TC01448

Appeal number: TC/2011/03641

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

KHALIL OPTICIANS LTD **Appellant**

- and -

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

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 17 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 6 May 2011, and HMRC's Statement of Case dated 7 June 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against a £500 penalty imposed in respect of the late filing of its P35 employer's annual return for the tax year 2009/10.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly 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—
>
> (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, ...
>
> (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, ...

4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the Tribunal may

> (i) if it appears ... that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears ... to be correct, confirm the determination, or
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> (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount.

5. Section 118(2) of the TMA provides as follows:

> (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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.

The arguments of the parties

6. The Appellant's case as stated in the notice of appeal and in correspondence is as follows. In November 2010, the Appellant was made aware that its bookkeeper had been embezzling funds from the company, and that the bookkeeper had failed to file the P35 and P14 forms. The bookkeeper stated that she filed the Appellant's personal tax return rather than the P35 as she misread the reference numbers. The Appellant was very upset to discover this. The Appellant is a small company that employs five people. The economic climate is poor and the penalty is damaging to the business. The Appellant trusted the bookkeeper to be competent to do the job, which was not the case. By the time that the problem was discovered, the bookkeeper had erased all entries on the computer for the whole financial year. A great deal of effort was required to put matters right. A new bookkeeper was employed in December 2010. The Appellant was not aware of the problem at the time of the deadline for filing the P35 as it was hidden. The Appellant has always paid its PAYE and NIC on time.

7. The HMRC statement of case states amongst other matters as follows. The Appellant has been registered with the employer scheme since 19 June 2003 and would be an experienced employer fully aware of its tax obligations. The return was delivered late, and the penalties have been correctly charged in accordance with the legislation. It is the responsibility of the Appellant, as employer, to ensure that the legislative requirements are complied with, and this responsibility cannot be transferred or removed by engaging a bookkeeper. Employment of a dilatory bookkeeper cannot be a reasonable excuse. Not putting in place adequate internal controls cannot be a reasonable excuse. If the bookkeeper was at fault, the Appellant should seek redress against her. Ignorance of the legislation is no excuse. The possible effect of a penalty on future trade is not relevant to whether there is a reasonable excuse. HMRC have to be consistent as between all taxpayers. The penalty can only be set aside if the Appellant has a "reasonable excuse" which existed for the whole period of the default. A "reasonable excuse" is an exceptional event beyond the taxpayer's control which prevented the return from being filed by the due date, for instance because of severe illness or bereavement. Submission of the P35 within the time limit was within the Appellant's control.

The Tribunal's view

8. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability.

9. The Tribunal notes that the Appellant has not disputed that the return was filed late. The issue is whether the Appellant had a reasonable excuse for the lateness of the filing of the P35.

10. The circumstance advanced by the Appellant as a reasonable excuse is that its bookkeeper did not do what she was required to do, and that the Appellant was unaware of this until November 2010. Indeed, the Appellant says that the bookkeeper embezzled money from the company.

11. The Tribunal has considered *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199. That case concerned an appeal against cancellation of gross payment status rather than an appeal against a penalty for late filing of P35 returns, although the "reasonable excuse" test in both contexts may be materially similar. In that case, the appellant company which had no knowledge of tax or VAT matters had relied on a company secretary to ensure compliance with tax obligations. However, various tax obligations were not complied with. The Tribunal found in that case at paragraph 20 that it had been "reasonable for the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations". That decision concluded at paragraph 23, referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that "reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context".

12. The Tribunal notes that this case concluded that reliance on a third party "can" be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.

13. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had "relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists". It was further found in that case (at para. 8(q)) that as the appellant "did not have the specialist knowledge and expertise herself she employed and relied upon persons whom she reasonably believed to have such specialist knowledge and expertise".

14. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to pay taxes on time through incorrect advice received by a specialist.

15. The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

16. In *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC), the Tribunal said at paragraph 7 that mistakes by an agent did not amount to a reasonable excuse, in circumstances where "The mistake could have been avoided if the agent had exercised

proper care" and where "The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts".

17. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an employee or agent, the Appellant is in general under an obligation to ensure that the employee or agent files the return on time. Failure of the employee or agent to meet its obligations to the Appellant might entitle the Appellant to some recourse against the employee or agent, but in the Tribunal's view reliance on a third party such as a bookkeeper or accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to an employee of itself amounts to a reasonable excuse.

18. The Tribunal finds that the Appellant has advanced no other circumstances that would amount to a "reasonable excuse" for late filing under s.118(2) of the TMA.

19. The Appellant has not sought to dispute the amount of the penalty, in the event that there is no reasonable excuse.

Conclusion

20. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalty and dismisses the appeal.

21. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 15 SEPTEMBER 2011