



TC01834

Appeal number: TC/2011/05023

Section 98A(2) TMA 1970 – penalties for late Employer’s End of Year Return – cessation of Appellant’s business – HMRC did not impose penalties until after cessation – whether reasonable excuse – appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

MR D A DENT t/a TONY’S MEATS

Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

Sitting in public at Alexandra House Manchester on 25 October 2011

For the Appellant Mr Dent

For the Respondents Mr I Birtles Officer of HM Revenue and Customs

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DECISION

The Appeal

- 5 1. This is an appeal by the Appellant Mr David Anthony Dent t/a Tony's Meats against penalties totalling £1,200 under s 98A(2) Taxes Management Act 1970 for the late receipt of a 2006-07 Employer's End of Year Return.
- 10 2. Regulation 73(1) of the Income Tax (Pay as You Earn) Regulations 2003 requires an employer to render a completed Employer's Annual Return (P35 and P14) for any employee employed during the tax year. A Return is required even if the employer has not had to make any deductions of PAYE or National Insurance contributions from their employees pay during the year.
3. Employers are required to send their Returns to HMRC by the 19 May following the tax year end.
- 15 4. Interim penalties are charged under s 98A(2)(a) and (3) TMA 1970 where a Return remains outstanding after the due date. Penalties are charged at £100 per month for all or part of a month from the due date of the Return until the date it is received.

The factual background

- 20 5. The facts of this case are that Mr Dent was a self-employed butcher between 2005 and 2007. The filing date for his Employer's End of Year Return 2006-07 was 19 May 2007, which could have been filed on paper or on-line.
- 25 6. On 15 December 2006 there is a record of the Appellant's bookkeeper Miss D McCormack telephoning HMRC's Debt Management and Banking office and advising that she would complete the necessary PAYE and any other necessary Returns before the end of the PAYE, that is by 19 May 2007.
- 30 7. On 2 February 2007 the Appellant had occasion to speak again to HMRC's DMB division. At the time he had been negotiating a Time to Pay arrangement to clear outstanding tax and PAYE. He requested that any communications be sent to himself in addition to his agent as he was not convinced that his agent was doing his job properly.
8. Communication between HMRC and the Appellant continued from February 2007 onwards, principally in connection with repayment of outstanding tax. There is a note in HMRC's action record printout that 'this is a cessation ..'. The note is made on 6 March 2007.
- 35 9. On 26 May 2008 the Appellant's Return had not been received by HMRC and a penalty notification of £1,200 was issued to the Appellant for the period 20 May 2007 to 19 May 2008.

10. The Appellant's Return was received on-line on 22 July 2008. The Return was filed by the Appellant's agent incorrectly and shown as the Return for 2007-08. The figures from the Return were subsequently transferred to the correct year by HMRC after the agent advised that they had been made in error.

5 11. On 7 April 2011 HMRC's Debt Management and Banking office issued a final demand for payment of the £1,200 penalty.

12. On 19 May 2011 the Appellant's agent appealed the penalty.

10 13. In the appeal the Appellant's agent explained that on 11 August 2006 he had notified HMRC that the Appellant's business was to cease in August 2006 and that he had requested cancellation of the Appellant's PAYE account and that he had no further contact with the Appellant until it came to his attention in June 2008 that the Appellant's Return had not been filed. The agent says that he then filed the Return as a goodwill gesture. The agent said that he had appealed the penalty on behalf of the Appellant in June 2008 but neither he nor the Appellant heard anything further from
15 HMRC and assumed that the appeal had been successful. HMRC say that the appeal had been rejected on 3 October 2008 and both the Appellant and his agent says they received no notification of this decision.

14. On 15 June 2011 HMRC advised that because the appeal was by then out of time any appeal would have to be referred to the Tribunals Service.

20 15. The Appellant appealed to the Tribunal on 27 June 2011. He advised that his business had ceased at the end of August 2006 and that he assumed his accountant had taken all necessary steps to deal with the cessation.

Relevant legislation

25 16. Section 98A TMA 1970 (2) with regard to the imposition of penalties in the case of late returns states :-

'(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 ..'

30 '(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, ..'.

17. Section 100 TMA 1970 (3) states : -

35 'Notice of a determination of a penalty ... shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.'

HMRC's submissions

18. HMRC submit that the Appellant should have completed a Return at the time of cessation of his business, but in any event by 19 May 2007. The Appellant's agent was aware that a cessation Return was required, but failed to submit one. Legislation places responsibility for the delivery of an Employer's Return on the employer and the responsibility cannot be transferred to an agent acting on the employer's behalf. The employer therefore bears responsibility for any default. HMRC assert that the Appellant was aware that the agent may not have been doing his job properly and that therefore it was reasonable to expect him to check that the agent was successfully complying with his instructions in order that the Appellant complied with his tax obligations. HMRC say that for these reasons the failure to submit the Employer's Return was not out of the Appellant's control and that he had done nothing during the fourteen month default period to check that the Return had been submitted. HMRC contend that the Appellant should seek redress for the failure and any penalties which followed directly as a result of that failure specifically from the agent and not HMRC.

19. HMRC say that a first interim penalty is normally issued if a Return has not been received four months after the due date. A second interim penalty is issued when the Return has still not been received after a further four months and a third interim penalty issued where the Return is still outstanding after a further period of four months. Final penalties are issued when the Return is received. In this case HMRC say that it did not adopt the normal time structure for issuing penalty payments because the Appellant had ceased in business and may not have had an address to issue penalties to until the 26 May 2008, being the date the penalty notification of £1,200 was issued to the employer's private address.

The Appellant's submissions

20. The Appellant says that his personal address was known to HMRC from the outset. He had resided at 4 Crescent Road Stockport DK1 2QG from at least 19 May 2007 when his Employer's End of Year Return was due to be filed. His address would also have been readily available from his accountants who were in regular contact with HMRC.

21. Mr Dent appeals the penalty on the basis that he did not receive any P35 documentation from HMRC for submission of a Return for 2007. He says that a facsimile message was transmitted by his agents to HMRC on 11 August 2006 requesting cancellation of the PAYE account as his last pay roll payment was July 2006. He reiterates his agent's statement that no correspondence was received from HMRC until issue of the penalty notice sent direct to Mr Dent in May 2008. He considers the penalty to be excessive in comparison to his total PAYE liability for the year, and the failure to submit an End of Year Return as required was a genuine error as he had not realised what was required, given that his business had ceased trading in August 2006. He had notified HMRC of this fact, had no employees during the relevant period and assumed from the fact that he had not received a response to the notification that he had complied with all necessary filing obligations.

22. It is clear that there is an obligation on the part of HMRC under s 100 (3) TMA 1970 to serve notice of determination of a penalty. If an employer is liable to a penalty under s 98A (2) notice of that penalty should be given.

Conclusion

5 23. The Appellant does not dispute that the Employer's End of Year Return was submitted late. He asserts that he has a reasonable excuse for the late submission of the Return and that the penalties that have been imposed are excessive and unfair.

10 24. The law does not define reasonable excuse but it is normally regarded as an exceptional event, beyond a person's control, which prevented the Return from being filed by the due date. The Appellant must also show that the reasonable excuse existed throughout the entire period of default and that he acted promptly in remedying matters immediately the reasonable excuse came to an end.

15 25. HMRC should issue penalties as and when they fall due in order to ensure that the taxpayer/employer is put on notice that he is in default. In this case HMRC did not issue the penalty notice until 26 May 2008 by which time penalties had accumulated to £1,200. There is no statutory obligation on HMRC to issue reminders, but there is plainly a common law duty on its part not to act unconscionably. There was a delay in the issue of penalties for which no reasonable explanation has been offered by HMRC. HMRC has therefore not complied with its obligation to implement
20 legislation relating to the issue of penalties in a timeous and fair manner.

25 26. Taking all the circumstances into account, and considering the actions of the Appellant from the perspective of a prudent individual exercising reasonable diligence, it cannot be said that a reasonable excuse existed throughout the entire period of default. However, the delay on the part of HMRC in issuing the penalty notices cannot be ignored. The Tribunal has a discretion to mitigate penalties where it considers that a reasonable excuse has been shown. On the facts of the case, although the Appellant has not shown that a reasonable excuse existed throughout the entire period of default, the Tribunal considers that penalty notices should have been issued no later than four months after the initial default. Accordingly the Tribunal allows the
30 appeal in part and determines the penalty at £400.

35 27. 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.

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MICHAEL S CONNELL
TRIBUNAL JUDGE
RELEASE DATE: 17 February 2012

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