



TC04401

Appeal number: TC/2014/05684

Penalties - Section 98A (2) and (3) Taxes Management Act 1970 - Employer's End of Year return P35 late for 2010, 2011 and 2012 - whether reasonable excuse - no - application for permission out of time appeal - not allowed

FIRST-TIER TRIBUNAL

TAX

JOHN A H ROSS

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ALBAN HOLDEN**

**Sitting in public at Alexandra House, 14 – 22 The Parsonage, Manchester on 17
December 2014**

Mrs Elaine Crozier, Accountant, for the Appellant.

Mr Helen Roberts, Officer of HM Revenue and Customs, for the Respondents

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DECISION

Decision under Appeal

- 5 1. This is an appeal by Mr John A H Ross ('the Appellant') against penalties of £800.00 for the late filing of the Employer's Annual return for 2009-10, penalties of £1,200.00 for the late filing of the Employer's Annual return for 2010-11 and penalties of £1,200.00 for the late filing of the Employer's Annual return for 2011-12 imposed under s 98A(2) & (3) Taxes Management Act 1970.
- 10 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) Regulations 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).
- 15 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.
- 20 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.
- 25 5. The appeal was notified to the Tribunal on 15 October 2014 and therefore was out of time. The Appellant asks for permission to bring a late appeal.

The background facts

2009-10

6. The Appellant was required to file an Employer Annual return for the year 2009-10. The filing date was 19 May 2010. The return was not filed on time.
- 30 7. HMRC sent the Appellant a late filing penalty notice on 27 September 2010 in the amount of £400.00 for the period 20 May 2010 to 19 September 2010.
8. HMRC sent the Appellant a second late filing penalty notice on 24 January 2011 in the amount of £400.00 for the period 20 September 2010 to 19 January 2011.
9. The 2009-10 Employer Annual Return was filed on 15 December 2010.

2010-11

- 35 10. The Appellant was required to file an Employer Annual return for the year 2010-11. The filing date for the return was 19 May 2011. The return was not filed on time.

11. 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.

12. HMRC sent the Appellant a second late filing penalty notice on 30 January 2012 in the amount of £400.00 for the period 20 September 2011 to 19 January 2012.

5 13. HMRC sent the Appellant a third late filing penalty notice on 28 May 2012 in the amount of £400.00 for the period 20 January 2012 to 19 May 2012.

14. The 2010-11 Employer Annual Return was filed online on 19 August 2014.

2011-12

10 15. The Appellant was required to file an Employer Annual return for the year 2011-12. The filing date for the return was 19 May 2012. The return was not filed on time.

16. 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.

17. HMRC sent the Appellant a second late filing penalty notice on 26 January 2012 in the amount of £400.00 for the period 20 September 2012 to 19 January 2013.

15 18. 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.

19. The 2010-11 Employer Annual Return was filed online on 19 August 2014.

20. On 22 August 2014, the Appellant submitted an appeal against the penalties to HMRC stating as follows:

20 "I was deeply shocked when I was recently informed by phone I had £4,000 of penalties. I have not received any prior warning of this accumulating penalty. I am a sixty six year old veterinary surgeon working in a small two person practice. I have very limited computer skills and the business is not computerised. I am dependent on my son for VAT returns but we found wages/PAYE/End of Year very difficult. This is now done by my
25 accountant's Johnstone Howell & Co. We had entered end of year returns up to April 12, and the accountant up to April 13, but for some reason they were not on your data base. The accountants are re-entering all the missing data."

21. On 17 September 2014, HMRC replied to the Appellant, advising that the appeal was not accepted because the requirements of s 31A TMA 1970 had not been met.
30 The appeal had been made outside the 30 day time limit which applies from notification of the penalties and no reasonable excuse had been shown for not appealing within the time limit. HMRC advised that it was open to the Appellant to lodge an application to the Tribunal for permission to make a late appeal.

The Appellant's case

35 22. On 15 October 2014, a late appeal was lodged with the Tribunal by the Appellant's accountants in which the Appellant's original grounds of appeal (paragraph 20 above) were reiterated and additional grounds for appeal stated as:

40 "The Appellant runs a small veterinary practice and when online filing was introduced for P 35's, he asked his son, who also works in business, to assist him, as the Appellant himself is not particularly computer literate. Mr Ross's son then

registered online for the business and at the end of each tax year went online to submit (as he believed) the P35 returns. Obviously something was not processed correctly as HMRC never received the submitted returns.

5 What we find odd as accountants is that it took until 2014 for a phone call to be made to the Appellant in respect of the 2010 2011 and 2012 returns and that penalties were outstanding. This was the first time the Appellant was made aware penalties had been issued. He does not believe that he received any of the penalty notices and therefore did not appeal within the requisite 30 day period. The Appellant also feels that as a small employer who only employs one person a penalty of £3200 is exceptionally high for something that, had he known earlier was not working, he would have rectified. The Appellant has now instructed us, his accountants to file his future returns.”

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

15 **HMRC's submissions**

24. In this instance, HMRC objects to the late appeal. It was clearly stated in each Notice of Penalty Determination that any appeal should be made in writing within 30 days of the date of issue, as shown on the notice. All of the Notices of Penalty Determination were sent to the address held on HMRC records. However, no appeal was received against the 2009-10, 2010-11 and 2011-12 penalties until 22 August 2014.

25. HMRC contends that no reasonable excuse has been provided as to why a late appeal should be accepted.

26. 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 his Employer Annual Returns were filed on time.

27. The Appellant has operated a Pay As You Earn Employer's scheme for many years. An employer must complete and file an Employer Annual Return 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.

28. 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.

29. There is no statutory definition of reasonable excuse which “is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18 & 19).

30. HMRC consider a reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the employer's control, and which prevents the employer from complying with his obligations.

31. HMRC's view is that the actions of the employer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence,

having proper regard for their responsibilities under the Taxes Acts. If the employer could reasonably have foreseen the event, whether or not it is within their control, HMRC would expect them to take steps to avoid a breach of their obligations. Further, if there is a reasonable excuse it must exist throughout the failure period.

5 32. Between September 2010 and May 2013 a total of eight Penalty Determination Notices were issued to the Appellant at his business address, 28 Cambridge Road, Ellesmere Port, Cheshire CH65 4AG. Each Notice of Penalty Determination contains information on why the penalty has been issued and how it has been calculated. It also includes the sentence:

10 “If you do not understand why you have received this notice please ask me about it. My details are shown above.”

33. On the reverse of the Penalty Notice, information is given on how to pay the penalty, the end of year return and appeals. The first sentence of the paragraph on appeals clearly says:

15 “If you want to appeal you should write to us within 30 days of the date the original Notice of Penalty Determination was issued...”

Each notice was issued to the Appellant at his business address, which had been the address noted on HMRC’s internal PAYE records for the Appellant since 6 September 2003.

20 34. The Appellant’s correspondence shows his address as 28 Cambridge Road, Ellesmere Port, Cheshire. CH65 4AG, so, there is no reason to believe the post has been delivered to an incorrect address. There is no record of any correspondence being returned to HMRC.

25 35. HMRC submit that a prudent employer exercising reasonable foresight and due diligence, having proper regard for their affairs under the Taxes Acts, would have acted on receipt of the penalty notices and if they were in any doubt contacted HMRC to clarify the situation and notify their appeal or find out exactly what was required of them.

30 36. HMRC’s Integrated Debt Management System shows a record of contact between HMRC and the Appellant on numerous occasions between November 2010 and April 2014.

35 • HMRC telephoned the Appellant on 11 November 2010. He was advised that the 2009-10 P35 was outstanding and he stated that he believed he had not actually got one. The call was cut off as the order line number was being given to Mr Ross.

40 • On 26 January 2011 HMRC telephoned the Appellant when he promised to file the 2009-10 return by 23 Feb 2011. He explained it was late due to it being overlooked and he agreed to send future returns on time. He advised he had sent a paper copy of the 2009-10 P35 on 30 November 2010. He was given the Employer’s Helpline number to request a paper 2009-10 P35 and agreed to send it recorded delivery by the date advised. During this call the Appellant was warned of legal action and penalties.

- Further contact was made between HMRC and the Appellant regarding payment of the 2009-10 late filing penalties on 3 March and 12 and 14 April 2011. The Appellant claimed he had paid the penalty in December 2010 or February 2011.

5 • On the 12 September 2012 HMRC contacted the Appellant and left a message. It was also recorded at that time, that a letter requesting the outstanding returns had been issued to the Appellant after the case had been reviewed as part of a project. This would have been in respect of the outstanding returns for 2010-11 and 2011-12.

10 • On 16 April 2013 HMRC again contacted the Appellant. During the conversation he was advised of the P35's outstanding for previous years and warned of legal action and penalties. The Appellant said he would look into it.

15 37. It was not until twelve months later that the Appellant contacted HMRC, on 11 and 16 April 2014, to advise he had submitted the returns and was checking they were on HMRC's system. He explained the returns were late due to him being unaware of the procedures. In fact, the 2010-11 and 2011-12 Employer End of Year returns were not submitted on-line until 19 August 2014.

20 38. The Appellant's letter of appeal was received by HMRC on 22 August 2014. He said he was shocked when he was informed that he had £4,000 of penalties and had not received any prior warning. However, HMRC submit that eight Notices of Penalty Determinations were issued to the Appellant during September 2010 and May 2014. The Appellant had a total of nine telephone conversations with HMRC regarding the outstanding returns and penalties between November 2010 and April 2014. At no time during any one of those conversations did the Appellant question or appeal the
25 penalties issued.

39. HMRC say that late appeals should not be admitted. He waited more than three years ten months from the date of the first penalty before appealing to Tribunal. HMRC submit that for each decision no reasonable excuse has been offered for the late appeal.

30 **Conclusion**

40. The Tribunal should only give permission to bring a late appeal where there is good reason to do so and where the interests of justice would be served in doing so, having regard to all of the circumstances.

35 41. 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) 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
40 normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation.

42. It is also 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.

43. It was the responsibility of the Appellant to ensure that he complied with his tax responsibilities by filing Employer Annual returns by the due dates 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.

5 44. The Appellant was put on notice that the 2009-10, 2010-11 and 2011-12 Employer's Annual Returns had not been filed when he received the late filing penalties between September 2010 and May 2013.

10 45. The Tribunal accordingly finds 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 his Employer's Annual returns on time or throughout the failure period.

46. In any event the appeal is out of time. The Appellant has not provided an adequate explanation for the delay in submitting appeals - a delay that extended up to three years and ten months. We therefore do not grant permission to bring a late appeal.

15 47. The appeal is accordingly dismissed and the late filing penalties are confirmed.

48. 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 CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 12 MAY 2015

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