



TC03629

Appeal number: TC/2014/00323

*NATIONAL INSURANCE CONTRIBUTIONS - employee benefits -
Penalty for late filing of Employer's annual Return – whether return due -
yes - whether there was a reasonable excuse for late return - no - whether
penalty disproportionate - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TELEMATIQUE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 22 April 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 10 January 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 24 February 2014.

DECISION

Introduction

1. This is an appeal against a penalty of £400 imposed for the late filing of the Employer's annual, employee benefits Return, P11D(b), for the tax year 2012-13. The penalty was imposed in accordance with Regulation 81(2)(a) of the Social Security (contributions) Regulations 2001.

2. Dr Ayad Al-Mukhtar is the sole director of the appellant company and appeals on its behalf.

The issues

3. Dr Al-Mukhtar appeals on the following grounds

- (1) The company is not liable for the penalty
- (2) There is a reasonable excuse for the late return
- (3) The penalty is disproportionate.

4. HMRC oppose these grounds of appeal.

The facts

The agreed facts

5. The HMRC website contains the following information regarding the requirement to file a return:

“After the end of the tax year you need to complete and send your expenses and benefits form. You need to submit a form P11D ..for each employee to whom you have provided expenses and benefits during the tax year, and one form P11D(b) to declare the overall amount of Class 1A National insurance contributions (NICS) due on all the expenses and benefits you have provided.”

6. Dr Al-Mukhtar is the sole director and employee of Telematique Limited.

7. The company was required to file an employee benefits return, P11D(b), for the tax year 2011-12 as it had made a beneficial loan to Dr Al-Mukhtar. The return was filed after the due date and the company incurred a late filing penalty in the sum of £107.

8. HMRC assumed that Dr Al-Mukhtar continued to receive the beneficial loan for the year 2012-13 and sent the company a filing reminder on 14 April 2013. A further reminder was sent on 16 June 2013. The reminder informed the company that the due date for filing the P11D(b) return was 06 July 2013. The return was not received on 06 July and remains outstanding.

9. On 11 November 2013 HMRC issued a penalty of £400 for the failure to file the return for the default period 07 July to 06 November 2013.

The contested facts

5 10. Dr Al-Mukhtar states that he was not required to provide the return as the company had no employees and no tax or NIC liabilities. He has not provided any evidence relating to the beneficial loan.

11. HMRC submit that Dr Al-Mukhtar was employed by the company and received beneficial loan of £712. In support of their case they have provided a printout of Dr Al-Mukhtar's individual PAYE record for the year 2012-13.

10 *Findings of fact*

12. I find that Dr Al-Mukhtar received a beneficial loan in his capacity as an employee of the company for the year 2012-13. I make this finding because these facts have been recorded on Dr Al-Mukhtar's personal tax return the contents of which have not been challenged.

15 **Liability for the penalty**

The law

13. HMRC has the burden of proving that the penalty has been incurred. *Jussila v Finland (75053/01) [2006] ECHR 996*.

20 14. Employers have an obligation to account for the expenses and benefits paid to their employees. The benefits can be accounted for via the monthly payroll or by filing an annual return on form P11D, Regulation 85 Income tax (Pay as you earn) Regulations 2003. A beneficial loan to an employee defined as an "employee benefit" in accordance with Regulation 87(1) (c) of the Income Tax (Pay as you earn) Regulations.

25 15. In addition to the above requirements an employer is due to file an annual return if Class 1A National insurance contributions are due upon the employee benefits paid. The P11D(b) return is due to be filed by 06 July following the end of the year to which it relates. Regulation 80(1) Social Security (contributions) Regulations 2001. (SI2001/1004). The return must show the following information:

30 " (a) such particulars as they may require for the identification of the employer;

(b) the year to which the return relates;

(c) the amounts which are emoluments in respect of which a Class 1A contribution is payable; and

35 (d) the amount of any Class 1A contribution payable in respect of that year."

16. If the return is not filed by the due date a penalty is payable in the sum of £100 per month, or part month, of the default period, Regulation 81(2) & (4) Social Security (contributions) Regulations. Regulation 81(5) provides:

“The total penalty payable ...shall not exceed the total amount of class 1A contributions payable”

17. This Tribunal may set aside the penalty if it appears ..that no penalty has been incurred” s100B(2) TMA and Regulation 82(1) Social Security (contributions) Regulations.

The arguments

18. Dr Al-Mukhtar maintains that he is not required to file a return as no benefits have been paid.

19. HMRC state that the company has a statutory obligation to file the return in accordance with the Regulations

Reasons for decision

20. I accept that Dr Al-Mukhtar is the sole director of the company. However Regulation 80(1) of the Social Security (contributions) Regulations provides that the return must be made when the employer pays “employee benefits”. There is no distinction between the requirements imposed for “sole director” companies and larger organisations with several employees.

21. I have found as a fact that Dr Al-Mukhtar was an employee of the company and that he received employee benefits in the form of a beneficial loan. Accordingly I find that the company was required to file a P11D(b) return in accordance with Regulation 80(1) of the Social Security (contributions) Regulations.

22. I find that the penalty has been correctly calculated taking into account the number of employees and the period of the default.

Reasonable excuse

The law

23. A penalty will not be chargeable if the employer has a “reasonable excuse” for the late filing of the return Regulation 81(9) Social Security (contributions) Regulations.

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

25. The taxpayer has the burden of proving that there was a reasonable excuse.

The arguments

26. Dr Al-Mukhtar submits that the return was not required as he believed there no legal requirement to do so.

27. HMRC submit that Dr Al-Mukhtar had filed a return for the previous year and was sent two reminders of the requirement to file the return for the year 2012-13.

Reasons for decision

5 28. I find that Dr Al-Mukhtar would have been aware of the requirement to file the P11D(b) return because he had incurred a similar penalty in the previous tax year and he was sent two reminders before the due date. In addition information regarding the requirement to file the return is available on HMRC's website. If in doubt Dr Al-Mukhtar could have sought advice from HMRC but there is no evidence that he did so.

10 29. I also note that the return remains outstanding and Dr Al-Mukhtar has not provided any explanation for the continuing failure to file the return.

30. For these reasons I do not find that there is a reasonable excuse for the late submission of the return throughout the period of the default.

Proportionality

15 *The law*

31. 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 procedures adopted by HMRC for issuing similar monthly penalties imposed for the late submission of Employers Annual returns. It was decided that HMRC had acted lawfully in allowing such penalties to accumulate for four months before issuing the first interim penalty.

32. The case also established that this Tribunal has no power to discharge penalties on the grounds of fairness. Mr Justice Warren commented at [58] of the judgement:

25 "in purporting to discharge the penalties on the grounds that their imposition was unfair the Tribunal was acting in excess of its jurisdiction".

The arguments

30 33. Dr Al-Mukhtar submits that HMRC have acted unfairly in waiting four months to issue the first penalty of £400. He also states that HMRC are unfairly targeting small companies such as his.

34. HMRC submit that the penalty has been correctly imposed in accordance with the legislation. They do not accept that the company has been targeted or that they have acted unfairly.

Reasons for decision

35 35. I accept that HMRC did not issue the first penalty until the return had been outstanding for four months. However the case of *Hok limited* above has established that HMRC have acted lawfully in delaying the issue of the first penalty for a period

of four months. HMRC do not have the power to reduce the penalty to reflect the declared NIC payable in accordance with Regulation 81(5) of the Social Security (contributions) Regulations because no return has yet been submitted.

5 36. I do not find that Dr Al-Mukhtar has been unfairly targeted for the imposition of this penalty as he has not provided any evidence in support of this assertion. The penalty has been correctly imposed in accordance with the legislation and this Tribunal has no jurisdiction to cancel lawful penalties on the grounds of fairness. *Hok limited (above)*

Decision

10 37. The appellant is liable for the penalty.

38. There is no reasonable excuse for the failure to submit the return.

39. The penalty imposed is proportionate.

40. The appeal against the penalty of £400 is dismissed.

Right of appeal

15 41. 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
20 “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: 21 May 2014

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