TC02894

Appeal number: TC/2012/03534

INCOME TAX – penalty for late return of P35 - whether year end return was filed timeously - third party software - reasonable excuse – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RENNIE SMITH & CO **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
HELEN M DUNN, LLB

Sitting in public at Wellington House, 134-136 Wellington Street, Glasgow on 19 July 2013

Mr and Mrs Smith for the Appellant

Mr William Kelly, Officer of HMRC, for the Respondents

DECISION

Introduction

1. This appeal relates to a penalty notice in the sum of £400 issued by HMRC on 26 September 2011. The penalty was imposed under section 98A(2)(a) Taxes Management Act (TMA) 1970 in relation to a failure to file a complete and correct P35 Return by the due date under Regulation 73 of the Income Tax (Pay As You Earn) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001. The appellant appealed on the basis that they believed that they had a reasonable excuse in terms of section 118(2) TMA 1970.

2. It was a matter of agreement between the parties that in terms of the relevant legislation the Return had to be filed with HMRC by no later than 19 May following the end of the tax year. It was the appellant's contention that they had done so whereas HMRC argued that the Return was filed on 24 November 2011.

3. Mr Smith repeatedly indicated that he wished to refer to HMRC's treatment of other taxpayers and in particular the treatment of clients of his firm. The Tribunal repeatedly had to emphasise the limits of their jurisdiction and in particular that the only matter with which they could be concerned was the decision that was the subject matter of this appeal. HMRC's handling of the affairs of other taxpayers, whether or not they were clients of the appellant, could not be considered or taken into account. This is not the forum for such issues. Accordingly to that extent, the Tribunal did not hear evidence as to HMRC's treatment of, and attitude to, other taxpayers who were clients of the appellant.

4. Prior to the hearing HMRC had requested that the Tribunal issue a Direction requiring the appellant to produce to the Tribunal and HMRC a copy of any email confirming that the appellant had successfully submitted the P35. The appellant had requested a Direction that HMRC produce to the Tribunal and to them, a copy of any email, which confirmed that the P35 had either been successfully received or rejected. The Tribunal declined to issue either Direction specifying that the existence or otherwise of such emails would be a matter for the Tribunal to consider and weigh in the balance and that in the context of all of the other evidence at the substantive hearing of the appeal.

The appellant's bundle

5. This appeal had been categorised as "basic" in terms of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). On 26 February 2013 the Tribunal intimated to the appellant that they should bring with them to the hearing all documents etc which they wished the Tribunal to consider. That letter also stated "If you intend to rely upon any documents that you have not previously sent to HMRC, please send copies of them to the Tribunal and HMRC so that they are received at least 21 days before the hearing. If you do not do so, the Tribunal may refuse to let you rely on them at the hearing."

6. On the morning of the appeal the appellant lodged a bundle extending to some 55 pages. At the outset of the hearing, it was agreed that, following a brief perusal, a number of the papers in that bundle were duplicates of papers in HMRC's bundle. In particular, Folio 3 being the letter of appeal with enclosures, Folios 9 to 10 being the response from HMRC, and Folios 15-21 being the Notice of Appeal were already in HMRC's bundle. It was agreed that for ease of reference, where there were copies in both bundles then the Tribunal would refer to HMRC's bundles as the Tribunal, and the appellant, had had prior intimation of that and had perused it prior to the Hearing. Both bundles were referred to in the Hearing.

7. The appellant's bundle also included information relating to clients of the appellant. Appellant's Folio 31 relates to an unidentified client of the appellant and it is the same client for whom there is documentation at Folios 5-7 of HMRC's bundle. Appellant's Folio 32 relates to the same client and to another client. Appellant's Folios 33 and 34, which are dated April and June 2013, also appear to relate to a client since neither carry the appellant's reference. Appellant's Folios 54 and 55, which are both dated 7 April 2011, are HMRC emails relating to successful online submission for other clients. They are in the standard form and read:

"Thank you for sending the PAYE End Year submission on line.

The submission for reference … was successfully received on 07-04-2011. 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".

8. The anonymised annual return reminder and P35 interim penalty letter dated April and May 2013 at appellant's Folios 52 and 53 were not relevant to this appeal since they relate to subsequent tax years and had been produced to show a change in practice. The Tribunal has no jurisdiction to look at HMRC's practice and procedure particularly in regard to perceived fairness or otherwise. The Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) re-affirmed the First-tier Tribunal's limited jurisdiction in respect of penalty appeals, and in particular emphasised that it had no statutory power to adjust a penalty on the grounds of fairness.

9. Copies of *Rushworth Furniture Ltd* TC/2011/01868, *Ballysillan Community Forum* TC/2011/01121 and *Louise Fernandez* TC/2011/00378 were also included

10. Mr Kelly did not seek an adjournment to consider the appellant's bundle in detail.

The Appeal

11. The Notice of Appeal dated 27 February 2012 was lodged with the Tribunal and the grounds of appeal were that (a) they had logged on to the online filing system on 29 March 2011 so any failure to submit the P35 was due to an error within HMRC's system, and (b) HMRC had acted unreasonably in delaying the issue of a warning notice and penalty until September 2011 and in support thereof they relied on *inter alia* the decision in *HMD Response Internal v Revenue and Customs.*

12. The Appeal was sisted pending the issue of the decision in *HMRC v Hok Ltd* 2012 UKUT 366 (TCC) released on 23 October 2012.

13. Following the recall of the sist the appellant intimated that they wished to continue with the appeal and that their basis for so doing was on the grounds of reasonable excuse in terms of Section 118 Taxes Management Act 1970, as amended. There was no dispute between the parties about the legislation relevant to this appeal so we do not rehearse it in this decision.

The issues

14. Although the appellant latterly argued that the only basis for the appeal was reasonable excuse, we found that there were two issues. Firstly, was the return filed timeously? Secondly, if the return was late, was there a reasonable excuse for the late filing?

The burden of proof

15. The onus of proof in a penalty case is on HMRC (*Jussila v Finland* (73053/01) ECtHR (Grand Chamber)). Therefore it is for HMRC to establish that the return was filed late.

16. As far as the question of reasonable excuse is concerned, the burden of proof lies with the appellant.

Background findings in fact

17. The appellant is a firm of Chartered Accountants and the partners are Mr and Mrs Smith. They provide a wide range of financial, tax and accountancy services and included in that is the provision of payroll services to 30 clients. Mrs Smith was responsible for that and it involved end of year filing for approximately 30 clients (her husband said 40 clients).

18. The firm had registered their e-mail address with HMRC and used that address not only for their contact with HMRC for their clients but also for themselves. In their dealings with HMRC for themselves, they did so as agents for the firm, not as principals.

19. The appellant was conversant with online filing to the extent that it was offered as a service for clients and they used third party software to do so. It was approved third party software called Iris. It was utilised for the appellant's own return. Mr Smith's evidence that they were very experienced and did not do test submissions online was accepted.

20. It was not disputed that HMRC's records show that the appellant logged on to HMRC's Government Gateway, via Iris, on the morning of 29 March 2011, nor that HMRC have no record that the P35 was submitted successfully on that date. It is not disputed that neither an acceptance nor a rejection email was received by the appellant.

21. It is not disputed that the appellant's P14/P35 Internet Filing Summary, from Iris, which was printed at 10.40 on 29 March 2011 is accurate as to the information input. Mr Smith was clear that that was the only record they held, in March, in relation to filing of the return.

22. The Penalty Notice was issued on 26 September 2011. When the appellant received the Penalty Notice, it was appealed (together with appeals for clients) on 6 October 2011. The letter of appeal submitted hard copy interrogations of Iris dated 3 October 2011 as evidence that they had filed timeously. In correspondence, HMRC described that as "computer speak". Neither party could explain what they meant, but see paragraph 25 below.

23. HMRC's records, at Folio 18 and also produced at appellant's Folio 35 disclose that the return was successfully submitted electronically on 24 November 2011 and a further attempt was made on 29 November but was rejected. Appellant's Folio 36 is the standard e-mail, dated 24 November 2011 at 15.29, stating that there has been successful transmission but explains that if it was a test transmission it would still need to be sent live. The appellant's Folio 37 shows a rejection of the same return. Since the return had been accepted five days previously that is unsurprising. It was not disputed that a return can only be submitted once electronically.

The reasons for the decision and further findings in fact

24. There is no doubt that it is for HMRC to prove that the required end of year filing did not take place by 19 May 2011. That does not mean that the Tribunal looks only at what is produced by HMRC. On the contrary we must consider and weigh all of the evidence. Mr Kelly argued that although Mrs Smith had successfully logged onto the appellant's account on 29 March 2011, the P35 had not been submitted. It is HMRC's argument that whilst that information was completed online, it simply was not submitted to HMRC on that date.

25. Online Services had confirmed that there were no technical problems with HMRC's system on 29 March 2011. Indeed the system must have been live and operating appropriately since Online Services have confirmed that Mrs Smith logged on to the system.

26. Mr Kelly had sought advice from digital specialists to explain the hard copy interrogations of Iris. He confirmed that it was not in fact "computer speak". It is a record of the information that is input on to Iris. That made sense to the Tribunal. He then explained that the software enables a taxpayer to work on a return, in whole or in part, and the information is retained within the third party software until such time as, in his words, the taxpayer "presses submit". Effectively Iris, and other third party software, is an interface between the taxpayer and HMRC. When the return is submitted, it will either be a test submission or a final submission. In either case the automatically generated response from HMRC is instantly issued (see paragraph 7 above). Whilst the appellant has produced copies of such responses for their clients they have no such response for themselves for that tax year until November 2011.

27. It is agreed that the return was successfully filed electronically on 24 November 2011. A return can only be filed once, as is evidenced by the rejection five days later. Mr Kelly argued that the fact that it was possible to file in November was very clear evidence that no return had been filed before then. The Tribunal accept that, on the face of it, that is the situation, and that the return would appear to have only been successfully filed in November. However, we also have to weigh the conflicting evidence.

Mrs Smith's evidence

28. Mrs Smith gave clear and credible evidence to the Tribunal. She did log on to the system, via Iris, in her capacity as Rennie Smith & Co, as agent for the appellant itself. The pay and salary details for March had been finalised so she wished to file the return as promptly as possible and her intention was to file the firm's own return first to ensure that there were no problems. When she had completed the return, she printed out the Internet Filing Summary from Iris at 10.40 am. She filed it.

29. Having done so she then proceeded to submit returns for clients such as the two examples produced which were submitted on 30 March 2011 and 27 April 2011.

30. She believed, and believes, that she had successfully logged on to the HMRC system via Iris and that she had submitted the return timeously. She told us that since she did not receive a message from Iris indicating that there was any problem she assumed that the return had been filed. She had faith in Iris, which she described as being "very good with problems". It was only when the firm received the Penalty Notice in September 2011 that she realised that HMRC had apparently not received the return. She delayed in filing online at that stage because she wished to contact Iris to ascertain what had happened. She also searched the appellant's records to check if there had been any e-mail traffic in regard to the filing of the return and there was none.

Iris interrogations

31. It was on 3 October 2011 that the appellant was able to interrogate Iris to ascertain what had been done in March. Those were the printouts produced to HMRC with the letter of appeal and described by HMRC as "computer speak" in their then response.

32. At the hearing, looking to the Folios in HMRC's bundle, as agreed, neither party could explain any entry in those folios. It was certainly not drawn to the Tribunal's attention that the copies in HMRC's bundle differed from those in the appellant's bundle. The only commentary at the hearing was to identify that Folios 5 – 10 related to clients.

33. It was only when drafting the summary of reasons for the Summary Decision that we attempted to analyse those interrogations and came to what was described as a "logical inference" that there was a difference between what was done for the clients and what was done for the appellant. When drafting this full decision, and noting that the folios relating to the interrogations were not identical in both bundles and that HMRC's folios were in fact not complete, the same inference cannot be drawn. It is

clear now that the interrogations are the same. That does not tell the Tribunal anything since no one could explain the import of the interrogations. For the avoidance of any doubt, in detailed discussion immediately after the Hearing, and for the reasons set out in this decision, we decided that the appeal had failed. The inference drawn from the analysis of the interrogations appeared to significantly bolster that reasoning. It did not change it. The absence of that inference does not change it.

Was the return filed timeously?

34. We find that on the balance of probability the Iris interrogation(s) are a record of the information that Mrs Smith placed on Iris but we cannot go further and state that it demonstrates that it was submitted. We do not know what the final entry "</GovTalkMessage>" means. A similar entry appears at the beginning of the interrogation and certainly that was not the return being filed.

35. We accepted Mr Kelly's explanation as to the way third party software operated as an interface. We accepted that Mrs Smith did input the information onto Iris. Amongst many arguments Mr Smith suggested that HMRC's computer system must have failed. Is it likely that the HMRC computer system suffered from a glitch and totally failed to receive the return? Whilst theoretically that is possible, we do not accept that in these circumstances. It recorded the log in and we have confirmation that there were no problems on that date. We have seen other cases where HMRC have confirmed that the system was "down". In those cases the third party software has told the taxpayer that it was impossible to file the return. On the balance of probability, we find that the most likely explanation is that whilst the information was loaded onto Iris, the next step, which was to then have Iris submit it to HMRC, was not taken. We accept that that would have been inadvertent.

36. Mr Smith argued that if he failed in this appeal he would appeal to the Upper Tribunal and seek a Direction requiring HMRC to produce the records for 2010. He believed that since it had been possible for the return to be filed in November 2011, the return allegedly submitted in March must have been wrongly "filed" by HMRC as if it was for the tax year to 5 April 2010. No evidence was produced in support of that assertion. He had not raised that point previously as he had only thought about it when preparing the appeal. He accepted that there could be no adjournment of the Hearing to allow him to explore any argument on that point more fully and that that was why he would take it to the Upper Tribunal. In any event, we certainly do not accept that argument; there is no evidence to support it and it seems inherently extraordinarily unlikely. In any event, there will have been a return submitted for the previous year and if there had been an attempt to submit a further return that would have generated a response, just as the two attempts in November 2011 generated two responses.

37. We have no difficulty in finding that on the balance of probabilities, HMRC have clearly demonstrated that no electronic return was received and processed until 24 November 2011. Accordingly, the return was not filed timeously and the penalty is triggered.

Was there a reasonable excuse?

38. The legislation does not define a reasonable excuse. Reasonable means exactly that and has to be considered in light of the whole circumstances of any particular case. Taxpayers are expected to act with reasonable prudence and diligence in attending to their tax affairs.

39. We are not dealing here with a novice at online filing. The appellant repeatedly stated that they are very experienced. Quite apart from anything else they had access to the extensive online guidance provided by HMRC. Although HMRC had produced a copy of their guidance for filing online returns, unfortunately the version in the papers was that for 2012-13 and there had been changes in the interim. However, the Tribunal is conversant with the version available in 2010-11 having seen it in connection with other appeals many times and it is still available online at http://www.hm-online.net/paye/payroll/year-end/annual-return.htm. The relevant point is that, although that version did not tell taxpayers to contact the helpline if no response is received, it did read as follows:

"Acceptance and rejection messages when you file online

After you file your Employer Annual Return online, you'll get an acceptance or rejection message through the software or service you use. If you've provided HMRC with an email address, you'll also get an email message. These messages are usually issued within a minute of filing, but it can take longer if your return covers a large number of employees.

If your return is successful, you'll get the following messages:

- Software - '9004: the EOY Return has been processed and passed full validation'
- Email - 'The submission for [your PAYE reference] was successfully received on [date]. 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'

If your return is rejected, you'll get the following message instead:

- Software - your message will highlight the area(s) of your return that have led to its rejection.
- Email - 'The submission for reference [your PAYE reference] was received on [date]. Unfortunately it could not be accepted as it failed data checks. To correct this, please use the help provided within the software you used to complete your form and send it again'"

40. The appellant had provided HMRC with an e-mail address (info@renniesmith.co.uk) and so should have expected to receive an acceptance or rejection message and an e-mail. None of these was received. Mrs Smith confirmed that after the penalty notice was received she had checked her inbox and there had been no communication from HMRC in relation to the firm's Return.

41. The appellant had produced at appellant's Folio 31 an example of an acceptance message for a client, which was received on 30 March 2011. At a bare minimum, the confirmation emails received for clients on 30 March, and 7 April 2011 should have meant that the appellant should have questioned why nothing similar had been

received in relation to their own return. Mr Smith's argument on that point was to challenge the Tribunal and ask how long should a taxpayer have to sit and wait for a message? That is quite simply not the point.

42. Was Mrs Smith's belief that because she had received nothing from Iris a reasonable excuse? We find that it is not. The basic point is that in the absence of contact from HMRC, successful filing cannot be presumed.

43. We do not find that the fact that Mrs Smith assumed that the filing of the appellant's own return had been successful, because it had not been rejected and she had heard nothing from HMRC or Iris, can amount to a reasonable excuse. The reason that the filing was not successful is not material. The absence of an e-mail confirmation alone, either positive or negative, meant that the P35 had not been successfully filed. A prudent advisor, let alone a prudent taxpayer should have known that.

44. Mr Smith argued that they had more than 40 clients and it was sometimes difficult to match the e mails with the appropriate references. That is not a reasonable excuse for a professional office.

45. Lastly, by no later than the receipt of the Notice of Penalty on 26 September 2011, the appellant knew that apparently no electronic return had been received. The interrogation of Iris was in early October. The return was only filed at the end of November. Even, if there had been a reasonable excuse at any stage, which is not accepted, there was no excuse latterly. The reasonable excuse must subsist throughout the period of the default.

46. In summary, the issues for the Tribunal are quite clear. Was the return late? It was. If so, has the penalty been correctly calculated? It was. Did the appellant have a reasonable excuse for the late filing? For the reasons set out herein we find that there was no reasonable excuse on the facts found. Accordingly the Appeal must fail.

47. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 24 September 2013