



TC03905

Appeal number: TC/2012/06002

Penalty for late online filing of Employer's Annual Return - Appellant delegated task to an agent which erroneously believed that the business had been transferred to a new owner which would file the return - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OWEN HUGHES & HUTCHINGS

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 26 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 24 May 2012, and HMRC's Statement of Case submitted on 04 February 2013, the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Owen Hughes & Hutchings ('the Appellant') appeals against a £600 penalty imposed under Section 98A(2) & (3) Taxes Management Act 1970 for the late filing of the Employer's Annual Return for tax year 2009-10.
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) of The Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulation 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
20 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.
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 liable to penalties in an amount equal to the total duty shown
35 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's Annual Return (P35 & P14s) for the year 2009-10. The filing date for the return was 19 May 2010.

10. The Employer's Annual Return was not filed on time.
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.
- 5 12. On 21 October 2010 the Appellant appealed against the penalties, on the grounds that they had been taken over by a Dental Consortium on 1 February 2010 and the agent, Curtis Bowden & Thomas, Chartered Accountants, thought the new consortium would have filed the Employer's Annual Return for 2009-10. The failure to file by the deadline was a misunderstanding.
- 10 13. The Employer's Annual Return was filed online on 2 November 2010.
14. HMRC sent the Appellant a final late filing penalty notice on 5 November 2010 for £200 for the period 20 September 2010 to 2 November 2010.
15. The appeal of 21 October 2010 was misplaced but on 19 January 2012 HMRC replied to the Appellant, rejecting the appeal and offering a review.
- 15 16. Following the review on 21 March 2012 HMRC upheld its decision. The Appellant appealed to the Tribunal on 24 May 2012.
17. The stated grounds of appeal were that
- "The Appellant had been taken over by a consortium on 1 February 2010. The agent thought that the new consortium would have filed the Employer's Annual Return for 2009-10 but they took over as a new employee. The failure to file the Employer's Annual Return by the deadline was a misunderstanding between the agent and the Dental Consortium.
 - HMRC should have notified the Appellant that no Employer's Annual Return had been received before penalties of £600 had arisen. The case of *Hok Ltd V HMRC* supported their view."
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HMRC's contentions

18. 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.
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19. 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). This was confirmed by the First-tier Tribunal, in *Anthony Wood trading as Propaye v HMRC* (2011 UK FTT 136 TC 001010). Although the decisions in these cases are not binding, HMRC's view is that the reasoning is relevant to this appeal.
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20. HMRC consider 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 the return on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

21. HMRC's view is that the actions of the employer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts.

22. If the employer could reasonably have foreseen the event, whether or not it is within their control, HMRC would expect them to take steps to meet their obligations.

23. If there is a reasonable excuse it must exist throughout the failure period

24. HMRC say that the Appellant has been registered as an employer for some time and was therefore fully aware of the requirement to ensure its tax obligations were up to date and that the Employer's Annual Return was submitted on time.

25. HMRC contend that the Employer's Annual Return for the tax year 2009-10 was filed on 2 November 2010. HMRC submit that fixed penalties have been correctly charged in accordance with the legislation. The penalties may only be set aside if the taxpayer has a reasonable excuse which existed for the whole period of default.

26. The Appellant's agent, Curtis Bowden & Thomas, state that the failure to file the Employer's Annual Return by the deadline was due to a misunderstanding between them, the agent, and the Dental Consortium who took over the Appellant on 1 February 2010.

27. HMRC submit that it is the employer's obligation to make Employer's Annual Returns by the due date. The actions of a third party do not relieve the employer from his legal obligation to ensure his returns are filed on time. This obligation cannot be transferred to another person or body. Even if the employer engages someone to assist with that obligation the responsibility for submitting and ensuring the returns are filed rests with the employer. HMRC do not consider that a misunderstanding between an employer and their agent constitutes a reasonable excuse. It is the responsibility of the employer to ensure all their tax affairs are up to date.

28. Curtis Bowden & Thomas state that HMRC did not notify the Appellant that no return had been received thereby allowing penalties to accumulate to £600.

29. HMRC contend that the legislation at Section 98A of the Taxes Management Act (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 four months after the due date;

- a second interim penalty is issued where the return has still not been received after a further four months;
- a third interim penalty is issued where the return is still outstanding after a further four months.

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

10 31. There is no obligation upon HMRC to issue reminders to taxpayers or notify taxpayers that an Employer's Annual Return has not been received prior to the issue of penalty notices. There is also no statutory obligation upon HMRC to issue penalty notices closer to the deadline date. It is well publicised on HMRC's website that penalties can be imposed for the late submission of Employer's Annual Returns and that a reminder will not necessarily be sent. HMRC do not accept that any perceived communication delay can amount to a reasonable excuse.

15 32. Curtis Bowden & Thomas refer to the decision of the First-tier Tribunal in the case of *Hok Ltd v HMRC* as the appeal in that case was made on similar grounds.

20 33. HMRC contend that while cases heard by the Special Commissioners or First-tier Tribunal do carry weight, they do not set a precedent. Hok Ltd appealed against fixed penalties totalling £500 charged under Section 98A of TMA 1970 for the late filing of its Employer's Annual Return for 2009-10. The First-tier Tribunal decided that HMRC had not acted fairly or in good conscience by not 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.

25 34. HMRC appealed this decision and the Upper Tribunal heard the appeal in July 2012 and released its decision on 23 October 2012. The Upper Tribunal found that HMRC's decision to charge Hok Ltd penalties for the 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.
30 The decision of the Upper Tribunal creates a precedent and is binding on all cases where similar issues are raised.

Conclusion

35 35. 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.

40 36. 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.

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

5 38. As HMRC argue, it is the employer's obligation to make Employer's Annual Returns by the due date. This obligation cannot be transferred to another person or body. The responsibility cannot be delegated. The action or inaction of a third party does not relieve the employer from its legal obligation to ensure compliance. A genuine mistake or misunderstanding is not a reasonable excuse.

10 39. The Tribunal find that the late filing penalties charged are in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file its Employer's Annual return on time or throughout the failure period.

40. The appeal must therefore be dismissed and the £600 late filing penalties are confirmed

15 41. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **MICHAEL S CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 11 August 2014

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