



EMPLOYER'S ANNUAL RETURNS – P35 – Section 98A Taxes Management Act 1970 ('TMA') – flat-rate penalties for failure to file a P35 return on time – whether taxpayer had a reasonable excuse for her default – Permission to appeal out of time refused - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07220

Appeal number: TC/2019/00609

BETWEEN

C & D FLOWERS LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ABIGAIL HUDSON

The Tribunal determined the appeal on 4 June 2019 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 January 2019 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 March 2019.

DECISION

INTRDOUCTION

1. This is an appeal by C & D Flowers Limited ('the Appellant') against fixed rate penalties totalling £1,300 imposed by the Respondents ('HMRC') under Section 98A of the Taxes Management Act 1970 ('TMA'), for the late filing of Employer's Annual returns for the tax years ending 5 April 2011 and 2012.

BACKGROUND

2. The Appellant's return for the tax year 2010-11, was due no later than 20 May 2011.

3. The Appellant's return for the tax year 2011-12, was due no later than 20 May 2012.

4. The penalties for late filing of a return can be summarised as follows:

(i) A fixed penalty of £100 per month is imposed (under Section 98A(2) Taxes Management Act 1970) for the late filing of the Employer's Annual return (where the number of persons in respect of whom particulars should be included in the return is fifty or less).

The Appellant's returns for the tax years 2010-11 and 2011-12 were not filed on time and penalties of £100 and £1,200 respectively were imposed, under (i) above.

Filing date

5. Under Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001, an employer must deliver a complete Employer Annual Return before 20 May following the end of the tax year. That return must be delivered electronically (Regulation 205 IT(PAYE) Regs 2003).

Reasonable excuse

6. Section 118(2) Taxes Management Act 1970, provides that a penalty does not arise in relation to a failure to make a return if the person satisfies HMRC (or on appeal, a Tribunal) that they had a reasonable excuse for the failure and they put right the failure without unreasonable delay after the excuse ceased.

7. The law under paragraph 16(2) of Sch 56 of the Finance Act 2009 specifies three situations that are not reasonable excuse:

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

8. There is no statutory definition of "reasonable excuse". Whether or not a person had a reasonable excuse is an objective test and "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).

9. The actions of the taxpayer 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. The decision depends upon the particular circumstances in which the failure occurred and the particular circumstances and abilities of the person who failed to file their return on time. The test is to determine what a reasonable taxpayer, in the position of the taxpayer, would have done in those circumstances and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.

10. The onus lies with HMRC to show that the penalties were issued correctly and within legislation. If the Tribunal find that HMRC have issued the penalties correctly the onus then reverts to the Appellant to show that he has a reasonable excuse for the late filing of his CT return.

The background facts

11. The Appellant company was required by to submit a return by, at the latest, 20 May after the end of the tax year. The return for 2011 was therefore due to be returned online by 19 May 2011. The return for 2012 was therefore due to be returned online by 19 May 2012.

12. The 2011 return was submitted online on 25 July 2011 and was therefore 2 months late. The 2012 return has not yet (as at the date of the statement of case) been submitted.

13. HMRC imposed a flat-rate penalty of £100 when the 2010-11 return was not submitted on time. A penalty notice was sent to the appellant on 30 May 2011. Subsequently penalties of £1,200 were imposed when the 2011-12 was not submitted on time and remained outstanding. Penalty notices were then sent to the appellant on 24 September 2012, 28 January 2013 and 27 May 2013. The penalty notices were sent to the address on file for the Appellant company.

14. The Appellant appealed to the Tribunal on 9 January 2019.

PERMISSION TO APPEAL OUT OF TIME

15. The appellant's appeal was notified to the Tribunal late. For the following reasons, I have decided not to give permission for the appeal to be notified late:

16. The relevant penalty notices were dated between 30 May 2011 and 27 May 2013. Therefore the time limits for appealing expired between 29 June 2011 and 26 June 2013. No appeal was received until 22 November 2018, and so the Appellant was between five and over seven years late in appealing.

17. The notice of appeal indicates that the company has recently "been made aware" that there were outstanding P35's. It is not clear to me what is meant by that or when the company became aware of the penalties. Penalty notices were issued to the postal address on record on 30 May 2011, 24 September 2012, 28 January 2013 and 27 May 2013. Despite those penalty notices, the 2011-12 assessment has still not been filed. Those notices included information upon how the penalties could be appealed and yet no appeal was submitted until November 2018. Ms Day has not provided any explanation for why the Appellant did not appeal earlier.

18. The consequences to either party of an extension of time limits must be considered in light of my assessments of the merits of the substantive appeal. The Respondent is entitled to some finality in properly administering the tax regime and the time limits have been imposed by statute to provide that finality. The Appellant would be prejudiced by a refusal to extend the time limits; however, she provides no explanation for her delay in appealing and no explanation as to why that prejudice should be mitigated.

19. In considering the application for permission to appeal out of time, pursuant to *Data Select Ltd v HMRC [2012] UKUT 187 (TCC)* I have considered:

- a) The purpose of the time limit;

- b) The length of the delay;
- c) Whether there is a good explanation for that delay;
- d) The consequences of permission to appeal;
- e) The consequences of refusal of permission.

20. In the circumstances I do not consider that the Appellant has a good explanation for her delay which is of some significant length. In balancing the prejudice caused to both parties, I conclude that it would be inappropriate to extend the time limit for appeal, and the application for permission to appeal out of time is refused.

The Appellant's case

21. The Appellant's grounds of appeal appear to be that there has been no contact since 2014 from HMRC and therefore the company assumed that no debt was outstanding.

HMRC's Case

22. Under Regulation 73(1) of the Income Tax (PAYE) Regulations 2003 an employer was required to file with HMRC a completed Employers Annual return on or before its filing date. A complete return needs to be correctly submitted and received by HMRC before it is deemed to have been validly delivered and the company's filing obligations met.

23. HMRC would expect C & D Flowers Ltd to be aware of their responsibilities when a notice to file is issued and ensure a complete and valid return is submitted for the specified period a notice has been delivered for. It is not enough to have a willingness to file a return, a company must ensure that it has in place the necessary systems and processes to ensure its filing obligation is met. To that end, it must exercise due diligence and foresight. In this case, it is evident that C & D Flowers Ltd has not demonstrated the due level of prudence and diligence necessary to adhere to its filing obligation.

24. Tax legislation places the primary and sole responsibility of awareness of the employer's filing obligation and ensuring adherence to that obligation upon the employer. The employer cannot transfer this obligation to another person / body. Even if the employer engages someone to assist with that obligation, the responsibility for submitting and ensuring the returns are filed on time rests squarely on the shoulders of the employer.

25. A late filing penalty is raised solely because the Appellant failed to deliver the Employers Annual return by the statutory due date.

26. Where a return is filed after the relevant deadline a penalty is charged. The later a return is received, the more penalties are charged.

Reasonable Excuse

27. Under section 118(2) Taxes Management Act 1970 liability to a penalty does not arise in relation to failure to make a return if the taxpayer has a reasonable excuse for failure.

28. 'Reasonable excuse' was considered in the case of *The Clean Car Company Ltd v The Commissioners of Customs & Excise* by Judge Medd who said:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?" [Page 142 3rd line et seq.].

29. HMRC considers a reasonable excuse to be something that stops a person from meeting a tax obligation on time despite them having taken reasonable care to meet that obligation. HMRC's view is that the test is to consider what a reasonable person, who wanted to comply with their tax obligations, would have done in the same circumstances and decide if the actions of that person met that standard.

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

31. The Appellant has not provided a reasonable excuse for its failure to file a Employers Annual return for the tax years 2010-11 and 2011-12 on time and accordingly the penalties have been correctly charged in accordance with the legislation.

32. The amount of the penalties charged is set within the legislation. HMRC has no discretion over the amount charged and must act in accordance with the legislation. By not applying legislation and as such not to have imposed the penalty would mean that HMRC was not adhering to its own legal obligations.

FINDINGS OF FACT

33. The Appellant is silent on the fact of late submission and the reasons for it, although doesn't appear to dispute the assertion that the 2010-11 return was filed late and the 2011-12 return is still outstanding. I find that on the balance of probabilities the return that was due on 19 May 2011 was not filed until 25 July 2011, and that the return that was due on 19 May 2012 has not yet been filed. The 2010-11 return was therefore over one month late and the 2011-12 return is well over 12 months late.

34. Penalty notices were sent to the registered office of the Appellant on or around 30 May 2011, 24 September 2012, 28 January 2013 and 27 May 2013. A further penalty notice was sent on 6 October 2014. No evidence has been put before me that there were any difficulties with the postal service at the relevant time. I therefore conclude that it is likely that the Appellant received those notices.

35. A person is liable to a penalty if (and only if) HMRC give notice to the person specifying the date from which the penalty is payable (*Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761). I am satisfied that the penalty notices were sent to the registered office postal address of the Appellant.

36. Debt demand letters were then sent to the registered address between September 2011 and May 2014 and the Respondent's computer system indicates that a telephone message was left with the company on 17 July 2014 without response. Mr Day in his letter of 2 November 2018 appears to accept that there was contact in relation to these issues in 2014, and Ms Day indicated that contact continued until October 2014. There was no change of registered address during the years in question and a wealth of correspondence sent to that address. I find it grossly unlikely that all of that correspondence failed to reach the Appellant. I therefore conclude that the appellant was aware of the failures to file and the penalties imposed prior to October 2014.

37. I have not been provided with any documentation from HMRC suggesting or implying that the penalties have been cancelled, and I conclude that they have not.

DISCUSSION

38. Relevant statutory provisions are included as an Appendix to this decision.

39. I have concluded that the P35 return for the tax year 2010-11 was submitted on 25 July 2011. It should have been submitted by 19 May 2011. I have concluded that the P35 return for the tax year 2011-12 has not been submitted. It should have been submitted by 19 May

2012. Subject to considerations of “reasonable excuse” set out below, the penalties imposed are due and have been calculated correctly.

40. 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, which prevents him or her from complying with an obligation which otherwise they would have complied with.

41. The Appellant was or should have been aware that the returns would need to be filed. Each penalty notice should have triggered action, as indeed it appears that the first notice in 2011 did, yet the 2011-12 return was never delivered. The first notice for the 2011-12 return should have prompted further action on the part of the Appellant which would have avoided the increasing penalties. No explanation has been proffered as to why the returns were not delivered on time. I therefore conclude that there was no reasonable excuse for the failures.

42. In *Perrin v HMRC* [2018] UKUT 156, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account. The Upper Tribunal had concluded that for an honestly held belief to constitute a reasonable excuse it must also be objectively reasonable for that belief to be held. It is not suggested that C & D Flowers Limited honestly believed that the return had been filed.

43. I have also borne in mind the recent comments of the Tribunal in *Hesketh v HMRC* [2017] UKFTT 871 about whether ignorance of an obligation to file could excuse late filing. Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. If the Appellant was not aware of the responsibility to file, that would not constitute a reasonable excuse. The onus is upon an appellant to ensure that he or she properly understands their obligations under the law. However, in this case the Appellant was fully aware of the requirement. The argument before me appears to be that upon the dissolution of the scheme in 2014, the Appellant assumed that the penalties would be written off. However, notification of the penalties was given well before the scheme was dissolved, the penalties were not cancelled, and I conclude that C & D Flowers Limited did not have a reasonable excuse for the late filing of returns for the tax years 2010-11 and 2011-12.

CONCLUSION

44. I therefore confirm the fixed penalties of £100 and £1,200.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**ABIGAIL HUDSON
TRIBUNAL JUDGE**

RELEASE DATE: 21 JUNE 2019

APPENDIX
RELEVANT STATUTORY PROVISIONS

46. The penalties at issue in this appeal are imposed by Section 98A(2) and (3) Taxes Management Act 1970.

Taxes Management Act 1970

47. Section 98A provides as follows:

(2) - Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and

(b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding

(i) in the case of a provision of PAYE regulations, so much of the amount payable by him in accordance with the regulations for the year of assessment to which the return relates as remained unpaid at the end of 19th April after the end of that year, or

(ii) in the case of a provision of regulations under section 70(1)(a) or 71 of the Finance Act 2004, £3,000

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and

(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

48. Section 100B provides –

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax, except that

references to the tribunal shall be taken to be references to the First-tier Tribunal.

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

- (i) if it appears that no penalty has been incurred, set the determination aside,
- (ii) if the amount determined appears to be correct, confirm the determination, or
- (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,

(b) in the case of any other penalty, the First-tier Tribunal may—

- (i) if it appears that no penalty has been incurred, set the determination aside,
- (ii) if the amount determined appears to be appropriate, confirm the determination,
- (iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or
- (iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.”

49. Section 118(2) provides that for the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the Commissioners or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

Schedule 56 Finance Act 2009:

50. Paragraph 16 of Schedule 56 of the FA 2009 provides –

(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.]

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Income Tax (PAYE) Regulations 2003:

51. Regulation 73 states –

- (1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.
- (2) The information is—
 - (a) the tax year to which the return relates,
 - (b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and
 - (c) the total net tax deducted in relation to those payments.
- (3) The return must be supported by the following information in respect of each of the employees mentioned in paragraph (2)(b).
- (4) The supporting information is—
 - (a) the employee's name,
 - (b) the employee's address, if known,
 - (c) either—
 - (i) the employee's national insurance number, or
 - (ii) if that number is not known, the employee's date of birth, if known, and sex,
 - (d) the employee's code,
 - (e) the tax year to which the return relates,
 - (f) the total amount of the relevant payments made by the employer to the employee during that tax year, and
 - (g) the total net tax deducted in relation to those payments.
- (5) Paragraphs (2)(c) and (4)(g) are subject to regulation 64(7) (trade disputes).
- (6) If an employee was taken into employment after the beginning of the tax year, the employer must also provide the total amounts of—
 - (a) any amounts required by regulation 43(9), 52(11), 53(3) or 61(3) to be treated as relevant payments made by the employer to the employee during the tax year,

(b) any amounts treated as tax deducted by the employer by any of those regulations,

(c) the sum of the figures given under sub-paragraph (a) of this paragraph and paragraph (4)(f),

(d) the sum of the figures given under sub-paragraph (b) of this paragraph and paragraph (4)(g).

(7) The return must include—

(a) a statement and declaration containing a list of all deductions working sheets which the employer was required to prepare or maintain at any time during that tax year; and

(b) a certificate showing—

(i) the total net tax deducted or the total net tax repaid in the case of each employee, and

(ii) the total net tax deducted or repaid in respect of all the employees, during that tax year.

(8) The statement and declaration and the certificate must be—

(a) signed by the employer, or

(b) if the employer is a body corporate, signed either by the secretary or by a director.

(9) Paragraph (8) is subject to regulation 211(5) (authentication in approved manner if return sent electronically).

(10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).

Social Security (Contributions) Regulations 2001:

52. Paragraph 22 of Schedule 4 states –

(1) Not later than 44 days after the end of the year the employer shall render to the Inspector or, if so required, to the Collector in such form as the Board may approve or prescribe, a return showing in respect of each employee, in respect of whom he was required at any time during the year to prepare or maintain a deductions working sheet in accordance with this Schedule—

(a) such particulars as the Board may require for the identification of the employee,

(b) the year to which the return relates,

(c) in respect of each and under each of the category letters, the total amounts for the year shown under—

(i) each of heads (i) to (iv) severally of paragraph 7(13)(b) (such amounts being rounded down to the next whole pound if not already whole pounds) in the case of paragraphs (i) to (iii)),

(ii) paragraph 7(13)(c)(i), and

(iii) paragraph 7(13)(c)(i) and (ii) added together;

(d) the total amount of any statutory maternity pay paid during the year; and

(e) the total amounts he is entitled to deduct under regulation 5 of the Reimbursement Regulations.

(2) The return required by sub-paragraph (1) shall include a statement and declaration in the form approved or prescribed by the Board containing a list of all deductions working sheets on which the employer was obliged to keep records in accordance with this Schedule in respect of that year, and shall also include a certificate showing—

(a) the total amount of earnings-related contributions payable by him in respect of each employee during that year;

(b) the total amount of earnings-related contributions payable in respect of all his employees during that year;

(c) in relation to any contracted-out employment the number notified by the Board on the relevant contracting-out certificate as the employer's number;

(d) in respect of statutory maternity pay paid during that year to all his employees, the total of amounts determined under regulation 3 of the Compensation of Employers Regulations and deducted by virtue of regulation 4 of those Regulations; and

(e) the total amount deducted under regulation 8 of the Reimbursement Regulations in respect of all his qualifying employees in that year.

(3) If paragraph 25 applies, the return required by sub-paragraph (1) and the certificate required by sub-paragraph (2) shall include the information specified in that paragraph.

(4) If the employer is a body corporate, the declaration and the certificate referred to in sub-paragraph (2) shall be signed by the secretary or by a director of the body corporate.

(5) If, within 14 days of the end of any year, an employer has failed to pay to the Collector the total amount of earnings-related contributions which he is liable so to pay, the Collector may prepare a certificate showing the amount of such contributions remaining unpaid for the year in question, excluding any amount deducted by the employer by virtue of the Compensation of Employers Regulations.

The provisions of paragraph 17 shall apply with any necessary modifications to the amount shown in that certificate.

(6) Notwithstanding sub-paragraphs (2) to (5), the return referred to in sub-paragraph (1) may be made in such other form as the Board and the employer approve, and in that case—

(a) sub-paragraphs (2) to (5) shall not apply; and

(b)the making of the return shall be subject to such conditions as the Board may direct as to the method of making it.

(7) Section 98A of the Taxes Management Act 1970 (penalties for late, fraudulent or negligent returns) as modified by the provisions of paragraph 7 of Schedule 1 to the Act shall apply in relation to the requirement to make a return contained in sub-paragraph (1).