



TC03167

Appeal number: TC/2013/01818

PAYE end of year return - Appellant's financial controller ill - Appellant's agent attempted filing but inadvertently failed to submit return - whether reasonable excuse - on the facts – yes - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOOK US A LONG TIME LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
JANET WILKINS**

Sitting in public at 45 Bedford Square London WC1B 3DN on 23 August 2013

**Jonathan Plant, Director of the Appellant Company, and Matthew Mead,
Accountant, for the Appellant**

Paul Reeve, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Took Us A Long Time Limited (“the Appellant”) against
5 two penalty notices issued by HMRC because the Appellant had not delivered to
HMRC its PAYE End of Year Return (form P35) for the year 2011/12 by the due date
of 19 May 2012.

2. A £4,000 penalty was issued on 24 September 2012 (for the period 20 May
2012 to 19 September 2012) on the basis that the Appellant had 487 employees as that
10 was the number of employees reported in the previous year of 2010-11. A penalty of
£4,000 was issued on 17 October 2012 (for the period 20 September 2012 to 10
October 2012) because the return showed that there were 757 employees.

3. The Appellant’s return was received by HMRC on 10 October 2012.

4. The Appellant had not lodged an appeal against the second penalty of £4,000,
15 but there had clearly been an objection conveyed in correspondence between the
Appellant and HMRC, and HMRC accepts that the second penalty is under appeal for
determination by the Tribunal.

The legislation

5. Regulation 73 (1), The Income Tax (Pay As You Earn) Regulations 2003
20 requires an employer to submit to HMRC an End of Year return by 19 May following
the end of the preceding tax year.

6. Regulation 205, The Income Tax (Pay As You Earn) Regulations 2003 requires
an employer to deliver to HMRC an End of Year return electronically that accounts
for the tax deducted from their employees.

7. Schedule 4, Paragraph 22, Social Security (Contributions) Regulations 2001
25 requires an employer to deliver to HMRC an End of Year return electronically that
accounts for the National Insurance deducted from their employees.

8. Section 98A, Taxes Management Act 1970 makes an employer liable to a
penalty if they fail to deliver their PAYE End of Year return by the due date.

9. Section 100, Taxes Management Act 1970 authorises HMRC to issue penalties
30 and makes provision for an appeal to be made.

10. Section 100B, Taxes Management Act 1970 provides that the Tribunal may set
aside the penalty, confirm it or vary it if incorrect to the correct amount.

11. Section 118(2), Taxes Management Act 1970 provides that there will be no
35 penalty if there is a “*reasonable excuse*” for the return being late provided the return
is made “*without unreasonable delay*” after the “*excuse*” ceased.

12. Section 100B Taxes Management Act 1970 provides :

“(2) [subject to sections 93(8) and 93A(7) of this Act] on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but –

- 5 (a) in the case of a penalty which is required to be of a particular amount, the [First-tier 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
 - 10 (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount,”

The background facts

13. The Appellant’s PAYE return should have been delivered before 20 May following the end of the tax year, that is on or before 19 May 2012, but was not
15 received by HMRC until 10 October 2012.

14. Section 98A(2)(a) Taxes Management Act 1970 provides that there will be a liability to a penalty of the relevant monthly amount for each month, or part of a month, during which the failure continues. In this case the failure continued for four whole months and one part month, and so penalties for five months were charged.

20 15. Section 98A(3)(b) Taxes Management Act 1970 provides that the relevant monthly amount where the number of employees is greater than 50 is £100 for each 50 persons and an additional £100 where that number is not a multiple of 50. As there were 757 employees in this case, the penalties are set at 16 x £100 per month (or part month) – penalties totalling £8,000 [16 groups of 50 employees x £100 x 5 months =
25 £8,000] have been charged.

16. The issue before the Tribunal was whether the Employer’s Annual Return was received late by HMRC, and if so whether the Appellant can demonstrate that they had a “reasonable excuse” for the return being received late, and if so, was the return then received by HMRC “without unreasonable delay” once the “excuse” had ended.

30 The Appellant’s case

17. In their appeal to HMRC dated 5 November 2012 the Appellant said that it had filed its Employer’s End of Year Return on 5 April 2012, adding that it was “resubmitted” on 10 October 2012.

18. In the Appellant’s notice of appeal to the Tribunal it states :

35 (1) “We specifically arranged for the end of year procedures, including online filing, to be carried out by our accountants on 5 April 2012. All other procedures were followed and it is therefore reasonable to accept our explanation that we acted in good faith and believed that the online filing was

carried out at this time. It appears that this filing was not received by HMRC but this could simply have been due to website/computer issues of which we would not have been aware.

5 (2) There were no financial or any other reasons to delay filing the return, therefore it is reasonable to accept that we believed that we had filed on time. The alternative explanation is that we wished to incur penalties.

(3) As soon as we were made aware the problem existed we “re-filed” the return online.

10 (4) Our previous filing (and payment) history has been exemplary and there are no reasons why the filing of this return should be any different.”

19. The Appellant adds, in its notice of appeal, that it has an issue with regard to the time it took HMRC to notify them of the filing failure and imposed the penalties. Had HMRC imposed the first penalty after one month rather than four months, the matter would have been dealt with much earlier and the penalty considerably reduced.

15 HMRC’s case

20. HMRC maintain that the return was not filed on 5 April 2012 as claimed by the Appellant, and was in fact filed on 10 October 2012.

21. Mr Reeve for HMRC said that there is no physical evidence to prove that filing of the Appellant’s Annual Return took place. Such evidence (for example a computer generated acknowledgement of receipt) would exist as evidence if successful filing had taken place.

22. It is not sufficient to “arrange” for the filing of the return to take place. An employer has to ensure that filing actually takes place. HMRC accept that there was an intention to file on 5 April 2012, but contend that an intention to file is not a reasonable excuse for the failure to do so. To accept such an intention as a reasonable excuse would be manifestly contrary to the purpose of the legislation. An honest belief that something has been done, no matter how sincerely held, cannot by itself amount to reasonable excuse.

23. The suggestion that something may have been wrong with HMRC’s website on the day that the alleged filing is said to have taken place is refuted. HMRC is not aware of any computer issues that would have led to a successfully submitted return not being acknowledged or being rejected.

24. Mr Reeve said HMRC had invited the Appellant to take up the matter with its software provider to establish whether there may have been any problem or reason why the return should not have been successfully submitted, but the Appellant does not appear to have contacted them.

25. Had the Appellant’s agent attempted to file the return online it would have received one of two automated messages from HMRC’s computer system – either acknowledging receipt or advising that filing had been unsuccessful. If the return had been filed there would be evidence of that, but no such evidence has been provided.

26. The fact that there were no financial or other reasons to delay filing the return or that the Appellant's previous filing records had been exemplary do not amount to a reasonable excuse for the failure to file the return on time.

5 27. Mr Reeve on behalf of HMRC submitted that whether or not the penalties were issued after one month, four months or later is not relevant as to whether or not the Appellant has a reasonable excuse. Following the decision in *Hok Limited* the First-tier Tribunal does not have the jurisdiction to consider HMRC's administration of the relevant legislation, and if the Appellant wished to pursue such an argument it must do so by way of judicial review.

10 28. The onus was on the Appellant to submit the return and it is not relieved of its responsibility for the failure because it passed the task to a third party. The Appellant remains responsible for the agent's action or inaction. The Appellant or the agent should have taken measures to satisfy itself that the return had been successfully filed. Acting in good faith is not a reasonable excuse.

15 The Appellant's response

29. At the hearing, Mr Jonathan Plant, a director of the Appellant company and Mr Matthew Mead, the accountant who had dealt with the failed P35 submission, gave evidence to the Tribunal. Mr Plant said that the filing of the Employer's Annual Return was normally dealt with by the individual who lodged the appeal with the
20 Tribunal, Mr Darren Pollock, who was ill and had been hospitalised for open heart surgery shortly prior to the filing date. Following that he had been diagnosed with terminal cancer. Mr Pollock instructed Mr Mead to deal with the filing of the Employer's Annual Return.

30. Mr Mead confirmed that he had attended the Appellant company's offices on 5
25 April 2012 with the specific task of running the company's pay-roll year end to include the online submission. The company used SAGE software which has a "step by step" approach to year end procedures. Mr Mead said that Mr Pollock was quite ill, but despite this was on the telephone to him for over an hour giving him instructions on end of year procedures and how to file the P35 return. So far as he was aware he
30 had followed Mr Pollock's instructions and submitted the return to HMRC.

31. Sadly Mr Pollock passed away after this appeal was lodged with the Tribunal, but, prior to his death had written to HMRC confirming that he had instructed Mr Mead to lodge the return. The Appellant company had never previously failed to file its return on time. All payments of PAYE and NIC liabilities were up to date and the
35 company's filing history was exemplary. As Mr Pollock said in correspondence with HMRC there was no logical reason for the company intentionally to withhold submission of its return. He referred to a possible software/computer "glitch", either at the Appellant company's end or with HMRC. He said that HMRC's website had been down on numerous occasions to his knowledge and in a letter to HMRC on 25
40 April 2013 referred to HMRC's website on which it was acknowledged that "some customers were not receiving the submission response e-mail issued by Government

Gateway ...” (service issues – Pay As You Earn (PAYE) 22 March 2013) which Mr Pollock said was clear evidence that HMRC’s system may not be reliable at all times.

Conclusion

5 32. Although HMRC are not under an obligation to issue reminders to employers who have not filed their returns, it has to be said in this particular case, that it is regrettable the penalties were not imposed sooner. Legislation does not define what a reasonable excuse is and each case has to be considered on its own merits. Normally there would only be a reasonable excuse if an exceptional event beyond the employer’s control prevented him from complying with his filing obligations.
10 However it is quite clear in this case that the Appellant company made every attempt to file its Employer’s End of Year Return on time. Mr Pollock, the individual who normally dealt with the return, and Mr Mead, the accountant, together used their best efforts to ensure that the return was filed. We are satisfied that the Appellant has shown a reasonable excuse for its failure to file the return on time.

15 33. We accordingly allow the appeal and discharge the penalty of £4,000 issued on 24 September 2012 and the penalty of £4,000 issued on 17 October 2012.

34. 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
20 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 19 December 2013

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