



TC01571

Appeal number: TC/2011/03296

PAYE regulations – employer’s annual return – £500 fixed late filing penalty – reasonable excuse found for one month out of delay of over four months – penalty therefore confirmed in reduced amount of £400

FIRST-TIER TRIBUNAL

TAX

PALEWELL INTERIMS LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS (Income tax)**

Respondents

TRIBUNAL: KEVIN POOLE (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 26 August 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 20 April 2011 and HMRC’s Statement of Case submitted on 24 May 2011.

DECISION

Introduction

1. This appeal relates to a fixed penalty of £500 imposed by HMRC in respect of
5 the late filing of the Appellant's employer's annual return (forms P14 and P35) for the
year ended 5 April 2010.

The Facts

2. The Appellant was required, pursuant to Regulation 73 of Income Tax (Pay as
you Earn) Regulations 2003 ("the PAYE Regulations") to file its employer's annual
10 return for the year ended 5 April 2010. The deadline for the filing was 19 May 2010.
By reason of Regulations 205-207 of the PAYE Regulations, the return had to be filed
online.

3. The Appellant registered with the Government Gateway for online filing on 4
May 2010, but had to await an activation code through the post before being able to
15 file the return. The activation code did not arrive.

4. On 14 or 15 May 2010 the Appellant's director Mr Olds contacted HMRC to
inform them that the code had not arrived. He explained that he was going to be away
from his registered address until early August and asked if a new activation code
could be sent to him at a different address. HMRC told him this was not permissible
20 under their data protection guidelines, and the only practical solution was for him to
re-register upon his return.

5. Mr Olds was then away until early August. Upon his return he re-registered
on 12 August 2010 and then attempted to activate the registration. I infer that he
attempted to use the old activation code (which had presumably arrived after his
25 departure in May), but in any event the activation was unsuccessful.

6. Mr Olds contacted the HMRC helpdesk on 14 September 2011 (apparently
after attempting to activate his 12 August registration with the new activation code,
which had by then expired), to be informed that they were unable to resolve things for
him remotely. He was advised that he should re-register again and request a further
30 activation code. He did so, and finally completed the return on 13 October 2010.

7. HMRC issued a penalty notice dated 27 September 2010 for £400 in respect of
the period of delay up to 19 September 2010, and then issued a further penalty notice
dated 21 October 2010 for £100 in respect of the final period of delay up to 13
October 2010.

8. These penalty notices were issued under section 98A Taxes Management Act
35 1970 ("TMA"), by virtue of regulation 73(10) of the PAYE Regulations (which
provides that section 98A TMA applies in relation to the obligation to deliver a return
under Regulation 73).

9. Section 98A TMA provides as follows:

“(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—

5 (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....

...

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

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

15 10. On 22 February 2011 HMRC issued a revised penalty notice in the sum of £164. This was done in accordance with their general practice on mitigation, in the mistaken belief that the Appellant’s total tax and NIC for the year as disclosed on its return was this amount (whereas this was in fact the outstanding amount at the year end as shown on the Appellant’s annual return). HMRC subsequently amended the
20 penalties back to £500 when they discovered their mistake.

11. The Appellant has provided no evidence of why Mr Olds was away from his address for some three months, or why he was prevented from making any other arrangements for the filing to be dealt with for that period.

Discussion

25 12. I consider that the Appellant has a reasonable excuse for an initial part of the period of the delay, attributable to the delay caused by the activation code reaching him following his registration on 4 May 2010. I fix that period at one month.

13. Section 118(2) TMA provides:

30 “For the purposes of this Act.... 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 unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased”

35 14. I therefore consider that, given the existence of the reasonable excuse for a period of one month, the Appellant is to be deemed not to have failed to deliver its return for the period of one month commencing at the beginning of 20 May 2010 and ending at the end of 19 June 2010

15. I cannot agree however that this reasonable excuse continued any longer. Mr Olds knew he was going to be away from home for an extended period and should

5 have made arrangements to ensure that all obligations were dealt with well in advance of such an extended absence. I note that on at least one occasion the Appellant delayed in activating its registration until the activation code sent to it had expired, and the chronology generally does not satisfy me that the Appellant gave urgent priority to the making of this return, even after Mr Olds' return in August.

16. I accept that the Appellant's compliance record in other respects may well be faultless, but that cannot affect the question of whether it has a reasonable excuse for this particular default.

10 17. I do not accept that the penalty is disproportionate to the default. The effective interest rate is irrelevant, the purpose of the penalty is to act as a deterrent to ensure prompt filing, not to compensate HMRC. I am satisfied that whilst the penalty in this case may be considered harsh, it is not "plainly unfair" in the circumstances and therefore I do not feel able to interfere with it on grounds of proportionality.

Decision

15 18. Following my finding that the Appellant has a reasonable excuse for one month of the period of the delay, I consider that the Appellant is in default for the period from the beginning of 20 June 2010 until it filed the return on 13 October 2010. This is a period of three months and 24 days. Applying the formula of "£100 per month or part thereof" set out in section 98A TMA, this equates to a penalty of
20 £400.

19. I therefore confirm the penalty in the reduced amount of £400. The appeal is accordingly allowed to the extent of £100 of the original penalty but dismissed as to the remainder of it.

25 20. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

35 **KEVIN POOLE**
TRIBUNAL JUDGE
RELEASE DATE: 14 NOVEMBER 2011