



TC03253

Appeal number: TC/2012/05841

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. David Wake Walker v HMRC [2012] UKFTT 717 followed. Coales v Revenue and Customs Commissioners [2012] UKFTT 47 not followed.
Burden of proof.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GRAY PUBLISHING

Appellant

- and -

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

**TRIBUNAL: JUDGE GERAIN T JONES Q. C.
MR DUNCAN MCBRIDE.**

Sitting in public at Bedford Square, London on 20 December 2013.

Mr Gray for the Appellant

**Miss Oromoloye, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The appellant firm has appealed against a penalty of £400 levied against it by
5 the respondents on the basis that the appellant failed to file its end of year P35 return
for the fiscal year ended 5 April 2011 by 19 May 2011. The alleged default is
admitted but the appellant contends that there was a reasonable excuse for that default
and that no penalty is therefore payable.

2. Mr and Mrs Gray are partners in a small family publishing and printing
10 business. It was not in dispute that the business has habitually filed its tax returns and
end of year returns timeously and otherwise complied with its obligations towards the
respondent.

3. We heard evidence from Mr Gray and Mrs Gray. Although Mrs Gray was the
15 second witness it makes sense to deal first with her evidence. That is because she was
more involved in the administrative side of the business and was the person who
habitually attended to PAYE and end of year returns. It was her evidence that in the
past she had always filed the partnership's annual returns, latterly online. She said that
20 during the fiscal year ended 5 April 2011 the firm had had no employees after the last
employee had left the firm's employ and the appropriate P45 had been filed. The
evidence given by Mrs Gray was that in those circumstances she believed that there
was no need for any end of year return to be filed given that the firm then had no
employees and there was nothing due for payment to the respondent; and that the
respondent was on notice of those facts.

4. When cross examined Mrs Gray accepted that she usually read various circulars
25 and documents promulgated by the respondent and said that notwithstanding that she
firmly believed that an end of year return was not required, she nonetheless
telephoned the respondent sometime prior to 19 May 2011 with a view to having her
belief confirmed. However, she was unable to obtain a timeous reply and so gave up
her attempt, no doubt having numerous important matters to attend to in and about the
30 running of a small business.

5. We mention the fact of the attempted telephone contact because Miss
Orimoloye relied upon it in support of the contention that even though the appellant,
by its responsible partner, may have had an honest belief that there was no need for it
to file an end of year return, that honest belief might not have been reasonably held.

35 6. Mr Gray gave evidence to a like effect and said that the firm's last employee
had left in September 2010 and that the respondent was so aware, having received the
appropriate P45. He made the point that the partnership had nothing whatsoever to
gain by omitting to file forms that were due given that that task could be undertaken
within minutes online and it was known (and is accepted) that there was nothing due
40 for payment to the respondent.

7. It was our judgement that both Mrs Gray and Mr Gray were patently honest and
reliable witnesses and we accept their evidence. Indeed, it is fair to record that on

5 behalf of the respondent, Miss Orimoloye made no suggestion to the contrary. Her case was put on the basis that even though the appellant, by its responsible partner, may have honestly believed that there was no need to file the end of year tax return, it was not reasonable for such a belief to be held and so a reasonable excuse cannot be established sufficient to lead to this appeal being allowed.

8. 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.

10 9. 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
15 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.

20 10. 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. It is worth setting out his approach :

25 *“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”.*

30 *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.*

35 *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 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
40 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 out in Chichester v Commissioners of Revenue and Customs [2012] UKFTT 397. It is particularly relevant to note paragraphs 15 and 16 of that decision which are as follows:

5 “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 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
10 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 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
15 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 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
20 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.”

25 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
30 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
35 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.

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 :

40 “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.”

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.

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 (and this 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 : *Did X reasonably honestly believe that a given fact was in existence*, rather than : *Did X honestly belief 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.

12. If a person holds 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 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 in a relevant state of fact being capable of amounting to a reasonable excuse. It confuses the stages at which subjectivity and objectivity play their legitimate parts.

13. This is made very 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 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

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.

5 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 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 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, 10 on the other hand, going on to ask whether if an honest belief in that state of fact did 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. 15

16. Accordingly, we must direct ourselves that if we accept as a matter of fact, that the appellant, by its partner(s) 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. 20

17 We accept and find as a fact that the appellant, by Mrs Gray, honestly believed that because, from September 2010, the partnership had no employees, it was not necessary for any end of year filing to take place by 19 May 2011. 25

18. 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. 30

Decision.

35 Appeal allowed. Penalty set aside.

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

RELEASE DATE: 23 January 2014