



TC03713

Appeal number: TC/2011/08318

PAYE – employer’s annual return – penalty for late submission – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ADLEME INTERNATIONAL LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 04.06.2014 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 10.10.2011 (with enclosures), HMRC’s Statement of Case submitted on 25.11.2011 (with enclosures)[and the Appellant’s Reply dated 22.11.2011 (with enclosures).

DECISION

5 1. The Tribunal decided that the Late Filing Penalty Notice dated 26.05.2011 in the sum of £100 was properly issued by the Respondents.

2. The appeal is dismissed.

3. The Tribunal found that the filing date for the Appellant's Employer Annual Return for the year 2010-2011 (forms P35 and P14) was 19.05.2011. The Return was filed online on 23.05.2011 i.e. four days late.

10 4. The Tribunal further found that there was no reasonable excuse for the failure to file the Employer Annual Return on time.

15 5. The Appellants have at all material times acted through their agents John D Kilby & Co. It is not in dispute that reliance upon a third party cannot constitute a reasonable excuse. The Respondents have correctly observed, in the Statement of Case, that the responsibility for filing the Return on time rests solely with the employer and this responsibility cannot be transferred to an agent working on his behalf.

20 6. The Appellant Company was incorporated on 04.06.2009. An Employer PAYE scheme had a date of commencement of 06.04.2010. The PAYE scheme itself was set up on 18.05.2010; the Respondents complain that the letter informing them of this, and revealing the PAYE reference number, was not received until 23.05.2011, four days after the deadline for submission of the Annual Return; they say that they could not, therefore, file the Return by 19.05.2011.

25 7. The Respondents say that they issued a form CT41G (New Company details) to the Appellants on 25.06.2009 but there is no record of it being returned. The Appellants say that their agent returned it to the Respondents on 05.11.2010. Their agent sent the Respondents a copy of this form with their letter dated 26.09.2011 and a copy is reproduced in the Tribunal submission bundle. It is noted that the Appellant's agent has placed a line in the box at No 15 indicating that no HMRC
30 office is dealing with the Company's PAYE.

8. The Tribunal cannot form a view as to whether the Appellants sent, and the Respondents received, the form CT41G in or about November 2011 but if it was sent at that time there is no explanation for the apparent delay of sixteen months.

35 9. Even if the form CT41G was returned to the Respondents there is no obligation upon them to ensure that a PAYE record is set up upon its receipt. In this case no PAYE record was set up and the absence of information about the appropriate HMRC office would in any case have been a hindrance to the Respondents.

10. The Tribunal accepts the Respondent's argument, in the Statement of Case, that a prudent employer and/or agent would have taken steps to ensure that a PAYE

scheme was set up from the inception of the business in order to ensure that all relevant literature was issued including a payslip booklet or reference number to enable payments to be allocated to the correct account.

5 11. The Appellants could have availed themselves of telephone or email facilities to undertake the registration process for employers (HMRC literature reproduced at Folio 14 of the Respondents' Statement of Case refers).

10 12. Eventually the PAYE scheme was set up on 17.05.2011, two days before the deadline for submitting the Annual Return. There was insufficient time for the Respondents to process this before the deadline. No blame can be attached to the Respondents in this respect. More timely action by the Appellants or their agents would have avoided the default that eventually occurred.

13. The Tribunal acknowledges that although no end of year Return for 2009-2010 was submitted by the Appellants no payments were made to employees until 2010-2011. Consequently no forms P35 or P14 were due for 2009-2010.

15 14. Ultimately it is the responsibility of the employer to ensure that Annual Returns are filed on time. In this case the Appellants have failed to meet their statutory obligations.

20 15. The test applied by the Tribunal in considering the matter of reasonable excuse is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the Return would become due on a particular date would not have avoided the default. The facts and chronology of events, set out in the Notice of Appeal, the Respondents' Statement of Case and in the Appellants' Reply, disclose that such foresight and diligence would have avoided the default.

25 16. The Appellant's agent has submitted, in their letter dated 22.12.2011, that the imposition of the penalty is disproportionate, unjust and unfair. Those arguments have already been disposed of by the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC) and *HMRC v Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC). In the former it was made clear that the First-tier Tribunal has no jurisdiction to determine the fairness of a penalty imposed by statute. It is plain from a perusal of 30 the latter that a penalty of the magnitude of that imposed in this case could not be described as disproportionate even if there were jurisdiction to deal with the argument.

35 17. 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.

**WDF COVERDALE
TRIBUNAL JUDGE**

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