[2018] UKFTT 0041 (TC)

TC06319

Appeal number: TC/2017/06853

NATIONAL INSURANCE CONTRIBUTIONS – Class 1A – failure to make return on form P11D(b) on time – penalty of £1,200 imposed – application to make a late appeal to HMRC – permission granted – evidence from accountant that P11D(b) filed on time - no evidence that determination made by authorised officer of HMRC – appeal upheld.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRENT PERSONNEL LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

The Tribunal determined the appeal on 24 January 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 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 November 2017 and the Appellant's Reply dated 27 November 2017.

DECISION

1. This is an appeal by Trent Personnel Ltd ("the appellant") against a penalty determination charging them £1,200 for the late filing of the employer's annual return form P11D(b). It also an application by the appellant for permission to appeal out of time, an application opposed by HMRC.

Facts

2. I have a bundle consisting of the appeal and a number of documents exhibited to HMRC's Statement of Case. From this and from the appellant's reply of 27 November 2017 I find the following facts.

3. The appellant was required by regulation 80 of the Social Security Regulations 2001 (SI 2001/1004) ("SSR") to "render" (an unnecessarily biblical and obscure verb) a return to HMRC of, in particular, the amounts of Class 1A National Insurance Contributions ("NICs") payable by the employer in respect of the year concerned.

4. The return concerned was for the tax year 2014-15 and was required to be rendered by no later than 6 July 2015.

5. Here it may be worth explaining some of the terms. Class 1A is a category of NICs paid only by an employer in respect of some benefits provided to employees which are not earnings for Class 1 purposes. The typical case is where the benefit of a car and fuel is provided to an employee.

6. A P11D is a return an employer must make of all the benefits and expenses provided to employees which are chargeable to income tax but are not income from which PAYE is deducted. A P11D(b) is the form on which Class 1A NICs details are given.

7. A P11D is also required to be filed no later than 6 July – the relevant regulation says before 7 July. The filing of a P11D does not require the employer to pay anything to HMRC: it is an information return only. Amounts of Class 1A contributions shown in the P11D(b) are payable on 19 or 22 July.

8. In June 2015 HMRC issued a reminder to all employers to remind them to send in both forms P11D and P11D(b) by 6 July and to pay any Class 1A contributions by then. They cannot say if it was issued to the appellant.

9. In July to August 2015 HMRC sent an "interim" penalty letter to all employers who has not substituted P11Ds and P11D(b)s by the due date. They cannot say if it was issued to the appellant.

10. HMRC sent the appellant (whose name the Statement of Case consistently misspells) a late filing penalty notice on 14 March 2016 for £800 covering the period 7 July 2015 to 6 March 2016. HMRC exhibit a computer record to show the issue of the notice, a copy of which they do not have.

11. The P11D(b) was rendered on 20 June 2016.

12. HMRC sent the appellant a late filing penalty notice on 11 July 2016 for £400 covering the period 7 March 2016 to 6 July 2016. HMRC exhibit a computer record to show the issue of the notice, a copy of which they do not have.

13. On 12 July 2017 the appellant appealed against both penalties.

14. On 7 August 2017 HMRC rejected the appeals on the basis that the appellant had no reasonable excuse for appealing late. The appellant was informed that they could apply to the Tribunal for permission to make the appeal out of time to HMRC.

15. On 3 September the appellant notified an appeal, though its director, to the tribunal. This notice of appeal was blank in box 6 dealing with out of time applications.

Law

16. The requirement to make the return is in regulation 80 SSR:

> "(1) Where a Class 1A contribution is payable to the Board in accordance with regulation 71(1), 72(2) or 73(2), the employer shall render to them a return, not later than 6th July following the end of the year, showing—
>
> (a) such particulars as they may require for the identification of the employer;
>
> (b) the year to which the return relates;
>
> (c) the amounts which are general earnings in respect of which a Class 1A contribution is payable; and
>
> (d) the amount of any Class 1A contribution payable in respect of that year.
>
> (1A) The employer must render the return required by paragraph (1)—
>
> (a) by sending it to the Board; or
>
> (b) arranging for the information which it would contain to be delivered to an official computer system by an approved method of electronic communications.
>
> (2) The return shall include a declaration by the person making the return to the effect that the return is, to the best of his knowledge, correct and complete.
>
> (3) The declaration must be—
>
> (a) signed by the employer; or,
>
> (b) where the employer is a body corporate, signed either by the secretary or by a director.
>
> (3A) Where the return referred to in this regulation is rendered as mentioned in paragraph (1A)(b) the declaration must, instead of being signed, be authenticated by or on behalf of the employer in such a manner as may be approved by HMRC."

17. The penalty provision is included in regulation 81 SSR:

> "(2) Any person who fails to make a return referred to in paragraph (1) by the date which applies to him under regulation 71(1), 72(2) or 73(2), may be liable—
>
> (a) within 6 years after the date of that failure, to a penalty 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; and
>
> (b) if the failure continues beyond 12 months, to a penalty not exceeding so much of the amount payable by him in accordance with the regulations for the year to which the return relates as remains unpaid at the end of 19th July after the end of that year.
>
> (3) The penalty referred to in paragraph (2)(b) is without prejudice to any penalty which may be imposed under paragraph (2)(a) and may be imposed within six years after the date of the failure referred to in paragraph (2) or at any later time within three years of the final determination of the amount of a Class 1A contribution by reference to which the amount of that penalty is to be ascertained.
>
> (4) For the purposes of paragraph (2), "the relevant monthly amount" in the case of a failure to make a return is—
>
> (a) where the number of earners in respect of whom particulars of the amount of any Class 1A contribution payable should be included in the return is 50 or less, £100; or
>
> (b) where that number is greater than 50, £100 for each 50 such earners and an additional £100 where that number is not a multiple of 50.
>
> (5) The total penalty payable under paragraph (2)(a) shall not exceed the total amount of Class 1A contributions payable in respect of the year to which the return in question relates.
>
> (6) Any penalty imposed in accordance with this regulation shall be recoverable as if it were a Class 1A contribution which the employer is liable to pay to the Board under regulation 71.
>
> (7) A penalty imposed in accordance with this regulation shall be due and payable at the end of 30 days beginning with the date on which notice of the decision to impose it was issued.
>
> (8) The Board may, in their discretion, mitigate any penalty, or stay or compound any proceedings for any penalty, imposed in accordance with the provisions of this regulation, and may also, after judgment, further mitigate or entirely remit such a penalty.
>
> (9) For the purposes of this regulation a person shall be deemed not to have failed to have done anything required to be done within a limited time if he—
>
> (a) did it within such further time as the Board allowed; or

(b) had a reasonable excuse for the failure and if that excuse ceased, did it without unreasonable delay after that excuse ceased."

18. The "relevant monthly amount" in this case is £100, as the number of employees is one.

19. Regulation 82 applies certain provisions of the Taxes Management Act 1970 of which the relevant ones are:

> "(1) Section 100 of the Management Act (determination of penalties by an officer of the Board) shall apply with any necessary modifications in relation to the determination of any penalty under regulation 81 as it applies to the determination of a penalty under the Taxes Acts.
>
> …
>
> (5) In this regulation—
>
> "the Management Act" means the Taxes Management Act 1970; and
>
> "the Taxes Acts" has the same meaning as in section 118(1) of the Management Act (interpretation)."

20. Section 100 TMA provides:

> "(1) … 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.
>
> …
>
> (3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.
>
> (4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.
>
> (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 his opinion, is correct or appropriate.
>
> …"

21. There was undoubtedly an appeal against the determination, and HMRC have accepted by conduct that there is a right to appeal the decision to make a determination. They do not say where that right of appeal is to be found. In most cases involving, as this does, NICs other than Class 4 the appeal right is in s 11 Social Security Contributions (Transfer of Functions, Etc) Act 1999 referring to a decision under s 8 or 10 of that Act.

22. The relevant decision seems to be that in s 11(1)(k)(ii) of the Act, a decision that a person is liable to a penalty under s 113(1)(a) of the Social Security Administration Act 1992. That section simply provides vires for regulations to impose penalties for contravention of regulations made under social security legislation, but since the regulations imposing the penalties are in regulation 80 SSR which are made by virtue of the Social Security Contributions and Benefits Act 1992 which provides for NICs of all classes, it seems that there is a right of appeal. It would be nice to be told this, especially as penalties relating to NICs of this class are not bread and butter matters for this Tribunal.

HMRC's submissions

23. In relation to the application to make the appeal late, HMRC ask the Tribunal to take into account the length of the delay in appealing, 15 months and 11 months respectively.

24. In relation to the merits of the appeal, HMRC say that the appellant has no reasonable excuse for filing the return late.

25. They say that a "reasonable excuse" is normally an unexpected or unusual event that is either unforeseeable or beyond the employer's control. But in any event the actions of the employer must be considered from the perspective of a prudent employer, exercising reasonable forethought and due diligence, having proper regard for their responsibilities.

Appellant's case

26. The appellant says in their appeal notice that if they had been told of the failure eg by a penalty notice for one month of £100 issued soon thereafter they would have remedied the mistake.

27. When they received the £800 penalty they phoned HMRC and were told it was a mistake. When they received the additional £400 penalty notice they contacted their accountant who corrected the error. They offered to pay £100.

28. They do not address the lateness of the appeal.

Discussion

Late appeal permission

29. I deal first with the late appeal application.

30. I follow the three stage approach in *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906 ("*Denton*") to applications from relief from sanctions, and I know from *R (oao Dinjan Hysaj) v SSHD* [2014] EWCA Civ 1633 ("*Hysaj*") that an application to do something after the time permitted by either the Rules of the tribunal or any enactment is to be treated in the same way as an application for relief from sanctions.

31. *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*") is also binding on this Tribunal. Although it, a decision of the Upper Tribunal, was applying a previous version of the CPR by analogy, nothing in recent cases suggests that the five questions suggested as relevant in *Data Select* are not relevant any longer. Indeed those questions may be seen as reflected in the three stage *Denton* approach.

32. At the first *Denton* stage I am required to establish whether the delay was serious and significant, and the first *Data Select* question is: how long was the delay? I agree with HMRC that delays of 11 and 15 months cannot be regarded as other than serious and significant.

33. The second stage as laid down by *Denton* is an enquiry into the reasons for the delay, or why "the default occurred" in the language of that case.

34. The reason seems to be that the appellant thought that everything had been settled by July 2016. It seems odd that HMRC were not apparently seeking to collect the penalty or the Class 1A contributions if it had not been, but I have no evidence of what HMRC's debt management actions or inactions were at the time.

35. At the third stage I must evaluate "all the circumstances of the case, so as to enable [the tribunal] to deal justly with the application". It is here that the remaining *Data Select* questions come in.

36. I do not need to spend much time on the reason for the time limit. All time limits in tax are there so that HMRC can know within a reasonable time whether or not it will need to devote resources to defending an appeal, including in the Tribunal.

37. As to the consequences of giving and not giving permission, if I refuse permission the prejudice to the appellant is that it will have to pay just over £700 (as the penalty is abated to the Class 1A NICs actually payable). If I give permission HMRC will not be prejudiced as they have prepared a statement of case to deal with the substantive appeal and no further work is required.

38. Tribunals and courts are enjoined by *Hysaj* not to consider the merits of the appeals, unless they are what the parties in the Court of Appeal in *R (oao Rowe & ors) v HMRC* [2017] EWCA Civ 2105 called a "slam dunk" case (see [58]).

39. I have therefore looked to see if there is a slam dunk case here. Since I read the papers and came to a fairly firm conclusion before realising that this was an opposed late appeal case, I have in a sense already conducted a mini trial in my mind.

40. In my view it is clear that the appellant would succeed in a substantive appeal on two bases. In view of this, the total lack of prejudice to HMRC and the explanation for the delay (though that is less compelling) I grant permission to the appellant to make the appeal out of time to HMRC.

41. As HMRC have argued the substantive case in their Statement, I waive the formalities necessary to get the appeal properly before me.

The appeal

42. This is a case where a reply to the Statement of Case on the papers is important. I assume that it was copied to HMRC. Since HMRC have not raised any objection or put any evidence forward to show that it is wrong, I accept it as stating fact.

43. The reply is an email from the appellant's accountant. In it she says that she has considered her file for the client and it shows

(1) the P11D and P11D(b) were filed on time on 26 June 2015.

(2) when the appellant received the penalty notice for £800 in March 2016, her colleague told the appellant of this, and it would have been then that the appellant phoned HMRC to tell them of this and was told that the penalty was wrong and would be cancelled.

(3) when the appellant received a reminder in June 2016 to pay the £800 she spoke to HMRC who said the original post had not been processed.

(4) she wrote to HMRC on 11 July 2016 attaching a copy of the original P11D and P11D(b) as submitted on 26 June 2015, together with a 64-8 as they had been erroneously removed from HMRC's records as agent.

(5) further letters to HMRC were not replied to.

44. She added some thoughts on why there has been a problem. It is that HMRC have incorrectly removed several clients when they updated their website so that she could not access the clients' records, but they did not know this when they sent in the P11D(b). It is standard practice for HMRC to ignore letters from agents who are shown on their systems as not authorised.

45. In the light of this further evidence, there was no failure to submit the P11D(b) on time.

46. The second reason is that by invoking s 100 TMA HMRC are required to show that an authorised officer of HMRC made the determination. They have not done so. The closest they have come to doing that is to provide me with a specimen redacted copy of a determination made in a different year (as usual HMRC's redaction is ineffective so that I can see that it was 2014-15). It also shows clearly, with no attempt at redaction, the name of the employer to whom it was issued, and it is not the appellant. That is extremely sloppy on the part of HMRC

47. It shows the name of an officer as the person who issued it. There is no indication that that officer was authorised and was the officer who made the determination in this case, or indeed in the specimen case.

48. I have held in *Khan Properties Ltd v HMRC* [2017] UKFTT 830 (TC) that where a s 100 TMA determination is made it cannot be made by a computer or by an officer who is not authorised. The same applies here where s 100 is adapted for the purpose of making the determination.

Decision

49. I permit the appeals to be made late.

50. The penalties are cancelled.

51. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 6 FEBRUARY 2018