



TC03908

Appeal number: TC/2014/01094

Penalty of £1200 for late online filing of Employer's Annual Return - Appellant assumed penalties related to PAYE payments which in fact were paid up to date and that penalties had been issued in error - whether reasonable excuse - yes for part of period - appeal part allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LESLEY AWDRY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 28 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 20 February 2014, HMRC's Statement of Case submitted on 13 March 2014 the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Lesley Awdry, ('the Appellant') appeals against a £1,200 penalty (mitigated to £559.00) imposed under Section 98A(2) & (3) Taxes Management Act 1970 for the late filing of the Employer's Annual return for tax year 2011-12.
2. The point at issue is whether or not the Appellant has a reasonable excuse for submitting the late return.

Background

- 10 3. Regulation 73(1) The Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 requires an employer to deliver a complete Employer's Annual Return - forms P35 & P14's before 20 May following the end of the tax year. The return must include
15 specified information relating to relevant payments made during the tax year to employees for whom they had to prepare or maintain deduction working sheets (form P11 working sheet or equivalent payroll deductions record).
4. Regulation 205 The Income Tax (Pay As You Earn) Regulations 2003 requires the mandatory use of electronic communications by employers who must deliver their
20 P35/P14 forms online using an approved method of electronic communications for 2009-10 onwards.
5. The full return i.e. the P35 and a P14 for each employee must reach HMRC no later than 19 May following the end of the tax year. If the return is not received by the due date the employer is liable to a penalty.
- 25 6. Where the employer does not file their annual return on time they will be charged a penalty in accordance with Section 98A(2)(a) & (3) Taxes Management Act (TMA) 1970.
7. Fixed penalties of £100 per month (or part month) for each batch (or part batch) of 50 employees are charged for the first 12 months the return is late.
- 30 8. 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
35 liable to penalties in an amount equal to the total duty shown on the return.
- £100 or less, the employer is liable to a penalty of £100 only.
9. The Appellant was required to file an Employer Annual return (P35 & P14s) for the year 2011-12. The filing date for the return was 19 May 2012. From 2009-10

onwards this had to be filed online using an approved method of electronic communication.

10. HMRC sent a P35 reminder to the Appellant on 2 December 2011.

5 11. HMRC sent a letter to the Appellant at the end of May 2012 advising that she “may have already incurred a penalty” The letter, whilst not advising that a penalty had in fact already been incurred (although not processed) clearly refers to the fact that the Appellant’s return has not been filed and was overdue.

10 12. HMRC sent the Appellant a late filing penalty notice on 8 October 2012 for £400 for the period 20 May 2012 to 19 September 2012. Although there is no copy of the covering letter notifying the penalty, the Appellant must have been aware of the penalty because she refers in her appeal to penalties “starting to mount up”.

13. HMRC sent the Appellant a second late filing notice penalty on 28 January 2013 for £400 for the period 20 September 2012 to 19 January 2013.

15 14. HMRC sent the Appellant a third late filing notice penalty on 27 May 2013 for £400 for the period 20 January 2013 to 19 May 2013.

15. A paper copy of the Employer Annual Return (P35 and P14's) for 2011-12 was received by HMRC dated 15 May 2013 and sent back to the Appellant on 31 May 2013 as the incorrect version of the P14's was used.

16. The Employer Annual return was filed online on 1 July 2013.

20 17. As a concession to small employers, HMRC allows fixed penalties to be mitigated to the amount of the duties on the return (i.e. total tax & NIC) if these are less than the penalty, down to a minimum of £100. In this case, the duty on the Appellant’s P35 Employer's Annual Return was £559.57, therefore the penalties were mitigated to £559.

25 18. On 27 January 2014 the Appellant appealed to HMRC against the penalties, on the grounds that:

30 “The payment was made by me on time, but due to the glitch in your system, it was not logged as paid. The penalties started to mount up and each time I tried to resolve this issue I was told I owed nothing by one person, and then another told me I did, when I clearly knew I had paid my dues.

35 After several phone calls by me and letters from you we applied for a copy of the cheque, front and back from my bank. This then gave proof of payment to you in May 2012. The problem I have now is just penalties which I feel are unjust as payment was received but not logged by yourself due to computers”.

19. HMRC sent the Appellant a letter on 3 February 2014 advising that the outstanding penalties were not for the late receipt of payment and were for the late

receipt of the Appellant's 2011-12 P35 Employer's Annual Return, which was due by 19 May 2012 but not received until 1 July 2013. HMRC went on to explain that the Appellant's appeal was outside the statutory time limit, but that she had the right to apply to the Tribunals Service for permission to make a late appeal.

- 5 20. On 16 February 2014 the Appellant wrote to HMRC to appeal against the late penalties saying:

10 "The reasons behind my late submission, was due to me stopping
employing as my business was suffering due to Wessex Water digging
up the road in front of my yard and blocking my access for nearly
eighteen months. I had to let my staff go and reorganize in June 2011
as my finances were failing. Unfortunately I forgot to submit my P35
when it was due by the 19th of May 2012 which caused the penalties,
but I was misled into believing the penalties were for a payment that
had not been received for May 2011 but was actually sent in. Below
15 are the reasons for this error.

When I received my first letter in October 2012 about penalties I
phoned and discussed the matter with an officer who informed me I
owed nothing so I thought all must be ok.

20 The next letter arrived on the 28th of January 2013, again I rang and
spoke to a different officer who said there was a late payment in May
2011 but there was a glitch in the system and the officer would look
into it.

25 The next letter arrived on the 27th May 2013, again I rang in and spoke
to a different officer who advised me to get a copy of the cheque I sent
to the PAYE for my May 2011 payment which I duly did. All was in
order from my end but on checking back I realized I had not sent my
P35 in for the year end 2012, so I processed it and have not employed
since.

30 I had another letter stating the penalties again, I again rang in and
spoke to an officer who advised me I owed nothing and they had
received the copy of the cheque, and all was sorted for the May 2011
payment. The officer advised me to write in within 30 days appealing
against the penalties which had arisen due to the May 2011 payment.

35 I duly wrote to the tax office stating my case, who wrote back on the
3rd February 2014. From this letter I fully understood the problem was
with the late submission of my P35, and not the non-payment of the
May 2011 payment."

21. On 20 February 2014 the Appellant notified her appeal to the Tribunal.

40 22. The Notice of Appeal to the Tribunal included an application to appeal out of
time. HMRC objects to the late appeal because although the penalty determinations
were issued on 8 October 2012, 28 January 2013 and 27 May 2013 all clearly stating
that any appeal should be made in writing within 30 days of the date the Notice of
Penalty Determination was issued, no appeal was received from the Appellant until 27
45 January 2014.

HMRC's contentions

23. Undelivered correspondence is recorded by HMRC, and there are no records held to show any of the penalty notices or indeed any other mail was returned undelivered. Therefore, the penalty determinations were deemed to have been received within the
5 ordinary course of post-delivery in line with Section 7 of the Interpretation Act 1978.

24. HMRC contends that no reasonable excuse has been provided as to why a late appeal should now be accepted.

25. With regard to the substantive issues this appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day
10 responsibilities of the Appellant to ensure a complete 2011-12 Employer's Annual return was filed online by the legislative due date.

26. HMRC have no discretion in the calculation of the penalty amount as it is set in statute, Section 98A TMA 1970. Employers who fail to submit their return on time will be subject to a penalty under this section.

15 27. Whilst the Appellant may have met her financial obligations, Regulation 69 of the Income Tax (Pay As You Earn) Regulations 2003 and Schedule 4 Part 3 of the Social Security (Contributions) Regulations 2001 provides that the employer shall pay the liabilities due within 14 days [or, if payment is made by an approved method of
20 electronic communications in respect of earnings paid after 5th April 2004, within 17 days] after the end of the tax period. HMRC contend that although the employer may have fulfilled her obligations under Regulation 69 and paid the liabilities due, this cannot provide a reasonable excuse for failing to file the 2011-12 Employer Annual Return. Furthermore, HMRC submit that while the Appellant may have paid all tax on
25 schedule up to the date of cessation this is what is expected from her as an employer who employs staff under the PAYE system.

28. The fact that the Appellant ceased trading on 6 September 2011 has no bearing on the fact that an Employer's Annual Return (P35 & P14's) still has to be done. The P35 is required by the employer to balance up the payments made with the individual
30 P14's for each employee. The fact that the Appellant ceased midyear does not alter the fact that she had to account for the PAYE amounts that she paid over throughout the year. The completion of P14's is also required to enable the employee to receive their P60 summary of Tax and NIC paid.

29. The Appellant has stated in her Notice of Appeal that after the business ceased she sent in her final PAYE payment but then forgot to send the P35 in April 2012.
35 HMRC submit that forgetting to send the P35 cannot be deemed a reasonable excuse.

30. Despite HMRC confirming through penalty notifications issued on 8 October 2012, 28 January 2013 and 27 May 2013 that an Employer's Annual Return for 2011-12 had not been filed, advising it must be filed and the consequences of not doing so, the Appellant failed to take timely action to rectify this failure.

31. This in HMRC's view is not the actions of an employer exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts.

5 32. Although the Appellant states that when she received a penalty letter she thought it was referring to non-payment of PAYE, HMRC contend that the Notice of Penalty Determination clearly advises that it is in respect of the P35 return not being filed by 19 May 2012.

10 33. It was the Appellant's responsibility to ensure that the regulations were followed. The End of Year return for 2011-12 was received late and as a result penalty determinations have been correctly charged and issued under Section 98A (2) TMA 1970.

Conclusion

15 34. The onus of proof rests with HMRC to show that the penalty was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late filing of its Employer's return. The standard of proof is the ordinary civil standard of the balance of probabilities.

20 35. There is no statutory definition 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 that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

25 36. A taxpayer acting in a reasonable manner would ensure that they adhered to their legislative obligations.

30 37. The Appellant says that she ceased to employ anyone in her business in May 2011 and sent in her final PAYE payment but then forgot to send in the P35 in April 2012. When she received a penalty letter at the end of May 2012, she thought it was referring to non-payment of PAYE, but the letter clearly referred to the late filing of her P35. The Appellant had also previously received HMRC's reminder letter in December 2011. She says she spoke to someone at HMRC who said there was nothing to pay and she considered the matter closed. She says she had made several 'phone calls and received letters from HMRC before she eventually applied for a copy of the cheque, front and back, from her bank which established that payment of all
35 PAYE due had been made to HMRC in May 2012. Following this the Appellant received penalties in October 2012, January 2013 and May 2013, apparently still not realising that the penalties related to the late filing of her P35 return.

40 38. It was only when the Appellant received HMRC's letter in February 2014 that she says she finally understood the penalty was in relation to the late submission of the P35. However the Appellant had filed a paper copy of the Employer Annual Return (P35 and P14's) for 2011-12 on 15 May 2013 which was sent back to the

Appellant on 31 May 2013 as the incorrect version of the P14's was used. The Appellant eventually filed her Annual return online on 1 July 2013.

5 39. HMRC says that despite confirming through penalty notifications issued on 8 October 2012, 28 January 2013 and 27 May 2013 that an Employer's Annual Return for 2011-12 had not been filed, advising it must be filed and the consequences of not doing so, the Appellant failed to take timely action to rectify this failure.

10 40. Although the letter from HMRC at the end of May 2012 clearly refers to the fact that the Appellant's return had not been filed and was overdue, it is difficult to understand why in the many telephone conversations and letters between the parties, the Appellant was not told that the penalties related to the overdue return, particularly before the penalties were issued in October 2012, January and May 2013. Furthermore the penalties do not appear to have been accompanied by a covering letter explaining what the penalties related to.

15 41. The Appellant contacted HMRC in October 2012 and seems to have been assured that the penalties issued that month were in error. The same happened again in January and May 2013. At that stage the Appellant realised that she had not filed her 2012 return and therefore filed the return. However she was still unaware what the penalties related to.

20 42. Clearly the Appellant thought that the penalties were a mistake. Each time she tried to resolve this issue she was told that she owed nothing and no mention was made that the penalties related to her outstanding P35 return. In May 2013 there were several phone calls by the Appellant and letters from HMRC which resulted in the Appellant applying for a copy of her PAYE cheque from her bank to establish proof of payment.

25 43. The Tribunal find that the late filing penalties charged up until October 2012 are in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file her Employer Annual return on time and the £400 late filing penalties are confirmed.

30 44. However for the remainder of the default period the Appellant had a reasonable excuse, because throughout that period there was a failure on the part of HMRC to advise what the £400 penalties related to. Had the Appellant been told that they had been imposed because her 2012 return had not been filed, the Appellant would doubtless have remedied the situation. Whilst there is no duty on the part of HMRC to issue reminders, the situation in this particular case was unusual. Whilst HMRC
35 would not have intentionally misled the Appellant, their actions after October 2012 contributed to the Appellant's continuing misapprehension that the penalties related to PAYE. To some extent therefore the delay in the Appellant filing her return after October 2012 was in part due to HMRC being less than clear in informing the Appellant what the penalties related to. The second and third late filing penalties
40 issued in January and May 2013 are therefore discharged.

45. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 11 August 2014

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