



TC04310

Appeal number: TC/2014/03236

Section 98A (2) and (3) Taxes Management Act 1970 - Employer's End of Year return P35 late - agent failed to file return - whether reasonable excuse - no - appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IGNITE RECRUITMENT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

Sitting in public at Alexandra House, The Parsonage, Manchester on 24 November 2014

Mr Kieron Francis Nolan for the Appellant.

Mr Phil Jones, Officer of HM Revenue and Customs, for the Respondents

DECISION

Decision under Appeal

1. This is an appeal by Ignite Recruitment Limited ('the Appellant') against penalties of £969.00 for the late filing of the Employer's Annual return for 2010-11, and penalties of £1196.00 for the late filing of the Employer's Annual return for 2011 imposed under s 98A(2) & (3) Taxes Management Act 1970.
2. An employer has a statutory obligation to make End of Year returns (forms P35 & P14's) 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) Regulation 2001. The return must include specified information relating to relevant payments made during the tax year to employees (form P11 working sheet or equivalent payroll deductions record).
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 of £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.
4. For 2009-10 onwards, Regulations 205 to 205B of the Income Tax (Pay As You Earn) Regulations 2003 require employers to deliver their P35/P14 forms online using an approved method of electronic communication.
5. The appeal came before the Tribunal on 8 September 2014. The Appellant did not attend. The Tribunal determined the appeal in the Appellant's absence, having satisfied itself that the Appellant had been given notice of the date, time and venue of the appeal and that it was in the interests of justice to proceed. The Appellant asks for that Decision to be set aside.
6. The appeal was notified to the Tribunal on 2 June 2014 and therefore was out of time. The Appellant also asks for permission to bring a late appeal.

30 **The background facts**

2010-11

7. The Appellant was required to file a P35 and P14 return for the year 2010-11. The filing date was 19 May 2011.
8. HMRC sent the Appellant a late filing penalty notice on 26 September 2011 in the amount of £400.00 for the period 20 May 2011 to 19 September 2011.
9. HMRC sent the Appellant a second late filing penalty notice on 28 May 2012 in the amount of £800.00 for the period 20 September 2011 to 19 May 2012.
10. The 2010-11 Employer Annual Return was filed online on 27 January 2014.

11. As a concession to small employers, HMRC allows fixed penalties to be mitigated to the amount of the duties on the return (i.e. total tax and NIC) if these are less than the penalty, down to a minimum of £100. The total tax and NIC duties shown on the 2010-11 Employer Annual Return were £970.11. Therefore, the penalties of £1,200.00 have been reduced to £969.00.

2011-12

12. The Appellant was required to file an Employer Annual return (P35 and P14) for the year 2011-12. The filing date for the return was 19 May 2012.

13. HMRC sent the Appellant a late filing penalty notice on 24 September 2012 in the amount of £400.00 for the period 20 May 2012 to 19 September 2012.

14. HMRC sent the Appellant a second late filing penalty notice on 28 January 2013 in the amount of £400.00 for the period 20 September 2012 to 19 January 2013.

15. HMRC sent the Appellant a third late filing penalty notice on 27 May 2013 in the amount of £400.00 for the period 20 January 2013 to 19 May 2013.

16. The 2011-12 Employer Annual Return was filed online on 20 January 2014.

17. The total tax and NIC duties shown on the 2011-12 Employer Annual Return were £1,196.72. Therefore, as a concession, the penalties of £1,200.00 were reduced to £1,196.00.

18. On 20 February 2014, Mr Kieron Nolan a Director of the Appellant Company submitted an appeal to HMRC against the penalties stating as follows:

“I outsourced my payroll to a company called Cash Simply (part of the Simplicity Group). I signed a contract with them on 13/01/2011 to deal with all matters relating to PAYE.

I was made aware that there was a problem with the authorisation code on 18/05/2012. My payroll provider tried to use the code used by my previous provider and there was a problem. They contacted HMRC numerous times (see enclosed for information relating to the subject in question) with no joy. I then tried to contact HMRC at least five times to find out why the login details I gave them did not work. I was informed that the data was correct and to try again. I think it was around the third call that I was informed HMRC would send out new login details.

After at least five requests for the relevant paperwork; it finally arrived, at least ten months later. I then forwarded the information to Cash Simply, which they actioned and became the authorised agent. I was amazed it had taken so long to send out the relevant paperwork.

I spoke to Simply Cash and asked them if everything was in order with my account. Marie Holmes their Payroll Supervisor informed me that it was. The last correspondence I received from them was dated 1 February 2013.

Cash Simply did not file the data which they were contracted to do and they did not inform me of any issues relating to this.

Ignite Recruitment have always paid any monies owed on time and if for reasons outside our control interest was/is always paid in full.

5 I requested a response from Cash Simply with reference the reason they did not file my PAYE for over nine months, to date I have not had any communication to confirm the reason why.”

19. On 7 May 2014, HMRC responded to the Appellant in respect of the appeals against the 2010-11 and 2011-12 penalties, advising as follows:

“The appeals were made outside the statutory time limit.

10 HMRC can only accept a late appeal if there is a reasonable excuse for the lateness. HMRC consider that Ignite Recruitment Limited has not provided a reasonable excuse for making the late appeals.

Ignite Recruitment Limited has the right to apply to the Tribunals Service for permission to make a late appeal.

15 Please note that your agent could have filed the Employer Annual Returns as a filing only agent using third party or HMRC software at any time.”

The Appellant’s case

20. On 2 June 2014, Mr Nolan notified a late appeal to the Tribunal in which the original grounds for appeal were reiterated and additional grounds for appeal were stated as:

20 “I don't understand why/how Ignite Recruitment Limited can be held accountable for the fact it has taken at least ten months to obtain an agent activation code from HMRC.

How can Ignite Recruitment Limited be held accountable for my payroll provider not filing the requested information for a further nine months?

All fines against Ignite Recruitment Limited should be cancelled with immediate effect.”

25 21. The Notice of Appeal to the Tribunal included an application to appeal out of time.

22. At the hearing, Mr Nolan insisted that he had not received the Tribunal’s original notification of the appeal hearing date. He said that he had experienced problems with his post and that mail had gone missing.

30 23. Mr Nolan said that his main ground of appeal was that the agent should bear responsibility for the late filing of the returns.

24. In answer to questions he confirmed that he had received all the penalty notices which he said he had sent on to the agents for them to pay. He did not feel that he should be accountable for their actions. He had been told that everything was in order.
35 They had since apologised to him.

HMRC's submissions

25. In this instance, HMRC objects to the late appeal because penalty determinations for 2010-11 were issued on 26 September 2011 and 28 May 2012. In addition penalty determinations for 2011-12 were issued on 24 September 2012, 28 January 2013 and 27 May 2013. It was clearly stated on each Notice of Penalty Determination that any appeal should be made in writing within 30 days of the date of issue shown on the notice. All of the Notices of Penalty Determination were sent to the address held on HMRC records at the time. However, no appeal was received against the 2010-11 and 2011-12 penalties until 20 February 2014.
26. HMRC contends that no reasonable excuse has been provided as to why a late appeal should now be accepted.
27. With regard to the substantive issues, HMRC say that this appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure that a 2010-11 Employer Annual Return was filed on or before 19 May 2011, and a 2011-12 Return on or before 19 May 2012.
28. The Appellant has operated a Pay As You Earn Employer's scheme since 21 January 2011.
29. An employer must complete and file an Employer Annual Return (P35 and P14) if they had to maintain a form P11 (or equivalent payroll deductions record) for at least one employee during the tax year. This applies even if an employer did not have to make any deductions of PAYE or NIC from employees during the tax year.
30. The 2010-11 Employer Annual Return filed online on 27 January 2014 demonstrated that the Appellant maintained forms P11 for eight employees during that year and deductions were made in the amounts of £456.31 for NIC and £513.80 for Income Tax. Therefore the Appellant was required to file a 2010-11 Employer Annual Return online on or before 19 May 2011 but failed to do so.
31. The 2011-12 Employer Annual Return filed online on 20 January 2014 demonstrated that the Appellant maintained forms P11 for eleven employees during that year and deductions were made in the amounts of £174.52 for NIC and £1,022.20 for Income Tax. Therefore the Appellant was required to file a 2011-12 Employer Annual Return online on or before 19 May 2012 but failed to do so.
32. HMRC maintain that filing an Employer Annual Return online is a straightforward process. The HMRC Website provides detailed guidance on how to file online and the online filing options available. Therefore, HMRC maintain that the Appellant could have filed the 2011-12 and 2012-13 Employer Annual Returns online and did not require the intervention of an agent to do so.
33. A filing only agent is not entitled to receive information online, by telephone or in writing regarding a client. To receive such information the agent must complete HMRC's online authorisation process. To do this an agent must enrol for the PAYE for Agents online service to request online authorisation for each client, for which purpose an agent needs the Employer PAYE reference and Accounts Office reference.

The agent must then follow the on screen instructions to set up the client's authorisation. On completion of this process, HMRC will send a letter containing a unique authorisation code to the client. The client should then present that code to the agent to enable him/her to complete the online authorisation process. The code expires 30 days after issue, so it is important that the client passes the same to the agent promptly. When the agent receives the code he must log onto HMRC Online Services to complete the authorisation process. The agent will then be able to see the client on his/her client list within a few days. Once a client has been added to an agent's list, the agent can submit a return for that client within 72 hours. Therefore, HMRC maintain that Cash Simply could have filed the 2010-11 and 2011-12 Employer Annual Returns online for the Appellant at any time prior to January 2014 but chose not to do so.

34. According to HMRC's records the agent requested online authorisation for the Appellant on 7 February 2011, 8 April 2011 and 15 May 2011. On each occasion, HMRC issued a letter containing a unique authorisation code to the Appellant at St James Court, 30 Brown Street, Manchester M2 1DH. It was the responsibility of the Appellant to present the unique authorisation code to the agent within 30 days to allow the completion of the online authorisation process. Mr Nolan says that he did not receive the unique authorisation codes. This may have been because the Appellant company changed address, but it was the responsibility of the Appellant to notify HMRC promptly of any change of address. HMRC do not issue unique authorisation codes via recorded delivery.

35. There is nothing held on HMRC records to demonstrate that any further requests for an authorisation code were submitted in the period 16 May 2011 to 11 May 2012.

36. It is clear from the email sent by HMRC to the agent on 18 May 2012 that the agent was still unable to complete the authorisation process on that date. On that occasion, HMRC advised the agent that the details that they had provided in respect of the Appellant did not match those held by HMRC. HMRC further advised the agent to:

- Check with the client that the details were correct.
- Ask the client to contact HMRC to update their records
- Request a reissue of the authorisation code.

37. As a result of HMRC's email of 18 May 2012 the agent asked the Appellant to confirm their PAYE and Accounts Office references and contact HMRC to ensure the updating of records. The agent sent a further email to the Appellant on 8 June 2012 attaching a copy of a late filing penalty notification and requesting a reply to their email of 18 May 2012.

38. On 25 June 2012, HMRC were notified of an updated address for the Appellant. As the details provided by the agent matched the information held by HMRC the agent was advised to complete the online authorisation process again.

39. As part of the authorisation process a further unique authorisation code would have been issued to the Appellant by HMRC.

5 40. HMRC's records demonstrate that on 13 November 2012 correspondence issued to the Appellant at City View House, Union Street, Ardwick, Manchester was returned undelivered by Royal Mail. Therefore, HMRC set the Returned Letter Service (RLS) signal on the employer's record and reissued the correspondence to the agent.

10 41. HMRC's records further demonstrate that the agent contacted HMRC again on 20 November 2012 to advise that they were having problems getting the online agent authorisation code. On that date the agent was advised that the business address of the Appellant had been noted as RLS. The agent stated that she would check the same and provide an update. However, HMRC were not provided with the updated address for the Appellant until 31 January 2013.

15 42. The Appellant was not prevented from filing its 2010-11 and 2011-12 Employer Annual Returns online by the failure of HMRC to issue client authorisation codes. HMRC maintain that authorisation codes were issued to the Appellant following each online authorisation request made by the agent. HMRC are not responsible for any failure on the part of the Appellant to provide an updated address or to forward the required unique authorisation code to the agent.

20 43. Furthermore, HMRC are not responsible for the failure of the agent to submit the 2010-11 and 2011-12 Employer Annual Returns as a filing only agent. This option was available to the agent throughout the period 19 May 2011 to 19 January 2014.

25 44. HMRC maintain that it was the responsibility of the Appellant to ensure that they complied with their tax responsibilities by filing a 2010-11 Employer Annual Return by the due date of 19 May 2011 and a 2011-12 Employer Annual Return by 19 May 2012, in accordance with Regulation 73 of the Income Tax (Pay as you Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001. This responsibility cannot be transferred to any other person acting on behalf of the employer. Where a person has asked another person to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to a third party and that third party failed to complete it. HMRC expect an employer to take reasonable care to explain to the third party what they require them to do, to set deadlines for the work and to make regular checks on progress.

35 45. HMRC does not consider a dilatory agent a reasonable excuse for late filing. If the employer feels that the agent failed in his/her professional capacity or did not follow specific instructions then the employer should seek redress directly from the agent.

40 46. If an employer engages an agent to file an Employer Annual Return online, the employer must keep a written record confirming that the information the agent has filed on their behalf is correct. Any written confirmation - such as a letter or email - is acceptable. This information is shown on the HMRC website. The Appellant has not presented any evidence to suggest that they sought or received any such confirmation from their agent in respect of the 2010-11 Employer Annual Return on or shortly after 19 May 2011 or in respect of the 2011-12 Employer Annual Return on or shortly after 19 May 2012.

Conclusion

47. The Tribunal allowed the Appellant's application for an extension of time within which to lodge an appeal, and also accepted Mr Nolan's submission that he had not received notification of the initial hearing on 8 September 2014.

5 48. Section 118(2) TMA 1970 provides statutory protection from a penalty if the
employer had a reasonable excuse for failing to file their return on time. There is no
definition in law of reasonable excuse, which is a matter to be considered in the light
of all the circumstances of a particular case (*Rowland v HMRC* [2006] STC (SCD)
10 536 at paragraph 18). This was confirmed by the First-tier Tribunal, in *Anthony Wood
trading as Propaye v HMRC* (2011 UK FTT 136 TC 001010). A reasonable excuse is
normally an unexpected or unusual event either unforeseeable or beyond a person's
control which prevents him from complying with an obligation.

15 49. It is necessary to consider the actions of the Appellant from the perspective of a
prudent taxpayer exercising reasonable foresight and due diligence and having proper
regard for their responsibilities as provided by legislation.

50. In this case, an employer's PAYE scheme had been in operation since 21 January
2011. The employer and any agent acting on its behalf would have been notified of
the PAYE and Accounts Office reference numbers shortly after that date.

20 51. Although the Appellant used an agent, it remains under an obligation to ensure
that returns are filed on time. Reliance on a third party cannot relieve the Appellant of
its own obligation to file Returns on time. Failures on the part of the agent might
entitle the Appellant to some recourse against the agent, but that is a separate matter.

25 52. It was the responsibility of the Appellant to ensure that it complied with its tax
responsibilities by filing a 2010-11 Employer Annual return by the due date of 19
May 2011 and a 2011-12 Employer Annual Return by 19 May 2012 in accordance
with Regulation 73 of the Income Tax (Pay as you Earn) Regulations 2003 and
Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001.
Where a person has asked another person to do something on their behalf, that person
is responsible for ensuring that the other person carries out the task. They cannot
30 claim they had a reasonable excuse merely because they delegated the task to a third
party and that third party failed to complete it. An employer should take reasonable
care to ensure that the third party does what they require them to do, to set deadlines
for the work and to make regular checks on progress. In the event of default on the
part of the agent the Appellant should seek redress directly from the agent. Having a
35 dilatory agent is not a reasonable excuse for late filing. If the employer feels that the
agent failed in his/her professional capacity or did not follow specific instructions
then the employer must seek recourse against the agent.

40 53. The Appellant was put on notice that the 2010-11 Employer's Annual Return had
not been filed by its agent when it received the late filing penalties between
September 2011 and May 2012. The Appellant was also put on notice that its agent
had not filed the Employer's Annual Return in respect of 2011-12 when it received
penalties between September 2012 and May 2013. In fact the two Returns were not
filed until January 2014.

54. The Tribunal accordingly find that the late filing penalties charged by HMRC are in accordance with legislation and there is no reasonable excuse for the failure of the Appellant to file its Employer's Annual returns on time or throughout the failure period.

5 55. The appeal is accordingly dismissed and the late filing penalties are confirmed.

56. 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**

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RELEASE DATE: 4 March 2015

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