



TC03839

Appeal number: TC/2014/00416

Section 98A (2) and (3) Taxes Management Act 1970 - Employer's End of Year return P35 late - agent failed to file return - whether reasonable excuse - no - appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DEBORAH NORRIS t/a CURZON DINER

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 17 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 letter of Appeal dated 15 January 2014, HMRC's Statement of Case dated 11 February 2014 and the Appellant's reply of 20 February 2014

DECISION

Decision under Appeal

1. This is an appeal by Deborah Norris t/a Curzon Diner against penalties amounting to £400 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 (forms P35 & P14's) 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) Regulations 2001. The return must include 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).
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 50 employees. If the failure continues beyond 12 months a penalty can be imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.
4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 require the mandatory use of electronic communications by employers who must deliver their P35/P14 forms online using an approved method of electronic communications for 2009-10 onwards

The background facts

5. The Appellant was required to file an Employer Annual return for the year 2012-13. The filing date for the return was 19 May 2013.
6. HMRC sent the Appellant an Employer Annual Return reminder (AR1N) on 28 April 2013.
7. From 31 May 2012, HMRC introduced the issue of a P35 Interim Penalty letter where an Employer Annual return remained outstanding after the due filing date. The P35 Interim Penalty letters was issued over a five day period so that each one reached an employer within a month of the filing deadline. Therefore, HMRC would have issued a P35 Interim Penalty letter to the Appellant on or a few days after 31 May 2013.
8. 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.
9. At the date of HMRC's submission to the Tribunal (11 February 2014) HMRC has not received a 2012-13 Employer Annual Return. Nor had the Appellant notified HMRC of a nil declaration in respect of the 2012-13 tax year.

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The Appeal

10. On 16 October 2013, K & K Accountants appealed against the penalties in writing stating as follows:

5 ‘My client was advised that her previous agent, The Personal Tax Centre, had prepared the relevant P35 in April 2013 and that they were to submit the same to you prior to 19 May of this year. It has now come to my client’s attention that for some reason said P35 was not submitted by the agent whom my client had instructed in good faith.

10 My client’s business is extremely small and the turnover and profits have been badly hit as a result of the current recession. Having to pay this £400 penalty would place extreme hardship on my client and she may have to cease trading. I understand that any staff who were assisting my client are now having their hours cut drastically and if the business were to close this would create further unemployment.’

15 11. HMRC sent the Appellant a decision letter on 29 October 2013 rejecting the appeal and offering a review. On the same date an additional letter was issued to the Appellant advising her that HMRC had not received a 64-8 authorising K & K Accountants to act on her behalf.

12. On 15 November 2013, K & K Accountants requested a review of HMRC’s decision reiterating the previously stated grounds for appeal and in addition stating:

20 ‘My client also wishes to de-register as an employer as soon as possible as her business is extremely small and is on the verge of closure due to the current recession.

In view of the small sum involved (£400.00) and the negative effect that such a sum would have on the continued survival of this local business I sincerely hope that you will look on this application to waive this £400.00 favourably’.

25 13. On 28 November 2013, HMRC issued a letter to the Appellant advising that K & K Accountants had not been authorised to deal with matters relating to her Employer PAYE Scheme.

30 14. HMRC carried out a review and issued their review conclusion to the Appellant on 31 December 2013. The outcome of the review was that HMRC’s decision should be upheld.

15. On 15 January 2014 K & K Accountants submitted an appeal to the Tribunal stating the following grounds for appeal.

‘The responsibility for originally filing the return that has led to the penalties arising still rests with the Personal Tax Centre, Ashley Road, Boscombe.

35 I cannot believe the amount of correspondence that has been generated in relation to this matter. The business in question (The Curzon Diner) is tiny in nature and mainly offers customers cheap cooked breakfasts.

40 I have already written under separate cover to the HMRC PAYE office in Newcastle to deregister the Curzon Diner as an employer, as in the writer’s option, a small business like this should never have registered as an employer in the first place,

taking account of its size and the very casual nature of the staff that may be required on the odd busy day.

5 In view of the above, will you please ensure the survival of this small local business, which is being strangled by red tape and bureaucracy, please now, waive all fines and penalties arising in relation to the 12-13 annual return’.

16. On 23 January 2014, HMRC received authorisation enabling K & K Accountants to deal with matters relating to the Employer PAYE scheme.

HMRC’s submissions

10 17. The Appellant registered as an employer with HMRC through the Employer Helpline on 16 January 2012 and has operated a PAYE scheme since that date.

18. The 2011-12 Employer Annual Return was filed online on 11 April 2012. At the date of this statement HMRC has not received any notification that the PAYE scheme ceased prior to 6 April 2012.

15 19. An employer must complete and file an Employer Annual Return if they had to maintain a form P11 (or equivalent payroll deductions record) for at least one employee during the tax year. This applies even if an employer did not have to make any deductions of Pay As You Earn (PAYE) or National Insurance contributions (NIC) from employees during the tax year.

20 20. If an employer did not have to maintain any forms P11 during a tax year they are not required to complete an Employer Annual Return. However, the employer must notify HMRC that an Employer Annual Return will not be completed. An employer or agent can notify HMRC of a nil declaration by completing a ‘No Employer Annual Return to make’ form online, by telephoning the employers helpline or by writing to HMRC. This information is also shown on the HMRC website and was therefore
25 available to the Appellant.

21. At the date of this statement HMRC has not received a 2012-13 Employer Annual return, nor has the Appellant submitted a nil declaration for that year despite the issue of the Employer Annual Return Reminder (AR1N) on 28 April 2013, the P35 Interim Penalty letter on or a few days after 31 May 2013, the penalty notification of 23
30 September 2013, the decision and review conclusion letters of 29 October 2013 and 31 December 2013 and the telephone calls made to her and her agent on 7 February 2013.

22. In order to file an Employer Annual Return online an Employer must first register/enrol as a user of the ‘PAYE Online for employers’ service. HMRC records
35 demonstrate that the Appellant registered for the PAYE online filing service on 18 June 2013 and was therefore in a position to file the 2012-13 Employer Annual Return from that date. However she has failed to do so.

23. In the appeal K & K Accountants have stated that the Appellant’s business is extremely small. 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
40 less than the penalties, down to a minimum of £100. However, in this instance the

2012-13 Employer Annual Return has not yet been submitted, therefore mitigation of the fixed penalties is not applicable.

5 24. HMRC maintain that it was the responsibility of the Appellant to ensure that she complied with her tax responsibilities by filing a 2012-13 Employer 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. This responsibility cannot be transferred to any other person acting on behalf of the employer. Where a person has asked another person to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to a third party and that third party failed to complete it. HMRC expect an employer to take reasonable care to explain to the third party what they require them to do, to set deadlines for the work and to make regular checks on progress.

15 25. HMRC does not consider that dilatoriness on the part of an agent is a reasonable excuse. If the employer feels that the accountant has failed in his professional capacity or did not follow specific instructions then the employer should seek redress directly from the accountant.

20 26. If an employer engages an agent to file an Employer Annual Return online, the employer must keep a written record, confirming that the information the agent has filed on her behalf is correct. Any written confirmation - such as a letter or email - is acceptable. This information is shown on the HMRC website. The Appellant has not provided any evidence to suggest that she sought or received any such confirmation from her agent in respect of the 2012-13 Employer Annual Return.

25 27. In the case of *Stewarton Polo Club Ltd v HMRC*; Judge Dr C. Staker stated in paragraphs 14, 15 and 17:

30 "The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

35 The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted."

40 The Tribunal considers that the obligation to ensure that the return is filed on time is on Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse."

45 28. Furthermore, in the case of *Schola UK Ltd v HMRC*; Judge M. Tildesley OBE stated in paragraph 7:

“The Appellant’s reason for not filing the return on time was essentially its agent made an honest mistake. The Appellant was bound by the actions of its agent and cannot avoid its responsibilities under the Tax Acts by transferring them to its agent. The agent’s mistake was that it did not check that it had received the acknowledgement of receipt of the return which HMRC sends by e-mail. The mistake could have been avoided if the agent had exercised proper care. The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts. The Tribunal, therefore, finds that the Appellant did not have a reasonable excuse for the late filing of the 2008-09 end of year return.”

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10 29. In the case of *The Cove Fish & Chip Restaurant Ltd v HMRC* (2011) UKFTT 625 (TC) Judge Dr Staker dismissed the appeal noting:

“The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as a bookkeeper, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as a bookkeeper cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the Appellant to a third party of itself amounts to a reasonable excuse.”

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25 30. HMRC has no statutory obligation to issue reminders for Employer Annual Returns. The obligation to submit a return by the due date lies with the employer in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003.

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31. Interim penalties are charged under Section 98A (2) (a) and (3) TMA 1970 where a return remains outstanding after the due date. There is no statutory timetable HMRC must follow when issuing penalty notices. A penalty notification is not a reminder to submit a return, but is a charge for not submitting the return by the due date.

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32. HMRC acknowledge the agent’s statement regarding the current financial state of the Appellant’s business. However, HMRC can only act in accordance with legislation and cannot accept any inability to pay the penalties charged as a reasonable excuse for the late filing of the 2012-13 Employer Annual Return.

33. In response to the agent’s statement regarding the amount of correspondence generated in this case, HMRC maintain that the penalty notification was issued as a direct result of the Appellant’s failure to comply with her tax responsibilities 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. HMRC issued further correspondence in response to the appeal and subsequent request for a review. It is the contention of HMRC that none of the above correspondence would have been issued if the Appellant had complied with her tax responsibilities on or before the due filing date of 19 May 2013.

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34. The Appellant’s 2012-13 Employer Annual Return due on 19 May 2013 has not yet been filed, therefore penalties have been correctly charged in accordance with s 98A(2) & (3) Taxes Management Act 1970.

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Conclusion

35. When a person appeals against a penalty they are required to have a reasonable excuse. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable
5 excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation.

36. It is necessary to consider the actions of the Appellant from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation.

10 37. The Appellant's appeal does not contain anything which shows that something exceptional prevented her from filing her Employer's End of Year Return on time. The Appellant would have been aware of the necessity to file her return online and to do so by 19 May 2013. It is accepted that the Appellant relied upon her agent to file the return. However, as HMRC argue, it is established law that a taxpayer must take
15 responsibility for the action or inaction of their agent or representative. HMRC have to be seen to be consistent in their approach to all taxpayers.

38. The Tribunal therefore finds that the late filing penalties charged by HMRC are in accordance with legislation and there is no reasonable excuse for the failure of the Appellant to file her Employer Annual return on time or throughout the failure period.

20 39. The appeal is accordingly dismissed and the £400 late filing penalties are confirmed.

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
25 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: 24 July 2014

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