35. In order to file a test submission, Pennybridge Accounting would have had to access "test" mode on the system. The obligation was on the agent to ensure that the "live" P35 transmission was made. The HMRC website clearly indicated that if a test submission was sent and a message was received saying it had been successful, the user should not forget that the still needed to be filed properly.

36. If an employer (or agent) wished to file a return before the start of the next tax year, this could be done. The HMRC website gave specific instructions in relation to this:

> "Returns filed before the start of the new tax year
>
> If you file your annual return before 6 April (for example, because you've ceased being an employer), HMRC will still let you know straight away whether the return has been accepted or rejected. However, the return won't actually be processed for tax and NICs purposes until early April. Please remember to check carefully that the return you are sending is for the correct year. . . ."

37. Information about PAYE and the completion of returns was widely available. Someone acting in a reasonable manner to ensure that they adhered to their legal obligations would have been aware of such information and would have acted accordingly. The form ARN1 and the P35 Interim Penalty Letter should have alerted the Appellant to the fact that the 2011-12 return was outstanding and that a successful submission had not yet been received by HMRC.

38. Reliance on a third party could not be considered to be a reasonable excuse; the responsibility for meeting tax obligations remained on the Appellant as an employer.

39. HMRC accepted that Pennybridge Accounting were under the impression that the 2011-12 Employer Annual Return had been filed correctly, that was not as such to be considered a reasonable excuse. Nothing in the appeal showed that something unexpected or unusual prevented the Appellant from submitting the return on time. It had been received late, and as a result a penalty had been correctly determined to be charged and issued under s 98A(2) of the Taxes Management Act 1970 ("TMA 1970").

Discussion and conclusions

40. I deal first with the matters raised in the papers which were before me for the purposes of the summary decision, and then consider points raised by Mr McDowell in subsequent correspondence.

41. As already indicated, the crucial question is the status of the HMRC email dated 30 March 2012 (see above). Mr McDowell described it as a "receipt". However, as he also indicated in the Notice of Appeal,

> "All submission receipts say the same thing whether filed on the 30th March 2012 or 30th April 2012."

42. Mr McDowell assumed that the wording of the email was related to the time at which the submission was made. It is clear, both from HMRC's submissions and from the website extract which they provided, that a response will be given in respect of a submission where it is made early. However, that in itself does not establish what the nature of the submission is.

43. The distinction which needs to be made is between a "test transmission" and a "live transmission" (sometimes referred to as a "successful submission"). If a test transmission is made, this does not have the effect of filing the return; all it does is to establish that a subsequent attempt to file a return will not be rejected. Mr McDowell expressed concerns in the correspondence about the data protection implications of information being provided to HMRC and somehow lost in their system. Those concerns were misplaced; if a test transmission has been made, HMRC's systems will not have registered the return itself, but only what might be described as the "pathway" for a return to be submitted at a subsequent stage. It enables the user to find out whether the return will pass the validation checks in HMRC's system, so that any problems can be put right before the "live return" is filed.

44. A "live transmission" is one which has the effect of putting the return into HMRC's system for processing. If a live transmission is successful, a single message is sent to the user's commercial software, indicating that: "The EOY Return has been processed and passed full validation". In contrast, a test transmission will result in two messages being received via the commercial software, the first being:

> "This submission would have been successfully processed if sent under non test conditions."

45. I accept HMRC's evidence that a return can only be filed once; if this were not the case, it would be a recipe for chaos, as HMRC would not be able to determine which of more than one filings was the "correct" or "valid" one. As the return was not successfully filed until 12 June 2012, it follows that the submission made on 30 March 2012 was not a "live transmission", whatever Mr McDowell's intentions may have been. It is clear that there was nothing to prevent a live transmission being made on that date, as HMRC made clear on their website that early filing of returns before the beginning of the new tax year was possible.

46. The form of the email "receipt" was the same whether a submission was a test one or a "live transmission". Thus the HMRC message dated 30 March 2012 could not be taken as confirming that a successful "live transmission" had been made.

47. Mr McDowell concentrated on the emails being the same whether the submission was made on 30 March 2012 or 30 April 2012. As I have indicated, this is not the issue; successful "live" submissions could have been made at either stage. The

real issue is the nature of the submission made on 30 March 2012. As the successful live submission was only made on 12 June 2012, the 30 March submission can only have been a "test transmission"; this is borne out by HMRC's records, which show two submissions, namely the one on 30 March 2012 (recorded as "Test"), and the one on 12 June 2012 (recorded as "Live").

48. The emails on both occasions were the same. The reason is that they were not stating whether the submission in each case was "test" or "live"; they were simply acknowledging receipt of a submission. Thus receipt of an email in this form *cannot* be taken as confirmation that there has been a successful "live" submission (ie that the return has been properly filed with HMRC).

49. I find on the evidence before me that the Appellant's P35 return for 2011-12 was not filed on 30 March 2012, but on 12 June 2012. If (as I presume to have been the case) Pennybridge Accounting intended the submission made on 30 March 2012 to be a "live" one, they did not achieve this result. The HMRC website information available at the time emphasised the need to check the status of the submission; the following wording appeared in bold type in the section under the heading "What happens when you file online":

> "Please note that the wording on this email will be the same whether the submission was in Test In Live or live and that you still need to file a live return. If you are unsure if you have sent a live submission you can check by contacting HMRC's Online Services Helpdesk."

50. There is no evidence of Pennybridge Accounting having contacted HMRC in this way. The firm appears to have assumed that it had made a successful live submission, without checking. The actual position was that it had not done so. As a result, the Appellant's return was not filed on time, and a penalty was incurred.

51. Mr McDowell did not seek to argue that there had been a reasonable excuse for the late filing. This was because he contended that the return had been filed on 30 March 2012, as evidenced by what he described as a receipt from HMRC. I have found on the evidence that the return was filed late, on 12 June 2012. I think it appropriate to consider whether the receipt of the email message on 30 March 2012 could have been considered to amount to a reasonable excuse.

52. My conclusion is that it could not. The HMRC website instructions made clear that if someone who had made a submission was unsure whether it was successful, that person was at risk of finding that it had not been successful and should therefore check the position with HMRC's Online Services Helpdesk. This placed an obligation on that person. Merely assuming that a submission amounted to a successful "live" submission was not enough; it was necessary to check. No reason was given in the correspondence from Pennybridge Accounting for omitting to take this step. It therefore follows that there was no reasonable excuse for the late filing of the Appellant's 2011-12 P35 Employer's Annual Return, and the £100 penalty must therefore be confirmed.

53. The Upper Tribunal's decision in *Hok Ltd* makes it clear that where it has been shown that penalties are properly due and there is no basis in the legislation to reduce or cancel them, the First-tier Tribunal has no general power to discharge fixed penalties on discretionary grounds.

54. In his letter to HMCTS dated 14 June 2013, Mr McDowell referred to one of the attachments, the summary decision of Judge Geraint Jones QC in the R&A Logan case, which I assume to be an appeal made by another client of Pennybridge Accounting. Mr McDowell asked whether the decision in that case could be assumed to be binding in respect of other appeals. The answer is that a decision of one First-tier Tribunal is not binding on other First-tier Tribunals. (In contrast, all First-tier Tribunals are bound by decisions of the Upper Tribunal Tax and Chancery Chamber). Further, the decision in the R&A Logan case was a summary decision; as summary decisions are not published, they are not available to other Tribunal Judges. The only reason for me being aware of that case is that Mr McDowell attached a copy of it to his letter to HMCTS; even if other First-tier Tribunal decisions were to be binding, which they clearly are not, it would not have been possible for me to take it into account.

55. As that decision is a summary one and so does not contain full facts and findings, I have no information as to the evidence which was before Judge Geraint Jones QC. Even if I did and that evidence happened to be identical to that in the present case, the position is that it is for each Tribunal panel to come to its own conclusion on the evidence before it. It is entirely possible for one Tribunal panel to come to a different conclusion on the basis of what may appear to be similar facts. It is not unknown for different Tribunal panels to arrive at different conclusions as to the law; in the present case, I do not think that my view on the law differs from that of Judge Geraint Jones QC. It appears that my conclusions on the facts are different; I have stated my reasons in this decision.

56. Mr McDowell's letter raised another issue. As this might be seen as amounting to an allegation of bias on my part, I do not feel that I can ignore it. He stated:

> "I can appreciate that the HMRC are your ultimate paymaster and future generous pension provider but you cannot let this get in the way of what I am sure you will agree is to accept this appeal and rule in favour of my clients."

57. This comment displays a significant misconception as to the status of these Tribunals. The Tribunals are part of an entirely separate government Department, the Ministry of Justice, and are entirely independent from any other government department. Their role is to deal completely independently with disputes between taxpayers and HMRC (and in certain cases, other government Departments). Thus HMRC has no influence, whether financial or otherwise, on the result of any appeal before these Tribunals. Mr McDowell's comment is entirely inappropriate; I would have preferred to ignore it, but the independence of these Tribunals, whoever the members of any particular panel may happen to be, is too important to be left unmentioned.

58. This case has demonstrated the importance of careful reading of forms and instructions issued by government departments; unless appropriate procedures are properly followed, difficulties are likely to arise.

Right to apply for permission to appeal

59. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 9 October 2013