



TC02975

Appeal number: TC/2012/03465

INCOME TAX – EMPLOYERS ANNUAL RETURN – penalty for late filing – Regulation 73(1) The Income Tax (PAYE) Regulations 2003 and Para 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 – reasonable excuse – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LITTLEWOOD HIRE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER G. NOEL BARRETT LLB
ALAN SPIER**

**Sitting in public at Alexandra House, The Parsonage, Manchester
on 4th September 2013**

Mr C M Littlewood, Company Director, for the Appellant

M/s H Roberts of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

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1. This is an appeal against penalties for late filing of the Appellant's P35 Employer's Annual Return for the tax year 2011-12. (We note the mistaken reference in M/s Roberts submission to the 2010-11 tax year).
- 10 2. The Appellant is a small company which is run by Mr Littlewood and his 84 year old mother and which has just two employees.
3. Employers are required to submit their Employer's Annual Return to HMRC no later than 19 May (the "due date"), following the tax year end.
- 15 4. Interim penalties are charged where a return remains outstanding after the due date.
5. Penalties are charged at £100 per month for all or part of a month from the due date of the Return until the date it is received.
6. HMRC sent an electronic notification to the Appellant on 25th March 2011, requiring it to file an Employer's Annual Return.
- 20 7. The Appellant says that it correctly filed its return online on 18th May 2011.
8. HMRC say that the return filed on 18th May was defective and that it was not until 4th February 2013 that the Appellant filed a correct return.
9. Late filing penalties in the sum of £900 have been imposed on the Appellant.
- 25 10. The Appellant appeals on the grounds firstly that its return was not filed late and secondly on the grounds that if it is deemed that its return was filed late, that it has a reasonable excuse for such late filing.

The Law

- 30 11. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 impose a statutory obligation on an employer to deliver an Employer's Annual Return before 20 May following the end of a tax year.
- 35 12. The Employer's Annual Return consists of a P14 for each employee, together with a P35 which is the Employer's composite return. The P14 and the P35 have to

contain the requisite information set out in Regulation 73(2), and the details submitted within the forms have to correspond with one another.

13. With regard to the imposition of penalties section 98A TMA 1970 (2) and (3) states;

5 (2) "...any person who fails to make a return in accordance with the provision shall be liable –

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues...."

10 (3) "For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return –

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and....."

15 14. Section 118(2) of TMA 1970 states;

20 "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"

25 15. Regulation 205-205B of the Income Tax (PAYE) Regulations 2003 provides that an employer must use electronic communications to deliver the Employer's Annual return on-line from the 2009-10 tax year onwards.

16. The Government first announced in 2002 that small employers would be required to file on-line by 2010.

30 ***The Evidence and our Findings of Fact***

17. We were able to read and refer to the document bundle provided by HMRC and the document bundle provided by Mr Littlewood, Director of the Appellant. We also heard oral evidence from Mr Littlewood and from M/s Roberts for HMRC.

18. It was accepted by the parties and we accept that the Appellant knew of its obligation to file its return on-line by no later than 19th May 2012. There was also little dispute between the parties over the relevant legislation, other than Mr Littlewood's query as to whether a return which was submitted by no later than 19th May, but which contained incorrect information would satisfy the regulation. M/s Roberts submitted that the return would have to be correct to satisfy the regulations and we agree with this submission.

19. There was a conflict between the parties as to whether the Appellant had filed on-line for the first time at the end of this tax year (2011-12), as Mr Littlewood maintained, or as to whether as M/s Roberts maintained, in accordance with the records available to her, the Appellant had previously filed on-line. The evidence provided by Mr Littlewood, was that the Appellant did not have the requisite computer software to enable it to file on-line in previous tax years, (despite the fact that all Employers were supposed to file on-line from 2009-10 onwards). We preferred Mr Littlewoods evidence in this respect and agree with his submission that:

“this (2011-12) year was our trial”

20. Mr Littlewood's evidence was that he had on behalf of the Appellant electronically filed the correct returns P14 and P35 on 18th May 2012 and that they had not been accepted (which he did not realise until many months afterwards), because of a computer problem on HMRC's computer system.

21. HMRC's evidence was that there was a discrepancy between the figures within the P14 and the P35, (which are checked automatically through the computer system) and which did not therefore correspond with each other. As a result the returns filed on 18th May were “unsuccessfully validated” and were not therefore accepted into HMRC's system, leaving the returns outstanding.

22. We shall comment further on the conflict between this evidence shortly

23. Three days later, on the 21st May 2012, Mr Littlewood re-filed the P14 electronically. He maintains that the figures within that re-filed P14 were the same as the figures in the P14 which he had originally filed three days earlier. HMRC were unable to challenge this because the re-filed form automatically “overwrites” the original form which is then no longer retrievable. However they questioned why Mr Littlewood had re-filed the P14 if the details were the same?

24. Mr Littlewoods explanation was that he had been contacted by HMRC by telephone on the 21st May, because they said there was a computer problem with his on-line submission three days earlier and as a result he needed to re-file the P14. This he did, that same day without, he said, altering the figures.

25. HMRC confirmed that they had no record of any such telephone call.

26. Had the matter ended there, we think it unlikely that it would ever have come in front of this Tribunal. Unfortunately it did not end there, because unbeknown to Mr Littlewood, even though, (as it subsequently transpired), the figures on the re-filed

P14 corresponded with the figures on the original P35, that original P35 had also been “unsuccessfully validated” meaning that it too needed to be re-filed in order to match up with the re-filed P14.

5 27. We are inclined to the view that Mr Littlewood was prompted to re-file the P14 on the 21st May because he was contacted by HMRC and accept his evidence in this regard. We think it highly unlikely, that he would, of his own volition, have re-filed the P14 on 21st May with precisely the same figures upon it as the P14 which he had filed three days earlier. We are also prepared to accept Mr Littlewood’s evidence that the figures on both the earlier and the later filed P14’s were the same.

10 28. Mr Littlewood confirmed that he thought that everything was in order after the 21st May 2012. There is then some confusion on Mr Littlewood’s part in his evidence as to when he next received communication from HMRC. At one point Mr Littlewood accepted that he had received HMRC’s letter dated the 7th January which confirmed that the P35 he filed on 18th March had been rejected because of its mis-match with
15 the P14 and needed to be re- filed. Indeed he brought the Tribunals attention to the fact that HMRC had wrongly stated in their letter dated 7th January that the amount of National Insurance Contributions due was in the sum of £34,710.28 instead of the correct figure which was £3,410.28. At another point Mr Littlewood said that the first time he knew there was a problem was when he received the Notice of Penalty
20 Determination dated 7th February 2013 from HMRC.

25 29. HMRC referred us to both to the fact that they had issued a consolidation stencil letter to the Appellant at its correct address on 7th July 2012 which letter warned the Appellant that its Employer’s Annual Return was still not complete and also referred us their BROCs records of telephone calls for August 2012, which showed apparent contact with the Appellant on several occasions.

30 30. Mr Littlewood stated that the Appellant had never received the letter from HMRC dated 7th July and suggested, given its importance that it should have been sent either recorded or registered post and that as HMRC held both his email and mobile telephone details, they should have sought to contact him by alternative means. M/s
35 Roberts explained to us and we accepted that the letter of 7th July was computer generated; that it was sent to the correct correspondence address for the Appellant, (which was in fact Mrs Littlewood’s home address not the company’s works address); and that HMRC had no reason to doubt other than that the Appellant had received it. She confirmed that HMRC sent a great number of these types of letter to Tax Payers and that they could not be expected to send and monitor them by registered post or recorded delivery. Furthermore as the letter was computer generated there was no
“human intervention” and therefore contact with Mr Littlewood by alternative means would not have been possible either. We accepted M/s Roberts explanation.

40 31. HMRC’s computer record of actions for August 2012 shows that HMRC attempted to contact the Appellant by telephone on the 16th and 17th August, but the telephone number recorded by HMRC was not the Appellant’s telephone number and we were informed by the Mr Littlewood that it belonged to an entirely separate unrelated company.

32. Subsequently on the 17th August 2012, HMRC sent a reminder consolidation stencil letter to the Appellant to Mrs Littlewood's home address. Whilst Mr Littlewood said that he did not receive this, we believe that his mother most probably did receive it, because three days later on the 20th August 2012 she telephoned HMRC to say that Mr Littlewood would ring the following week and she was on that occasion advised by HMRC that the P14 was now correct and all that was needed was for the P35 to be submitted again. It seems to us highly unlikely that Mrs Littlewood's telephone call to HMRC was unprompted and far more likely that it came about as a result of her having received the letter from HMRC of the 17th August

33. On 13th November HMRC's records show that they spoke to Mr Littlewood over the telephone and that he agreed during that conversation to contact on-line services and get the P35 re-submitted. Mr Littlewood denies that this conversation took place.

34. On 14th December 2012 HMRC's records show that they telephoned the Appellant and spoke with "Chris", (who Mr Littlewood explained was "only" a driver), Mr Littlewood appeared to accept that this conversation had taken place and was somewhat critical of HMRC having spoken to Chris about the matter. In any event during that conversation HMRC advised Chris of the late filing penalties and Chris confirmed to them that he could not contact Mr Littlewood because he was on a plane but that he would pass the message on as soon as possible. Mr Littlewood confirmed in his evidence and we accept that he was on a plane at the time of this conversation and that Chris was going to the airport to collect him. We believe that Mr Littlewood was made aware of HMRC's telephone call.

35. HMRC also confirmed from the Online Services Helpdesk Records and we accept, that Mr Littlewood had logged on-line on 6th August 2012, 4th November 2012, 5th December 2012, 1st February 2013 and again on 4th February 2013 when the P35 was successfully submitted. It seems to us highly unlikely, given the number of occasions Mr Littlewood logged online, that he was other than aware of the fact that the Appellant's Employers Annual Return still needed to be submitted.

36. Whilst we accept that Mr Littlewood may not himself have seen the letters sent out to the Appellant at Mrs Littlewoods home address by HMRC on 7th July and 17th August, we believe it more likely than not that these letters were received and indeed opened by Mrs Littlewood . Furthermore we believe that the reminder letter of the 20th August would have been what prompted Mrs Littlewoods telephone call to HMRC on 31st August.

37. Whilst Mr Littlewood having criticised HMRC for leaving a message with his employee Chris, then suggested that his mother Mrs Littlewood, at 84 years of age, would not understand the complexities of the matter. The fact remains however that it was the Appellant and not HMRC who employed these individuals and who should as a prudent business have established reliable systems and people to answer and make telephone calls and to receive correspondence. We find that it was the Appellant who was at fault in these matters not HMRC.

38. Mr Littlewood was also critical of the huge number of times, (60 or more he said), he had tried to contact HMRC by telephone unsuccessfully and of HMRC's failure to return his calls. M/s Roberts confirmed that HMRC's records showed that Mr Littlewood only contacted the Online Services Desk on 1st and 4th February 2013 and only contacted the Employer Helpline on 17th December 2012 and 14th February 2013. We do not accept in those circumstances Mr Littlewood's evidence in this regard.

39. Nor do we do not accept that so many alleged telephone calls would go unrecorded by HMRC. Furthermore we find it to be inconsistent with the evidence Mr Littlewood gave at an earlier juncture as to the Appellant not knowing about the need to re-file it's P35 until February 2013 when the Appellant received the penalty notice.

Reasonable Excuse

40. Miss Roberts confirmed and we accepted that the burden of proving this appeal rests upon the Appellant.

41. M/s Roberts also confirmed that there was no statutory definition of what amounted to a reasonable excuse and explained that HMRC considered that a reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the employers control and which prevents the employer from complying with their obligation. A combination of unexpected and foreseeable events she submitted may, when viewed together, be a reasonable excuse.

42. HMRC view was M/s Roberts submitted that the employer should be considered from the perspective of a prudent person exercising reasonable foresight and due diligence having proper regard for their responsibilities under the Tax Acts.

43. We accept this interpretation.

44. We have weighed the evidence we have heard very carefully.

45. We find that the Appellant has succeeded in establishing a reasonable excuse for late filing of its return from 19th May 2012 to the end of August 2013

46. We accept the Appellants evidence that HMRC suffered some sort of computer problem on 18th May and that they telephoned Mr Littlewood on the 21st May and asked him to re-submit the Appellant's P14, because of this error, which he did immediately.

47. As we believe that the computer error was the fault of HMRC, we accept this as being an unexpected or unusual event that was either unforeseeable or beyond the employers control and which prevented the employer from complying with their obligation and find that the Appellant has a reasonable excuse for not submitting its

return until 21st May and therefore find that the penalty of £100 for May 2012 should be dismissed.

5 48. Following on from the 21st May we think it entirely reasonable for Mr Littlewood, as a prudent business man and director of the Appellant to believe that matter had been resolved and that the return had been properly submitted. The computer print outs provided by HMRC, showing the returns as “unsatisfactorily validated”, are we believe far from clear and HMRC have not been able to establish to our satisfaction how the Appellant should have known, prior to late August that it had to resubmit the P35 after it had resubmitted the P14. We accept that this was an
10 unusual event that was unforeseeable, and accept that the Appellant has a reasonable excuse for late filing through until the end of August 2012 and that the penalties of £100 per month for June July and August - £300 should also be dismissed.

15 49. Furthermore had the Appellant then re-submitted its P35 within a reasonable period from the end of August, say by the end of September 2012, then we would have been prepared to allow the appeal in its entirety.

50. The Appellant did not however re-submit its P35 until 4th February 2013.

20 51. It is clear to us that by the end of August 2012 the Appellant should have known of the further actions it needed to take. We accept that two warning letters had by that time been sent to the Appellants correct postal address by HMRC. There had also been several telephone conversations, the contents of which should have been conveyed to Mr Littlewood on behalf of the Appellant. Whether they were or not is in our view a matter entirely for the Appellant, we do not accept that any criticism should be directed towards HMRC over these matters.

25 52. We accept that whilst Mr Littlewood may not have been aware personally of the two letters or the telephone calls and that the earlier letter may just have gone astray, he should have been made aware of them and as a reasonably prudent businessman he should have taken adequate steps to ensure that there were proper systems and suitably knowledgeable staff in place at the Appellant Company, so as to ensure that correspondence and the content of telephone messages were conveyed to him
30 properly and timeously. We do not accept that the events which followed beyond the 31st August, were unexpected or unusual events that were either unforeseeable or beyond the employers (Appellant’s) control and which prevents the employer (Appellant) from complying with their obligation.

35 53. We also take into account in reaching this view the number of times Mr Littlewood logged online between August 2012 and February 2013, which we believe provides further corroboration of our view that Mr Littlewood should after August 2012 have had some knowledge of what was required of the Appellant.

40 54. We also take into account Mr Littlewoods evidence that all that happened in February 2013 when the P35 was finally re-submitted was that one of HMRC’s people removed a technical glitch which allowed the P35 to be re-submitted and that the resubmitted P35 was the same as that first submitted in May 2012. We are not

5 however prepared to accept Mr Littlewoods submission that because the two P35's were the same, that the P35 submitted on 4th February 2013 should be backdated to 18th May 2012, for the reasons we have already given as to the information which clearly should have been within the Appellants knowledge from the end of August 2012.

Decision

10 55. In the circumstances we allow the appeal in part for the month of May 2012 and the following months of June July and August 2012 and dismiss the first £400 of the penalties. We dismiss the appeal for the remaining part in relation to the period from 31st August 2012 to 4th February 2013 and allow the remaining penalties in the sum of £500.

15 56. 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)" 20 which accompanies and forms part of this decision notice.

25 **G NOEL BARRETT LLB**
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 10 October 2013

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