



TC03717

Appeal number: TC/2011/08482

PAYE – employer’s annual return – penalty for late submission – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A & B FENCING LTD

Appellant

- and -

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

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 09.06.2014 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 Notice of Appeal dated 18.10.2011(with enclosures), HMRC’s Statement of Case submitted on 02.12.2011(with enclosures) and the Appellant’s Reply dated 03.01.2012 (with enclosure) and the Appellant’s letter dated 28.05.2014.

DECISION

1. The Tribunal decided that the Late Filing Penalty Notices dated 29.09.2008,
5 26.01.2009 and 25.05.2009 in the total sum of £1,200 were not appropriately issued
by the Respondents.

2. The appeal is allowed and the said Notices are set aside.

3. The Tribunal found that the filing date for the Appellant's Employer Annual
Return for the year 2007-2008 (forms P35 and P14) was 19.05.08. The Return was
10 delivered in paper form on 20.07.2009 i.e. 427 days late.

4. The Tribunal has noted that the Appellants do not seek to argue that the
penalties in this case, or the penalty regime in general, were unfair. In these
circumstances it has not been necessary for the Tribunal to consider the Upper
Tribunal's decision in the case of *HMRC v Hok* [2012] UKUT 363 (TCC). The
15 Appellants case is that they had a reasonable excuse for the late filing of the Annual
Return.

5. The Tribunal found that there was a reasonable excuse for the late filing and
that this excuse lasted throughout the whole period of default.

6. It is the Appellant's case that they attempted to file the Annual Return
20 electronically on 19.05.2008. They say that this was unsuccessful because the
Government Gateway "crashed". They admit that there is no evidence to corroborate
this but their subsequent actions are consistent with an intention to file the Annual
Return and the Tribunal sees no reason to disbelieve them.

7. Thereafter, evidently on the following day, the Appellants sought advice from
25 the Respondents and were told to submit a paper Return which they did. Again there
is, unfortunately, no copy of this paper Return to corroborate this but the Tribunal will
accept their evidence.

8. It would appear that the Appellants only became aware that the paper Return
had not been received by the Respondents after receipt of the first Penalty Notice on
30 29.09.2008. There is no evidence that they had received any non-delivery advice from
Royal Mail so they had a reasonable assumption that it had indeed been delivered in
May 2008. They requested another form P35 from the Respondents.

9. The Respondents then sent them the wrong form P35: it was a form for the year
2005-2006. The Appellants have produced a copy of that wrong form to corroborate
35 this. The Appellants telephoned the Respondents on 04.02.2009 to request the correct
P35 for the 2007/2008 tax year.

10. Following receipt of the correct form (there is no evidence of the date of
receipt) the Appellants completed it and returned it to the Respondents on 22.06.2009
by which time all three Penalty Notices had been issued.

11. No issue is taken by the Respondents with the lateness of this appeal; the appellants wrongly assumed that their telephone contact with the Respondents, requesting the correct paper Return form, would suffice as a formal Notice of Appeal.

5 12. It appears to the Tribunal that the Appellants have, at all material times, acted in good faith. The test applied by the Tribunal in considering the matter of reasonable excuse, is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the Return would become due on a particular date would not have avoided the default. The facts and chronology of events, set out in the
10 Notice of Appeal and the Respondent's Statement of Case and the Appellant's reply, disclose that the Appellants did indeed exercise such foresight and due diligence but the default nevertheless occurred. On the facts as presented to the Tribunal the Appellants could not reasonably have avoided it. This applies to the whole period of default, commencing on 19.05.2008.

15 13. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**WDF COVERDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 11 June 2014