



**TC02273**

**Appeal number: TC/2010/04682**

*INCOME TAX: Employers Annual Return; delay in filing; fixed monthly penalties; delay by Revenue in sending out penalty notices; unfair when taxpayer is not aware of its default? – yes: substitution of reduced penalty.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MOH PROPERTIES LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER HACKING**

**The Tribunal determined the appeal on 19 October 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 received by the Tribunal on 17 June 2011 and HMRC's Statement of Case submitted on 4 August 2011(with enclosures)**

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## DECISION

### *The Appeal*

1. This was an appeal against a decision confirmed on review on 26 May 2011 imposing a penalty of £500 for the late delivery of the Appellant's Employers' Annual Return form P35 for the tax year ending 5 April 2010.
2. The return was due to be filed on-line by 19 May 2010. It was only finally delivered (on-line), almost 5 months late, on 14 October 2010.
3. The Appellant, by its principal director Mr Benedict O'Halloran, stated that it believed it had in fact achieved a successful filing of its P 35 return on 28 April 2010 being well before the due date of 19 May 2010. It was only when it received the Revenue's penalty notice that it realised that there was a problem.

### *The issues to be determined by the Tribunal – Was the P 35 filed on or before the due date?*

4. The first issue in dispute concerns the factual issue of whether the Appellant completed a successful filing of its P 35 on 28 April 2010 as it asserts or whether that attempt was unsuccessful.
5. In its appeal to the Tribunal the Appellant states:

“MOH submitted its P 35 on time in April 2010 in the usual manner. A letter was received by MOH from HMRC some 5 months later stating that no P 35 submission had been received and a penalty of £500 was to be paid. This was appealed by MOH and a review undertaken. MOH maintains that the form was submitted on-line though HMRC's computer system does not concur. HMRC was asked by MOH that if MOH was unable to prove otherwise, the penalty should be £100 and not the £500 issued as MOH have records of submission in its files and believed the submission had occurred as stated by law. HMRC states that it takes 5 months to notify companies of any perceived error and therefore a 5 month penalty is due. As aggrieved MOH disagrees wholly”

6. The evidence adduced by the Revenue which undertook an investigation of its IT records (exhibited in the enclosures to its Statement of Case) shows that whilst MOH was recorded as having logged onto its on-line system on 28 April 2010 the return was not actually submitted. The final step of the on-line filing process requires that the “submit” option on the drop down menu be clicked on: this it would seem MOH had not done. As a result the filing did not take place. The Revenue suggests that what happened in this case is that the system will very probably have shown on-screen an advice to the effect that the filing had resulted in an “update” message and that this was confused by the operator at MOH with the successful filing message needed.
7. The Revenue's on-line filing system provides a positive on-screen confirmation of a successful filing although confirmations are also sent out to taxpayers where a valid e-mail address has been registered with HMRC. A copy of one or other of these confirmations would resolve any doubt about the success or otherwise of the filing. The on-screen confirmation is sent out immediately the filing succeeds. The e-mail

advice may take a few minutes. In either case there is no appreciable delay. If neither advice has been received it is almost certain that the filing has not been successful.

8. The Revenue states that information concerning its on-line filing system is provided both on the Revenue's web site and in its published materials. In this case the Appellant had, says the Revenue, successfully filed its returns on-line for some years and they will therefore, it says, be aware of what is required and of the need to secure positive confirmation of a successful filing.

9. The Appellant has asserted that it has records of its submission of the return. No such evidence has been seen by the tribunal or, it would seem, by the Revenue.

*The issues to be determined by the Tribunal – The Revenue's practice of advising taxpayers in default of their electronic filing obligations 5 months after the (non) event.*

10. The second issue which this appeal addresses concerns the level of the penalty.

11. Section 98A(2) Taxes Management Act 1970 (TMA) provides as follows:

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

(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 the paragraph has already been imposed.

By Sub-section 3 of the above section:

For the purposes of sub section 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

12. The Appellant complains that the practice of the Revenue in imposing a penalty only after the fourth month of delay so that by that time a penalty of £500 had become payable is unfair. It argues that had it been made aware of the problem with the filing at an earlier date the matter could have been looked into and resolved. Significantly the penalty would be smaller.

*The findings of the tribunal – the electronic filing*

13. In relation to the first issue concerning whether or not the Appellant had achieved a successful filing of its return by the due date the Tribunal whilst accepting that the Appellant did indeed log onto the Revenue's system with the intent to complete its filing of the P 35 return finds that it did not in fact submit the return as required by the legislation. (Regulation 73 Income Tax (PAYE) Regulations and paragraph 22 Schedule 4 Social Security (Contributions) Regulations 2001).

14. The evidence in this respect supports the Revenue's contention that the filing failed because the final step of submission followed by receipt of an acknowledgment of successful filing did not take place. This is, in the view of the Tribunal, very probably the result of simple human error.

15. The only way a taxpayer in such a situation may avoid the otherwise inevitable imposition of a penalty is to establish that a "reasonable excuse" exists for the failure (Section 118(2) TMA). Such an excuse is required to exist for the whole period of the failure. This provision is however of little assistance to the Appellant as its case has been not that it had some excuse for the late filing but that it had in fact filed its return by the due date as required. To the extent however that simple human error was the cause of the failure such will not afford the Appellant a "reasonable excuse". The term "reasonable excuse" whilst not defined in the tax legislation is generally not apt to include circumstances within the reasonable control of the Appellant or which are of a usual, mundane or ordinary nature. Human error will not generally therefore suffice and does not do so in these particular circumstances in the finding of the Tribunal.

*The findings of the tribunal – the Revenue's delay in advising of the penalty*

16. The Tribunal does not accept that it is reasonable that the Revenue should fail to inform the taxpayer of its default in filing for such a period of time that a penalty of £500 becomes payable.

17. In its Statement of Case the Revenue states that it is not under any statutory obligation to issue monthly reminders and that penalty notices are not reminders. It goes on to assert that it has no discretion in the calculation of the penalty which is set by statute.

18. It seems to the Tribunal reasonable to contend from the tenor of the legislation cited above that a purpose of the legislation was to provide a disincentive to delay in filing returns: the greater the delay - the greater the penalty. Had it been the intention to impose a larger fixed penalty no doubt quite different language would have been used. In circumstances where the taxpayer is unaware of its default the continuing imposition of monthly penalties operates unfairly and in the finding of the Tribunal in a way not intended by Parliament. The Tribunal does not doubt that had the Appellant been made aware of the problem at an earlier date it would have investigated the position and resolved it at a lesser cost in terms of the penalty for which it was liable.

19. The assertion by the Revenue that it has no discretion in the calculation of the penalty is correct as a matter of law but the issue in this appeal addresses

not the method of calculation of the penalty but the Revenue's delay in giving effect to what is, the Tribunal believes, clearly intended as an incremental penalty designed to encourage observance of the filing dates.

20. The Tribunal finds therefore that it was unreasonable of the Revenue not to have informed the Appellant of its default at the earliest practical opportunity. It may be that for administrative or technical reasons the task of informing taxpayers at a date earlier than 5 months after the due filing date is not possible. If there is such a systemic problem then the Revenue should be clear about that matter and should say so – indeed the Appellant says that it did say so. That such a problem should result in unfairness to the taxpayer and defeat the apparent intention of the legislation is not acceptable and the Tribunal will exercise its right to substitute for the penalty imposed a more reasonable penalty which has regard to the particular circumstances of this appeal.

21. The Tribunal accepts that there would be likely to be both administrative and technical problems in dispatching penalty notices for late filing immediately on a penalty first becoming payable. Realistically however it could be expected of the Revenue that it should be able to dispatch penalty notices at some time during the first month of delay. In those cases in which the penalty was not disputed and the filing was promptly executed the maximum penalty might be limited to £100 or if the delay in filing ran over to a second month, £200. That the taxpayer should be happily kept ignorant of its filing status and the commensurate penalty for 5 months seems to the Tribunal to be neither just nor fair.

22. In the case of the Appellant it is doubted whether even if it had been informed of the failure of its filing in the first month, it would have simply filed the return without more. It would no doubt have entered into a dialogue with the Revenue asserting, as it has done in this appeal, that it had already filed its return. The Tribunal finds it more likely than not that the filing of the Appellant's return would have run into the second month of penalties.

#### *The tribunal's decision*

23. In the circumstances of this appeal the Tribunal having found that the Appellant failed without reasonable excuse to file its Employers' Annual Return form P 35 by the due date and having regard to its observations above concerning the time taken by the Revenue to raise a penalty notice, substitutes for the penalty imposed by the Revenue a reduced penalty of £200.

Accordingly this appeal is allowed in part

24. 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.

**CHRISTOPHER HACKING  
TRIBUNAL JUDGE**

**RELEASE DATE: 28 March 2012**