TC01638

Appeal number: TC/2011/01758

PAYE and NIC – late employer's annual return (P35/P14) for 2009-10 – simple oversight – held no reasonable excuse – penalty of £500 found to be disproportionate in the circumstances – appeal allowed

FIRST-TIER TRIBUNAL

TAX

AST SYSTEMS LIMITED **Appellant**

-and-

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

TRIBUNAL: **KEVIN POOLE (TRIBUNAL JUDGE)**
ALAN SPIER FCA

Sitting in public in Nottingham on 26 September 2011

Tim Redmond, Director for the Appellant

Nadine Newham, Presenting Officer for the Respondents

DECISION

Introduction

1. This is an appeal against a fixed penalty of £500 imposed in respect of the Appellant's late filing of its employer's annual return for the year ended 5 April 2010.

2. We heard evidence from Mr Redmond, the main executive director and the main employee of the Appellant (the other director and employee is his wife).

3. The facts were not in dispute, so Mr Redmond's credibility was not tested. We did however find him to be a reasonable and responsible businessman, aware of his responsibilities as such and keen to discharge them.

The Facts

4. The Appellant carries on business as an installer of home automation systems, intruder alarms and related equipment. It is a small company. In the year ended 5 April 2010 it had two employees (Mr & Mrs Redmond) and was therefore required to file an employer's annual return for the year ended 5 April 2010.

5. For the first time, the return had to be filed online (although the Appellant had previously filed returns online). The deadline for filing was 19 May 2010.

6. Mrs Newham said that the Appellant was sent an electronic "employer notification" on 17 January 2010 reminding it of the need to file its forthcoming employer's annual return online. A proforma of the letter which she said was sent was produced to us. It bears no apparent hallmark of being an electronic communication, so Mrs Newham must have meant that this form of letter was attached to an email sent to the Appellant. HMRC's computer records on the point simply say "P35 P35 INHIBITED – P35N" for the event occurring on 17 January 2010. That is the evidential basis upon which Mrs Newham says this notification was sent. It clearly reminds the recipient that the return must be filed online by 19 May 2010.

7. Mr Redmond (who dealt with such matters on behalf of the Appellant) did not recall seeing this notification, but did not deny he may well have received it. He explained that in a small business such as the Appellant, he has to deal with everything and he freely admitted that he made mistakes. As he said, "I am an engineer, not a tax collector".

8. The Appellant failed to file its return on time. Mr Redmond said he had simply overlooked the need for it by the time May 2010 came around. As the main employee of the Appellant, he concentrated more on his work as an engineer than on dealing with tax forms.

9. The Appellant (and Mr Redmond) only became aware of the oversight when a penalty notice dated 27 September 2010 was received from HMRC for £400, in

respect of the period of delay up to 19 September 2010. We accept Mr Redmond's evidence that it was only received by him very shortly before 11 October 2010.

10. Mr Redmond immediately took the necessary steps and filed the return online without delay on 11 October 2010. We are satisfied he acted promptly upon receiving the penalty notice, which was clearly not actually placed in the post by HMRC on the date it was purportedly issued.

11. HMRC issued a further penalty notice dated 20 October 2010 for £100 in respect of the final period of delay up to 11 October 2010.

12. The total of the PAYE and NIC paid by the Appellant in respect of the 2009-10 year was £1,045.68. All that liability was paid on time. The annual return simply represented a reconciliation exercise for HMRC in that it enabled them to tally up the various payments and returns during the year and close off the Appellant's employer's record for the year.

13. Mr Redmond had no effective reminder system even though, if he thought about it, he knew the return had to be made shortly after the end of the tax year. He had made the return every year since 2002, and had incurred a previous late filing penalty in 2005 for a similar oversight. He had paid the £100 penalty on that occasion without demur.

14. HMRC also asserted in their statement of case that the Appellant had incurred a penalty (no amount stated) for late delivery of its 2006 return, but this was not mentioned at the hearing and we had no further evidence of it.

15. We infer that as this was the first year in which HMRC did not send out paper P35's to employers, it was the lack of an actual form arriving on his desk which led to Mr Redmond forgetting to deal with the 2009-10 return.

16. We did not feel that the Appellant was able, in these circumstances, to make out a reasonable excuse for the delay in filing the return. It should have been well aware of its obligations and an excuse of simple forgetfulness cannot be accepted as reasonable. To be fair, Mr Redmond had not seriously argued that it could.

Argument

17. Mr Redmond's main argument was that "a £500 penalty seems incredibly harsh for the late return of one form", given that HMRC already had all the information, no reminders were sent, all the PAYE and NIC had been paid on time through the year and the amount of the penalty was more than the total amount of PAYE and NIC that the Appellant would have paid for a five month period equal to the delay.

18. Mrs Newham submitted that there was no basis on which we could set the penalty aside on what are commonly called "proportionality" grounds. She said that the penalty regime had been set by Parliament at £100 per month of delay, and that was the end of the matter. The Tribunal had no power to reduce the statutory amount.

Decision

19. We disagree. On the basis of the reasoning set out in *Enersys Holdings UK Limited v* HMRC [2010] UKFTT 20 (TC), we consider that this Tribunal does have power to strike down a penalty if it is "not merely harsh but plainly unfair", and that power extends to these penalties as much as it does to VAT default surcharges. Mrs Newham submitted the circumstances in the two cases were very different, in particular the *Enersys* case involved a delay of one day, attributable to an administrative error.

20. We do not accept that the principle set out in the *Enersys* case is to be restricted to the narrow facts of that case. The case contains a general statement of principle, with which we agree. We do consider that a penalty of £500 in the circumstances we have outlined for late delivery of a form with no associated outstanding tax liability was "not merely harsh but plainly unfair". As part of our overall consideration, we have taken into account the fact that the Appellant is a small business and the penalty represents very nearly half of the Appellant's total PAYE and NIC for the year in question, all of which had been paid on time.

21. With no power to reduce the penalty, we have no choice but to set it aside in full.

22. We agree with Mrs Newham that HMRC are under no statutory obligation to notify a defaulting taxpayer of penalties which have been incurred promptly after a default first occurs. However, HMRC cannot be surprised to be faced with a proportionality argument if they delay notifying a penalty to a defaulter until a penalty which Parliament has fixed at £100 per month is allowed to escalate to £500 while HMRC apparently sit on their hands. If the delivery of the return is so important that it merits a fine at such a level, it seems surprising (to put it at the very lowest) that they should take no steps for over four months to chase it.

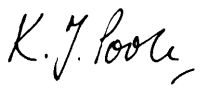
23. Whilst the comment is not relevant to our decision, when HMRC delay issuing penalty notices for over four months, it is hard to escape the conclusion that the penalty regime is being used as a revenue earning device rather than for its proper purpose as a mechanism to encourage prompt compliance by taxpayers with their obligations. It is understandable if the taxpayer sees it this way, and this can only go towards undermining any co-operative relationship between HMRC and taxpayers.

24. We should emphasise that we are not saying that every penalty of £500 for a delay of this length should be set aside. Each case needs to be considered on its own merits and it is not difficult to envisage a situation in which a £500 penalty could easily be justified.

25. The appeal is allowed. The penalty must be set aside in full.

26. 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.



KEVIN POOLE
TRIBUNAL JUDGE
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