



**TC01765**

**Appeal number: TC/2011/03788**

*Late filing of End of Year return by employer; penalties; s.98A (2) and (3) TMA; difficulty with online filing; “reasonable excuse” under s.118(2) TMA not found.*

**FIRST-TIER TRIBUNAL**

**TAX**

**PETER GLADWYN T/A PETER GALDWYN BUILDERS      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE: CHRISTOPHER HACKING**

**Determined 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 5 April 2011, HMRC’s Statement of Case submitted on 28 June and the Appellant’s Reply dated 2 July 2011**

## DECISION

1. This was an appeal against a decision confirmed on review imposing fixed penalties under Section 98A (2) and (3) Taxes Management Act 1970 (TMA) following the late submission of the Employers Annual End of Year Return for the tax year ending 5 April 2010.

2. The return was due to have been filed online by 19 May 2010.. A first interim penalty notice was issued on 27 September 2010 in the sum of £400. At the date of the hearing of this appeal the End of Year Return remained outstanding

3. HMRC's Statement of Case rehearses the relevant provisions of the tax legislation requiring a return to be submitted by companies including in particular the provisions for electronic filing of the annual End of Year return (P35). Online filing of the Employers Year End Return became mandatory for the tax year 2009/2010. In fact the appellant had been filing its returns online from the tax year ending 5 April 2006 and must, the Tribunal considers, be reasonably acquainted with what is required to effect a successful filing. Also detailed in the HMRC Statement of Case are the provisions of Section 98A TMA dealing with the calculation of the fixed penalties payable when a return is filed late. These statutory provisions are not in issue between the parties.

4. The appellant's case as stated in its Notice of Appeal is that he submitted his annual return online on 22 April 2010. The first he knew that his return had not been successfully filed was when in September 2010 he received a first interim penalty notice in the sum of £400. Mr Gladwyn contends that as he only employed one person on a part time basis and not a batch of 50 employees. The appellant also asks how he can be expected to know that he has not successfully filed his return online. He states that he is a single trader doing his best to understand new technology. Mr Gladwyn finally makes the point that he has paid all tax and National Insurance due.

5. Mr Gladwyn states that he has subsequently tried to complete an online filing but that the Revenue's system will not allow him to do so. The Tribunal understands that this is the reason that the filing remains outstanding.

6. The papers included with the Revenue's submission state that far from being a newcomer to the process involved in effecting an online filing of his annual employers return Mr Gladwyn has been filing online since 2006. In support of this HMRC produced in its Statement of Case a summary of search results and a filing history for the appellant's business which confirm this. (see folios 3 and 11 attached to the Respondents Statement of Case). This provides part at least of the answer to the appellant's question as to how he is expected to know what is required of him in relation to effecting a successful online filing. The tribunal accepts the evidence of the Respondents concerning this issue.

7. The other reason which the Revenue advance in reply to the question posed by the Appellant is that there is substantial information on its website and in published materials designed to assist employers to know what is required of them and how to

deal with any problems which may arise. Copies of these materials are also exhibited to HMRC's Statement of Case. Importantly it is made very clear that a successful filing will always be acknowledged by the Revenue either automatically at the time of filing through its intranet or, alternatively, by e-mail very shortly after the filing.

5 Absent either communication the taxpayer ought properly to assume that the filing has not been successful. Provision is made for testing submissions before making a final online filing of the return. The Tribunal is bound to conclude that Mr Gladwyn did not seek to effect a "test" filing and did not bother to satisfy himself that his filing had been successful as indicated by either of the forms of acknowledgment referred to

10 above.

8. If as Mr Gladwyn has stated (and this fact is not in dispute) he genuinely experienced technical problems in effecting the filing, his proper course was to contact the Revenue on its telephone help line. There is no indication with the appeal papers that Mr Gladwyn availed himself of this facility.

15 9. Although Mr Gladwyn says that he only employed one part time employee the Revenue state that during the year there were 2 employees in respect of which information was required to be included in the return. The reference in the calculation of the penalty of a "batch" of 50 employees is to the fact that under the statutory scheme the first fixed penalty and indeed subsequent fixed penalties are based on the

20 number of employees: the first category being that of businesses employing up to 50 employees. It matters not that only one or two may in fact be employed. What is important is that there are not more than 50 employees.

10. Section 118 (2) TMA allows for the penalty to be set aside where there is a reasonable excuse for the failure to file on time. What a "reasonable excuse" might be

25 is not defined. The Revenue considers that any such reason would have to be something exceptional or out of the Appellant's control. The Tribunal does not accept that this approach is definitive. The words "reasonable excuse" are ordinary words to be construed accordingly. However the criteria proposed by the Revenue whilst neither definitive or exhaustive, do in the view of the tribunal, represent a reasonable

30 starting position for considering what is and what is not a "reasonable excuse". It seems unlikely that it was Parliament's intention that an employer could avoid his duty to file a return on time by reason only of some "ordinary" excuse nor does it seem likely that matters within the taxpayers control would generally found such an excuse.

35 11. The tribunal is unable to find on the facts before it anything which could be said to amount to a reasonable excuse for the Appellant's failure to file his employers' annual return by the date due. The matters advanced by the appellant are far from out of the ordinary and the filing of the return was a matter within Mr Gladwyn's control. No other features of Mr Gladwyn's appeal provide what the Tribunal would consider

40 to amount to a reasonable excuse for the delay in filing the employer's return

12. The appeal must be dismissed and the penalty confirmed.

13. 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.

10

**CHRISTOPHER HACKING**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 20/01/2012**

15