



TC03291

Appeal number: TC/2013/05938

TYPE OF TAX – PAYE – Employer’s year-end return – penalties for late submission – whether submitted on time – no - whether penalties due – yes - whether penalties can be discharged on grounds of unfairness – no – whether finding that HMRC’s failure to send prompt reminders unfair – no – whether reasonable excuse for late submission – no – penalties confirmed-

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAKEVINE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE FIONAGH GREEN

The Tribunal determined the appeal on 21 November 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 21 June 2013 (with enclosures) and HMRC’s Statement of Case submitted on 19 September 2013 (with enclosures).

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DECISION

Introduction

5 1. This is an appeal against penalties of £1200.00 for late submission of Employer's Annual Return for the tax year 2009-2010.

2. The appeal is determined without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal having decided that there was sufficient evidence and that it was fair and just to
10 proceed.

3. The Tribunal firstly decided to allow the appeal to proceed out of time. The appeal had been received by HMRC outside of the 30 day time limit allowed from the date of issue of the penalty notices. The Tribunal accepted that the Company had been in contact by telephone with HMRC on 7 May 2011 and 17 May 2013. HMRC
15 did not object to the appeal proceeding out of time in their statement of case and the Tribunal decided, in all the circumstances, that the appeal should be allowed to proceed out of time.

Facts

4. Makevine Limited ('the Company') was required to file an Employer Annual
20 Return for the year 2009-2010 by 19 May 2010. From 2009 – 2010 onwards this had to be submitted online using an approved method of electronic communication.

5. The Company was required to complete an Employer Annual Return for 2010-2011 using the PAYE information.

6. HMRC sent an electronic reminder P35N to the Company on 24 January 2010,
25 four months before the filing date.

7. HMRC sent the Company a late filing penalty notice on 27 September 2010 for £400.00 for the period 20 May 2010 to 19 September 2010.

8. HMRC sent the Company a second late filing penalty notice on 19 January 2011 for £400.00 for the period 20 September 2010 to 19 January 2011.

30 9. The Company contacted the Debt Management Team of HMRC on 7 May 2011 and the Employer Annual Return was filed on line on 8 May 2011.

10. HMRC sent a final late filing penalty notice on 8 May 2011 for £400 for the period 20 January 2011 – 8 May 2011

35 11. The Company had been submitting returns on line for a number of years and was familiar with the end of year procedure. No information had been received by HMRC regarding any change of email address

Legislation

5 12. The obligation to make a year-end return is imposed on an employer by Regulation 73 (1) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) which provides that

(1) Before 20 May following the end of a tax year, an employer must deliver to the Inland Revenue (HMRC) a return containing the following information

(2) The information is –

(a) the tax year to which the return relates,

10 (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

(c) the total net tax deducted in relation to those payments...

15 13. The Regulation goes on to list the information which must be supplied, and regulation 211 provides that the employer must use two prescribed forms, the P35 and P14 to supply it. Form P35 contains, in essence, a summary, while one P14 must be submitted for each employee, giving the prescribed information specific to that employee. They are still referred to as ‘forms’ even though the requirement now is to file the information on line rather than on paper.

20 14. Taxes Management Act 1970

Sections 98A(2) and (3)

(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-

25 (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, and...

(3) for the purposes of subsection (2) (a) above, the relevant monthly amount in the case of a failure to make a return-

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

Section 118 (2)

(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 Commissioners 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 if he did it without unreasonable delay after the excuse had ceased

Section 100 – Determination of penalties

- 5an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

Section 100B – Appeals against penalty determinations

10 (1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to...the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the first-tier Tribunal

15 (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but-

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may –

20 (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,

25 (b) in the case of any other penalty, the First-tier Tribunal may-

(i) if it appears...that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears...to be appropriate, confirm the determination,

30 (iii) if the amount determined appears...to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears ...to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

Issue

15. The issues for the Tribunal to decide were whether –

- (i) the submission was on time or made at an earlier date than 8 May 2011
- 5 (ii) HMRC had reminded the Company to file
- (iii) HMRC had acted fairly in not sending out the late filing penalty notice until 27 September 2010, the second penalty notice until 19 January 2011 and the third penalty notice until 8 May 2011
- (iv) the penalties were correctly charged
- 10 (v) there was reasonable excuse for the late submission

The submissions of the parties

16. The Company –

- (i) the year-end return was submitted in good time during May 2010
- (ii) HMRC held an outdated email address for the Company and no email confirmation
15 was received
- (iii) it was unfair for HMRC to wait four months before informing the Company of the penalty charges
- (ii) the Company was informed, after the issue of the penalty notices, that the original submission should be resubmitted as not received and that this had been done
- 20 (iii) that if the submission was not received that a reasonable excuse has been given and continued throughout the period of the return being overdue
- (iv) that in a previous appeal penalty notices had been vacated as the original submission had been carried out as a test submission and that the same situation may have arisen on this occasion
- 25 (v) the Company had never ignored letters and submissions were made on time
- (vi) Mark Cooper, Director on behalf of the Company contacted the debt management team of HMRC on 7 May 2011 after earlier attempts to contact HMRC by telephone
30 and letter had not been successful. The year-end return was submitted on 8 May 2011

17. HMRC –

(i) the Company was required to complete a year-end return for 2009-2010 using the PAYE information. The company had submitted year-end returns online since at least 2005 – 2006 and was familiar with the submission process

5 (ii) a P35N electronic reminder was sent to the Company some four months before 19 May 2010 advising that a year-end return needed to be made and filed by 19 May 2010

(iii) that the Company has an obligation to account for PAYE

10 (iv) the submission was not made until 8 May 2011 and there had not been an earlier submission or test submission made. HMRC had not been informed of any change to the email address. An email address is not necessary to submit a year-end return. In the absence of receiving any notification in May 2010 the Company had not taken any action to ensure that the submission was made and received. The Company had not given the actual date in May 2010 when an attempt had been made to submit the year-end return.

15 (iv) information is published and on HMRC website advising employers of what they need to do to fulfil their obligations and advice is also available on the Employer Helpline and from local Employer Centres

20 (v) that a prudent employer would have contacted HMRC for advice which would have alerted the Company to the fact that a year-end return was required but that the Company did not do so

25 (vi) that the Company does not have reasonable excuse for the late submission and there was no unexpected or unusual event that was either unforeseeable or beyond the employer's control which prevented compliance. The Company failed to operate the PAYE scheme correctly and that HMRC had to be consistent with their approach

(vii) that there is no obligation to issue a reminder or to notify that a P35 had not been received prior to the issue of a penalty notice

30 (viii) that it is well publicised on HMRC website that penalties can be imposed for the late submission of returns and that a reminder will not necessarily be sent. The penalty notices had been received. The first penalty was issued four months after the due date which was the general period of issue to employers. The penalty notice was not a reminder but a notification of the penalty due on a particular date. The second penalty notice was issued four months after the first penalty notice and the third penalty notice was issued the day after contact was made by the Company on 7 May 35 2011.

Discussion

18. The first issue was considered. There was no evidence regarding any acceptance or error messages or any information from the Company regarding the submission process or the actual date when a test or submission was attempted. Gary Toulson, agent for the Company provided information that he did make the submission but that as HMRC did not have an up to date email address no email confirmation was received. No change of email address had been provided to HMRC. An instant message would still have been sent confirming whether a submission had been successful or not. None had been sent. No submission was successfully made by the Company until 8 May 2011. If the Company had believed that the year-end return had been successfully submitted in May 2010 then the issue of two penalty notices should have alerted the Company that something had gone wrong with the submissions. Contact was not made until 7 May 2011 when Mark Cooper contacted the debt management team.

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19. The second issue was considered. HMRC did send a P35N electronic reminder on 24 January 2010.

20. The third issue was considered. Although the return was due by 19 May 2010 it was not until 27 September 2010 that HMRC sent the Company a late filing penalty notice for the period 20 May 2010 to 19 September 2010 and by then the Company had accumulated four monthly penalties of £100.00 each. HMRC then sent the second penalty notice on 19 January 2011 for the further four month period 20 September 2010 to 19 January 2011. The notice prompted the filing of the return. An electronic reminder P35N was sent by HMRC to the Company on 24 January 2010 four months before the required submission date of 19 May 2010.

21. Although there is now a change of practice by HMRC and taxpayers are informed within a month of a failure to file the P35 this does not mean that HMRC acted unfairly in sending out the penalty notice on 27 September 2010. The legislation makes it clear that an officer of HMRC may determine what penalty is appropriate or correct and in this case there is only one possible correct penalty namely £100.00 for each month or part of a month for which the return was late and the Tribunal's power on appeal against fixed penalties is limited to correcting mistakes. There is no general power to substitute an amount other than the correct amount, whether on the basis of fairness or otherwise.

22. HMRC do not accept that they have acted unfairly. There is a statutory obligation on employers to file year-end returns. There is no requirement that HMRC should send reminders or that they should warn employers that they are in default.

23. The Tribunal would be acting in excess of its jurisdiction if it discharged the penalties on the ground that their imposition was unfair. HMRC did not send out the penalty notice until September as their systems were designed to check not only

whether a return was due at all, but whether those returns which have been submitted are correct which remains the practice following the procedural changes which now include the sending of two reminders where before there were none. It remains the case that a penalty notice is not sent out by HMRC until September. An improvement in practice does not however mean that before the improvement the practice was unfair. There is no evidence that by sending out the penalty notices in September and in January that this was a deliberate act to ensure that £800.00 would be due in penalties. Following the Upper Tribunal decision of *The Commissioners for Her Majesty's Revenue and Customs v Hok Limited* [2012]UKUT 363 (TCC) although the penalty notice could have been sent out within a month, the fact that it was not sent out until September and again four months later in January, was not unfair and the penalties are due. The third penalty was sent out a day after the contact was made by Mark Cooper on behalf of the company and the year-end return submitted. The penalty notice is not a reminder. The Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due.

24. The fourth issue was whether the penalties were correctly charged. For the reasons set out above, and the year-end submission not having been made until 8 May 2011, the Tribunal decided that the penalties were correctly charged.

25. The fifth issue was whether there was a reasonable excuse for the late filing of the year-end return. There is no definition in law of reasonable excuse. Case law has determined that reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual (but not exceptional) event, either unforeseeable or beyond control which prevents compliance with an obligation which otherwise would be carried out. It is necessary to consider the actions of the Company from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities.

26. The Company provided information that previous year-end returns had been correctly submitted. A penalty notice issued to the Company for an earlier tax year had been vacated as a submission had been recorded as a test submission. However for the tax year 2009 – 2010 no test submission was made and there was no submission until 8 May 2011. The only submission made was a live submission. The Company was aware of the obligation to submit by 19 May. The responsibility remains on the employer to ensure that all obligations are met. The fact that the Company assumed all Pay As You Earn matters were dealt with does not amount to a reasonable excuse. A reminder to file was sent out by HMRC on 24 January 2010 four months before 19 May 2010. The Company also knew that year-end returns were due by 19 May. Information is available on HMRC website to advise employers of what they need to do to successfully submit a year-end return. The responsibility for the submission of the year-end return is on the Company. Enquiries could have been made and advice sought. Although there had been no intention to disregard the year-end return, it had not been submitted. The Company should have taken reasonable care to avoid the failure to submit which he did not do. There were no

unexpected or unusual events which prevented the Company from seeking advice and making the year-end return by 19 May 2010. There is no reasonable excuse

5 Decision

27. For the reasons above the appeal is dismissed and the £1200.00 late filing penalties are confirmed.

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28. 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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**FIONAGH GREEN
TRIBUNAL JUDGE**

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RELEASE DATE: 7 February 2014