



**TC01617**

**Appeal number: TC/2011/02170**

*Section 98A(2) and (3) TMA 1970 – late employer’s end of year return –  
Appellant thought he had submitted return – whether reasonable excuse –  
no – appeal disallowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**HOMEGA LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)**

**Sitting in public at 11 Albion Street Leeds on 4 August 2011**

**Mr J J Pollock Director of the Appellant Company for the Appellant**

**Mr J Osborne, Senior Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Decision under Appeal

- 5 1. This is an appeal by Homega Limited against the £500 penalty imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the year ending 5 April 2010.
2. An employer has a statutory obligation to make End of Year returns 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.
- 10 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.
- 15 4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 provides that an employer must use electronic communications to deliver their 2009/10 end of year return online.
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### The background facts

- 5.(i) The filing date for the Appellant's 2009/10 return was the 19 May 2010. This had to be filed online.
- 5.(ii) A first interim penalty of £400 for the period 20 May 2010 to 19 September 25 2010 was issued on 27 September 2010.
- 5.(iii) The 2009/10 return was filed online on 16 October 2010.
- 5.(iv) A final penalty of £100 was issued on 21 October 2010 in respect of the period 20 September 2010 to 13 October 2010.

### The Appeal

- 30 5. Mr Jonathan Pollock a director of the Appellant Company says that he honestly believed that he had filed the P35 return, but when he checked the system for the status on 16 October 2010 it showed the return as "updated" not "submitted". He had retained an online printout dated 3 May 2010 being the date he thought the P35 had been submitted. Mr Pollock accepts that the return was not submitted but says it is unreasonable for HMRC to have waited four months before notifying him that the return had not been filed. He says it is unfair that HMRC should allow such penalties to accumulate and that if there is no obligation on HMRC to issue reminders the penalty could have been much greater. The Appellant submits that if a fixed penalty of £100 is payable for the first month of default then the penalty has fallen due for 35

payment and a tax-payer should be made aware of that immediately. Had they done so, the Appellant would have realised his mistake and immediately filed the return. It was not either in the interests of the tax-payer or the Exchequer for HMRC not to issue reminders as and when penalties fall due.

5 HMRC's submissions

6. Mr Osborne on behalf of the Respondents said that HMRC do not issue reminders to employers who have not filed their return by the due date as it is their responsibility to ensure that their return is filed on time. He says that the Appellant would have received either an acceptance or rejection message on submitting the P35  
10 return and therefore had not followed the correct procedure.

7. Mr Osborne further explained that penalties are deferred until September in order to give HMRC time to process all returns, electronic or otherwise, and resolve any exceptions arising in relation to returns that have been made, which he says helps to reduce the risk of issuing penalties where returns have been submitted on time but  
15 HMRC have not had the time to fully process them or those who had already told HMRC they had no return to make. HMRC say that the penalty is not and should not be seen as a reminder and that there is no statutory timetable for HMRC to follow when issuing penalty notices.

Conclusion

20 8. It is reasonable to expect a business person to exercise due diligence and a proper regard for compliance with their tax obligations. A notice to file a return was issued to the Appellant and it was its responsibility to ensure that the return was filed on time.

9. The Tribunal may set aside a penalty determination if it considers that the Appellant had a reasonable excuse for not filing the return on time. Legislation does  
25 not define reasonable excuse, each case has to be considered on its own merits, but is normally taken to mean something exceptional or out of the tax-payer's control.

10. Taking all the circumstances into account the Appellant has not shown a reasonable excuse throughout the period of default and accordingly the Tribunal must disallow the appeal and confirm the surcharge of £500.

30 11. 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  
35 "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**

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**TRIBUNAL JUDGE**  
**RELEASE DATE: 2 December 2011**

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