TC06638

Appeal number: TC/2017/08024

EMPLOYMENT INTERMEDIARIES RETURNS - penalties for failing to file returns for three periods - no evidence that an authorised officer of the Board made a determination under section 100 TMA 1970 - HMRC policy seemingly inconsistent with the law - appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EXPION SILVERSTONE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 20 June 2018 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 2 November 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 20 December 2017 and various correspondence between the parties.

DECISION

Nature of the appeal

1. This is an appeal against a penalty for £1750 (in fact three penalties; one of £250, one of £500 and one of £1,000) imposed by the respondents (or "**HMRC**") under section 98(1)(b) of the Taxes Management Act 1970 ("**TMA 1970**") for the failure to file Employment Intermediaries returns (the "**Returns**") on time under regulation 84F of the Income Tax (PAYE) Regulations 2003 for three tax quarters ending 5 July 2016 (£250), 5 October 2016 (£500) and 5 January 2017 (£1,000).

Employment Intermediaries returns

2. An employment intermediary within the meaning of section 716B Income Tax (Earnings and Pensions) Act 2003 must for each tax quarter provide to HMRC specified information relating to payments made to agency workers for whom it has not operated PAYE. The information to be provided is specified in Regulation G of the PAYE Regulations and must be included in a return in a form prescribed by HMRC. The return must be made no later than the end of the tax month following the end of the tax quarter using an approved method of electronic communication.

Penalties for non-compliance

3. An employment intermediary who fails to file a return for a tax quarter on time is liable to a penalty under section 98(1)(b) of TMA 1970. The relevant provisions of section 98 of TMA 1970 provide for an initial penalty not exceeding £3,000 and if the failure continues after the initial penalty has been imposed, further penalty or penalties not exceeding £600 per day.

4. The amount of a penalty is based on the number of offences in a 12 month period. The amount is £250 for the first offence, £500 for a second offence and £1,000 for a third and later offences.

5. In order to visit a penalty under section 98 of TMA 1970 for failure to deliver a timely return, HMRC must determine the penalty pursuant to the provisions of section 100 TMA 1970.

Facts

6. HMRC record the following facts in the Statement of Case. I am happy to adopt them.

> (1) HMRC's records show that the appellant filed one or more late returns during the quarters ended 5 July 2016, 5 October 2017 and 5 January 2017.
>
> (2) HMRC sent the appellant a notice of penalty assessment for £250 on 19 April 2017 for the defaults for the quarter ended 5 July 2016. This is

evidenced by an extract from HMRC's computer records (more of which below).

(3) On the same date, HMRC sent the appellant notices of penalty assessments for £500 and £1,000 for the quarters ending respectively 5 October 2016 and 5 January 2017.

(4) The extract from HMRC's computer records referred to above is a one page landscape document. It has in the left hand column the heading "charge type" and then columns showing dates, amounts and amounts outstanding. The three penalties with which this appeal is concerned are identified towards the foot of that page as charge type "EI late report penalty". The issue date for all three penalties is 19.04.2017. The due date is the same in each case, being 19.05.2017. The amounts are £1,000, £500 and £250 for the three periods. And that is it. That is the only evidence that HMRC have put forward as evidence that a valid penalty has been determined pursuant to section 100 TMA 1970.

Burden of proof etc

7. The burden of establishing that the appellant is prima facie liable to the penalties which must be assessed and notified in accordance with the law lies with HMRC. It is for them to prove each and every factual matter said to justify the imposition of the penalties on this particular taxpayer.

8. The standard of proof is the civil standard of proof namely the balance of probabilities or more likely than not.

9. I can (and should) consider the validity of the penalty notices when determining the matter to which the appeal relates – see my decision in *Barry Lennon v HMRC* [2018] UKFTT 0220 at [24(10)-(40)]

Section 100 TMA 1970

"Determination of penalties by officer of Board

100(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting at such amount as, in his opinion, is correct or appropriate.

100(2) ……..

100(2)A……

100(3) ……..

100(4) ……..

100(5) If it is discovered by an officer of the Board authorised by the Board for the purposes of this section that the amount of a penalty determined under this section is or has become insufficient the officer may make a determination in a further amount, so that the penalty is set at the amount which, in this opinion, is correct or appropriate".

Discussion

10. I have a number of observations on section 100 TMA 1970:

(1) The use of the word "may" means HMRC have a discretion as to whether an officer of the Board should make a determination imposing a penalty. But once they have decided to impose a penalty, the determination must be made by an officer of the Board. It does not mean that having decided to impose the penalty, HMRC have two choices. One is to have the determination made by an officer of the Board; the other involves an alternative assessment and notification regime. There is but one regime, and that is that the determination must be made by an officer of the Board authorised for the purposes of section 100 TMA 1970 to make the determination.

(2) My understanding is that all officers of the Board are authorised whatever their grade.

(3) The authorised officer is a real officer. It is not a computer. Nor is it HMRC. In this respect HMRC's submissions recorded in the First-tier Tribunal Decision of *Donaldson* (*Robert Morgan and Keith Donaldson v HMRC* [2013] UKFTT 317) are instructive.

> *"Meaning of "HMRC decide"*
>
> 28. In particular, it is HMRC's case that the requirement for "HMRC" to "decide" was met. It says this for a number of reasons.
>
> 29. Decision by authorised officer not required: Firstly, it contrasts it with the requirement for any particular officer to make a decision. For instance, certain penalties can only be imposed by an officer of the Board authorised by the Board for the purpose. The most obvious example is in s 100(1) TMA which provides:
>
> > "….an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate."
>
> Subsection (2) contains exceptions to this rule. As s 100C(1) makes clear, any penalty within the exception could only be imposed by an officer of the Board with the permission of this Tribunal. So penalties under the Taxes Acts require a decision of an authorised officer."

(4) So it seems that HMRC themselves recognise, as per their submissions in *Donaldson* above, that a real life officer of the Board must make the determination.

(5) *Donaldson* was concerned with the imposition of late filing and daily penalties under Schedule 55 Finance Act 2009, and in particular with the provisions of paragraph 4(1)(b) of that Schedule which reads "HMRC decide that such a penalty should be payable….".

(6) It is in the context of distinguishing a decision by HMRC from a decision made by an officer of the Board that HMRC made their submissions set out above.

11. Mindful of this, and having read the papers, and having seen that the only evidence that HMRC had adduced on the papers that a section 100 TMA 1970 compliant determination had been made by an officer of the Board was the computer printout mentioned at [6(4)] above, I issued directions directing HMRC to provide written submissions evidencing the name of the HMRC officer who made the penalty determination; details and evidence of how and when that officer made the determination; the process by which the HMRC computer was then instructed to send notification to the appellant; and how those determinations were subsequently recorded on the appellant's computer records.

12. HMRC's initial response was an application for an extension of time to comply with the direction on the basis that guidance was awaiting from Policy.

13. In the grounds for the application to extend time, HMRC said "as the question goes to the heart of how penalties are issued, Policy are taking time to fully consider and generate a response…."

14. An extension of time was subsequently granted and shortly before that deadline expired, HMRC responded further with the following submission:

> "Although HMRC has been granted a time extension it is still not possible to provide a detailed response to these directions. These penalties were automatically issued by HMRC's computer systems therefore we cannot provided a named person in respect of individual cases.
>
> The computer recorded the penalties and issued penalty notices on 19/04/2017 in accordance with the HMRC's policy in respect of late filing of Employment Intermediary returns".

15. On the basis of this, I have come to the conclusion that no real life officer of HMRC has made a determination. HMRC have had over two months to identify an officer who made the determination and have been unable to do so. Indeed the stark admission that the penalties were automatically issued by HMRC's computer systems strongly suggests that no officer of the Board was involved in either the determination of the penalties nor in sending out assessments based on those determinations.

16. It seems to me that if HMRC are suggesting that their policy is that no officer of the Board makes a determination in relation to penalties for late filing of Employment Intermediaries returns and the penalties are not only recorded and notified by a computer but also determined by a computer (i.e. there is no human intervention in the determination process) then their policy is inconsistent with the law.

17. As I have said at [7] above, it is incumbent on HMRC to satisfy me that it is more likely than not that the penalty has been properly determined under section 100 TMA 1970.

18. In light of what I have said above, I cannot come to that conclusion. Indeed I come to a wholly contrary conclusion; namely that no valid determination of the penalties has been made by an officer of the Board pursuant to section 100 TMA 1970.

Decision

19. I allow this appeal.

Appeal rights

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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE
RELEASE DATE: 22 June 2018