



TC01471

Appeal number: TC/2011/01711

Income Tax – PAYE – penalties for late submission of end of year return – attempted online filing – receipt of successful submission notification relating to a different company – attempted submission without P14 forms – held, no reasonable excuse for late filing – recommendation to HMRC to consider adjustment of penalty

FIRST-TIER TRIBUNAL

TAX

HOTLINE CARS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
JACQUELINE DIXON**

The Tribunal determined the appeal on 23 June 2011 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 25 February 2011, HMRC's Statement of Case submitted on 29 March 2011 and the Appellant's Reply dated 24 April 2011.

DECISION

1. In accordance with paragraph 3 of the Practice Statement made by the Senior President on 10 March 2009, and in the light of the practice adopted for Default Paper cases, this appeal was considered by the Tribunal Judge in discussion with the Tribunal member, but the decision was that of the Tribunal Judge alone.

2. The Tribunal decided that there was no reasonable excuse throughout the period of default for the late submission of the Appellant's P35 end of year return for the year 2009-10, that the penalty of £500 should be confirmed, and that the appeal should be dismissed.

3. The summary decision setting out those conclusions was released on 28 July 2011. On 1 August 2011, the Appellant's agent sent an email to the Tribunals Service requesting full written findings and reasons. For some unexplained reason, this message was overlooked by the Tribunals Service. The Appellant's agent sent a further message dated 4 September 2011 to the Tribunals Service, stating that she had received on the previous day a letter stating that the appeal had been dismissed and payment released for collection. She commented:

"This is unacceptable as this case is still on going as far as I am concerned as you have not allowed me to follow the correct procedure.

I wish to have sight of the full written findings of fact and reasons for the decision as soon as possible. I have an appointment to see my member of parliament next week and wish to have sight of the findings ASAP ! Can these be emailed to me or posted by return.

Please acknowledge this and let me know which course you are going to take. Thank you."

4. The request for full written findings and reasons was communicated to the Tribunal Judge by email on 5 September. Where a summary decision has been issued in a Default Paper case, a full decision is only prepared if one of the parties requests it. As a result, it cannot be made available immediately, and has to be prepared by the Tribunal Judge. The further work involved in doing so has to be fitted into the Judge's timetable having regard to the latter's availability and other commitments, including the production of decisions in other cases. Further, the large majority of Tribunal Judges provide their services on a part-time fee-paid basis and therefore cannot be assumed to be immediately available for Tribunal work. For these reasons, it was not possible for this Decision to be produced in time for the agent's appointment with her Member of Parliament.

The facts

5. The filing date for the Appellant's 2009-10 end of year P35 return was 19 May 2010. The Appellant's agent, Sue Oakley, was responsible in her capacity as the Appellant's book-keeper for submitting the return. This was the first year for the Appellant to submit its return on line. In her letter dated 18 October 2010 to the Respondents ("HMRC") appealing against the imposition of the penalty, Sue Oakley

described the process which she followed. She did not find the HMRC website the most user friendly one which she had used, but on 21 April 2010 she entered all the information for each individual and then entered the information for the P35. She then submitted this information to HMRC and received a response showing that it had been successful and that the EOY had been processed and passed full validation.

6. The document which she received was headed "Submission Succeeded..." It stated: "The following information regarding your submission was returned by the Government Gateway." It set out a "Correlation ID", and the date and time of submission. Under "Message from HMRC", it stated: The EOY return has been processed and passed full validation". At the foot, it stated: "An **encrypted** version of the file submitted to the Government Gateway has been saved to", followed by a file reference. This file reference included a company name; the name was that of another company, and not that of the Appellant, but it appears that neither Mrs Oakley nor the Appellant noticed this at that point.

7. Following receipt of this document, Sue Oakley and the Appellant assumed that the filing obligation in respect of the 2009-10 P35 return had been fulfilled. At some point in September 2010, HMRC wrote to indicate that no P35 return had been received for that period. (No copy of the relevant letter was included in the papers submitted to the Tribunal; to enable the Tribunal to give proper consideration to the matters raised by the appeal, this letter should have formed part of the evidence.)

8. Subsequently, Sue Oakley had various conversations with the HMRC helpline. During these conversations she discovered that the HMRC website did not make any reference to the fact that it was necessary to submit each P14 record to the P35 section. Following the instructions from the HMRC helpdesk, she went online into one of the Appellant's records and clicked on the P35 box, which took her into a completely new screen showing all the information from the P14s which she had entered. She followed the prompt to submit this, and also produced reams of printout giving all the details of the P14s. In her subsequent letter dated 18 October 2010 she commented that these printouts carried no page numbers, resulting in immense difficulties if the printouts of the P14s were to get out of order in knowing which page belonged to which record.

9. On 21 September Sue Oakley made what she later described as "the second submission" on behalf of the Appellant. This proved to be a successful submission. The standard HMRC email acknowledgment of successful submission was sent to the Appellant's email address. This included the following wording:

"Thank you for sending the PAYE End of Year submission online.

The submission for reference 671/HZ79898 was successfully received on 21-09-2010. If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed."

10. The submission was a "live" transmission, as the evidence included a copy of the P35 form as submitted to HMRC. There was no copy included in the evidence of any document corresponding to that in paragraph 6 above but carrying the correct

company name for the Appellant; again, a copy should have formed part of the evidence.

11. On 24 September 2010 HMRC issued a Notice of Penalty Determination to the Appellant. This stated that as the Appellant had not made its return by 19 May 2010, it was liable to a penalty. The penalties were £100 a month or part month for every 50 (or up to 50) employees. The penalties had been charged for the period from 20 May 2010 up to 21 September 2010. The total penalties due were therefore £500.

12. Sue Oakley's letter dated 18 October 2010, already considered above, appealed against this penalty determination. On 23 December 2010 HMRC wrote to her setting out their conclusion that they did not agree that the Appellant had a reasonable excuse for the late submission of the return.

13. On 6 January 2011 the Appellant requested a review of HMRC's decision. The Appellant's reasons for not accepting HMRC's view were:

(1) This year was the Appellant's first time for submission of P35 returns on line;

(2) Mrs Oakley submitted on time and received an acknowledgment;

(3) After receiving a "very non explanatory" letter from HMRC, the Appellant had tried many times without success to contact the HMRC office. When the Appellant did manage to make contact it became apparent that despite confirmation on screen the submission was incomplete;

(4) The Appellant thought that to be penalised for not being able to follow a poorly designed website was totally unfair;

(5) The initial submission had been made on time and in good faith.

14. On 17 February 2011 HMRC's Appeals Review Officer wrote with the conclusion of her review. This was that the decision to reject the penalty appeal was correct. Her reasons were:

(1) The Appellant had not complied with its tax obligation to complete and file a complete and correct P35 return by the due date. A complete return consisted of form P35 and the corresponding number of P14s;

(2) She did not consider that the reasons outlined for the late filing of the return constituted reasonable excuse in accordance with the legislation;

(3) In a case where an employer failed to make end of year returns on time, a penalty was incurred on the day after the filing date for the relevant return. Under the legislation the penalty was fixed at £100 per month (or part month) for each batch (or part batch) of 50 employees.

15. She explained her decision. From the correspondence she was aware that the Appellant's reasons for appeal were:

(1) It believed that it had filed P35 and P14s on 21 April 2010;

- (2) The Appellant had not been notified of the non receipt of the P35 and P14s until four months later;
- (3) It was the Appellant's first year filing on line.

16. The Review Officer stated:

5 "I have liaised with my colleagues in On-line services who have confirmed that the submission you believed was made on 21/04/2010 was in fact for a different employer. It would appear that your book-keeper made an administrative error when submitting what she thought was your Year End Return. The confirmation email that you received
10 was a receipt for someone else, if you examine the email closely you will see the name of the employer concerned.

15 As regards not receiving any reminders for four months, I am sorry but HMRC are under no obligation to issue reminders to employers who do not file on time. Penalty notices are not reminders. They are simply a notification to a customer summarising the amount of penalties outstanding on a given date. Our systems are updated once returns are submitted to us and then we perform checks to see what returns were not with us by 19th May. We take care to try and ensure that we do not send out penalty notices when we have had the return in by the due date. All this takes time, and so we do not issue penalty notices until
20 September.

25 I note your point that 2009/2010 was the first year you filed online. HMRC acknowledged this by allowing a concession for 2009/2010 only, to allow employers to file the return by paper if they were having difficulties filing online.

In light of the above I have to rule that you have not offered a reasonable excuse so the decision to reject the penalty appeal was correct."

30 17. On behalf of the Appellant Mrs Oakley gave Notice of Appeal to the Tribunals Service on 25 February 2011.

Arguments for the Appellant

18. In addition to the points put in the correspondence leading up to the Notice of Appeal, Mrs Oakley made the following points:

35 (1) She referred to the document mentioned at paragraph 6 above ("the Acknowledgment"). As she usually followed a procedure of printing out all documents relating to everything she did on behalf of the Appellant, when she found an email relating to the EOY submission in the Appellant's archived PAYE file, she never thought for one minute that it belonged to another company.

40 (2) On one of the documents submitted by HMRC it stated that Haselhursts Accountants (who submit annual accounts for the Appellant) were also responsible for providing accountancy services for the company referred to in the Acknowledgment. She had contacted Haselhursts, who were mortified to learn that she had a document relating to another of their clients. They had looked back

at time sheets relating to their members of staff who might have been preparing accounts for both companies for the relevant year, and could not see how the Acknowledgment could have been in the Appellant's own file.

5 (3) She was not a computer novice; she had done small company computerised accounts for over 15 years. She was now retired and only prepared accounts at home for her brother's company [the Appellant]; she did not submit information for anyone else. She had had a message on her screen saying that the submission had been successful and was prepared to testify to that effect. She commented that when re-submitting the return in September 2010, while talking to a member
10 of HMRC's staff on the telephone at the same time, the latter had said that Mrs Oakley was not the first, and that this had happened before.

(4) She requested that HMRC be asked to reconsider their decision. She did not know what had happened here, but whatever it was, it was through no deliberate fault of her own. She hoped that the appeal could be reconsidered and brought to
15 a favourable conclusion.

Arguments for HMRC

19. In their Statement of Case, HMRC made the following points:

(1) An employer had a statutory duty to make End of Year returns before 20 May following the end of a tax year.

20 (2) A person appealing against a penalty needed to show a reasonable excuse which existed for the whole period of default. The law did not state what amounted to a reasonable excuse, but HMRC took the view that it was an exceptional event beyond the person's control which prevented the return from being filed by the due date, for example severe illness or bereavement.

25 (3) Where a P35 was filed online, a message appeared on the screen confirming a successful filing. If the Appellant had successfully filed online before 20 May 2010, it would have received this message.

(4) HMRC's website, which was available for all employers, outlined the acceptance and rejection messages issued when P35 returns were submitted
30 online.

(5) The message received by the Appellant on 21 April 2010 [ie the Acknowledgment] was a receipt for the successful submission for another company. This return and submission were by Haselhursts Accountants, who were also shown on HMRC's records as the accountants for the Appellant. The
35 Appellant had not submitted a 'successful submission' receipt for its own return.

(6) HMRC stated that the Appellant had filed its 2008-09 end of year return on line, and that they considered that it should be familiar with the process. [In the light of the evidence that the 2009-10 return was the first to be submitted by the Appellant on line, this statement by HMRC appears to be incorrect.]

40 (7) Free help and advice on how to use the online filing system had been available since 2004 to all employers through HMRC's website, Advice Teams

and Employer Talk Events. This information had been widely advertised on the Internet, the Employers Bulletin and on CD ROM.

5 (8) HMRC had no statutory obligation to issue reminders for employers' End of Year returns. Under the PAYE Regulations, the obligation to submit the returns by the due date lay with the employer. There was a structured approach to the issuing of penalty notices. The penalties, although aimed at encouraging compliance and incidentally having the effect of reminding employers of their obligations, were not designed to be reminders for the outstanding return. The period of default in the present case was from 20 May 2010 to 21 September 10 2010.

Consideration and conclusions

15 20. The Tribunal held that the Appellant's obligation was to submit a complete P35 return, including all supporting P14 returns, by 19 May 2010. It was clear from Sue Oakley's letter dated 18 October 2010 to HMRC that P14 forms had not been included with what had been believed to be the submission made on 21 April 2010, as this was a process that she had discovered as a result of her conversations with the HMRC helpline in September 2010. Thus on the Appellant's own evidence, a complete return had not been submitted within the time limit.

20 21. Sue Oakley described the filing made on 21 September 2010 as "the second submission". However, it could not have been a second filing; the Tribunal is aware from submissions by HMRC in other cases that it is not possible to make two filings of the return for the same year. Thus if, as here, the return is successfully filed at a later stage, this amounts to evidence that any previous attempt to file was not successful.

25 22. As the complete return was not filed until September 2010, a penalty was due unless the Appellant could show that there was a reasonable excuse for the late filing, and that such excuse continued throughout the period of default. The Tribunal considered that, on behalf of the Appellant, Sue Oakley should have reviewed carefully the Acknowledgment, carrying the words "Submission Succeeded", received 30 on 21 April 2010, which would have enabled her to discover that this message related to the other company named in the file destination set out at the end of the message. Although the Tribunal understood that she might have been confused by seeing this message, the use of the electronic filing procedure for the first time required careful checking, with reference to HMRC's website or helpline if there was uncertainty as to 35 how to carry out that procedure.

40 23. The Tribunal accepted the evidence set out in Sue Oakley's letter to the Tribunals Service dated 24 April 2011 that the acknowledgment message related to a client of Haselhursts Accountants, and considered that the position should be examined by HMRC, but did not consider that this affected the Tribunal's conclusions as set out above. However, there are other implications, as indicated below.

24. The Tribunal did not consider the confusion to come within the description of a "reasonable excuse" as that expression has been interpreted in previous tribunal cases;

5 it was not something exceptional. The requirement for compliance in submission of returns, and the enforcement of such compliance, can result in what appears to be harsh treatment, but the objective is that all taxpayers should be treated equally in relation to their compliance obligations unless there is some exceptional reason for the failure to comply.

25. As the obligation falls on the taxpayer, HMRC is not required to notify the taxpayer of non-compliance. It is for the taxpayer to ensure that all the appropriate steps have been taken in order to ensure that the return and all supporting returns are filed on time.

10 26. Accordingly, the Tribunal confirmed the penalties, on the basis that in the absence of a reasonable excuse there is no power conferred on the Tribunal by s 110B(2)(a) of the Taxes Management Act 1970 (“TMA 1970”) to reduce or mitigate the amount of any penalties due. It is not open to the Tribunal to take account of the circumstances in which the Acknowledgment somehow found its way to Mrs
15 Oakley’s computer, despite the absence of any responsibility on her part for the affairs of the other company named in the Acknowledgment. However, s 102 TMA 1970, headed “Mitigation of penalties”, provides:

20 “The Board [ie HMRC] may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.”

Despite the strict position as found by the Tribunal, the Tribunal recommends that HMRC should consider adjusting the amount of the penalty in the light of the questionable circumstances in which the Acknowledgment was misdirected to the Appellant’s agent, leaving her with the incorrect impression that the Appellant had
25 successfully complied with its filing obligations for the year 2009-10.

Right to apply for permission to appeal

27. 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
30 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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JOHN CLARK

TRIBUNAL JUDGE

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RELEASE DATE: 23 SEPTEMBER 2011