



TC03636

Appeal number: TC/2013/07421

Section 98A (2) and (3) Taxes Management Act 1970 – Employer’s End of Year return late – penalty for one month’s delay – Appellant unaware that an attempt to file online was unsuccessful – whether reasonable excuse – no – appeal disallowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

D OSHER t/a MARATHON MOTORS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR LESLIE HOWARD**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 21 February 2014

Mr Lawrence Osher on behalf of his son, the Appellant

Ms Karen Weare, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by D Osher t/a Marathon Motors ('the Appellant') 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) Regulation 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 fifty employees. If the failure continues beyond twelve 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-gearred 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

The background facts

5. The filing date for the Appellant's 20012/13 return was the 19 May 2013. This had to be filed online.

6. The 2012/13 return was filed on 10 June 2013

7. A penalty of £100 was issued on 14 June 2013 in respect of the period 20 May 2013 to 11 June 2013

8. On 25 June Mr Lawrence Osher appealed the penalty on behalf of his son, the Appellant.

The Appellant's case

9. The Appellant accepts that the P35 return was filed late but says that he has a reasonable excuse for the late filing.

10. Mr. Lawrence Osher, the Appellant's father, says he is seventy years of age and has paper filed since he was a teenager. However he struggles with filing accounts online. He logged on and erroneously believed that he had filed the return online early in April 2013.

11. He says that he finds navigating websites a daunting task but he was pleased that he had managed to successfully file the VAT and Real Time returns successfully. He states that because of the regularity of filing VAT and Real Time Payments he is

able to manage these online processes, but the filing of the Employer End of Year Returns online is still causing him problems.

12. He adds that he thought he had filed the P35 successfully because he received a 'successful online submission'. He subsequently realised that this related to a Real Time PAYE submission and not the P35.

13. The Return relates to just one employee and there are no outstanding payments. All monies, including VAT, have been paid. There is nothing outstanding or underpaid and he asks HMRC to show consideration and remove the penalty.

HMRC's Case

14. 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 and the Appellant does not dispute that the P35 was submitted late.

15. The Appellant has been operating as an employer within the PAYE scheme since 10 September 2003. Mr. Osher senior has been filing Employer Annual Returns annually and has been filing these returns online since 2009-10. HMRC consider him to be experienced with the end of year procedures and with the online filing process.

16. This is not the first occasion on which the issue of a late filing penalty arose. Mr. Osher senior filed his 2010-11 Employer Annual Return late and the Appellant incurred a penalty charge of £100. He appealed against the penalty charge on behalf of his son, stating the same reasons that were provided in this appeal and also citing his wife's health problems as grounds of appeal. On that occasion HMRC decided to allow the appeal and cancel the penalty. HMRC contend that this should have put him on notice that it was necessary to have adequate measures in place to meet his PAYE obligations.

17. Many third party commercial payroll software packages will allow an employer to make a test submission so that it can be checked whether the Return contains any issues to be fixed prior to it being filed.

18. HMRC contend that Mr. Osher has not provided a reasonable excuse for the filing failure. The legislation places responsibility for delivery of the completed Employer's Annual Return with the employer. HMRC have to be seen to be consistent in their approach to all their customers, particularly to those who comply with the regulations. HMRC submit that the penalty was correctly charged in accordance with the legislation.

19. It was also open to Mr. Osher to appoint an agent to deal with online submissions. In that event he would have to authorise HMRC to correspond with the agent on his behalf by completing form 64-8. This is, of course, a matter of personal choice.

Conclusion

20. 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.

21. It is necessary to consider the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation. 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. The Appellant appears to have made a genuine mistake when initially attempting to file his P35. However, that does not amount to a reasonable excuse.

22. The appeal is therefore disallowed and the £100 penalty payable for late submission of the Employer's Annual Return is confirmed.

23. 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: 23 May 2014