



TC01868

Appeal number:TC/2011/03249

Section 98A(2) TMA 1970 – penalties for late submission of Employer’s Annual P35 Return – Appellant’s business had suffered financial difficulties – unable to pay accountants fees for dealing with Returns - whether reasonable excuse - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EUROTEX TRADING LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL

**Sitting in public at 4th floor City Exchange Albion Street Leeds on 11
November 2011**

For the Appellant: Mr Siddiq Birader Director of the Appellant Company

For the Respondents: Ms Nadine Newham Officer of HM Revenue and Customs

DECISION

The Appeal

- 5 1. This is an appeal by the Appellant, Eurotex Trading Limited (“the Appellant”), against penalties totalling £400 under s 98A(2) Taxes Management Act 1970 for the late submission of the Employer’s Annual Return for the tax year ending 5 April 2010.
2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 and
10 paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 impose a statutory obligation on an employer to deliver a Employer’s Annual Return before 20 May following the end of a tax year.
3. Employers are required to submit their Returns to HMRC no later than 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.
- 20 5. If a failure continues beyond twelve months a penalty may be imposed under s 98A(2)(b) TMA 1970 up to a maximum of the amount outstanding at 19 April.

The factual background

6. The Appellant company is a clothing manufacturer trading from Dewsbury, West Yorkshire and had previously filed its Employer’s Annual Return on time.
7. A P35 PN (notification to complete form P35 Employer Annual Return) was
25 issued to the Appellant on 17 January 2010. On 26 September 2010 the Return had not been submitted.
8. On 27 September 2010 a first interim penalty notice of £400 was issued, calculated for the four months 20 May 2010 – 19 September 2010. The failure to submit a Return continued. As at the date of HMRC’s paper hearing submission on 25
30 May 2011 the period of default was 371 days.
9. On 25 October 2010 the Appellant appealed against the interim penalties saying it had been suffering severe trading difficulties and as a result of financial problems had been unable to pay its accountants professional fees. In consequence the Employer’s Annual Return had not been filed. The Appellant company said that
35 previously it had been up to date with its records and asked HMRC to mitigate the penalties.

Relevant legislation

10. 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 –

5 (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues ..’

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

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

HMRC’s submissions

11. HMRC say that the Appellant company has been registered within the current employer’s scheme since 29 November 2001 and therefore is to be considered an experienced employer, fully aware of its tax obligations. HMRC submit that the P35
15 PN issued on 17 January 2010 clearly informed the Appellant that its 2009-10 Employer Annual Return had to be filed on-line by 19 May 2010 and warned of the consequences if the Return was filed late. HMRC further submit that information about PAYE including employer obligations and the submission of an Annual Return including Return filing dates and penalties are within the public domain and widely
20 available on the internet and HMRC’s website. HMRC also have a telephone help line.

12. In response to the Appellant’s grounds of appeal HMRC say that financial difficulties and the fact that the Appellant company had not been able to pay its accountant is not a reasonable excuse for the failure to submit an Annual Return.
25 There was no reason why the Appellant company could not have filed the Return if necessary by seeking help from HMRC. The Appellant could have contacted HMRC prior to the filing date to advise of its difficulties and requested an extension to the filing date under s 118(2) TMA 1970. In this case the Appellant had chosen none of these options, and as at the date of the appeal hearing had still not filed its Annual
30 Return.

The Appellant’s submissions

13. Mr Birader, director of the Appellant company, said that its accountant had always previously filed the Employer’s Annual Return and despite the fact that the company had not paid its accountants fees Mr Birader had assumed that the Return
35 had nonetheless been filed. He said that the company had been experiencing extreme trading conditions and that he had laid off most of the company’s employees. He had also been experiencing personal problems as a result of the ill health of both his mother and father and had been unable to devote sufficient time to the administration of his business. Mr Birader was unable to explain why as at the date of the appeal the
40 Employer’s Annual Return had still not been filed.

Conclusion

14. Employers are obliged to keep records of all payments to and deductions from their employees and must record this information on form P11 or an equivalent pay roll record for each employee. The P11 figures provide the information that is needed
5 at the end of the year to complete the Employer's Annual Return. There was no reason therefore why the employer could not have completed its Employer's Annual Return which had been previously filed on time since 2001. No specialist knowledge was required for submission of the Return and the Appellant's inability to pay its accountant cannot be deemed a reasonable excuse. Although Mr Birader said that he
10 had been trying his utmost to remedy matters, no evidence was provided to show what steps he or the Appellant company had taken to resolve matters.

15. Penalties may only be set aside if they have been imposed incorrectly or the employer has a reasonable excuse for the failure and any reasonable excuse for late filing must have existed throughout the entire period of default. Reasonable excuse is
15 not defined in legislation. It is normally regarded as being an exceptional event beyond the Appellant's control which prevented the Return from being filed by the due date. Although Mr Birader's parents had been ill, he had therefore been able to devote insufficient time to the administration of his business and compliance with his obligations, this could not be regarded as a reasonable excuse or that the filing of the
20 Return was outside the control of the Appellant at any time.

16. Taking all the circumstances into account the Tribunal does not accept that a reasonable excuse existed throughout the period of default.

17. The appeal is therefore dismissed and the penalty determination confirmed.

10. This document contains full findings of fact and reasons for the decision. Any
25 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)"
30 which accompanies and forms part of this decision notice.

MICHAEL S CONNELL

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TRIBUNAL JUDGE
RELEASE DATE: 6 March 2012