TC01495

Appeal numbers: TC/2011/01775:
TC/2011/01833

Income Tax – PAYE – P35 end of year returns – penalties – whether difficulties in submission resulting from disabilities of director amounted to a reasonable excuse – held, no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

JN DIMENSIONS LTD
YOUR BUILDING EXPERT LTD **Appellants**

- and -

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

TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
SUSAN HEWETT

The Tribunal determined the appeals on 29 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 Notices of Appeal dated 28 February 2011 and 1 March 2011, HMRC's Statements of Case submitted on 31 March 2011 and 5 April 2011 and the Appellant's Reply dated 3 May 2011.

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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 in respect of both appeals that there was no reasonable excuse throughout the period of default in either case for the late submission of the Appellant's P35 end of year return for the year 2009-10, that in each case the penalty of £400 should be confirmed, and that the appeals should be dismissed.

3. Following release on 3 August 2011 of the summary decision, on 28 August 2011 the Appellants requested full findings of fact and reasons for the Tribunal's decision.

The facts

4. The director of both the Appellants is Peter Graf von der Pahlen, who suffers from dyslexia, Asperger's syndrome and walking disability.

5. The PAYE end of year returns for both the Appellant companies for the year to 5 April 2010 were required to be submitted on line by 19 May 2010.

Your Building Expert Ltd

6. In relation to the second Appellant ("YBE"), Peter Graf von der Pahlen had worked on the P35 online return on 11 April 2010. He filled in all the information, and believed that he had submitted the return on that day. He made all the payments on time and believed everything to be in order.

7. Several months later YBE received a penalty notice dated 27 September 2010. YBE replied to the Respondents ("HMRC") on 18 October 2010, explaining that it had filed the return on 11 April 2010. Peter Graf von der Pahlen explained that he had filed the return on line; he had called HMRC on that day and HMRC had explained the software to him. The software on the CD had not worked properly and HMRC had advised him to download an additional program. He had then sent HMRC the results on the same day. He had also paid everything. He enclosed the return with his letter. He requested HMRC to cancel the penalty.

8. On 7 December 2010 HMRC wrote to YBE. The officer had considered the appeal against the penalty, and did not agree that YBE had a reasonable excuse for not sending in its return on time. The reason was that although YBE had made several log-ins on 11 April 2010, no submission attempts were made.

9. On 2 January 2011 YBE requested a review of HMRC's decision. Peter Graf von der Pahlen asked for the following points to be taken into account:

(1) He had attempted to submit the return on time. At the time, he was much delayed because the program provided by HMRC did not work properly and he had to call the advice line, who told him to download several upgrades. Despite these difficulties, he had completed the return on time (although it now seemed that it had not been received by HMRC).

(2) For two reasons, he had problems with reading and understanding documents which were sent to him; first, he was a foreigner, and English was not his first language, and secondly, he suffered from dyslexia. (Fortunately, one of his relatives was helping him to write the letter to HMRC.)

(3) He ran a very small business and the financial penalty would hurt the business a lot.

(4) Following receipt of HMRC's letter dated 7 December 2010, he had logged into the online account and submitted the return again. He believed that HMRC had received it this time, and he enclosed the submission confirmation.

10. On 16 February 2011 HMRC's Appeals Review Officer wrote to YBE with the results of his review. His conclusion was that the decision to reject YBE's penalty appeal was correct. He set out his responses to YBE's points:

> "You have advised that you thought you had filed your online return on 11 April, but my records show that you did not actually submit the P35 return at that time. The return was not submitted until 2 January 2011. The HMRC online system has been set up to ensure that as soon as HMRC receives your return online, it will be checked against the HMRC Quality Standard. You get a message, usually within a minute, letting you know whether HMRC has accepted or rejected your return. As you did not submit your return on 11 April, the fact you did not receive this message should have alerted you to the fact that a submission had not been made.
>
> I appreciate that you have paid your taxes on time but this is what is expected from you as an employer who employs staff under the Pay As You Earn system. The penalty is for late filing of the return. I cannot therefore accept this as a reasonable excuse for not filing on time.
>
> As regards the HMRC program, I have checked with my online services colleagues who have advised that there were some problems with the initial Employer's CD-ROM but the upgrades would have resolved this issue and allowed you to file on time. I'm unsure which advice line you contacted but can find no record of any calls made to the Online Services Help desk. If you had contacted this specific help desk the call would have been recorded and help given to enable you to file your return on time. Overall, it would appear that user error with the system was the problem and as such is not an acceptable excuse.
>
> I appreciate that as a small business you find the penalty damaging. However the penalty is calculated automatically on a formula based on the date of receipt of the return and the number of P14's submitted with the P35. The fixed penalty is £100.00 and is multiplied by the number of months from the due date to the date the return is received, multiplied by the number of groups of 50 employees. This is the

> standard calculation used in all cases and is applied to all employers who file returns late. The amount of the penalty is set by legislation as stated above and is not appealable."

11. YBE gave Notice of Appeal to the Tribunals Service on 1 March 2011. In the notice Peter Graf von der Pahlen referred to the language barrier as well as his disabilities (mental and physical) as being permanent problems. They therefore:

(1) were beyond the employer's control;

(2) continued throughout all of the period for which the return was overdue; and

(3) prevented the return from being made on time.

YBE submitted that these circumstances amounted to a reasonable excuse that that the penalty should be set aside. It made further submissions (referred to below).

JN Dimensions Ltd

12. In relation to the first Appellant ("JND"), Mr Graf von der Pahlen completed a paper return and filed it in person with HMRC on 17 May 2010. At the time he had been very much delayed because the program provided by HMRC did not work properly and he had to call the advice line, who had told him to download several upgrades.

13. On 27 September 2010 HMRC issued an interim penalty notice in the sum of £400 for the four months from 20 May 2010 to 19 September 2010. (The issue of further penalties has been "inhibited" by HMRC until the appeal has been settled.)

14. On 18 October Peter Graf von der Pahlen wrote to HMRC on behalf of JND appealing against the penalty. He stated that he had filed the return in person with HMRC's Swansea office on 17 May 2010; he enclosed a copy. He stated that, as shown on the return, JND was entitled to a refund of £507.41. He requested HMRC to cancel the penalty and to send the refund.

15. On 7 December 2010 HMRC responded to JND's appeal against the penalty. The officer considered that JND did not have a reasonable excuse for not sending its return on time. To date, HMRC had not received JND's P35 for the 2009-10 tax year. Further, as JND had been advised, it was required by law to file on line for 2009-10 and future tax years.

16. On 2 January 2011 Peter Graf von der Pahlen submitted a request on behalf of JND to HMRC for a review of the decision to impose the penalty. The grounds were:

(1) He had filed the P35 in person and on time. At the time, he was much delayed because the program provided by HMRC did not work properly and he had to call the advice line who told him to download several upgrades. Despite these difficulties, he had delivered the return on time.

(2) No-one had told him that he had to file on line; this had neither been stated on the advice line nor when he had delivered the paper return in person.

(3) He referred to his problems (as mentioned above) with reading and understanding documents sent to him in the post.

(4) He ran a very small business and the financial penalty would hurt the business a lot.

(5) He had taken steps for HMRC to send him a password for online filing and as soon as he received it, he would register the return on line.

17. On 10 February 2011 HMRC's Appeals Review Officer wrote to JND with the results of his review. His conclusion was that the decision in HMRC's letter dated 7 December 2010 (incorrectly referred to as 6 December) should be upheld. He did not consider that JND had a reasonable excuse for the late submission of the return. He set out his reasons:

(1) Under the legislation it was the employer's obligation to make end of year returns. HMRC's online support team had no trace of a call relating to JND's difficulties with the method of use, whether the HMRC CD-Rom or the HMRC online gateway. HMRC's records showed that at no stage did JND get to the stage of submission, something that the CD-ROM software would have been capable of doing if that had been the method of choice, hence showing an attempt to submit the return. Had JND attempted to use the online gateway, a log-in would have had to be completed; there was no record of any log-in.

(2) HMRC had written to every employer to tell them how online filing affected them and when they must file on line. Where HMRC's letters were undelivered, they sent them out again as soon as they had a new address. HMRC had also widely publicised online filing.

(3) The legislation required all employers to file end of year returns via electronic communication from 2009-10 onwards. Although the paper copy of the return which JND had sent was not an acceptable submission, in that it was not an original form, there was no record on HMRC's system showing that a return had been delivered to HMRC's Swansea office.

18. On 1 March 2011 JND gave Notice of Appeal to the Tribunals Service. JND gave the following reasons for appealing against the decision:

(1) The review decision did not take into account the part of the application which dealt with Peter Graf von der Pahlen's race (and thus resulting language barrier) or his disability (and resulting difficulties in understanding complex tasks).

(2) The problems which Peter Graf von der Pahlen had with reading and understanding documents sent to him in the post; he enclosed evidence, in the form of a letter from his GP, of his disability.

(3) The review decision explained the steps that HMRC had taken to make employers aware as to how online filing affected them. However, no consideration had been given in the review decision as to how the disadvantaged

were affected. The fact that his difficulties (which had been caused by race and disability) had apparently not been considered at all made the review decision unsound.

(4) In addition to his mental disability, he was also physically disabled as a result of a complicated break in his leg in 2008. He was awaiting further surgery due to the leg having become infected. He suffered extreme pain. This was affecting his work.

(5) The language barrier, as well as his disabilities (mental and physical), were permanent problems. They therefore were beyond the employer's control, continued throughout all the period for which the return was overdue, and prevented the return from being made on time.

19. In giving Notice of Appeal on both Appellants' behalf, Peter Graf von der Pahlen stated in the accompanying letters:

> "Due to my physical and mental disabilities, it would be difficult for me to attend a hearing. Can this appeal therefore be dealt with on paper."

Arguments for the Appellants

20. In addition to the above points made in the course of the correspondence, Peter Graf von der Pahlen made the following points:

(1) His disabilities amounted to a reasonable excuse for JND's return not being submitted on time.

(2) He referred to the long delays in HMRC responding to JND's letters. It had only been following HMRC's letter dated 7 December 2010 that he had been able to understand the situation and take immediate steps to solve the problem. Had HMRC acted more quickly in responding to JND's letters, the problem could have been resolved more quickly; not so many months would have passed and therefore a smaller penalty would have been incurred. If the Tribunal was not minded to cancel the penalty, he requested that at least the penalty be reduced to one for one month late filing because he could have filed the documents within one month had HMRC advised him promptly of the problem.

(3) He made similar points in relation to YBE's appeal. HMRC had not written to YBE until 27 September 2010. YBE had responded on 18 October 2010 and HMR had not responded until 7 December 2010. In the same way, he requested that if the penalty was not cancelled, it should be reduced to a penalty for one month's delay in filing.

21. In reply to HMRC's Statements of Case, Peter Graf von der Pahlen had set out in a letter dated 21 April 2011 (which had been drafted with assistance of family members) further responses to the points made by HMRC. Additional information was provided, including a psychologist's report, relating to his mental disabilities and the resultant issues arising in dealing with HMRC. These questions are considered below.

Arguments for HMRC

22. The legislation imposed a duty on the employer to make end of year returns by the due date of 19 May.

23. Where an employer appealed against a penalty, the employer had to show that it had a reasonable excuse which existed for the whole period of default. The law did not specify 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.

24. The applicable Regulation provided that an employer must deliver a relevant return to HMRC by an approved method of electronic communication. In August 2009 it had been amended to provide that all employers must submit returns electronically, unless they were exempt as detailed in the next following Regulation.

25. HMRC had no record that a paper return had been delivered to them. The copy P35 submitted by JND was not a complete return. It did not include completed P14s, nor did the amounts on that P35 agree with the amounts on the P35 filed on line on 11 January 2011.

26. A form P35PN (notice to file) had been issued to JND on 31 January 2010. This stated clearly to the employer that the P14s and the P35 for 2009-10 must be filed on line. It also advised that a penalty would be charged if any part of the return was received late and/or not filed on line. HMRC had provided extensive guidance to enable employers to comply with their online filing obligations.

27. JND had previously been the subject of P35 late filing penalties for the years ended 5 April 2005, 2007, 2008 and 2009. HMRC considered that JND should be aware through its director of the penalties for late submission of the end of year return. [As the penalties were subsequently cancelled, the Tribunal has ignored their imposition other than in the context of the information provided to JND that penalties would become due if returns were submitted late.]

28. In relation to YBE, HMRC's Online Services had confirmed that there might have been problems with the Employers CD-ROM, but that once the available upgrades had been downloaded, this would have resolved these issues and allowed the employer to file on line.

29. Where a P35 was filed on line, a message appeared on the screen confirming the successful filing. If YBE had successfully filed on line on or before the due date of 19 May, its director would have received this message. HMRC's website, available to all employers, outlined the acceptance and rejection messages issued when P35 returns were submitted on line.

30. While HMRC sympathised with Peter Graf von der Pahlen's dyslexia difficulties, it did not absolve the Appellants from the responsibility to ensure that their tax obligations were met. Processes could have been put in place to ensure that Peter Graf von der Pahlen met the Appellants' legal obligations in the operation of PAYE.

31. HMRC submitted that, to amount to a reasonable excuse, an illness must be so serious that it prevented the taxpayers (both Appellants) from controlling their business affairs. Peter Graf von der Pahlen had been in business since July 2004, but neither his dyslexia nor his poor English had prevented him from running a business.

Discussion and conclusions

Matters raised in the Appellants' reply to HMRC's Statement of Case

32. The psychologist's report (dated 9 February 2011) refers to Peter Graf von der Pahlen having been diagnosed with dyslexia at the age of nine, and to his having been diagnosed with Bipolar Depression in 2010. The conclusions of the report were that his score on the Autism Quotient was within the range expected for a person with Asperger syndrome. His score in the "Mind in the Eyes" test was very typical of someone on the Autistic spectrum.

33. The report did not specify the effects on his ability to carry on dealings with authorities such as HMRC. The following comments from the report were mentioned in the letter dated 21 April 2011 to the Tribunals Service replying to HMRC's Statements of Case:

> "Peter is inflexible in his routines and cannot break a routine once started..."
>
> "Marked impairment in the ability to initiate or sustain a conversation with others... Pedantic style of speaking, or inclusion of too much detail."
>
> "Peter has to avoid becoming overstressed and anxious as this will cause him to become more "Asperger's like" and less able to cope or communicate..."

34. The letter explained that despite his mental disability, he had not wished to be a burden on the state and had started the two Appellant companies for work in planning and construction respectively. His mental abilities were limited but he was doing his best to cope and be a productive worker.

35. The letter referred to his having had face-to-face advice from HMRC in 2004. Tax documents had always caused him problems due to their complexity. He would drive to HMRC's office (often several times a day) and meet people face to face; they would explain to him how to complete the forms. This service had then been removed by HMRC; there were no longer staff at the office with whom he could discuss matters face to face. Instead there was a telephone to connect the caller to an HMRC call centre. The letter explained that a person with Asperger syndrome had difficulties in having a proper conversation on the telephone. The consequent stress had prevented him from filling in the online forms correctly.

36. The only way in which he would have been able to put processes in place to ensure that the obligations in respect of the PAYE returns were met would have been to employ an accountant to give the face to face support. This was beyond his means.

37. It was admitted that he had not got the online filing system right straight away, and that a normal person would have. However, the disabled were subject to special protections in law. It was submitted that account should be taken of his special difficulties; he now understood the changes made to the system and the problems were unlikely to be repeated.

The statutory obligation

38. As submitted by HMRC, both Appellants were under the obligation to file the P35 returns and supporting P14 forms. Neither of the Appellants was exempt from the requirement to file P35 returns for 2009-10 on line, as neither came within the exceptions listed in Regulation 206 of the PAYE Regulations 2003.

39. Although both Appellants are run by Peter Graf von der Pahlen as director, they are separate and distinct legal persons. Thus the obligation to file the P35 returns on line is imposed on them, as it is for all other employers apart from those specifically exempted under the Regulations (see regulations 73, 205 and 206 of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682). It is therefore for both Appellants to ensure that appropriate arrangements are in place for them to comply with that obligation.

40. In the letter dated 21 April 2011, it was explained that Peter Graf von der Pahlen now understood the changes made to the filing system for P35 returns, and that the returns for the subsequent year had already been submitted. It therefore appears that making arrangements to adjust to those changes was within his capabilities, although this was not achieved for the year to 5 April 2010. The Tribunal accepts the submission of HMRC that widespread sources of information were provided to assist employers in moving to the electronic filing system, and concludes, despite the comments in that letter, that the Appellants were provided with adequate sources of information to enable them to comply with the filing obligations.

41. Thus in the case of JND, a paper return was not sufficient. Its obligation to file a return in the required electronic form was not fulfilled until the successful online filing on 11 January 2011.

42. The return for YBE was successfully filed on 2 January 2011. Although Peter Graf von der Pahlen believed that he had already filed this return on 11 April 2010, this could not have been the case. 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 the return is successfully filed at a later stage, this amounts to evidence that any previous attempt to file was not successful.

43. Thus both Appellants were in default as a result of the late submission of their P35 returns for the year to 5 April 2010, and in consequence liable to a penalty. The only basis for the Tribunal to cancel the penalties would be if the Appellants could show that they had a reasonable excuse for the late filing of their returns. If no reasonable excuse could be established, the penalties have to be confirmed.

Was there reasonable excuse?

44. Both Appellants contended that they had a reasonable excuse for their defaults. As the basis for reasonable excuse was the same in each case, it was agreed by the parties, and subsequently directed by a Judge, that both appeals should be considered together.

45. The grounds for reasonable excuse are that Peter Graf von der Pahlen as the director of both companies has mental and physical disabilities and difficulty with English, together resulting in difficulties in understanding complex tasks; for these reasons the withdrawal of face to face support on the change to the on-line filing system resulted in him not dealing with it correctly straight away.

46. In the Special Commissioners case of *Gladders v Prior* [2003] STC (SCD) 245 the Special Commissioner commented:

> "A reasonable excuse for not filing returns or paying tax on time is something outside the person's control that would prevent a reasonable man from complying, such as illness."

47. The Tribunal does not consider that disabilities amount to illness within this description. Although the Tribunal accepts and sympathises with the particular difficulties which the director's disabilities and language problems presented in complying with the Appellants' filing obligations for the relevant year, in its view disabilities and language difficulties cannot be viewed as matters outside the Appellants' control. The requirement was for the Appellants, through their director, to make appropriate arrangements to ensure that the filing obligations were met, as has been achieved in respect of the returns for the subsequent year. The director's substantial disabilities and difficulties were (and are) continuous rather than sudden or unexpected, and needed to be taken into account in setting up and dealing with the filing arrangements.

48. As a result, although sympathising with the director's position, the Tribunal concludes that the factors referred to and evidenced in the assessment and medical report attached to the reply to the Statements of Case does not constitute a reasonable excuse for the purposes of s 118(2) of the Taxes Management Act 1970.

49. In the absence of a reasonable excuse, the penalties have to be confirmed. The Tribunal has noted the comments made in the letter dated 21 April 2010 relating to the financial implications of the Appellants' liabilities to the penalties. However, it is not open to the Tribunal to take account of the consequent effect on the businesses of the Appellants, as the Tribunal has no power to adjust the amounts of the penalties.

50. Despite the Tribunal's appreciation of the difficulties for Peter Graf von der Pahlen and the two Appellants, the appeal must be dismissed.

Right to apply for permission to appeal

51. 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 CLARK

TRIBUNAL JUDGE
RELEASE DATE: 10 OCTOBER 2011