



TC03598

Appeal number: TC/2014/00378

INCOME TAX - PAYE - penalty for late submission of Employer's annual return – whether there was a “reasonable excuse” – yes in part – whether penalty disproportionate – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NIGHTINGALE KNITWARE CENTRE LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 22 April 2014 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 letters of appeal dated 02 and 30 December 2013 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 February 2014.

DECISION

Introduction

- 5 1. This is an appeal against a penalties amounting to £1,000 imposed for the late filing of the Employer's Annual return for the tax years 2010-11 and 2011-12. The penalties were imposed in accordance with s98A(2)&(3) Taxes Management Act 1970.
2. Mr Bhagat Singh Aulak is the managing director of the company and appeals on its behalf.

10 The issues

3. Mr Aulak seeks permission to appeal out of time. This is opposed by HMRC.
4. Mr Aulak submits that there is a reasonable excuse for the late submission of the returns. This is opposed by HMRC.

Permission to appeal out of time

- 15 5. The penalties were imposed on 26 September 2011, 25 January 2012 and 28 May 2012. The appeal was due to be sent to HMRC thirty days after the penalties were imposed. Mr Aulak lodged his appeal by means of a letter to HMRC dated 02 December 2013. Accordingly the appeal is out of time.
- 20 6. Mr Aulak states that he was unaware of the penalties until he received HMRC's debt collection letter of 21 November 2013. HMRC oppose the admission of the late appeal on the grounds that the penalties were sent to the correct address of the company.
- 25 7. This Tribunal has the power to extend the time limit for lodging an appeal in accordance with Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber Rules 2009) and the overriding objective Rule 2(1) "to deal with cases fairly and justly".
- 30 8. I am satisfied Mr Aulak did not receive the penalty notices and was not aware that they had been incurred until he received HMRC's letter of 21 November 2013. In forming this view I take into account my findings of fact as set out in paragraph 26 below. HMRC have provided a comprehensive case summary supported by evidence. Accordingly I do not find that they have been prejudiced by the delay.
9. For these reasons I am satisfied that it is in the interests of justice to permit the extension of time for appealing against these penalties.

The Law

- 35 10. In so far as it is relevant to this appeal the relevant law is set out below.

Obligation to file the return

11. An employer has an obligation to file an Employer's Annual Return before 20 May following the end of the tax year. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003.

5 *Imposition of penalty*

12. If the return is not filed by the due date a penalty is payable in the sum of £100 per month, or part month, for a firm with 50 employees or less, s98A(2) &(3) Taxes Management Act 1970 ("TMA").

Powers of the Tribunal

10 13. This Tribunal may set aside the penalty "if it appears ..that no penalty has been incurred" s100B(2) TMA.

Reasonable excuse

14. A penalty may be set aside if the taxpayer can establish a "reasonable excuse" for the late filing of the return throughout the default period s118(2) TMA.

15 15. In the case of *Rowland v HMRC [2006] STC (SCD) 536* it was decided that a "reasonable excuse" was "a matter to be considered in the light of all the circumstances of the particular case"

Proportionality

20 16. In the case of *The commissioners for Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC)* the Upper Tribunal considered the procedures adopted by HMRC for issuing penalties imposed in accordance with s98A(2)&(3) TMA. It was decided that HMRC had acted lawfully in allowing such penalties to accumulate for four months before issuing the first interim penalty.

25 17. The case also established that this Tribunal has no power to discharge penalties on the grounds of fairness. Mr Justice Warren commented at [58] of the judgement:

"in purporting to discharge the penalties on the grounds that their imposition was unfair the Tribunal was acting in excess of its jurisdiction".

Burden of proof

30 18. HMRC has the burden of proving that the penalty has been incurred. The taxpayer has the burden of proving that there was a reasonable excuse. *Jussila v Finland (75053/01) [2006] ECHR 996*.

The facts

The agreed facts

(a) Tax year 2009-10

19. The company filed the Employers Annual return (“the return”) after the due date. The company appealed in time and HRMC decided to cancel the penalty.

(b) Tax year 2010-11

20. On 13 February 2011 HMRC sent the company an electronic filing reminder for the tax year 2010-11. The due date for filing the return was 19 May 2011. The return was not filed by the due date. No further reminder was sent. On 26 September HMRC sent the company a penalty of £400 for the default period 20 May to 19 September 2011.

21. The return was filed online on 22 January 2012. A final late filing penalty of £500 was issued on 25 January 2012 for the default period 20 September 2011 to 22 January 2012.

(c) Tax year 2011-12

22. HMRC sent an electronic filing reminder to the company on 25 March 2012. A reminder letter was sent on 26 April 2012. The filing date was 19 May. The return was filed online on 23 May 2012. On 28 May 2012 HMRC issued a penalty of £100 for the default period 20 to 23 May 2012.

23. No further correspondence was sent to the company regarding the penalties until the debt collection letter was sent on 21 November 2013. In March and July 2013 the company were in discussions with HMRC regarding overpayments of PAYE. The notes of the conversations provided by HMRC make no reference to the outstanding penalties.

The contested facts

24. Mr Aulak submits that he did not receive the penalties and was unaware that they had been imposed until he received the debt collection letter on 21 November 2013.

25. HMRC submit that the penalties were sent to the correct address of the company. They submit that the company had previously received correspondence from them regarding an overpayment.

Findings of fact

26. I am satisfied on the balance of probabilities that Mr Aulak did not become aware of the penalties until he received the debt collection letter on 21 November 2013 because:

- (1) He responded promptly to the penalty imposed for the tax year 2009-10.

(2) He had every incentive to appeal against the penalties as his previous appeal had been successful.

(3) The telephone conversations during the course of 2013 make no reference to the issue of penalties. Indeed Mr Aulak was informed that he had “no other debts” during telephone call with HMRC on 16 July 2013.

The arguments

Reasonable excuse

27. Mr Aulak has not provided an explanation for the late filing of the return for the year 2010-11. However he submits that he was not aware that of the default as he did not receive the penalty imposed on 26 September 2011. Had this penalty been received he would have had the opportunity to file the return at an earlier stage. He has not provided an explanation for the late filing of the return for the year 2011-12

28. HMRC submit that the penalty was correctly served and this does not amount to a reasonable excuse.

Proportionality

29. Mr Aulak invites the Tribunal to reduce the penalties imposed on the grounds that the imposition will cause substantial financial hardship.

30. HMRC submit that the penalties are lawful and proportionate.

Reasons for decision – Tax year 2010-11

31. Mr Aulak has not provided any reason for the late submission of the return and does not assert that any attempt was made to file the return before the due date. Accordingly I do not find that there is a reasonable excuse for the initial failure to file the return before the due date.

32. There was no obligation upon HMRC to issue a penalty before 26 September. I have found as a fact that Mr Aulak did not receive the initial penalty notice issued on 26 September 2011. I am satisfied that had this notice been received Mr Aulak would have had the opportunity to submit the return more promptly thereby avoiding further penalties.

33. For these reasons I find that there was a reasonable excuse for the late filing of the return between 20 May and 19 September 2011 but there was a reasonable excuse for the continuing default between 26 September 2011 and 22 January 2012.

34. The applicable penalty is £100 for each month, or part month, of the default. s98A(2)&(3) TMA. The revised default period is four months and six days; accordingly the applicable penalty is £500 and the effect of this decision is to reduce the applicable penalty from £900 to £500.

Proportionality and fairness

5 35. I accept that this is a substantial penalty for the company. However there is no provision in the legislation for reducing the penalty on the grounds of financial hardship. The case of *HMRC v Hok limited (above)* established that this Tribunal is has no inherent jurisdiction to discharge the penalty on the grounds of fairness.

Reasons for decision – Tax year 2011-12

Reasonable excuse

10 36. Mr Aulak has not provided any reason for the failure to submit the return by the due date. Accordingly there is no reasonable excuse for the late submission of the return.

Proportionality

37. I accept that this was a short default period of three days. However this does not provide a reasonable excuse for the default as the penalty is imposed for the late submission of the return and does not depend upon the period of the delay.

15 **Decision**

Tax year 2010-11

38. There was no reasonable excuse for the failure to submit the return between 20 May 2010 and 26 September 2011 but there was a reasonable excuse for the continuing failure between 26 September 2011 and 22 January 2012.

20 39. The appeal against the penalty of £900 is allowed in part and the penalty is reduced to £500.

Tax year 2011-12

40. There was no reasonable excuse for the late submission of the return for the tax year 2011-12.

25 41. The appeal against the penalty of £100 is dismissed.

Right of appeal

30 42. 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.

**JOANNA LYONS
TRIBUNAL JUDGE**

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