TC03142

Appeal number: TC/2012/04514

INCOME TAX – PENALTY – Late submission of Employers' Annual Returns – Returns not filed by previous clerk to the Council - Whether reasonable excuse on facts – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VAN COMMUNITY COUNCIL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
NORAH CLARKE

Sitting in public at Eastgate House, Newport Road, Cardiff on 10 December 2013

John Dilworth, clerk to Van Community Council, for the Appellant

Karen Evans, of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Van Community Council (the "Council") against penalties of £4,800,[1] imposed under s 98A of the Taxes Management Act 1970 ("TMA"), for the failure to file its employers' annual returns (the "Returns") for 2006-07, 2007-08, 2008-09 and 2009-10 tax years on time.

2. Although the Council did not appeal against the penalty within the statutory time limit it was (by a direction of the Tribunal which was released on 15 June 2012) given permission to appeal out of time.

3. An employer is required to deliver an annual return to HM Revenue and Customs ("HMRC") under the Income Tax (PAYE) Regulations 2003. All subsequent reference to Regulations in this decision are, unless otherwise stated, to these Regulations.

4. Under paragraph (1) of Regulation 73 an employer "must" deliver an employers' annual return to HMRC "*before 20 May following the end of a tax year*" containing the following information:

> (a) the tax year to which the return relates,
>
> (b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and
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> (c) the total net tax deducted in relation to those payments.

5. Paragraph (10) of Regulation 73 provides that "*Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).*"

6. Section 98A TMA, which sets out the liability to penalties for non-compliance with the PAYE Regulations, provides:

> (1) PAYE regulations…may provide that this section shall apply in relation to any specified provision of the regulations.
>
> (2) Where this section applies in relation to a provision of regulations, 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, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed…

[1] made up of penalties of £1,200 for each year (at £100 a month) in which the Returns remained outstanding

> (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…

7. Under Regulation 205 of the Income Tax (PAYE) Regulations 2003 (as amended by Regulation 5 of the Income Tax (PAYE)(Amendment No 2) Regulations 2009) for 2009-10 and subsequent years an employer "*must*" deliver its annual return to HMRC "*by an approved method of electronic communications* [ie online]".

8. Section 118(2) TMA, so far as is material to this appeal, provides:

> … 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.

It is therefore necessary for a reasonable excuse to continue throughout the period of default for a person to be deemed not to have failed to do what was required of him.

9. There is no definition in the legislation of a "*reasonable excuse*" which has been held to be "a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

10. In the present case it is accepted that the Returns, which were due to be filed by 19 May following the end of the tax year concerned, were not filed until 17 January 2012. Therefore, as is clear from the legislation, unless it has a reasonable excuse which continued throughout the period of default, the Council is liable to penalties of £4,800.

11. Mr Dilworth explained that it was the duty of the clerk to the Council to submit the Returns to HMRC. Although the Council accepted it was ultimately responsible, its members were not told by its then clerk, Mr O'Brien, that he had failed to submit the Returns to HMRC and, as all correspondence regarding the Returns and penalty notices had been sent to Mr O'Brien, the Council was not aware of the situation. Mr Dilworth told us that the financial shambles caused by the former clerk extended to the failure to complete any sort of return or statement of accounts to the Council's external auditor Mazars LLP.

12. He produced a letter from Mazars to Mr O'Brien, dated, 29 November 2010, in which Mr O'Brien was warned that failure to prepare a statement of accounts is an offence under Regulation 21 of the Accounts and Audit (Wales) Regulations 2005. The letter also explained that under s 18 of the Public Order Act (Wales) 2004 an auditor has the right of access to every document relating to a body subject to audit and may require a person holding or accountable for any such document to attend before him and produced the document.

13. The letter continued, giving notice under s 18 Public Order Act (Wales) 2004 requiring Mr O'Brien to attend at the offices of the Wales Audit Office for this purpose.

14. Although the Chair of the Council was requested to attend the meeting at the Wales Audit Office it appears that Mr O'Brien did not respond to the letter from Mazars or attend any meeting.

15. When asked if he knew any reason why his predecessor as clerk to the Council, had failed to submit the Returns to HMRC Mr Dilworth could only say that Mr O'Brien appeared to have had a "couldn't care less" attitude towards his obligations and submitted that this incompetence amounted to a reasonable excuse for the failure to file the Returns by their due date.

16. Mr Dilworth also submitted that the penalties were harsh given that the Council's annual precept was approximately £20,000. He also noted that the issue could have been addressed sooner had HMRC, in addition to writing to the clerk had also contacted the chair of the Council as indeed Mazars had done in regard to the audit issues.

17. Although we agree with Mr Dilworth that had HMRC contacted the Chair of the Council, in addition to its clerk, it may have enabled the returns to have been submitted sooner thereby reducing the amount of the penalties, it is not a matter which we can take into account in determining this appeal. This is clear from the decision of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC) in which the judges (Mr Justice Warren and Judge Bishopp) said, at [56]:

> "… the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, …It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

18. It is also clear from *Hok*, that although HMRC may, under s 102 TMA, "*in their discretion mitigate any penalty … and may also, after judgment further mitigate or entirely remit the penalty*" the Tribunal does not have the jurisdiction to do so. Although, given as Mr Dilworth informed us that the Council's electorate includes the second most deprived areas in Wales and ultimately it is they, and not the former clerk, who will pay for his short comings, we would hope that HMRC would consider the exercise of their discretion under s 102 TMA.

19. Turning to the issue that is within our jurisdiction, whether there was a reasonable excuse; although the Tribunal has in some case held that reliance on a third party was a reasonable excuse it is clear from these cases, as noted by Judge Staker in *Stewarton Polo Club Ltd v HMRC* [2011] UKFTT 668 (TC) in at [12] that:

> "... reliance on a third party "can" be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse."

20. In *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC) (to which Judge Staker also referred) Judge Tildesley OBE held that reliance on an agent did not amount to a reasonable excuse. He said, at [7], that:

> "The Appellant's reason for not filing the return on time was essentially its agent made an honest mistake. … The mistake could have been avoided if the agent had exercised proper care. The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts.

21. This is consistent with the decision of the former President of this Tribunal, Sir Stephen Oliver QC, in *Jeffers v HMRC* [2010] UKFTT 577 (TC), where he held that reasonable reliance on an accountant did not constitute a reasonable excuse in the absence of any underlying cause, saying, at [17]:

> "The obligation to make the tax return on time is nonetheless the taxpayer's. It remains his obligation regardless of the fact that he may have delegated the task of making the return to his agent. There may be circumstances in which the taxpayer's failure, through his agent, to comply with, eg, the obligation to make the return on time can amount to a "reasonable excuse". To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional."

22. After citing the above passage from *Jeffers*, the Tribunal in *Bushall v HMRC* [2010] UKFTT 577 (TC) (Judge Hellier and Mr Laing), said:

> "56. It seems to us that reliance on an agent may be an excuse or a reason for non compliance, but such reliance is normal and customary, and the statute cannot have intended such reliance to constitute a *reasonable* excuse in every case. It seems to us that it cannot be the intention of legislation to permit the reliance on a competent person who fails unreasonably to fulfil the task with which he is entrusted to absolve the principal in all cases.
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> 57. We concur with the President when he said that to be a reasonable excuse the excuse must be something exceptional. In our view, in determining whether or not that is the case it may be necessary to consider why the agent failed (and thereby to regard the agent as an arm of the taxpayer). To give a simple example, if a return was given to someone to post, and that person failed to do so, the reasons for that failure will illuminate whether or not there is a reasonable excuse: if the messenger was run over by a bus the position will be different from the case where the messenger merely forgot."

23. Similarly in the present case, in the absence of any satisfactory explanation for the failure by Mr O'Brien to file the Council's Returns on time, we are unable to find that the reliance on him by the Council can amount to a reasonable excuse.

24. We therefore dismiss the appeal and confirm the penalties.

25. By way of postscript we should make it abundantly clear that our decision and the failures of his predecessor should not in any way be taken as a reflection on Mr Dilworth who advanced the Council's case before us in a clear and helpful manner and who, since his appointment, has ensured that the Council has complied with its obligations to file its employers' annual return.

26. 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 BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 December 2013