



**TC02868**

**Appeal number: TC/2012/02500**

*Penalty – late submission of employer annual return – Whether a reasonable excuse for late submission – Yes – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GORDON WEST  
T/A DISHFORTH NURSERY GARDENS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE CHRISTOPHER STAKER  
MR PHILIP JOLLY**

**Sitting in public in Bradford on 23 August 2013**

**The Appellant in person**

**Mr A Boal for the Respondents**

## DECISION

### Introduction

1. This is an appeal against a penalty totalling £400 imposed under section 98A of the Taxes Management Act 1970 in respect of the late submission by the Appellant of its employer annual return for tax year 2010-2011. The deadline for filing was 19 May 2011. The HMRC statement of case indicates that the employer annual return was filed electronically on 9 January 2012. It was a requirement that the return be filed online.

2. It is not disputed that the return was filed late, but the Appellant claims a reasonable excuse for the late filing.

3. This appeal was heard in Bradford on 23 August 2013. The Tribunal gave its decision orally at the end of the hearing. At the hearing, Mr Boal who represented HMRC requested full reasons for the decision, which are now provided.

4. The Appellant's case is in essence that his wife took steps to file the return online on 27 April 2011, within the applicable deadline, and that she and he reasonably believed that the return had been successfully submitted on that day. In particular, they received a confirmation e-mail from HMRC on that date, stating "Thank you for sending the PAYE End of Year submission online", and that "The submission for reference 406/H8098 was successfully received on 27-04-2011".

5. The HMRC case is that on 27 April 2011 the Appellant's online submission was sent as a test transmission, and that the Appellant did not submit a return as a live transmission until 9 January 2012. HMRC note that the confirmation e-mail received by the Appellant on 27 April 2012 also stated that "If this is a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed". HMRC contends that the Appellant does not have a reasonable excuse for failing to make a live transmission of the return by the deadline.

### The hearing and arguments of the parties

6. At the hearing, the Appellant appeared in person. He and his wife both gave oral evidence, confirming the detailed account set out in the grounds of appeal, and providing some additional details. The evidence was as follows. The Appellant and his wife are pensioners running a rural plant nursery, and employ one person for 18 hours a week for some 4 months of the year, and 10 hours a week for another 4 month period of the year. They are not computer literate. They have successfully submitted the return online by the deadline in a number of previous years. Normally they receive a CD-ROM containing the HMRC software for submitting the return online. This year for some reason they did not, and they therefore had to download the necessary software from the internet. They encountered difficulties doing so, possibly due to the slow internet speeds in the rural area where they live. On 26 April 2011, they spent 4 hours trying to do so. On the morning of 27 April 2011, they spent 28

minutes on the telephone with the HMRC helpline. Work commitments prevented any further time being spent on it that morning. In the evening, the return was submitted and the confirmation e-mail was received.

5 7. Mrs West gave evidence that it was her who submitted the online return, and that it was her who had done so successfully in each of the previous years. She said that she could not recall seeing, in any of the years in which she had submitted a return online, a box on the computer screen that had to be unticked in order for the submission to be sent as a live transmission rather than as a test transmission. She did not recall seeing a message on the computer screen stating whether or not the  
10 transmission was a live transmission or a test submission.

8. The Appellant relied on *Writtle College Services Limited v Revenue and Customs* [2011] UKFTT 478 (TC) (“*Writtle College*”), in which it was held that a confirmation message of the kind received by the Appellant “could easily mislead taxpayers who had not noticed that they had to ‘untick’ a box in order successfully to file a return”.

15 9. For HMRC, Mr Boal very helpfully produced a comprehensive speaking note setting out the relevant legislation, case law and the HMRC position. It is unnecessary to repeat its contents in full. The main HMRC submissions are as follows. There is no definition of a “reasonable excuse” in the legislation. The HMRC position is that it will usually be an exceptional or unforeseen event that is  
20 beyond the person’s control. In considering whether there is a reasonable excuse, the Tribunal should examine the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence having proper regard for its responsibilities under the Taxes Acts. It should be judged at the failure date, and it is necessary that the reasonable excuse be rectified without unreasonable  
25 delay once the reasonable excuse ceases.

10. Mr Boal acknowledged that the same confirmation e-mail was sent, regardless of whether a return was sent as a test transmission or as a live transmission. However, he contended that at the time of making the submission, a message appears on the sender’s computer screen stating clearly whether a test transmission or a live  
30 transmission has just been made. In the case of a live transmission, the message reads “The EOY return has been processed and passed full validation”. In the case of a test submission, the message reads “The submission would have been successfully processed if sent under non-test conditions”. Mr Boal did not present any evidence to support this contention, but he submitted that a finding had been made to that effect in  
35 *Law Costing Ltd v Revenue & Customs* [2011] UKFTT 278 (TC).

11. Mr Boal submitted that as the message that appeared on the computer screen at the time would have indicated whether it was a test transmission or live transmission, and given that the Appellant had not printed and kept a screenprint of the message that he received, it was not reasonable for the Appellant to have thought that the return had  
40 been successfully submitted on 27 April 2011. Mr Boal also submitted that the distinction between live transmissions and test submissions is pointed out in HMRC guidance, and that the Appellant was familiar with the online filing system, having successfully submitted returns in previous years. Mr Boal submitted that furthermore,

the Appellant would have been aware from a penalty determination dated 26 September 2011 and an HMRC letter dated 16 November 2011 that the return had not yet been submitted, yet the return was not finally submitted until 9 January 2012. Mr Boal submitted that consequently, the Appellant had not filed the return without delay after the reasonable excuse ceased.

12. Mr Boal additionally relied on *Boyd v Revenue & Customs* [2012] UKFTT 131 (TC); *FMA Consulting Ltd v Revenue & Customs* [2011] UKFTT 819 (TC); *Dhillon Haulage Ltd v Revenue & Customs* [2013] UKFTT 235 (TC); *Crafts4kids Ltd v Revenue & Customs* [2012] UKFTT 92 (TC), as well as *HMRC v HOK Ltd* [2012] UKUT 363 (TCC) and guidance provided by “one of the leading providers of reference material for the accountancy profession”.

13. After the hearing, the Tribunal received a further submission from the Appellant by e-mail. This additional submission has been disregarded by the Tribunal since, apart from anything else, it was provided after the Tribunal had by then already given its determination in the Appellant’s favour.

### **The Tribunal’s findings**

14. There was some discussion by the parties as to the legal test for a reasonable excuse. The Appellant relied on *Writtle College*, in which it was said at [20] that “An excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act. Here, the company completed the online return in good time, and believed it had been successfully submitted”.

15. The Tribunal does not consider it necessary in the present case to seek to give a definitive articulation of the legal test for a reasonable excuse. One of the cases relied on by HMRC, *Dhillon Haulage*, referred at [9] to “a prudent employer conscious of its responsibilities under the Taxes Acts”, which is substantially the same test as that relied on by the Appellant.

16. Neither of these tests makes it a strict requirement for a reasonable excuse that the lateness be due to circumstances beyond the Appellant’s control. However, it will clearly be more difficult for an appellant to establish that there was a reasonable excuse for lateness when the circumstances were within the appellant’s control.

17. In *Boyd*, it was stated at [52] that an “honest mistake” consisting of “ignorance, inadvertence or oversight in ensuring that the tax obligations had been fulfilled”, cannot amount to a reasonable excuse”. The Tribunal accepts that, without more, that is the case. However, where there are particular or unusual circumstances that cause an honest mistake to be made, it cannot be excluded that those circumstances may constitute a reasonable excuse.

18. The Tribunal is not prepared for purposes of this appeal to make a finding that the Appellant would have received a message on the computer screen indicating whether the submission was a test transmission or a live submission. No evidence to this

effect was submitted by HMRC. The Tribunal cannot take judicial notice of how the HMRC online filing system works, nor can it treat HMRC submissions as evidence. If HMRC wishes to rely on details of how the system functions as part of its case, relevant evidence needs to be provided.

5 19. The Tribunal also does not consider that “a prudent employer conscious of its responsibilities under the Taxes Acts” can be expected to be aware of guidance provided on a commercial basis by “one of the leading providers of reference material for the accountancy profession”, if the taxpayer is not an accountant.

10 20. The Tribunal has considered all of the evidence in the case as a whole. The Tribunal is persuaded on a balance of probabilities that the Appellant and his wife were aware of their responsibilities and took active steps to meet them. They had diligently filed returns online successfully in the past, and the Tribunal is persuaded that they approached the filing of the return in the year in dispute with equal diligence. They had spent some hours seeking to download software on one day, and  
15 then an additional half hour the next morning speaking to the HMRC helpline, after which work commitments required them to break off their efforts before returning to the matter in the evening. Due to circumstances beyond their control, they were unable to use the CD-ROM with which they were familiar. The Tribunal is persuaded that the experience as a whole could have left a reasonable and diligent taxpayer  
20 sufficiently distracted that despite good faith efforts, the return was inadvertently sent as a test transmission.

21. HMRC argue that the Appellant would have been aware from a penalty determination dated 26 September 2011 and an HMRC letter dated 16 November 2011 that the return had not yet been submitted. In fact, the Appellant would have  
25 been aware from these that HMRC considered that the return had not yet been submitted. The Tribunal accepts that this position of itself might initially have caused the Appellant confusion in such circumstances. The Appellant’s evidence is that once he became aware of HMRC’s position he tried contacting the HMRC office in Newcastle, and then contacted HMRC by post. He says that he received the 16  
30 November 2011 letter from HMRC, but that this did not advise him that he still needed to file the return, and that he promptly did so after speaking to the HMRC helpline on 6 January 2012. The return was filed on 9 January 2012. In all of the circumstances of the present case, the Tribunal is persuaded that the reasonable excuse continued until the return was finally filed.

### 35 **Conclusion**

22. For the reasons above, the Tribunal allows the appeal.

23. 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  
40 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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**DR CHRISTOPHER STAKER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10<sup>th</sup> September 2013**