



**TC01572**

**Appeal number: TC/2011/04006**

*PAYE – year end returns – penalties for late submission - electronic submission – electronic receipt received – no record of receipt by HMRC – reasonable excuse – yes – appeal allowed – section 98A Taxes Management Act 1970*

**FIRST-TIER TRIBUNAL**

**TAX**

**OZ BUILD CONSTRUCTION LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: NICHOLAS ALEKSANDER (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 26 October 2011 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 2011, HMRC's Statement of Case submitted on 26 July 2011 and the Appellant's Reply dated 3 August 2011.**

## DECISION

1. This is an appeal against penalties for failure to submit the Employer's Annual PAYE return (P35) on time.

### 5 **Background Facts**

2. The background facts are not in dispute and I find them to be as follows.

3. Cromack & Co act as a payroll bureau for one hundred payrolls, including that of the Appellant, Oz Build Construction Limited. On 20 April 2010, Cromack & Co submitted electronically the Appellant's P35 (Employer's Annual PAYE return) for 2009/10, along with the returns for 29 other clients. They received an electronic message from the Government Gateway confirming successful receipt for that and the other 29 returns submitted. A print-out of the electronic message was included in the papers submitted to the Tribunal.

4. On 27 September 2010 HMRC issued a penalty notice for £400 for failure to file the P35. An appeal was raised against the penalty and HMRC responded stating that the P35 had not been received, and could it please be resubmitted. The P35 was resubmitted electronically on 2 November 2010, and a letter sent to HMRC advising that this had been done and requesting confirmation that the P35 had been received. No reply was ever received to this letter, nor to the appeal against the penalties.

5. On 5 November 2010 a further penalty notice was issued for £200 and a further appeal lodged. On 25 November 2010 HMRC issued two "Appeal against Penalty Determination" letters stating that no payments would be sought until after the appeals had been determined. On 23 December 2010 HMRC's Debt Management Office wrote to the Appellant demanding payment of £600.

6. On 20 January 2011 HMRC wrote to the Appellant stating that they did not accept that there was a reasonable excuse for the Appellant's failure to submit the P35 on time. The reason given was that "You did not successfully submit your Employer Annual Return (P35) online 20th April 2010. Please note the response to your online submission informs you that the submission may be a test transmission and you will still need to submit your P35 using the live transmission in order for it to be processed. The P35 was received on 2 November 2010."

7. The Appellant asked HMRC to review the decision, and the conclusions of the review were set out in a letter dated 14 March 2011. The review upheld HMRC's decision of 20 January 2010. The reasons given were:

"\* Under Regulation 73 of the Income Tax (PAYE) Regulations 2003, it is the employer's obligation to make End of Year returns by the due date. Our online system shows that no P35 was received on 20 April 2010. On checking with our online support team they have confirmed that the P35 for [name redacted] was received on the 20 April 2010 at 09:28, the P35 for [name redacted] was received at 09:35 on the 20 April 2010 (not 09:42) and there is nothing showing an

5 attempt to file for Oz Building Construction Ltd 547/EZ14395 at all, should that be a test or otherwise until the 2 November 2010. HMRC website guidance (please see enclosed excerpt) advises that you will receive an acceptance or rejection message when you submit your return.

10 \* Can I please draw your attention to the e-mail provided in that it does show a 'successful receipt of online submission for reference 567/EZ55...' at the head of the copy, but a reference number 547/EZ14395 for all other receipts. Unfortunately I cannot ascertain as to why this discrepancy occurred. Whilst I recognise that the return was then submitted upon receipt of the penalty the fact remains it was not filed until the 2 November 2010.

15 \* HMRC is not required to issue reminders. Although penalties are charged on a monthly basis there is no statutory timetable HMRC must follow when issuing the notices. Penalty notices are not reminders."

8. The Appellant now appeals to the Tribunal against this decision.

### **The Law**

20 9. Regulation 73, Income Tax (PAYE) Regulations 2003 and Paragraph 22, Schedule 4, Social Security Regulations 2001 require that an employer files an End of Year Return before 20 May following the end of a tax year.

25 10. Section 98A Taxes Management Act 1970 provides for a fixed penalty of £100 for each month (or part of a month) to be charged where an employer fails to submit a return by the due date.

11. Section 118(2) Taxes Management Act 1970 provides that 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 ceased.

### **The Appellant's case**

30 12. The Appellant makes the following submissions:

(1) Cromack & Co's records show that a successful submission was made on 20 April 2010. They have no means of determining why it was not received by HMRC and therefore cannot present any additional evidence.

35 (2) The Appellant only became aware that there was a problem when a penalty notice was issued in September 2010.

(3) Cromack & Co have encountered other instances where HMRC have issued penalty notices and it has been subsequently show that the return had been submitted.

(4) It is unreasonable to be notified four months after the filing deadline that no return had been received, and in the meantime for penalties to increase.

5 (5) HMRC state that it is the responsibility of the taxpayer to file returns by the due date, and they have no requirement to issue reminders and there is no statutory timetable for issuing penalty notices. HMRC is capable of issuing such reminders in respect of late income and corporation tax returns and payments within a month of such a default.

(6) The level of penalty is out of all proportion to the offence in all the circumstances.

10 **HMRC's case**

13. HMRC makes the following submissions

(1) For there to be a reasonable excuse, there must be an exceptional event beyond the person's control which prevented the return from being filed by the due date – for example severe illness or bereavement.

15 (2) The responsibility for filing the return on time rests solely with the employer, and this responsibility cannot be transferred to an agent working on his behalf even if it is the fault of the agent.

20 (3) Interim penalties are charged under section 98A Taxes Management Act 1970 where a return remains outstanding after the due date. Although there is no statutory timetable, a first interim penalty is issued if a return has not been received within 4 months of the due date. Further interim penalty notices are issued after a further 4 and 8 months, and a final penalty is charged when the return is finally received. A penalty notice is not a reminder to submit a return, but a charge for not submitting the return by the due date.

25 (4) HMRC has no statutory obligation to issue reminders. The duty to file returns is on the employer by virtue of Regulation 73 (cited above).

(5) The legislation for income and corporation tax returns and payments is different from that covering PAYE returns, and comparisons cannot be made between the two.

30 (6) As the Appellant has two employees, the penalties have been correctly charged at £100 per month/part month for which returns are outstanding.

(7) HMRC cannot comment on whether penalties have been withdrawn in other cases, as each case is looked at in isolation.

35 (8) HMRC online services have confirmed that there is no evidence of any submission attempts for the Appellant until November 2010. HMRC confirm that the correlation ID (retrievable from the software provider and specific to a given submission) for the alleged submission on 20 April 2010 has been requested from the Appellant's representative by telephone on 25 July 2011, but the details have not been sent to HMRC.

40 (9) HMRC must be fair to those employers who file their tax returns on time.

## Conclusions

14. It is for HMRC to prove (on a balance of probabilities) that the Appellant has failed to file the P35 on time. If HMRC prove that the Appellant failed to file on time, it is for the Appellant to show that he had a reasonable excuse for his failure.

5 15. HMRC have produced a copy of their computer records that show that the P35 was only filed on 2 November 2011. The Appellant has presented a print-out of a receipt from the Government Gateway showing successful transmission of the P35 on 20 April, and the receipt shows its name and PAYE reference.

10 16. I am aware that the Government Gateway acts as an electronic portal for various government services, and not only for electronic submission of tax returns. I therefore find that HMRC has appointed the body operating the Government Gateway as its agent for the electronic submission of tax returns. I assume that HMRC has electronic links with the Gateway for transmission of tax returns from the Gateway to HMRC's own systems. It cannot have been the intention of Parliament that taxpayers take the  
15 risk of any failures in the electronic links between the Gateway and HMRC's own systems, I therefore consider that filing a return with the Gateway by the relevant deadline is sufficient to meet the requirements of Regulation 73 to file the Employer's End of Year return on time. If the return has subsequently "lost" in the system between the Government Gateway and HMRC's own system, this cannot give rise to  
20 penalties for the taxpayer.

17. I am satisfied that the Appellant filed the P35 Employer's End of Year return with the Government Gateway on 20 April 2010. The fact that HMRC's own systems have no record of that filing is consistent with failure of the communication systems between HMRC and the Government Gateway, and does not necessarily demonstrate  
25 that the return was not filed with the Gateway.

18. I am also satisfied that the Appellant's agent did not file a "test" return. I note that the warning about test transmissions is included on every electronic receipt, and the fact that the electronic receipt for the Appellant's return includes this warning is neither here nor there. Further the Appellant's agent filed 29 other returns  
30 successfully with the Appellant's, and there is no reason to believe that the Appellant's return was filed as a test return while all the others (which were received successfully) were filed as "live".

19. I note also that HMRC requested by telephone on 25 July 2011 the correlation ID for the 20 April 2010 submission (on the day before the Statement of Case was filed).  
35 The onus is on HMRC to show that the return was not filed on time, and on the evidence before me, I am satisfied that it was filed on 20 April. If the correlation ID is critical in determining whether a successful filing was made, it should have been requested in response to the Appellant's original appeal and at the very least as part of HMRC's review.

40 20. If I am wrong, and the Appellant did not file its return on time, I would in any event find that it had a reasonable excuse for its failure.

21. As HMRC acknowledge, what amounts to a "reasonable excuse" is not defined in the legislation. HMRC submit that for there to be a reasonable excuse, there must be an exceptional event beyond the person's control which prevented the return from being filed by the due date – for example severe illness or bereavement. This takes too narrow a meaning of "reasonable", and there will be other circumstances where a taxpayer has acted reasonably, and therefore has a reasonable excuse for its actions.

22. HMRC also state that the responsibility for filing the return on time rests solely with the employer, and this responsibility cannot be transferred to an agent working on his behalf even if it is the fault of the agent. Although reliance on a third party is specifically precluded from being a reasonable excuse for VAT purposes by s 71 Value Added Tax Act 1994, there is no similar provision in relation to PAYE. As this legislation came into effect many years after the VAT provisions had been in force it would have been open to the draftsman to adopt a similar restriction to the definition of "reasonable excuse" for income tax purposes. However as he did not do so I conclude that, in the absence of a specific provision to the contrary, reliance on a third party may, depending upon all the circumstances, amount to a reasonable excuse.

23. In this case, the Appellant appointed an experienced firm of accountants to operate its payroll. The accountants submitted the P35 return electronically, and received an electronic receipt from the Government Gateway. The receipt gave the name of the client and its tax reference. The accountants would have no reason to believe that the return had not been submitted on time.

24. The Appellant first learned that the P35 had not been received by HMRC was following the issue of the September penalty notice. Within a few days of the penalty notice being issued, the accountants contacted HMRC, and the return was resubmitted on 2 November 2010.

25. I consider that the Appellant and its agents acted reasonably and prudently in all the circumstances, and that they therefore have a reasonable excuse for their actions. The excuse ceased upon being notified by HMRC that the P35 had not been received, and the P35 was then resubmitted without unreasonable delay.

26. Given my findings on the timely submission of the P35 and the question of whether there was a reasonable excuse, I have no need to consider whether the penalties are disproportionate.

27. For the reasons given above, the appeal succeeds, and the penalties are dismissed.

28. 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.

**NICHOLAS ALEKSANDER**

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**TRIBUNAL JUDGE  
RELEASE DATE: 14 NOVEMBER 2011**

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