



TC03653

Appeal number: TC/2014/00324

Section 98A (2) and (3) Taxes Management Act 1970 – penalties for late employer’s end of year P35 return – Appellant assumed a ‘test’ submission was a live submission – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

QUALITY ASSET MANAGEMENT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 15 April 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 11 January 2014 and HMRC’s Statement of Case submitted on 6 February 2014, the Appellant submitting no Reply.

DECISION

The Appeal

- 5 1. This is an appeal by Quality Asset Management Limited ('the Appellant') against penalties of £500 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.
- 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 2013 in accordance with 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.
- 30 8. 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" (*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
35 together, be a reasonable excuse.

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 a P35 Interim Penalty Letter to the Appellant at the end of May 2013.
13. 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.
14. The Employer's Annual return was filed online on 17 October 2013.
- 15 15. HMRC sent the Appellant a final late filing penalty notice on 22 October 2013 for £100 for the period 20 September 2013 to 17 October 2013.

Appellant's contentions

16. On 15 October 2013 the Appellant appealed against the penalties. It's agent said:
- 20 1) 'The Employer's Annual Return was submitted online and an acknowledgement receipt received that the return had been received. The submission was not a test.
- 2) HMRC payroll software was used. It is a requirement that the submission is sent before the employer can continue to use the system into the New Year. Therefore, if the submission had not been sent the employer cannot proceed.
- 25 3) At the time of transfer to RTI (Real Time Information) there were problems with the new software not sending submissions and we had to wait for a software update. The PAYE tools helpline advised there were problems with submissions and asked us to be patient. We followed their direction.
- 30 4) We run payroll for another company and followed exactly the same procedure and have confirmed that their submission was successfully received.'
17. The Appellant says :
- 'The problem of non-submission occurred because we changed from Windows based Basic PAYE Tools to HMRC's MAC operating system tools. We were advised by the online helpline team that an update

5 would be available for MAC and that HMRC had encountered problems with the software rollout; that the update would rectify issues we'd had with submission. Because we were using a different operating system we had no reasonable way of knowing our submission had not been received as we received a message suggesting it had. The email we received said "Thank you for sending the PAYE End of Year submission online. The submission for reference 083/ZA52304 was successfully received on 28-04-2013." The email goes on to refer to if the submission was a test, the actual submission should still be sent. It was this actual submission we spoke to the online help team about, and they told us the update would fix the problem. We have since discovered the update did not fix the problem but we had no reasonable way of knowing this and received incorrect advice from the helpline.

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15 Because there were problems with the transition and introduction of MAC software we believe this led to our submission not being made. We sought help from the helpline, who confirmed the update would fix the problems we had encountered. Once the update installed we believed the submission had been made and there were no outstanding submissions showing. We did not find out until the penalty arrived some 4/5 months later there was a problem and feel the penalty is unreasonable and was due to software changeover which was not made clear by either HMRC or the helpline. We believe helpline staff may not have been trained to recognise issues with transition from one operating system to another."

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25 18. On 31 October 2013, HMRC informed the Appellant of its decision, rejecting their appeal and offering a review.

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

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- 1) 'It is unreasonable to wait 5 months before bringing this to our attention.
 - 2) This fine could kill a small business that has acted in good faith.'

20. HMRC carried out a review and issued their review conclusion on 17 December 2013. The outcome of the review was that HMRC's decision should be upheld.

35 21. On 12 January 2014, the Appellant notified their appeal to the Tribunal.

HMRC's contentions

22. HMRC's records show that a test submission was received on both 28 April 2013 and 16 October 2013. A live submission was not received until 17 October 2013.

40 23. Once HMRC's Basic PAYE Tools ('BPT') for filing a P35 Employer Annual Return is downloaded it is in the same format whether the operating system is Windows based or Mac based. HMRC have no records to indicate that there were any

problems with HMRC's BPT for filing a P35 Employer's Annual Return using either a Windows or Mac operating system.

24. Information regarding the download of BPT and completing 2012-13 Employer's Annual Return and switching to BPT in real time (RTI) is available on the HMRC website. HMRC submit that a prudent employer would have made themselves aware of this information to ensure that their tax obligations are met.

25. The Appellant used HMRC's BPT for filing their P35 Employer's Annual Return. HMRC provides an online learning module for using BPT in accordance with agreed measures with the professional tax bodies and tax charities

26. The guidance on HMRC's website clearly advises what version of BPT you must have. HMRC records confirm that this is the version the Appellant used to submit their Employer's Annual Return in 'test' on 28 April 2013 and 'live' on 17 October 2013. HMRC contend that if the Appellant were able to submit the Employer's Annual Return in both 'test' and 'live' using the same version, then the fault lies with the user rather than the operating system.

27. Although the acknowledgement email sent to the employer is generic for both test and live transmissions, as the Appellant used HMRC's BPT for filing they would have been able to check the status of their submission by looking at the Online Submissions Tab.

28. The Appellant would have had to choose to make a 'test' submission. Once the test submission is complete the Appellant would have been advised, 'Your test submission was successful; you must now file your Employer's Annual Return online to HMRC. Please select 'Next' to continue. If you do not file your return by 19 May, HMRC may charge you a penalty'.

29. HMRC contend that the BPT clearly advised the Appellant at each step of the process what was required of them, and would have left them in no doubt as to whether the P35 Employer's Annual Return was submitted correctly and in live mode.

30. HMRC further contend that following receipt of both the AR1N issued on 28 April 2013 and the interim penalty reminder at the end of May, if the Appellant were under the impression that the 2012-13 Employer Annual Return had been filed then this should have alerted them that something was wrong. Furthermore, HMRC contend that it is reasonable to expect that they would have checked if the submission had been made through the online submissions tab in BPT or contacted HMRC. However the Appellant waited, for whatever reason, until 17 October 2013 to file it's return.

31. The Appellant's agent has provided no evidence to substantiate its claim that it followed exactly the same procedure when submitting a 'live' Employer's Annual Return for another company.

32. 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:

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

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.

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

33. 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 that penalties may be imposed for the late submission of returns and that a reminder will not necessarily be sent.

34. 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 deemed a reasonable excuse for the actual failure.

35. 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 :

25 "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.

30 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.

35 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."

36. 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 37. In the case of *Hok Ltd v HMRC* the Appellant appealed against fixed penalties totaling £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 38. 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 39. HMRC acknowledge that 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 40. 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.

Conclusion

35 41. 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.

40 42. As HMRC say, although the acknowledgement email sent to the employer is generic for both test and live transmissions, the Appellant would have been able to check the status of their submission. Once the test submission is complete the

Appellant would have been advised, ‘Your test submission was successful; *you must now file your Employer Annual Return* online to HMRC.... If you do not file your return by 19 May, HMRC may charge you a penalty’. This should have left them in no doubt that the 2012-13 P35 Employer’s Annual Return had not been submitted in live mode.

43. It is indeed unfortunate that HMRC sometimes do not issue first penalty notices until there is already a significant period of delay. However, whilst this cannot of itself afford a reasonable excuse for the delay in delivering the return, not to issue penalty notices as and when defaults occur is not a deterrent to employers or taxpayers who, whether innocently or otherwise, have failed to comply with their obligations.

44. However, as HMRC contend, following receipt of both the AR1N issued on 28 April 2013 and the interim penalty reminder at the end of May, if the Appellant was under the impression that the 2012-13 Employer’s Annual Return had been filed, then this should have alerted them to the fact that something was wrong. Exercising a reasonable degree of prudence, the Appellant could have checked whether the submission had been made. It is not clear why the Appellant waited until 17 October 2013 to file its return.

45. 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.

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

47. 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: 28 May 2014

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