TC01794

Appeal number: TC/2011/03649

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

DUNSEVERICK BAPTIST CHURCH **Appellant**

- and -

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

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 20 January 2012 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 6 May 2011, HMRC's Statement of Case dated 10 June 2011, and other papers in the case.

DECISION

Introduction

1. The Appellant appeals against penalties totalling £400, imposed in respect of the late filing of its P35 employer's annual return for the tax year 2009/10. The deadline for filing the return was 19 May 2010.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that Section 98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

> (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
>
> (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, ...
>
> (3) For the purposes of subsection (2)(*a*) above, the relevant monthly amount in the case of a failure to make a return—
>
> (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, ...

4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the 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
>
> (iii) if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount.

5. Section 118(2) of the TMA provides as follows:

> (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or

> the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

The arguments of the parties

6. The Appellant's notice of appeal states the following. The Minister of the church has been there for 12 years. When he came, aspects relating to pay were new to him and to the church's treasurer. The Minister took responsibility for filing online returns, but was never sent an activation code to activate the service. The Minister genuinely believed that all had been submitted correctly and was not aware that the activation code that had not been sent was required. It was only when the penalty notice arrived that it was realised that something was wrong. The Minister and treasurer made phone calls to HMRC and were told that there was "nothing to worry about". The church nonetheless continued to receive letters stating that the penalty was applicable. The church called HMRC, and were told that the letters were "computer generated and not to worry". The notice of appeal gives the date and time and name of an HMRC official to whom one of the calls was made. However, the church received a further penalty notice.

7. The HMRC statement of case states amongst other matters as follows. The Appellant registered for online filing on 17 May 2010. There was no reason why the Appellant did not receive the activation code. The registration subsequently dropped off the system as the Appellant had not activated the code within 28 days. The Appellant reenrolled for the online service on 11 October 2010, and the service was activated on 22 October 2010. It was not until 4 February 2011 that the return was finally filed.

8. HMRC further submits as follows. Information about the PAYE system and online services is widely available and HMRC has helplines and public counters. Ignorance of the legislation is no excuse. After filing an online return, an acceptance or rejection message indicates if the submission was successful. There is no explanation for the delay in filing the return after the penalty notice was issued. HMRC have no discretion as to the level of penalty imposed as it is fixed by legislation. The Appellant has not established a reasonable excuse.

The subsequent procedure

9. After considering the notice of appeal and HMRC statement of case, the Tribunal issued directions to the parties. The directions noted the following.

> 4. The HMRC statement of case includes evidence in the form of an e-mail from HMRC's online services (folio 15) stating that the Appellant registered online on 17 May 2010, but at that point still needed an activation code. The e-mail states that "I can't see any underlying reason why they haven't received their activation code". However,

that e-mail stops short of confirming positively that an activation code was in fact sent. The e-mail states "one thing that does show is that they requested a replacement code two minutes after registering (no idea why)". The submissions of the parties to not expressly address this point. If the request was made within two minutes after registering, it presumably was, or at least was intended to be, an initial request for an activation code, rather than a request for a replacement activation code. If the Appellant requested an activation code at the time of registering, the Appellant was presumably aware that an activation code was required.

5. The e-mail then states that "They re-enrolled for the service on 11 October and activated on 22 October". The Appellant has not addressed in its submissions the question of why, if the Appellant's online registration had been activated on 22 October 2010, it took until 4 February 2011 for the Appellant to file the return.

6. The Tribunal does not consider that the evidence presently before it is sufficient to form a satisfactory basis for deciding this appeal. In any further submissions filed pursuant to these directions, the Appellant is invited to clarify whether it is the Appellant's case that it did not know that it required an activation code until the penalty was issued, or that the Appellant knew that it required an activation code but never received one. The Appellant is further invited to give more specific details of any steps that it took to obtain an activation code and to file the return, and further details of the conversations with the HMRC Helpline. The Appellant is also invited to give further details of why it believed, prior to receiving the penalty notice, that the return had been validly filed.

7. Although the burden is on the Appellant to establish a reasonable excuse, it appears to the Tribunal that HMRC should first confirm whether it has any further records of the communications that the Appellant had with HMRC in relation to this matter. It is noted that the HMRC statement of case already says that "HMRC cannot trace the exact calls as referred to by the Appellant". If HMRC has no further records, it can so confirm.

10. The following directions were accordingly given:

1. Within 28 days of the date of release of these directions, HMRC shall file with the Tribunal and serve on the Appellant any further records that HMRC have in relation to telephone or other communications between HMRC and the Appellant or Pastor Marc Taylor Mr Daniel McCurdy concerning the Appellant's efforts to register for PAYE online services and to obtain an activation code for that purpose, or concerning the penalty to which this appeal relates, and any further submissions of HMRC in relation to that material. If HMRC have no such further records, it shall so confirm to the Tribunal and to the Appellant.

2. Within 28 days of the date of service of any HMRC evidence or submissions or confirmation in accordance with Direction 1, the Appellant may file with the Tribunal and serve on HMRC any further

> evidence and/or submissions on which the Appellant wishes to rely in this appeal.
>
> 3. The Tribunal will thereafter proceed to give its determination in this appeal without a hearing, unless either party requests a hearing.

11. In response to the first of these directions, the Tribunal received a two line letter from HMRC stating that "please be advised that HMRC have no further records to submit".

12. No response was received from the Appellant in response to the second of the directions. The Tribunal was informed by the Courts and Tribunals Service that the Appellant had been chased but that nothing had been received by way of response. The Tribunal is thus required to give its determination on the basis of the evidence that it has.

The Tribunal's findings

13. The Tribunal must determine this appeal on the basis of the evidence before it, making findings of fact on a balance of probabilities.

14. The notice of appeal states that the Appellant "genuinely believed that we had submitted all correctly". On the other hand, it states that the Appellant was "not aware that the activation code that had not been sent was required".

15. It seems however that online filing is impossible without an activation code. It is very hard to imagine how the Appellant could, without an activation code, have used the online filing system in a way and to a point that they genuinely believed that the return had been filed online correctly. The HMRC evidence is that the Appellant never activated their registration. The Appellant suggests that this is because they never received the activation code, but if this is the case, it is difficult to see how the Appellant could possibly have believed that the return had been filed correctly. That is why the directions expressly invited the Appellant "to give further details of why it believed, prior to receiving the penalty notice, that the return had been validly filed".

16. As to the contentions about the subsequent telephone calls to HMRC, the information given in the notice of appeal was vague. The Tribunal directed HMRC to provide any further records that it has of such phone calls. HMRC responded that it had none. The directions expressly invited the Appellant "to give ... further details of the conversations with the HMRC Helpline". The Appellant did not do so.

17. The directions that the Tribunal issued pointed out problems with the Appellant's case, and provided the Appellant with an opportunity to present further evidence and submission to clarify. The Appellant has not taken up that opportunity. Even without drawing any inferences from that failure, the fact remains that the burden is on the Appellant to establish that its appeal should succeed.

18. On the basis of the evidence before it, the Tribunal is satisfied that the penalties were imposed in accordance with the applicable legislation. The Tribunal is not

satisfied that the Appellant has a reasonable excuse for the late filing of its employer's annual return. It follows that the appeal must be dismissed.

Conclusion

19. Under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

20. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE
RELEASE DATE: 31/01/2012