



TC03427

Appeal number: TC/2012/05410

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CARRYDUFF BUILDING SUPPLIES LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE IAN W. HUDDLESTON
MR JOHN ADRAIN FCA**

Sitting in public at Belfast on 21 October 2013

Lynn Long, Officer, appeared for HMRC

**Michelle Morgan and Ronan Bradley, Accountants of Maguire Farrelly
appeared on behalf of the Appellant**

DECISION

Nature of Appeal

1. This is an appeal against penalties imposed under Section 98 (A) (2) and (3) of the Taxes Management Act ("TMA") 1970 for the late filing of an employers annual return for PAYE for the tax year 2010 to 2011. Regulation 73 (1) of the Income Tax (Pay as You Earn) Regulations 2003 requires an employer to deliver a complete return before the 19 May following the end of each tax year. Each return must include specified information both in relation to the employees and the deductions which are made under the PAYE and NIC schemes. If the return is not received by the due date the employer is liable to a penalty pursuant to Section 98 A (2) (A) and (3) TMA 1970 which are calculated at the rate of £100 per month (or part month) for each batch of 50 employees.

Reasonable Excuse

2. Section 118 (2) TMA 1970 provides a defence for employer who has a reasonable excuse for the late filing of their return. Whilst there is no statutory definition of reasonable excuse there are a number of decided cases which provide guidance to the Tribunal the effect of which is to suggest that "reasonable excuse" "is a matter to be considered in the light of all the circumstances of the particular case" (Rowland v HMRC) [2006] STC 536 paragraph 18).

The Facts

3. Carryduff Building Supplies Limited (the Appellant) was required to file an employer return (P35 and P14s) for the year 2010 to 2011 before the 19 May 2011. From 2009 to 2010 onwards this return had to be filed on line.
4. It would seem from the evidence that HMRC sent an electronic reminder to the Appellant on the 12 February 2011.
5. HMRC say that the return was not submitted by the due date and, therefore, a late filing penalty notice was sent to the Appellant on the 26 September 2011 for £400 for the period 20 May 2011 to 19 September 2011. A second penalty notice was sent on the 30 January 2012 for £400 for the period 20 September 2011 to the 19 January 2012 and a third penalty notice was sent on the 29 May 2012 for £400 for the period 20 January 2012 to 19 May 2012.
6. On the facts of the case HMRC say that the employer annual return was only finally filed on the 19 December 2012 through the on-line system and an acknowledgement created on that day.

The Appellant's Case

7. The Appellant was represented by Maguire & Farry as accountants who, broadly speaking, have appealed against the penalty on the following grounds:-
- that their client both prepared and submitted the annual return on 4 April 2011 and was confident that it was "submitted" to HMRC on line on that date;

- that they were not aware until the penalty notice was received that the submission had not gone through;
- that the Appellant has otherwise an impeccable record of filing;
- 5 • that it took HMRC four months to issue the notification that the return had not been received;
- that the penalty amount should be mitigated.

8. After correspondence between the parties HMRC carried out a review and issued a review conclusion on the 12 April 2012 the outcome of which was that HMRC's decision should be upheld.

10 9. On the 1 May 2012 the Appellant notified their appeal to the Appellant giving the following grounds as the basis of their appeal: "that the Appellant had processed their forms on the 4 April 2011 as they were keen to submit at the earliest opportunity; if they had been made aware of the non-receipt they would have acted much sooner to resolve the confusion;

- 15 • that the policy of issuing penalty notices only after four months is very unfair;
- that the Appellant had an exemplary record;
- the fact that all PAYE payments were up to date by the 19 April 2012 should mean that any penalty is capped at £100."

20 *HMRC's Case*

10. HMRC's case is straightforward namely that the legislation imposes an obligation on all employers to submit their annual returns before the due date.

11. In the present circumstances HMRC take the view that the Appellant's simply failed to achieve correct submission of the return and that as a consequence the penalty became automatically due and that the penalty charge itself is correct and is
25 fixed in legislation and - applying the principles set down in the case of HOK Limited entirely proportionate.

12. Further HMRC assert that there is nothing on the facts which constitutes "reasonable excuse" for the employer's delay within the context of the statutory
30 defence incorporated in Section 118(2) Taxes Management Act 1970.

13. For all of those reasons HMRC says the appeal must fail.

The Evidence

14. We heard evidence from the Appellant's bookkeeper, Mrs Shirley Gilliland. Mrs Gilliland was a very cogent and compelling witness. She gave evidence, and indeed
35 produced, a written statement of her "payroll procedure". In relation to the return under appeal for the tax year 2010/11 she gave evidence that she completed the submission details on line in relation to the Gateway registration. According to her evidence she said that there was a time delay and that after a few minutes a message appeared on screen which stated that a receipt could not be produced at the relevant
40 time due to the high volume of submissions being processed but that a receipt would be sent to the email address provided in due course. On that basis she ended the submission process.

15. Mrs Gilliland also went on to give evidence to the effect that she continued to complete the "year end process" on the software that was used by the company. Her evidence to the Tribunal was that she would not have been able to do that had she not already completed all of the steps in the payroll year end process.

5 16. She gave evidence that she completed that process and received a "congratulations" message from the software indicating that she had completed all of the processes and that she could move forward to update the programme for the forthcoming tax year ie. 2011/12.

10 17. Mrs Gilliland, as I have said, was a compelling witness and left us in no doubt that she firmly believed that the correct processes had been followed and that a submission had been achieved. She produced "print outs" from the Appellant's system (dated 10:38 on the 5 April 2011) as evidence of what had been "completed".

15 18. Specifically on that point HMRC's response was that the submission could not have been validly achieved as evidenced, not least, by the fact that when, ultimately, an on line submission was made (on the 19 December 2012) the system was able to "accept" submission which in itself confirmed that no earlier submission could, or indeed, had been made.

20 19. Clearly there is a dispute on the evidence. The Appellant considers that a valid submission had been made because it was able to process through its own internal software. HMRC are equally clear that a submission was not made because HMRC's system was not updated.

25 20. Having heard the parties and having considered the evidence we find that Mrs Gilliland, whilst entirely diligent in what she was doing, was working on the proprietary software which the Appellant adopted for its PAYE processes. Our conclusion on the facts is that whilst that software appears to have been satisfactorily updated and allowed Mrs Gilliland to proceed to "open" a new tax year there does seem to have been a disconnect between the internal and proprietary software of the Company and HMRC's software. When the Appellant did ultimately submit its return (on the 19 December 2012) the fact that the system clearly accepted that second submission does tend to suggest that no earlier submission had, in fact, been made.

30 21. On the preliminary point, therefore, we do find that there was no actual submission by the relevant due date of 19 May 2011.

35 22. The second thrust of the Appellant's argument is that HMRC ought to have informed them of the issue much earlier than the date upon which the first penalty notice was issued (ie. some four months later). The argument was made that in the absence of knowledge of a failed submission that they could have done little to correct it - which they would have done had they known about the failure earlier. We have two observations in relation to that point. The first is that notwithstanding the penalty notice being served it did, in fact, take the Appellant approximately a further period of 40 15 months to actually complete the on line submission. Whilst we asked exactly why that was the case we did not feel we received a satisfactory answer to explain why there was that continued delay.

23. Secondly, as to the suggestion of "the unfairness" of the delay in serving penalty notices we note the Appellant's frustration but do not consider that the Appellant's perceived delay in the serving of that penalty notice constitutes of itself a reasonable excuse – which was the conclusion which the Appellant invited us to make.

5 24. What the Appellant's case boils down to is that an administrative error in the operation of a new system is sufficient to ground a finding of reasonable excuse. For the reasons given, we do not agree with that contention and on that basis dismiss the appeal.

10 25. 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)"
15 which accompanies and forms part of this decision notice.

20 **IAN W. HUDDLESTON**
TRIBUNAL JUDGE

RELEASE DATE: 19 March 2014

