TC02117

Appeal number: TC/2011/06324

PAYE – Penalties for late Employer's return - reasonable excuse – fairness - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR and MRS A MADDALO t/a A M COMPUTING DIRECT **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP

The Tribunal determined the Appeal on 7 February 2012 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 11 August 2011, HMRC's Statement of Case submitted on 3 October 2011 and the Appellant's reply dated 17 October 2011.

DECISION

Background

1. The Tribunal decided that the Appeal fails and that the penalties totalling £1,200 are confirmed.

2. In summary, this Appeal is against the imposition of penalties following the late submission of the Employer's Annual Return (P35) for the tax year ended 5 April 2010. The return for that year should have been filed by 19 May 2010. It was filed online on 7 June 2011 and therefore it was late. It is the statutory duty of the Appellants to submit the return on time.

The Legislation

3. An employer has a statutory requirement to submit the end of year return (P35), before 20 May following the end of the tax year, in accordance with Regulation 73(1) Income Tax (PAYE) Regulations 2003 and paragraph 22 Schedule 4 Social Security (Contributions) Regulations 2001. Regulation 73(10) provides that s.98A of the Taxes Management Act 1970 applies to Regulation 73(1).

4. If, as in this case, the return is not filed timeously, then Section 98A (2) and (3) Taxes Management Act 1970 provide that an employer is liable to a fixed penalty of £100 for each month or part month that it was in default with the return.

A penalty can only be set aside where there is a reasonable excuse for failure to file and that that excuse exists throughout the period of the default. Reasonable excuse is provided for by section 118(2) of the Taxes Management Act 1970:

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 Facts

5. The facts found by the Tribunal in this case are:-

(1) The Appellants' business AM Computing Direct ("the business") ceased to trade on 30 September 2009. All employees of the business other than Mrs D Wells were transferred to Good 4 Books at the beginning of the tax year commencing 6 April 2009. Mrs Wells was made redundant on 30 September 2009.

(2) Mrs Isabella Martin had been the employee who handled payroll matters for the Appellants. She is a mature employee, had no online training and was always apprehensive when going online. She very fairly

said that she was not IT qualified and that the online filing was a learning curve; she worked only for a few hours on a Wednesday once per week. She was aware of the requirement to file online. In 2007/08 and 2008/09 she had successfully submitted the P35 returns online.

(3) By letter dated 2 December 2009, Miss Martin advised HMRC of the facts set out in para 5(1) above and intimated that, in consequence, there would be no further PAYE due by the Appellants. She states that she called the helpline and was advised that no online P35 was required.

(4) A paper P35 was issued on 11 December 2009 but was not returned.

(5) Mrs Martin confirmed that she contacted the helpline and enquired again in March 2010, which was before the deadline, and was advised that she was required to submit the P35 online. Accordingly, she was aware that she required to file online and before the deadline.

(6) Mrs Martin states that she thought that she had filed successfully online on 7 April 2010 and indeed again later. She had not. The submission on that date was for the P45 for Mrs Wells, not the P35. The site "crashed" so she did not print off the submission.

(7) A Penalty Notice in the sum of £400 was issued to the Appellants by HMRC, on 27 September 2010, intimating that the P35 due to be submitted by 19 May 2010 was outstanding and that the penalty to 19 September 2010 was £400 and that penalties accrued at £100 per month.

(8) HMRC wrote to the Appellants on 30 November 2010 in response to her letter of Appeal, pointing out that Mrs Martin was not correct in saying that there was no need to complete the return and requesting the submission of the P35 and P14 online without delay. Advice was given about the helplines and the website.

(9) On 22 December Mrs Martin wrote to HMRC saying "I did file the PAYE on line 07-04-2010 and I will be enclosing a copy of the receipt. This was for the tax year 2009/2010...". The submission receipts produced were in regard to the starter, leaver and pension notifications (P45 and P46).

(10) On 23 December 2010, a letter was issued to the Appellants by HMRC confirming the £400 penalty, and again requesting submission of the P35.

(11) HMRC wrote to the Appellants on 13 January 2011 pointing out that the receipts related to the P45 and not the P35 and that there was no evidence of any other filing online on 07 April 2010 so the outstanding P35 should be submitted immediately.

(12) Further Penalty notices were issued on 24 January and 30 May 2011.

(13) On 7 April 2011, there was an attempted (but failed) submission of the P35 online.

(14) On 3 June 2011, HMRC wrote to the Appellants referring to the P45 which had been submitted on 2 February 2011, intimating that that did not suffice to discharge their obligation, that the statutory requirement was to lodge the P35 and the P14 online, and if that was not done immediately further penalties would accrue in addition to the £800 already charged. Advice was given about the helpline.

(15) On 7 June 2011, Mrs Martin contacted the helpline, and with assistance submitted the return. Mrs Martin did not submit the P35 until 7 June 2011 so the period of default was 384 days.

(16) On 8 June 2011, she wrote to HMRC Debt Management stating that she had submitted the form and that she wished to appeal the imposition of the penalties. HMRC responded on 19 July 2011 stating that the Appeals were all late and therefore not accepted.

(17) The late appeal in regard to all of the penalties was accepted by the Tribunal.

Reasons for decision

6. Section 100B(2)(a) Taxes Management Act 1970 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

(iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount."

Whilst it is unfortunate that HMRC's policy is not to issue first penalty notices until there is already a four month delay, the Tribunal does not consider this can afford a reasonable excuse to the Appellants for their delay in delivering the return. The legislation gives the Tribunal no power to mitigate the prescribed penalty simply as a result of the delay in its issue. In any event Mrs Martin was aware that she required to lodge the return online timeously.

7. There is power to quash a penalty as disproportionate if it is "not merely harsh but plainly unfair". Mrs Martin argued that the penalties of £1,200 might be considered harsh because it was a small business and struggled. On the facts of this case the Tribunal is unable to agree that it was "plainly unfair" since the Appellants and Mrs Martin were repeatedly advised to lodge the return and warned about the penalties which would continue to be imposed in the event of default. Accordingly, the Tribunal does not interfere with it on grounds of proportionality or common law fairness.

8. The only issue remaining is whether there was a reasonable excuse for the late submission of the return, since the Tribunal finds that there was a default and that the penalties had been correctly calculated.

9. It would appear that the Appellants did not know that the return had not been submitted, at least, until HMRC wrote to them with the first penalty notice on 27 September 2010. However, after that date they knew, or should have known, that there was a problem. The Appellants relied on Mrs Martin to submit returns timeously. Mrs Martin did know that the return required to be submitted. She seemed to have been confused as to what she had filed, when and how. The case of *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC) is in point. This Tribunal is not bound by that decision but considers that that case is comparable to this case in that to a large extent, *Schola* reflects the situation in this Appeal; in the *Schola* case the Appellant entrusted the filing of its 2008/2009 return to its accountants. The accountants believed they had filed the return by the due date and only became aware of its non-receipt by HMRC when the first penalty notice was issued. After inquiries were made, the accountants accepted that they had made an honest mistake. Judge Tildesley referred to the *"limited jurisdiction"* of the Tribunal *"which reflects the purpose of the legislation of ensuring that employers file their returns on time. The Tribunal has no power to mitigate the penalty."* Judge Tildesley went on to state:

"in considering reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having proper regard for his responsibilities under the Tax Acts."

It was held that the reason for the late filing was the honest mistake of the Appellant's agent; a mistake which could have been avoided if the agent had exercised proper care and therefore the Appeal was dismissed.

10. At the point when the first penalty notice was issued there is a possibility that Mrs Martin may have believed, albeit erroneously, that the return had been submitted online. However, firstly the returns for the previous two years had been successfully submitted online so the procedure should have been known to her. Secondly, the notification to file a return (P35PN) and other documentation make explicit the deadlines and penalties and also clearly state that "Further information is available to help you on our website, go to www.hmrc.gov.uk/payeonline". That website makes it clear that acceptance and rejection messages will be sent. No acceptance or rejection message was sent or received in 2010. Thirdly, Mrs Martin was clear that the website had crashed when she was online on 7 April 2010 and she had failed to print the submission. She assumed that the filing had been successful and she made no attempt to access the system further. The Tribunal accepts the submission by HMRC that any prudent individual would have accessed the system to ensure that the submission had been successfully sent. The Tribunal finds that the failure to ensure the receipt of acknowledgement by HMRC as in *Schola*, and the other actions of Mrs Martin, and therefore the Appellants had not been those of a prudent person exercising reasonable foresight and due diligence in the period before the first penalty notice was issued.

11. The situation is even more clear in regard to the subsequent penalty notices where she was repeatedly advised that the return had not been submitted, that penalties were continuing to accrue and that the return should be submitted without delay.

12. The Tribunal accepts that Mrs Martin clearly had difficulties in understanding what she had or had not done. The Tribunal found as facts that Mrs Martin was advised before the deadline that she required to file online, the information on how to do that is widely available, she had done so previously, she knew or ought to have known how the process worked and in particular that she would receive confirmation that any submission had been successful (or not). In the first instance she failed to ensure that what she thought was the P35 had been submitted successfully and consequently, there was a lack of diligence and care to ensure that the procedure had been correctly followed. Ignorance, inadvertence or oversight in ensuring that the tax obligations had been fulfilled, cannot amount to a reasonable excuse. The letters of 30 November 2010 and 13 January 2011 to the Appellants made it absolutely explicit that the return had not been filed online and that penalties would continue to accrue until the return was lodged: the failure to submit the return in the face of those letters, further penalty notices and correspondence compounds the situation.

13. The Appellant's reliance on Mrs Martin does not amount to a reasonable excuse. Reasonable excuse does not include past or future good compliance nor ignorance of the online filing system. The Tribunal cannot take into account the economic climate or the fact that this is a small business. The only question which the Tribunal can consider is whether or not, in terms of the law, there was a reasonable excuse for the failure to file throughout the period of default. There was at no stage a reasonable excuse and certainly not a reasonable excuse lasting the duration of the default.

14. Accordingly, the Appeal fails and in terms of Section 100B(2)(a)(ii) Taxes Management Act 1970 the penalties are confirmed.

15. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 5 July 2012