



**TC06954**

**Appeal number: TC/2018/03090**

*INCOME TAX – late filing of employer RTI return – software problems –  
whether reasonable excuse – no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CUNIS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**The Tribunal determined the appeal on 12 September 2018 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 9 May 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 6 July 2018.**

## DECISION

### Introduction

1. This is an appeal against penalties issued by HMRC on 9 February 2018 under paragraph 6C of Schedule 55 to the Finance Act 2009 (“Schedule 55”) for failure to file two Pay As You Earn (“PAYE”) Real Time Information (“RTI”) returns on time under Regulation 67B of the Income Tax (Pay As You Earn) Regulations 2003.

2. The two penalties appealed are:

- (1) A penalty of £200 for the period ended 5 December 2017; and
- (2) A penalty of £200 for the period ended 5 January 2018

### Appellant’s case

3. The appellant, Cunis, set out the following grounds of appeal, in summary:

(1) HMRC has previously cancelled penalties which had been issued for the same failure in earlier periods. HMRC’s cancelation of those penalties should be regarded as a precedent for this appeal.

(2) HMRC have stated in their review letter that penalties are in place to promote efficient operation of the tax system and to provide fairness so that no-one obtains an advantage. No financial loss has been incurred by HMRC as all PAYE and national insurance contributions have been paid on the 19<sup>th</sup> of each month.

(3) This is a reporting issue and not one that allows Cunis to gain financially as a result.

(4) The process date of the payroll has been uploaded to HMRC as the date on which staff are paid when this is not possible. This is a fault in the payroll software that has now been amended by Cunis’ software supplier.

(5) The payroll software was approved by HMRC and Cunis consider that it was the responsibility of HMRC to ensure that the product was fit for purpose and they impose the rules and regulations.

(6) HMRC appear to have suggested that Cunis have updated their payroll to try and avoid paying late. This is at best an exaggerated assumption as their process remained exactly as was.

### HMRCs case

4. HMRC made the following submissions, in summary:

(1) An RTI employer is required to deliver RTI about employee payments and deductions to HMRC on or before the date on which a relevant payment is made to an employee.

(2) For the relevant periods, Cunis delivered RTI information after the payment date on four occasions:

- (a) RTI submitted 12 December 2017 for payments made on 8 December 2017;
- (b) RTI submitted 20 December 2017 for payments made on 15 December 2017;
- (c) RTI submitted 3 January 2018 for payments made on 29 December 2017;
- (d) RTI submitted on 10 January 2018 for payments made on 5 January 2018

Although there have been four defaults in the two periods, paragraph 6C(7) of Schedule 55 provides that an employer will not be liable to more than one penalty in respect of each period.

(3) The RTI information on which the penalties are based was entered by Cunis under the RTI system. HMRC are unable to intervene or amend/update the information.

(4) HMRC have taken a lenient approach and cancelled earlier penalties on appeal by Cunis where the same reasons have been given, but this does not create a precedent. A taxpayer cannot rely on HMRC accepting appeals for the same reasons and having their penalties routinely cancelled.

(5) Cunis were issued with a letter on 6 January 2016 explaining the errors made and giving them an opportunity to update and correct their payroll. This also does not create a precedent in relation to this appeal.

(6) Despite the letter of 6 January 2016, Cunis were still making incorrect RTI submissions two years later. HMRC submitted that this is not a reasonable action, considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Taxes Acts.

(7) Penalties are set to encourage compliance and promote efficient operation for the taxation system. HMRC cannot accept the same reason again for late filing of RTI information: to do so would give Cunis an unfair advantage not given to other customers who do take steps to ensure that their returns are submitted on time.

(8) Cunis have submitted that the errors arose from a reporting issue that has now been amended by the software provider. HMRC's letter of 6 January 2016 advised Cunis that they needed to update their payroll process software to avoid further late filing penalties and where to seek help if necessary. HMRC submit that Cunis did not take appropriate or sufficient steps to ensure that they met their obligations as they should have contacted their software provider or HMRC on receipt of that letter.

(9) If Cunis' belief that they were filing their RTI submissions correctly amounted to a reasonable excuse, that excuse ended on receipt of HMRC's letter of 6 January 2016 and so did not last throughout the period of failure.

(10) HMRC tests payroll software to check that it can report PAYE information online and in real time. It is up to the employer to choose software which has the necessary features to make reports in the employer's specific

circumstances. HMRC cannot recommend one software product above another and is not responsible for any problems that employers have with software which they have purchased.

(11) HMRC submit that Cunis have not demonstrated that they had a reasonable excuse which prevented them from complying with their obligations throughout the period.

(12) HMRC considered whether special circumstances (as defined in *Crabtree v Hinchcliffe* [1971] 3 All ER 967 and *Clarkes of Hove v Bakers Union* [1979] 1 All ER 152) existed and concluded that no such circumstances applied that would merit a reduction in the penalty under paragraph 16 of Schedule 55.

## **Discussion**

### *Previous cancellation of penalties*

5. Cunis submitted that HMRC's cancellation of earlier penalties should be regarded as setting a precedent such that these penalties should be cancelled as well.

6. It is clear from the information provided that HMRC cancelled earlier penalties on the basis of leniency, to allow Cunis time to correct the issues with their processes that had led to the errors. This does not set a precedent that either HMRC or this Tribunal are required to follow. These penalties cannot therefore be cancelled on the basis of precedent behaviour by HMRC.

### *No financial loss*

7. Cunis submitted that no penalty should apply as there had been no financial loss to HMRC, on the basis of HMRC's comments that penalties are in place to promote efficient operation of the tax system and to provide fairness so that no-one obtains an advantage.

8. The penalties in this case are set down in statute, the intention of which is to discourage and penalise failures to provide information on time. There is no provision for a reduction in the penalty simply because the relevant payments have actually been made. The effectiveness of the legislation would clearly be negated if the penalties were withdrawn when the relevant PAYE payments were made.

### *Whether Cunis had a reasonable excuse*

9. Paragraph 23 of Schedule 55 provides that a penalty does not arise in relation to a failure to file RTI information on time if the taxpayer satisfies the Tribunal that they had a reasonable excuse for the failure and that the failure was corrected without unreasonable delay once the excuse ended. Two situations are stated not to be a reasonable excuse:

- (1) An insufficiency of funds, unless attributable to events outside the taxpayer's control; and
- (2) Reliance on another period to do anything, unless the taxpayer took reasonable care to avoid the failure.

10. Considering the documents provided, it is clear that the payment dates included in the relevant RTI information submitted by Cunis were prior to the respective dates of submission of that information. Cunis have not disputed receiving the penalty notice. The issue to be decided, therefore, is whether Cunis have a reasonable excuse for the failure to file the RTI information on or before to the relevant payment dates.

11. The test of whether something is a “reasonable excuse” for the late filing of a tax return is not set out in statute but, in my view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

“a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered”

12. Cunis submitted that there was a reporting issue with the software that they used that meant that the process date of the payroll was uploaded to HMRC as the date of payment and that this was a fault in the third party software used which has since been corrected by the software provider. The software was approved by HMRC.

13. The information provided to the Tribunal indicates that Cunis had explained to HMRC that there was a software problem which arose because Cunis’ employees were paid on a weekly basis, a week in arrears. The “process date” referred to Cunis’ grounds of appeal appears to be the date of the end of the relevant work week; Cunis explained to HMRC that the RTI information was submitted during the following week, and payment was made at the end of that following week, so that the RTI information was submitted before payment was made. Nevertheless, the software apparently included the date of the end of the work period as the payment date rather than the actual date of payment.

14. Cunis’ submission that that “HMRC appear to have suggested that Cunis have updated their payroll to try and avoid paying late. This is at best an exaggerated assumption as [Cunis’] process remained exactly as was” refers to a paragraph in an extract from a letter from HMRC in which HMRC state that Cunis appear to have updated their payroll processes such that the RTI information was submitted only one day late (rather than several days late) but that penalties would still apply.

15. This is, presumably, intended to support Cunis’ submission that the misidentification of the payment date on the RTI information was a software reporting issue rather than a process issue by Cunis.

16. I have considered the information provided and the circumstances described in the light of the test in *Clean Car*.

17. I note that Cunis have not provided any evidence to the Tribunal that the payments were actually made before the relevant RTI information was submitted to HMRC. Cunis have also not provided any evidence that they communicated with their software provider to resolve the problem between receiving HMRC’s letter of 6

January 2016 and the late reporting under RTI on 12 December 2017, almost two years later. Cunis have also not provided any details of why they could not use alternative payroll software.

18. I consider that, following the *Clean Car* test, a taxpayer in the same circumstances as Cunis, conscious of and intending to comply with their obligations regarding tax would have either changed their software or, where no other suitable software was available, been in continuing communication with the software provider to resolve the problem. The software problems described do not therefore provide Cunis with a reasonable excuse for providing HMRC with RTI information after the payment date shown in that information.

19. The fact that the relevant software was on a list of software tested by HMRC also does not provide Cunis with a reasonable excuse for the errors in December 2017 and January 2018. Even if Cunis had provided evidence that HMRC had specifically approved the software and had some responsibility for that software, it was clear by January 2016 that there was a problem with that software.

### **Conclusion**

20. The appeal is dismissed and the penalties confirmed in full.

21. 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.

**ANNE FAIRPO  
TRIBUNAL JUDGE**

**RELEASE DATE: 29 JANUARY 2019**