



TC03590

Appeal number: TC/2013/09217

Section 98A (2) and (3) Taxes Management Act 1970 - Employer's End of Year return P35 late - Penalty for four months delay - Appellant unaware that an attempt to file online was unsuccessful - whether reasonable excuse - no - appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AVON LEE LODGE

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 20 February 2014 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 27 November 2013, HMRC's Statement of Case submitted on 3 January 2013 and the Appellant's Reply dated 7 January 2013

DECISION

- 5 1. This is an appeal by Avon Lee Lodge against the £400 penalty 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 2013.
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.
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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 intended to be a tax geared penalty.
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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
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The background facts

5. The filing date for the Appellant's 20012/13 return was 19 May 2013. This had to be filed online.
6. A penalty of £400 was issued on 23 September 2013 in respect of the period 25 20 May 2013 to 19 September 2013
7. The 2012/13 return was filed on 27 November 2013.

The Appellant's case

8. The Appellant accepts that the P35 return was filed late, but says that it has a reasonable excuse for the late filing.
- 30 9. The Appellant's agents, PW Payroll Solutions, say that the Appellant has been a client of PW Payroll Solutions of many years. In September 2012 Avon Lee Lodge ceased trading and became a limited company. All employees moved across to the limited company.
- 35 10. In November 2013 PW Payroll Solutions went live with all clients in the pilot scheme for HMRC's new Real Time Information - RTI. Avon Lee Lodge was included in this as the decision to cease trading had not been made then. Avon Lee Lodge was accepted on to the pilot scheme.

11. When the decision to cease trading was made, the agent says that the Appellant was caught between two systems - RTI - and the old recording on the PAYE system. The agent says that they could not submit a cessation P35 as the Appellant was in RTI, but they also could not submit a cessation RTI file. There were
5 no employees on the PAYE scheme, as they had all been made leavers. It took time for HMRC and the agent's software colleagues to sort out the issue and eventually on 10 December 2012 they were able to 'submit' a cessation P35.

12. The agent says that it was not until they were notified of the penalty that they realised the submission had gone through as a 'test'. They immediately resubmitted the return as a 'live submission' on 27 November 2013 and asked HMRC to accept
10 that 'this error occurred in good faith due to the complexity of old and new systems working against each other and the human error in submitting a test submission as opposed to a live submission, during the period of trying to get the systems working. All other files and monies have been paid or made in good time throughout by Avon
15 Lee Lodge'.

HMRC's Case

13. HMRC state that if there were personnel employed under the PAYE scheme then the company has a liability to complete a P35 for all employees for whom a P11 was maintained. Their records show that there were employees up to cessation.
20 Further, the Appellant does not dispute that the P35 was submitted late.

14. Avon Lee Lodge initially advised that an online transmission was carried out on 10 December 2012. HMRC's records indicated that this was a test submission. The employer should have ensured that the submission was live. Furthermore, HMRC's website on filing your return states "Don't forget that you still need to file a live return
25 after your test has been successful". HMRC's Online Filing Service would have issued an acknowledgement confirming that the return had been filed if filed successfully.

15. Many commercial payroll software packages will allow employers to make a test submission so that they can check whether the Employer Annual Return contains
30 any issues to be fixed before filed properly.

16. HMRC state that the notification to file a return, issued on 24 March 2013, and the reminder to file a return, issued on the 28 April 2013, would have alerted the employer to the fact that a return had not been submitted.

17. HMRC say that an interim penalty letter was issued on 31 May 2013, with a
35 penalty notification on 23 September 2013. Nevertheless, the employer waited until 27 November 2013 to file the return.

18. The penalty charge was issued for failing to submit the end of year return on time. Avon Lee Lodge's contention that the penalties of £400 were incurred due to a belief that the return had been submitted is not a reasonable excuse.
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Conclusion

19. 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
5 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. The reasonable excuse must also exist throughout the entire period of default.

20. The Appellant's agent appears to have made a genuine mistake, but at law that is not a reasonable excuse. It is necessary to consider the actions of the Appellant
10 from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation. HMRC did not issue an acknowledgement of receipt of the P35 submitted on 10 December 2012 and that should have alerted the Appellant to the fact that the return had not in fact been filed. Furthermore the notification to file a return issued on the 24
15 March 2013 and the reminder issued on 28 April 2013 should have alerted the employer and its agent to the fact that a return had not been received.

21. The appeal is therefore not allowed and the £400 penalty payable for late submission of the Employer's Annual Return is confirmed.

22. This document contains full findings of fact and reasons for the decision. Any
20 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)"
25 which accompanies and forms part of this decision notice.

30 **MICHAEL S CONNELL**

TRIBUNAL JUDGE

RELEASE DATE: 12 May 2014