



TC03097

Appeal number: TC/2012/05954

TYPE OF TAX – PAYE & NI. End of year filing. Reasonable excuse. Honest belief as reasonable excuse. R v Unah [2011] EWCA Crim 1837; [2012] 1 WLR 545 followed. Chichester v Commissioners of Revenue and Customs [2012] UKFTT 397 followed. Coales v Revenue and Customs Commissioners [2012] UKFTT 47 not followed. Burden of proof.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID WAKE-WALKER LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR JOHN COLES.**

Sitting in public at Bedford Square, London on 29 August 2013.

Mr Wake-Walker for the Appellant

Mr Reeve, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant has appealed against a penalty of £600 levied against it by the respondents on the basis that the appellant failed to file its end of year P35 return by 19 May 2011. The alleged default is not admitted. We heard evidence from Mr Wake-Walker that he personally sat at the appellant's computer and sent the necessary end of year return(s) to the respondents on 13 May 2011. It was his evidence that he knows that he submitted it and that he printed off a copy for the appellant's file and placed that copy into the file. He said the filing related to only one employee.

2. The respondents contend that they did not receive the return, on the basis that their computer records do not show same being received. However, the respondents' log at page 14 shows that on 13 May 2011 the appellant, by one of its servants or agents, did access the Gateway and successfully logged on. That is some corroboration of the evidence given by Mr Wake-Walker.

3. The evidence comes to this. The appellant says that it sent the end of year return. The respondents say that it was not received. There are three possibilities. The first is that it was not sent. The second is that it was sent but not received. The third is that it was received but has not been logged or identified.

4. We do not have to decide which of those three possibilities represents the true state of fact. As this is a penalty appeal it would be for the respondents to prove that a penalty is due. However, on the facts of this case, that is not necessary because even if we had found that the appellant did not in fact send the submission, notwithstanding that the Gateway was accessed and Mr Wake-Walker filled out the form and took a copy of the completed form as well as sending it (as he believes he did), the appeal would nonetheless be allowed on the basis that the appellant, through the agency of Mr Wake-Walker, honestly believed that same had been successfully sent and thus could not reasonably be expected to make any further submission until informed by the respondents that it was the respondents' contention that the submission had not been received.

5. A "reasonable excuse" can be established where a person puts forward an excuse which, when judged objectively, amounts to a reasonable excuse. There can be no doubt that at that stage of the enquiry, an objective test applies.

6. If a person holds an honest belief in a state of fact which, when viewed objectively, provides that person with a reasonable excuse for not doing a particular act, the sole enquiry by the Tribunal is then to consider whether the person asserting that honest belief did in fact honestly hold the asserted belief. The more surprising, outlandish or unreasonable the belief being asserted, the less likely it is that, as a matter of the necessary forensic exercise, the Tribunal will accept that any such belief was honestly held. Nonetheless, if, once that forensic exercise has been undertaken, the Tribunal accepts that a person honestly believed that an asserted (relevant) fact did exist, there is then no room for going on to consider whether a reasonable person

would have held that belief. That is to confuse two separate and distinct stages of the enquiry.

7. As it was cited in Coales v Revenue and Customs Commissioners [2012] UKFTT 47, we must mention the reasoning of His Honour Judge Medd Q.C. in The Clean Car Company Ltd v Customs and Excise Commissioners [1991] VATTR 234.
5 It is worth setting out his approach :

“So I may allow the appeal if I am satisfied that there is a reasonable excuse for the company’s conduct. Now the ordinary meaning of the word “excuse” is, in my view, “that which a person puts forward as a reason why he should be excused”.

10 *A reasonable excuse would seem therefore to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pewell-Harvey, for the appellant, said were such that he should be excused, do in fact provide the company with a reasonable excuse.*

15 *In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my*
20 *judgement it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and subjective belief of the relevant person.”*

8. We however adopt and endorse the succinct and accurate statement of the law set
25 out by this Tribunal in Chichester v HMRC [2012] UKFTT 397. It is particularly relevant to note paragraphs 15 and 16 of that decision which were as follows:

“15. Whether a person holds an honest and genuine belief is a question of fact. It is an enquiry into the subjective state of mind of a given individual. There is no objective element to the enquiry: it is entirely subjective. That is the effect of the decision of the
30 *Court of Appeal in R v Unah The Times 2/8/11 where [it] decided, albeit in a rather different context, that a genuine or honestly held belief can amount to a reasonable excuse for not doing something that a person is required to do.*

16. If the claimant’s honest belief is, when viewed objectively, irrational or apparently unreasonable, that is a factor that might weigh in the forensic exercise of
35 *deciding whether the person claiming to hold the stated (honest) belief did in fact hold the claimed (honest) belief. It is not a separate test to be applied in deciding whether an honest belief amounts to a reasonable excuse. If it was, it would inject an impermissible element of objectivity into an enquiry which is solely subjective in the sense that it turns solely upon the state of mind or subjective belief of the relevant*
40 *person. Accordingly, it is wrong in law to proceed on the basis that an honestly held belief would not amount to a reasonable excuse if, from an objective standpoint, it*

5 *was considered that that belief was irrational or unreasonable. The objective analysis goes solely to the issue of credibility. If a Tribunal finds that a person, as a matter of fact, held a particular honest and genuine belief, that may amount to a reasonable excuse (on appropriate facts) regardless of whether that belief would be characterised as irrational or unreasonable when viewed objectively.”*

10 9. In The Clean Air Company Limited Judge Medd Q.C. did not have the advantage of considering the decision of the Court of Appeal in R v Unah [2011] EWCA Crim 1837; [2012] 1 WLR 545. The important point to emerge from Unah is that if the fact put forward by an appellant, as his excuse, is, when viewed objectively, sufficient to amount to a reasonable excuse, the fact that the hypothetical reasonable man may not have believed that fact to be in existence, is irrelevant once it is found as a fact that the appellant honestly believed it to exist. It is important to avoid confusing what it is that amounts to the reasonable excuse, that is, honest belief in a given state of fact (sufficient to feed a reasonable excuse), with the issue of whether a reasonable person would have believed that that given state of fact existed. That is to confuse the nature of the reasonable excuse (honest belief in the existence of a state of fact) with the role that objectivity plays in the forensic exercise of deciding whether the appellant did or did not honestly believe in the fact that he claims he believed existed.

20 10. That the foregoing approach is correct is encapsulated in paragraph 11 of the judgment of the Court of Appeal in Unah where it said :

“11. It follows that we see no reason why the defendant in this case ought not to be able to rely upon the genuine belief that the document was valid as an element in her basis for contending that she had a reasonable excuse for having this document in her possession.”

25 In other words, once it was accepted as a fact that the appellant honestly or genuinely believed that the document was a valid document (as opposed to a false or forged document), it was then for the jury to decide whether holding that honest belief amounted to a reasonable excuse within the meaning of the relevant statute. That is precisely the same approach that we have explained above; albeit less succinctly.

30 11. That clear statement of the law, set out in Chichester v Commissioners of Revenue and Customs [2012] UKFTT 397, was doubted by this Tribunal in Coales v Revenue and Customs Commissioners [2012] UKFTT 477 where the Tribunal stated, at paragraph 31 of the Decision, that it could not agree with the analysis in Chichester (above) and an earlier decision of this Tribunal in Intelligent Management UK Ltd v HMRC [2011] UKFTT 704. In Coales the Tribunal purported to go back to the relevant statute, in that case section 59C(9)(a) Taxes Management Act 1970, to reason that because the test under the Act is whether a person has a “reasonable excuse”, it necessarily follows that an honestly held belief must be reasonably held. That, in our judgement fails to recognise what it is that amounts to the relevant and applicable reasonable excuse. Indeed, it would mean that the relevant question would become :

40 *Did X reasonably honestly believe that a given fact was in existence, rather than : Did X honestly believe that fact Y existed and, if so, would his belief in that fact amount to a reasonable excuse for acting (or not acting) as he did. A person either holds a particular honest belief in a state of fact or he does not. It is not every honest belief*

that can found an argument that a person thus had a reasonable excuse for an identified default. The fact must be pertinent and relevant to the default that an appellant seeks to excuse. It will be a matter for each Tribunal whether belief in its existence is sufficient to found a finding that a reasonable excuse existed.

5 12. If holding an honestly held belief in a fact sufficient to found a finding that a reasonable excuse exists, the sole enquiry is into the subjective state of mind of the person asserting that he holds that honest belief. The reason for this is that the Tribunal must not confuse what it is that amounts to the reasonable excuse. Once it is
10 accepted or admitted that the holding of an honest belief in a relevant state of fact can, on appropriate facts, amount to a reasonable excuse, it is self evidently wrong then to go on to ask whether such an honest belief was reasonably held. If one does ask whether such an honest belief was reasonably held and, based upon objective analysis, answers that question in the negative, it is tantamount to sweeping away or, at the very least, emasculating the concept of an honest belief being capable of amounting to
15 a reasonable excuse. It confuses the stages at which subjectivity and objectivity play their legitimate parts.

13. This is made clear from considering the full judgement of the Court of Appeal (Criminal Division) in R v Unah (above).

14. Going back to the statute does no more than identify that a person may be excused
20 a particular penalty if he can establish that he has a “reasonable excuse” for his default (whatever default that might be). Once it is appreciated that it is the holding of an honest belief in a relevant state of fact that amounts to, or is capable of amounting to, a reasonable excuse within the statute, it is plainly wrong then to go on to ask whether a reasonable person would have held the honest belief which the Tribunal has
25 just found (in this hypothetical case) that the appellant does hold. That part of the enquiry only plays a part at the stage when the Tribunal is deciding whether the person did or did not honestly believe the fact which he asserts he honestly believed.

15. We should mention that in Coales the Tribunal referred to the decision of the House of Lords in R v G [2009] UKHL 13; [2010] 1 AC 43 (also cited and considered
30 in Unah). After referring to the speeches in the House of Lords at paragraphs 76 - 77 and, in particular, that of Lord Rodger at paragraph 81, the Tribunal concluded that “*It is plain that the House of Lords is interpreting reasonable excuse in substantially the same manner as Judge Medd Q C in The Clean Car Company Ltd in the passage which I have cited. The excuse must be objectively reasonable and that test must be*
35 *applied to the facts of the individual case.*” We respectfully disagree. The House of Lords did not fall into the trap of failing to distinguish between applying objective considerations to the forensic exercise of deciding whether a person is being truthful when he says he honestly believed in a given state of fact, on the one hand and then, on the other hand, going on to ask whether if an honest belief in that state of fact did
40 exist, whether, when viewed objectively, that would amount to a reasonable excuse sufficient to amount to a defence to the charge that had been laid.

16. Accordingly, we must direct ourselves that if we accept as a matter of fact, that the appellant held an honest belief in a state of fact sufficient to amount to an excuse

which, when viewed objectively, amounts to a reasonable excuse, there is no room for us to ask whether a reasonable person would or would not have held the identified honest belief. That would be an error of law.

5 17 We accept and find as a fact that the appellant, by Mr Wake-Walker honestly believed that he had successfully sent the end of year submission to the respondents on 13 May 2011. That finding does not imply that he did not in fact do so.

10 18. If we had had to make a finding relevant to what happened on that date we would not have been satisfied to the necessary standard of proof that if, as the respondents now claim, they failed to receive the submission, that was necessarily as a result of a failure on the part of the equipment being used by the appellant rather than the equipment being used by the respondents. In other words, the respondents have failed to discharge the onus of proving, on the balance of probabilities, that the expected filing did not take place by 19 May 2011.

15 19. 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)”
20 which accompanies and forms part of this decision notice.

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**GERAINT JONES Q. C.
TRIBUNAL JUDGE**

RELEASE DATE: 28 November 2013

30 Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 6 February 2014