



TC03945

Appeal number: TC/2011/07085

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NANTYFFYLLON RUGBY CLUB

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN N DENT

The Tribunal determined the appeal on 19th June 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 20th April 2011 (with enclosures), HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 24th October 2011, and the Appellant’s agent’s reply (with enclosures) dated 3rd November 2011

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DECISION

The Appeal

5 1. This is an appeal by Nanttyffyllon Rugby Club ('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 2009-10.

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 2010 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 2009-10. The filing date for the return was 19 May 2010. From 2009-10 onwards this had to be filed online using an approved method of electronic communication.

10. The Appellant, Robert Lloyd on behalf of the Club, was aware of the need to file a Return on time and states that he attempted to do so in April 2010.

11. HMRC sent the Appellant a late filing penalty notice on 27 September 2010 for £400 for the period 20 May 2010 to 19 September 2010.

10 12. The Employer's Annual return was filed online on 14 October 2010.

13. HMRC sent the Appellant a final late filing penalty notice on 21 October 2010 for £100 for the period 20 September 2010 to 14 October 2010.

Appellant's contentions

15 14. On 12 October 2010 the Appellant appealed against the penalty of £500 on the basis that:

1) As far as he was concerned the return was submitted online back in April. The club had been maintaining their payroll on the disc sent out by HMRC each year

20 2) He had encountered a few problems that year and had numerous failure attempts however he submitted the return and no failure message occurred. Because of the problems, he had now employed an agent to take care of the payroll from 2010/11. As a result he had no reason to open up the payroll details for last year.

25 3) On receipt of the penalty notice he opened the payroll software and could see another submission failure. He tried four times to submit the return, each time receiving failure messages

30 4) He genuinely thought the return had been submitted in plenty of time and had no idea it had not been accepted. He had not been notified it had not been received until 6 October 2010. If he had been notified sooner he would have dealt with the problem sooner. As soon as he was notified he took immediate action.

4) The amount of PAYE had always been paid on time and there was nothing outstanding at the end of the year.

35 15. On 5 January 2011, HMRC informed the Appellant of its decision, rejecting their appeal and offering a review.

16. On 20 January 2011 the Appellant requested a review of HMRC's decision, enclosing copies of the printouts of the 2009/10 P35 showing it was sent online on 16 April 2010.

5 17. HMRC issued a conclusion letter on 3 March 2011 upholding the original decision and stating that they had issued a submission failure receipt when the attempted filing took place in April 2010. The Appellant had stated that he had received a submission failure receipt, although he did not realise this until he received the penalty notification and checked his payroll software

10 18. The Appellant's representative responded on 22 March 2011, appealing against the decision not to accept her client's reason for the late submission, stating that her client had been unaware of the rejection because, after a number of attempts, the P35 had, as far as her client was aware, been submitted as no rejection notice was received as on the other attempts. The representative subsequently suggested that a reduced penalty may be due, but not the full £500.

15 19. On 3 November 2011, the representative added that it took her client at least four attempts in October 2010 to submit the 2009/10 P35. She also enclosed a number of case reports where challenges had been made to HMRC on the ground of delay in informing companies that no P35 had been received.

HMRC's contentions

20 20. HMRC contend that the Appellant has been filing online for a number of years and should be fully aware of the acceptance and rejection messages when submitting a return online. The Appellant has not provided details of the type of rejection messages received after each attempted submission, and therefore does not comment on any specific messages. However, at the point of submission the Appellant would
25 have to enter his ID and password. HMRC's tracking system will show where they have entered the correct ID, password and used the correct employer reference. There were no submission events for 2009/10 shown HMRC's tracking until October 2010.

21. Information regarding the PAYE and completing the Employer's Annual Return is available on the HMRC website.

30 22. 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.

35 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.

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

23. 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.

24. The legislative obligation placed on the Appellant to file its 2009-10 Employer's Annual Return on time was not dependent on them receiving a reminder to do so or a penalty notice.

25. It was the Appellant's responsibility to ensure that the regulations were followed. The Employer's Annual Return for 2009-10 was received late and as a result penalty determinations have been correctly charged and issued under s 98A (2) TMA 1970.

Conclusion

26. 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.

27. 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.

28. 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 :

"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.

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."

29. 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.”

10 30. 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 discharged all the penalties except for the £100 penalty for the first month the return was late.

15 31. 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.

20 32. 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.

25 33. We accept HMRC’s contention that the Appellant is an experienced filer of online documentation and would be familiar with acceptance and rejection messages. The receipt of such messages should have alerted the Appellant to the fact that something was wrong, enabling the Appellant to take corrective action at that point.

30 34. 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.

35 35. 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.

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

40 37. 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**

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RELEASE DATE: 20 August 2014