TC03258

Appeal number: TC/2012/02506

PAYE – LATE LODGING OF EMPLOYER'S ANNUAL RETURN – DIFFICULTIES WITH HMRC SOFTWARE – EMAIL FROM HMRC CONFIRMING SUCCESSFUL SUBMISSION BUT ACTUALLY TREATED AS TEST SUBMISSION – EMAIL CONFUSING - APPELLANTS UNAWARE RETURN NOT SUCCESSFULLY FILED - WHETHER REASONABLE EXCUSE - YES – APPEAL ALLOWED

FIRST-TIER TRIBUNAL
TAX CHAMBER

VALLEY CENTRE **Appellants**

- and -

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

TRIBUNAL: JUDGE N A BAIRD

The Tribunal determined the appeal on 3 January 2014 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 31 January 2012 (with enclosures), HMRC's Statement of Case submitted on 18 April 2013(with enclosures) and the Appellant's Reply dated 17 May 2013 (with enclosures).

DECISION

1 The appellant appeals against the decision of HMRC to impose a penalty of £500 in terms of Section 98A (2) and (3) of the Taxes Management Act 1970 for late submission of the Employer's Annual Return for the tax year ending 5 April 2011. The Annual Return was to be filed online by 19 May 2011. The appellant claims to have filed it online on 7 April 2011 but HMRC say it was not filed until 1 October 2011.

2. The appellants say that they believed they had successfully submitted their return on 7 April 2011. With their reply to the Statement of Case they submitted copies of two e-mails received from HMRC, one dated 7 April 2011 and the second 1 October 2011. Both are in exactly the same terms apart from the dates of receipt and read,

> 'The submission for Reference .....was successfully received on ..... If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.'

In his reply the appellants accepts that they may have ticked the wrong box, ie the 'yes' one in response to the question on the Return asking 'Send a test submission?' but if he did it was unintentional. He goes on to make the point that the reply from the HMRC system is the same whichever box you tick. As evidence of this he provided a copy of the relevant page of the form for his return for the year to April 2013. The appellants say there is no way anyone who had ticked the wrong box in error would know their return had been rejected as a test one. He expresses his annoyance at the fact that he was not made aware that his return had not been successfully filed until September 2011 when he received the penalty notice. He had no reason to think that what he had submitted was a test and if he had been told he would have remedied the situation immediately. He says he understands that HMRC in 2012 began to advise employers in late May if their return was outstanding. He concludes by saying he accepts that he *may* have made an error on the form and would be willing to pay a penalty of £100.

3. The position of HMRC is that there is a legal obligation on employers to submit the Annual Return on time. They say that their records indicate that what the appellants sent was a test submission sent using their Basic PAYE Tools filing method and in order to have done this the appellants must have actively accessed test mode on the system. They accept that the acknowledgment message is the same as for that sent for live submissions and say it is considered 'a courtesy message'. They also say that if a test submission is successful a message is sent saying that and advising that the Annual Return must now be filed online. They say that Employers can also check the status of submissions online. They are under no obligation to issue reminders for Employer's Annual Returns and it is their practice to issue the first penalty notice after four months. HMRC conclude that the appellant has not

established that on a balance of probabilities there is a reasonable excuse for her failure to file her return on time.

4. With regard to the fact that HMRC took four months to notify the appellant of the penalty, the First-tier Tribunal, in *Hok v HMRC [2011]UKFTT 433 (TC)* found that no penalty over £100 is recoverable for the first month unless HMRC proves that even if such a penalty notice, which would have acted as a reminder, had been issued, the default would nonetheless have continued. This decision was however overturned by the Upper Tribunal in *HMRC v Hok Ltd [2012] UKUT 363 (TCC)* in which it was held that in purporting to discharge the penalties on the ground that their imposition was unfair the First-tier Tribunal was acting in excess of its jurisdiction and its decision was quashed. There is therefore no merit in the submissions on the four month delay in issuing the penalty notice. .

5. If a person is to rely on reasonable excuse, this must have existed for the whole of the period of default. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him from complying with an obligation when he otherwise would have done. The matter has to be considered in the light of the actions of a reasonable prudent tax payer exercising foresight and due diligence and having proper regard for his responsibilities under the Taxes Act.

6. The appellants were of course obliged in terms of the relevant legislation to submit their return on time online. They believed that they had done so. HMRC take the view that the appellants, because they must have accessed the Basic PAYE Tools filing method would have known that what they had submitted was a test and that they would have to re-submit it. HMRC have not provided evidence that they sent an email acknowledging receipt of a successful test submission. I accept that the appellants may have made an avoidable error in the course of filing that put them on the path of a test submission.

6. I do however agree with the appellants that the e-mail that they received was confusing and unhelpful. It is difficult to comprehend why a message in such terms is issued when employers who regularly successfully file returns may have no idea that a rest is possible or that they may inadvertently have embarked on one. I do accept that the 'Submission details' document says under the heading 'Flag' – 'test' and that following a successful submission it says 'Flag – live' but if the appellants were unaware of the existence of a possibility of a test submission this would mean nothing to them. I would say too that in my view it is not at all clear what 'flag' is supposed to indicate or indeed what 'live' means in this context. I would have thought that HMRC's system could acknowledge by email in simple comprehensible terms whether a 'successful'submission was a test or a real one.

7. Having taken into account all the circumstances, I conclude that delay in filing the return and the actual failure of the submission in April were unforeseeable to the appellants in light of the unnecessarily confusing systems adopted by HMRC. I find

that the appellants have on the balance of probabilities established a reasonable excuse for the late filing.

8. I allow the appeal.

9.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.

N A BAIRD
TRIBUNAL JUDGE

RELEASE DATE: 20 January 2014