



TC03568

Appeal number: TC/2013/01174

INCOME TAX - penalty for late submission of Employer's annual return – whether there was a “reasonable excuse” – no – whether penalty unlawful – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EVERTILE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 17 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 25 July 2012, HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 16 May 2013 and the appellant's response dated 12 June 2013.

DECISION

Introduction

- 5 1. This is an appeal against a penalty of £200 imposed for the late submission of the Employer's annual return for the tax year 2011-12. The penalty was imposed in accordance with Section 98A(2) and (3) Taxes Management Act 1970.
2. Mr S Lew appeals on behalf of the company.

The issues

- 10 3. Mr Lew appeals on the following grounds :
- (1) The penalty has been inconsistently applied and is therefore unlawful and
- (2) there was a reasonable excuse for the late submission of the return.
4. These matters are disputed by HMRC.

15 The agreed facts

5. The company was required to file Employer's annual returns by 19 May 2012. The returns consisted of P35 and P14 returns.
6. The company had the option to submit P14 and P35 returns together or separately. The information concerning filing deadlines and penalties is available on
20 the HMRC website.
7. The P14 return was submitted separately on 19 April 2012. When filing the P14 return the online instructions on made it clear that the P35 was outstanding. On 29 April 2012 the company were issued with a reminder to file the return. The P35 was not filed by the due date.
- 25 8. On 29 May 2012 HMRC contacted the company by telephone to inform them that the P35 remained outstanding. The company attempted to file the P35 on 29 May 2012. However an error message was sent by HMRC confirming that the filing had not been successful.
9. There was no further contact between the company and HMRC between 29
30 May and 10 July. On 10 July HMRC contacted the company to inform them of the failed return. The return was filed online on 10 July 2012.
10. On 13 July 2012 HMRC issued a late filing penalty for the period 20 May to 10 July 2012.

The penalty

The law

11. An employer has an obligation to file an Employer's Annual Return before 20
5 May following the end of the tax year in accordance, Regulation 73(1) of the Income Tax (PAYE) Regulations 2003.

12. If the return is not filed a penalty is payable in the sum of £100 per month, or part month, for a firm with 50 employees or less, s98A(2)(a) & (3) Taxes Management Act 1970 ("TMA").

10 13. Section 100B(2) (a) TMA provides :

The first tier Tribunal may -

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

14. In the case of the commissioners for *Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC)* the Upper Tribunal considered the jurisdiction of the First-tier Tribunal. Mr Justice Warren commented:

20 "The First-tier Tribunal has only that jurisdiction which has been conferred upon it by statute and can go no further"

The arguments

15. Mr Lew submits that HMRC have decided to cancel the penalty issued to a sister company, Wilbow limited, based on identical facts. He considers that HMRC
25 have acted inconsistently in seeking to uphold this penalty.

16. HMRC accept that they have exercised their discretion to cancel the penalty imposed in relation to Wilbow limited. However they submit that this decision is not relevant to the merits of this appeal.

Reasons for decision

30 17. I am satisfied that the company is liable for the penalty as the return was submitted after the due date. I am further satisfied that the penalty has been correctly calculated taking into account number of employees and the period of the default. Accordingly there are no statutory grounds upon which the penalty can be set aside in accordance with s100B TMA (above).

18. I accept that HMRC appear to have adopted an inconsistent approach in that they decided to cancel the penalty imposed upon Wilbow limited based on similar facts. However there is no statutory basis for considering the consistency or fairness of decisions made by HMRC in relation to other taxpayers. Accordingly this Tribunal
5 has no jurisdiction to take such matters into account in considering the merits of this appeal. *HMRC v Hok limited (above)*

Reasonable excuse

The Law

19. A taxpayer will not incur a penalty if they can establish a “reasonable excuse”
10 for the late filing of the return throughout the default period s118(2 TMA).

20. In the case of *Rowland v HMRC [2006] STC (SCD) 536* it was decided that “reasonable excuse” was “a matter to be considered in the light of all the circumstances of the particular case”

The arguments

15 21. Mr Lew states that he was not aware that a P35 was required. He states that he filed the return on 29 May. However the online form contained a confusing question causing the return to be submitted incorrectly. He did not become aware that the return had not been submitted until 10 July whereupon he filed the return.

20 22. HMRC accept that Mr Lew may not have been aware of the need to file the return. However they submit that this does not amount to a reasonable excuse as information is available via their website and helpline. They accept that Mr Lew attempted to file the return on 29 May. However they submit that it would have been reasonable in the circumstances for him to have sought confirmation of receipt.

Reasons for decision

25 23. I accept that Mr Lew was unaware of the need to file a P35 in addition to the P14. However the need to file the P35 was identified during the course of filing the P14 and should have put him on notice that the return was outstanding. In addition Mr Lew was sent a filing reminder on 29 April which would have alerted him to the fact that the return had not been properly filed. In the event of any confusion it would have
30 been reasonable for Mr Lew to have sought advice from HMRC but he does not appear to have done so.

24. I accept that a genuine attempt was made to file the P35 return on 29 May. However the return was not successfully submitted and a rejection message was issued. In the event that the rejection message was not received it was reasonable in
35 the circumstances for Mr Lew to have sought confirmation of successful receipt before assuming that the return had been successfully filed.

25. For these reasons I do not find that there was a reasonable excuse for the late filing of the P35 return throughout the default period.

Decision

26. The penalty was lawfully imposed.

5 27. There was no reasonable excuse for the late filing of the P35 return for the year 2011-12.

28. The appeal against the late filing penalty of £200, is dismissed.

Rights of appeal

10 29. 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
15 “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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**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 6 May 2014