



TC03333

Appeal number: TC/2013/06240

Section 98A(2) and (3) Taxes Management Act 1970 – failure by agent of the Appellant to file employer’s end of year P35 return on time – whether reasonable excuse – no – appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOAN THI LE

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 13 November 2013 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 September 2013, HMRC’s Statement of Case submitted on 8 October 2013 and the Appellant’s representative’s response dated 21 October 2013

DECISION

Decision under Appeal

1. This is an appeal by Ms Toan Thi Le against penalties imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the tax year ending 5 April 2012.
2. An employer has a statutory obligation to make end of year returns before 20 May following the end of a tax year in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001.
3. In the case of an employer failing to make an end of year return on time s 98A (2) and (3) Taxes Management Act 1970 provides for a fixed penalty at £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees. If the failure continues beyond 12 months a penalty can be imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.
4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 provides that an employer must use electronic communications to deliver their 2009/10 end of year return online.

20 The background facts

5. The filing date for the Appellant's 2011/12 return was the 19 May 2012. This had to be filed online.
6. HMRC's records show that a "test submission" of the employer's annual return for 2011/12 was submitted on 26 April 2012.
7. On 31 May 2012 HMRC issued a P35 interim penalty letter advising the Appellant that she had incurred a penalty and how to avoid increasing it.
8. On 24 July 2012 HMRC wrote to the Appellant's agent to say that only a "test submission" had been submitted, asking the Appellant's agent to submit the actual return as soon as possible. The agents, VTV Associates, responded by reiterating their contention that the P35 had in fact been filed on time.
9. On 5 October 2012 HMRC issued a late filing penalty of £400 for the period to 19 September 2012. A further late filing penalty was issued on 27 May 2013 for £800 for the period from 20 September 2012 to 19 May 2013.
10. The Appellant appointed new agents, R S Porter & Co and the annual return was filed online on 1 August 2013 and subsequently amended and refiled on 2 August 2013.

The Appeal

11. On 2 August 2013 the Appellant's new agent RS Porter & Co submitted an appeal against the penalties.

5 12. The Appellant says that she had 'major problems' with her previous agent, VTV Associates Ltd, including the failure to submit the P35 for the year ended 5 April 2012 on time. She said that all reminders were sent to her agent and therefore she was unaware of the default and penalties. The Appellant's new agents, R S Porter & Co, say that the former agent had in fact deliberately withheld post from her that was received from HMRC. She says that as soon as she was aware of the position, she
10 appointed new agents and they filed the P35.

HMRC's submissions

13. HMRC issue emails for all return submissions that are made. The email advises '*if this was a test transmission, remember you still need to make your actual employer annual return using the live transmission in order for it to be processed*'. HMRC's
15 website advises that the basic PAYE tools and also many commercial payroll software packages will let employers, or their agents, make a test submission, so they can check to see if their employer annual return contains any issues to be fixed before they file properly. The website also states '*If you choose to do a test submission. Don't forget that you still need to file a live return*'.

20 14. According to the Appellant's agent R S Porter & Co, the Appellant's previous agent provided her with P60s which she gave to her employees and she assumed at the time that the agents had also submitted the P35 return.

25 15. When a person appeals against a penalty they are required to have a 'reasonable excuse'. There is no definition in law of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation.

30 16. HMRC said that the records indicate that the Appellant commenced operating as an employer within the PAYE scheme in August 2009, and therefore she would have been aware of the obligation to file P35 returns on time. It is an employer's obligation to ensure that HMRC is informed of any changes of representative and HMRC have no record of any undelivered correspondence being returned to them

35 17. HMRC say that it is established law that the obligation to ensure that the return is correctly filed on time lies with the employer, and the failure by an agent to meet his obligation to the Appellant may entitle the Appellant to some recourse against the agent but this cannot relieve the Appellant of the obligation to file a P35 on time or provide a reasonable excuse not doing so.

40 18. It is necessary to consider the actions of the Appellant from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation.

19. The Appellant has been registered as an employer since August 2009 and is therefore considered to be aware of and able to comply with her employer obligations.

20. HMRC's website provides unambiguous guidance to employers on how to file their Employer's Annual Return. It states that the deadline for filing the Employer's Annual Return is 19 May.

Conclusion

21. The Appellant's appeal does not contain anything which shows that something exceptional prevented her from filing her Employer's End of Year Return on time. The Appellant would have been aware of the necessity to file her return online and to do so by 19 May 2012. It is accepted that the Appellant relied upon her agent VTV Associates Ltd to file the return. However, as HMRC argue, it is established law that a taxpayer must take responsibility for the action or inaction of their agent. HMRC have to be seen to be consistent in their approach to all taxpayers, and in particular those who comply with their obligations

22. Having considered all the circumstances, the Tribunal accepts the submissions of HMRC and confirms that the penalties were correctly charged in accordance with relevant legislation

23. The appeal is accordingly dismissed.

24. 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.

**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 12 February 2014