



TC03697

Appeal number: TC/2014/00531

Section 98A (2) and (3) Taxes Management Act 1970 – penalties for late employer’s end of year P35 return – Appellant believed reasonable care taken – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AZESTA LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN N DENT

The Tribunal determined the appeal on 9th May 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 22nd January 2013 (with enclosures), and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 11th March 2014.

DECISION

The Appeal

5 1. This is an appeal by Azesta Limited ('the Appellant') against penalties of £400 imposed under s 98A(2) & (3) Taxes Management Act 1970 for the late filing of the Employer's Annual return for tax year 2012-13.

2. The Appellant failed to comply with its obligation to complete and file an Employer's Annual Return by the due date of 19 May 2013 in accordance with
10 Regulation 73 of the Income Tax (Pay as you Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001

3. The point at issue is whether or not the Appellant has a reasonable excuse for making late payments.

Legislation

15 4. Where the employer does not file their annual return on time they will be charged a penalty in accordance with s 98A(2)(a) & (3) Taxes Management Act ('TMA') 1970.

5. Fixed penalties of £100 per month (or part month) for each batch (or part batch) of fifty employees are charged for the first twelve months the return is late.

20 6. Where the total duty (NICs/Tax) shown on the return is:

equal to or more than the penalty amount, the employer is liable to the whole of the penalty amount.

more than £100 but less than the penalty amount, the employer is only liable to penalties in an amount equal to the total duty shown on the return.

25 £100 or less, the employer is liable to a penalty of £100 only.

7. Section 118(2) TMA 1970 provides statutory protection from a penalty if the employer had a reasonable excuse for failing to file their return on time.

8. There is no statutory definition of reasonable excuse, which "is a matter to be
30 considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18). A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the employer's control, and which prevents the employer from complying with their obligation to file on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

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Background

- 5 9. The Appellant was required to file an Employer's Annual return (P35 & P14s) for the year 2012-13. The filing date for the return was 19 May 2013. From 2009-10 onwards this had to be filed online using an approved method of electronic communication.
10. HMRC sent a P35N electronic reminder to the Appellant on 24 March 2013.
11. HMRC sent an Employer Annual Return Reminder (AR1N) to the Appellant on 28 April 2013.
- 10 12. HMRC sent the Appellant a late filing penalty notice on 23 September 2013 for £400 for the period 20 May 2013 to 19 September 2013.
13. The Employer's Annual return was filed online on 4 October 2013.
14. HMRC sent the Appellant a final late filing penalty notice on 9 October 2013 for £100 for the period 20 September 2013 to 4 October 2013.

Appellant's contentions

- 15 15. On 4 October 2013 the Appellant appealed against the penalty of £400 on the basis that:
- 1) They were under the misapprehension that they had filed the return prior to 19 May via 'Basic Tools Software'. There was a slight problem with the activation code for the government gateway which was repeatedly sent to the wrong address, rendering it invalid, but eventually this was sorted and the return supposedly made in May
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- 2) They were able to download and distribute all P60 forms to employees as one of the conditions for filing the return and thought that the return was complete. They are a small business with only 3 permanent employees, and as such always endeavour to be as prompt as possible with any payments and filing as any potential fines incurred have a big impact on the business.
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- 3) The penalty notice letter received was dated 23rd September, a full 4 months after the return should have been made, and was the first that they had heard of there being a problem with the return leading to it not being registered as filed correctly within the correct timeframe. Upon receiving the letter they immediately checked their records and followed the same procedures with Basic Tools as last time.
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- 4) If they had received the penalty notice sooner, they immediately would have checked the return had been filed correctly, and remedied the situation exactly as had been done that morning, and therefore negating the need to pay the sizable sum of £400 as a penalty. They would ensure that all future returns were double checked by themselves.
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16. On 24 October 2013, HMRC informed the Appellant of its decision, rejecting their appeal and offering a review.

17. On 5 November 2013 the Appellant requested a review of HMRC's decision, reiterating their earlier grounds of appeal and adding

5 1) We believe that we had taken reasonable care when we submitted the original P35 in May 2013. We acted immediately when we received the first letter from HMRC on 4th October (letter dated 23rd September 2013) stating that the returns had not been successfully filed, and rang HMRC on the 4th October, and submitted the forms immediately online on 4th October, this time
10 successfully

2) Had we received a letter immediately after the deadline we would have acted immediately and incurred only a £100 penalty. The letter on the 4th of October was the first reminder we had received.

15 3) We therefore would like to appeal your decision. We feel that £400 is unreasonable as it has taken 4 months for you to advise us that the P35 submission from your software had failed. We would accept £100 of the penalty based on your letter of 23rd September but not the £400 as the reminder has taken such a long time.

18. HMRC carried out a review and issued their review conclusion on 11 December
20 2013. The outcome of the review was that HMRC's decision should be upheld.

19. On 22 January 2014, the Appellant notified their appeal to the Tribunal. The appellant claimed that HMRC's software had failed, that they had no way of knowing that the submission had not worked and that the software had failed, and that it was the first time they had filed themselves online and could not be expected to know
25 what the final screen was supposed to look like. They reiterated that no warning had been given, and complained that the 'fine' represented more than 11 per cent of the amount due.

HMRC's contentions

20. HMRC's records show that an Employer notification was issued to the
30 Appellant on 24 March 2013. They also show that the Appellant registered the company for online PAYE on 25 April 2013. A 'PIN' required to enable the online account was issued to the address of the Appellant. The Appellant requested a duplicate activation code on 22 May 2013 and activated the account on 31 May 2013. The P35 could not have been submitted on 30 April 2013 as the online record had not
35 been activated on that date.

21. On 31 May 2013 the Appellant submitted a Full Payment Summary for the first pay period of the tax period 2013/2014 and continued to do so for each pay period thereafter. However, the P35 for 2012/2013 was not submitted until 4 October 2013

22. Information regarding the PAYE and completing 2012-13 Employer's Annual Return is available on the HMRC website.

23. HMRC further contend that the Appellant's failure to submit the end of year return by the due date can not be attributed to a fault in HMRC's systems.

5 24. The legislation at s 98A TMA 1970 sets no obligation on HMRC to issue penalties in any particular pattern; however penalties are generally issued to all employers using the following time structure:

A first interim penalty is issued if the return has not been received 4 months after the due date.

10 A second interim penalty is issued where the return has still not been received after a further 4 months.

A third interim penalty is issued where the return is still outstanding after a further 4 months.

15 Final penalties are charged under Section 98A(2)(a) TMA 1970 when the return is received.

25. Furthermore, there is no obligation upon HMRC to issue reminders or notify Employers that an Employer's Annual Return has not been received prior to the issue of a penalty notice. There is also no statutory obligation upon HMRC to issue penalty notices immediately after the deadline date. It is well publicised on HMRC's website
20 that penalties may be imposed for the late submission of returns and that a reminder will not necessarily be sent.

26. The legislative obligation placed on the Appellant to file its 2012-13 Employer's Annual Return on time was not dependent on them receiving a reminder to do so or a penalty notice. Any perceived delay in the issue of the penalty notice cannot be
25 deemed a reasonable excuse for the actual failure.

27. The Appellant is an experienced filer of online documentation and would be familiar with acceptance and rejection messages. Failure to receive these messages should have alerted the Appellant to the fact that something was wrong, enabling the Appellant to take corrective action at that point.

30 28. In the case of *Hok Ltd v HMRC* the Appellant appealed against fixed penalties totalling £500 charged under s 98A of Taxes Management Act ('TMA') 1970 for the late filing of its Employer's Annual Returns (forms P35 and P14) for 2009-10. The First-tier Tribunal decided that HMRC had not acted fairly or in good conscience by issuing the first penalty until four months after the filing date. As a result they
35 discharged all the penalties except for the £100 penalty for the first month the return was late.

29. HMRC appealed this decision and the Upper Tribunal found that HMRC's decision to charge Hok Ltd penalties for late filing of their Employer's Annual Return

was correct and that the First-tier Tribunal acted beyond its jurisdiction in discharging the penalties. The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.

5 30. First-tier Tribunal decisions do not set precedents and, as such, each case must be considered on its own merits. However, Upper Tribunal decisions do set precedent, which are binding on all cases where similar issues are raised.

10 31. HMRC contend that the legislation places responsibility for delivery of the completed Employer's Annual Return form squarely on the shoulders of the employer. The Appellant failed to operate the 'Pay as You Earn' Scheme correctly and in these circumstances HMRC have to be seen to be consistent in their approach to taxpayers, particularly those who comply with the regulations. It was the Appellant's responsibility to ensure that the regulations were followed. The Employer's Annual Return for 2012-13 was received late and as a result penalty determinations have been correctly charged and issued under s 98A (2) TMA 1970.

15 **Conclusion**

20 32. When a person appeals against a penalty they are required to have a reasonable excuse, which existed for the whole period of the default. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him or her from complying with an obligation which otherwise would have been complied with.

25 33. It is indeed unfortunate that HMRC sometimes do not issue first penalty notices until there is already a significant period of delay. However, this cannot of itself afford a reasonable excuse for the delay in delivering the return.

34. Furthermore, the following First-tier Tribunal judgements would agree with HMRC's stance. In the case of *Durnbrae Ltd v HMRC*; Judge J. Blewitt stated :

30 "The obligation to make End of Year Returns prior to the deadline of 20 May following the end of a tax year is set down by statute by virtue of Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001. It is a well-established principle of case law that the responsibility to ensure that all obligations are met lies with the taxpayer.

35 The penalties imposed as a result of an employer's failure to meet tax obligations are provided for by statute and the Tribunal has no discretion to mitigate those penalties unless it is considered that there is a reasonable excuse, in which case the penalties can be set aside.

There is no obligation upon HMRC to issue reminders to taxpayers or notify taxpayers that a P35 has not been received prior to the issue of penalty notices."

35. In the case of *Hall Safety & Environmental Ltd v HMRC*; Judge K. Poole stated in paragraphs 13 and 14:

5 “Whilst we agree it is unfortunate that HMRC’s policy is not to issue first penalty notices until there is already a four month delay, we do not consider this can afford a reasonable excuse to the Appellant for its delay in delivering the return. We have no power to mitigate the penalty simply as a result of the delay in its issue.”

36. „e accept HMRC’s contention that the Appellant is an experienced filer of online documentation and would be familiar with acceptance and rejection messages. Failure to receive these messages should have alerted the Appellant to the fact that something was wrong, enabling the Appellant to take corrective action at that point.

37. If the Appellant was experiencing difficulties in filing their return, then they could have contacted HMRC to ensure that the return was submitted by 19 May, or alerted them to the fact that they were experiencing difficulties. HMRC submit that no evidence has been provided by the Appellant – or is held on its records - indicating that a problem had occurred when filing the return. Exercising a reasonable degree of prudence, the Appellant could have checked whether the submission had been made.

38. The Appellant has accordingly not shown a reasonable excuse for its failure to comply with its obligation to complete and file an Employer’s Annual Return by the due date of 19 May 2013.

39. For the above reasons, the appeal is dismissed and the penalties upheld.

40. 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.

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**JOHN N DENT
TRIBUNAL JUDGE**

RELEASE DATE: 11 June 2014

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