



TC03844

Appeal number: TC/2014/00396

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**

THE LANGLEY ASSET MANAGEMENT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 17 April 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 17 January 2014, HMRC's Statement of Case dated 30 January 2014 and the Appellant's reply of 28 February 2014

DECISION

Decision under Appeal

- 5 1. This is an appeal by The Langley Asset Management Limited against penalties amounting to £500 imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the tax year ending 5 April 2013.
- 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 for whom they had to prepare or maintain deduction working sheets (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 at £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
20 imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.
4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 require the mandatory use of electronic communications by employers who must deliver their P35/P14 forms online using an approved method of electronic communications for 2009-10 onwards
- 25 The background facts
5. The Appellant was required to file an Employer Annual return for the year 2012-13. The filing date for the return was 19 May 2013.
6. HMRC issued an electronic reminder to the Appellant on 24 March 2013
7. HMRC sent the Appellant an Employer Annual Return reminder (AR1N) on 28
30 April 2013.
8. From 31 May 2012, HMRC introduced the issue of a P35 Interim Penalty letter where an Employer Annual return remained outstanding after the due filing date. The P35 Interim Penalty letters was issued over a five day period so that each one reached an employer within a month of the filing deadline. Therefore, HMRC would have
35 issued a P35 Interim Penalty letter to the Appellant on or a few days after 31 May 2013.
9. The Employer Annual return was filed online on 25 September 2013.
10. HMRC sent the Appellant a late filing penalty notice on 23 September 2013 in the amount of £400 for the period 20 May 2013 to 19 September 2013. HMRC sent
40 the Appellant a late filing penalty notice on 30 September 2013 in the amount of £100 for the period 20 September 2013 to 25 September 2013.

The Appeal

11. On 11 October 2013, the Appellant's agent, Tax Link, appealed against the penalties in writing stating as follows:

5 'My colleague who was responsible for the P35 Employer return submissions for the above client has produced a note on her file showing that she had filed the return. Unfortunately, the colleague in question is no longer working for us and is out of contact with us. The produced note leads us to believe that she genuinely believed that the filing had successfully taken place.

10 In late April 2013 we were forced to install a new Payroll computer system as our usual TAS Payroll software providers were not ready to comply with the RTI submissions that HMRC has implemented. This has hit unexpected technical and teething problems whilst filing the P35s for our clients. We experienced issues with the migration of the data from Sage to TAS Payroll causing a sudden disruption to the business and our records.

15 That could be the reason why the P35 for 2012-13 tax year has not been received by HMRC for the above client. Please note that the P35 Employer return has been filed on 25 September 2013, that is as soon as we have been alerted to the company's default.'

20 12. HMRC issued a decision letter to the Appellant and their agent on 31 October 2013 rejecting the appeal and offering a review.

13. On 11 November 2013, Tax Link requested a review of HMRC's decision in which the additional grounds for appeal were stated as:

25 'We strongly disagree with the outcome of your decision and kindly request a review of this decision letter. My client and ourselves accept that there are rules and regulations with regard to submitting documents such as Employer Annual Returns and accept the right of HMRC to charge penalties. However due to the unexpected events mentioned in previous communication with yourselves regarding the same issue, we appeal the penalty notice.

30 The difficulties included, but were not confined to; loss of data (payroll information) loss of company files and loss of information such as PAYE reference numbers and Accounts Office reference numbers.

35 My colleague who was responsible for the P35 Employer return submissions for the above client has produced a note on her file showing that she had filed the return. Unfortunately, the colleague in question is no longer working for us and is out of contact with us. The produced note leads us to believe that she genuinely believed that the filing had successfully taken place.

40 Although you mention that there is a responsibility to the employer to ensure that a return was filed, they have no way of obtaining this kind of information online as we deal with the filing of these documents, leaving the responsibility to lie with us. They trust in their accountants to file the necessary returns on time. However as their accountants we truly believed that these had been completed

and filed well before the deadline despite all the issues and unforeseeable events we had encountered. It was only brought to our attention that the return had not been filed when we received the Penalty Determination Notice on 23 September 2013. We then acted swiftly to resolve this and filed the return immediately.

5 Even though instrumental for administration and sending information, computers are prone to errors. Your office should recognise this fact as it does have a track record of issuing wrong tax codes, chasing incorrect 'underpayments' and suffering various IT glitches. This is not a ploy to discredit the work your office does, on the contrary, stating the facts show that your office must agree that
10 computer systems and software sometimes fail and have glitches. The fact of the matter is that the data migration from one software package to another caused this error to occur and we believe that HMRC are in no position to regard this as an "unreasonable excuse".

15 We would also like to stress that a number of clients suffered in much the same way as The Langley Asset Management Ltd. The cases differed in the way that our other clients P35s were submitted within a month of the deadline (19 June 2013). These clients received penalty notices, but when we appealed this decision, with much the same arguments as above, the fines were discharged without a problem. We were not notified of the unsuccessful receipt of the P35
20 until 23 September and had no way of knowing that the return failed.

Above all, I am seeking some uniformity in judgement with regards to the outcome of this penalty appeal'.

14. HMRC carried out a review and issued their review conclusion on 20 December 2013. The outcome of the review was that HMRC's decision should be upheld.

25 15. On 17 January 2014, the agent submitted an appeal to the Tribunal in which the grounds of appeal as set out in their earlier letters were reiterated and further grounds for appeal were stated as follows;

30 i. 'CISR81070 gives some examples of unforeseen events of what could be considered a reasonable excuse which closely resembles our client's position. Sudden disruption to a business or its records by a break in. Installation of a new computer system or program which has hit unexpected teething problems.

35 ii. In a recently decided case *HMD Response International v HMRC* 2011 UKFTT 472 - HMRC claimed not to have received a return for 2010 by 10 May, but the first HMD Response and its agent heard about it was via a penalty notice for £400 on 27 September — too late to meet the deadline for another increment on the penalty. The accountant produced a contemporaneous note in his office diary for 16 May showing that he had filed the return. He said that he genuinely and honestly believed that the filing had successfully taken place; the judges upheld the appeal.
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iii. In another case *Consult Solutions v Revenue & Customs* (2011) UKFTT 429 - the Tribunal found that the firm's lack of knowledge of the receipting arrangements was understandable given that this was the first

time they had used the online facility and that the systems or internet error was beyond their control.

5 These cases resemble our client's position in that the issues were caused due to unforeseen exceptional events beyond our control and that our colleague genuinely and honestly believed that the filing has successfully taken place.'

HMRC's submissions

16. The Appellant has operated an employer PAYE scheme since 13 December 2001 and Employer Annual returns have been filed online since 19 May 2008.

10 17. 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 Pay As You Earn (PAYE) or National Insurance contributions (NIC) from employees during the tax year.

15 18. The Employer Annual Return submitted on 25 September 2013 demonstrated that in the year ended 5 April 2013, P11's were maintained for ten employees and deductions were made in the amount of £2,720.73 for National Insurance Contributions (NIC) and £2,108.20 for Income Tax. Therefore, the Appellant was required to file an Employer Annual Return for the year ended 5 April 2013 by 19 May 2013.

20 19. HMRC consider the Appellant to be experienced with the online filing process including the acceptance and rejection messages provided as part of that process. HMRC records demonstrate that Tax Link enrolled as an agent with PAYE/CIS for agent's online filing service on 6 September 2004. Therefore, HMRC consider the agent to be experienced with the online filing process including the acceptance and
25 rejection messages provided as part of that process.

20. Where a return has been filed successfully the employer or person filing the return will receive the following messages.

- Software - '9004' The EOY Return has been processed and passed full validation'.
- 30 • Email - The submission for [your PAYE reference] was successfully received on [date]. If this was 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.'

35 21. Where a return has been rejected the employer or person filing the return will receive the following messages.

- Software — the message will highlight the area(s) of the return that have led to rejection.
- Email - The submission for [your PAYE reference] was received on [date]. Unfortunately it could not be accepted as it failed data checks. To correct this,

please use the help provided within the software you used to complete your form and send it again.

- If you do not receive either an acceptance or rejection response, please contact HMRC's Online Services Helpdesk.

5 22. This information is shown on the HMRC website and would have been available to both the employer and the agent.

23. The HMRC website also instructs employers and their agents to keep a screen print of any acceptance or rejection messages received and a copy of any email received.

10 24. HMRC note that a copy of an acceptance message has not been provided in support of the agent's statement that the Employer Annual Return was filed online prior to 25 September 2013. Neither the employer or agent have provided a copy of a rejection message to show that an attempt was made to file the 2012-13 Employer Annual return on or before the filing date of 19 May 2013. There is nothing held on
15 HMRC records to suggest that the agent or employer contacted the HMRC Online Services Helpdesk any time during the period 19 May 2013 to 25 September 2013 to report the non-receipt of an acceptance or rejection message. Nor is there any record of an attempted online submission prior to 25 September 2013 and the agent has not provided a copy of any note made on file by his former colleague.

20 25. HMRC contend that in the absence of an acceptance message it was unreasonable for both the Appellant and the agent to believe that a 2012-13 Employer Annual Return had been submitted prior to 25 September 2013. HMRC expect a prudent employer, exercising reasonable foresight and due diligence, to check that an Employer Annual Return has been filed on time.

25 26. A return can only be filed on-line once. The fact that a 2012-13 Employer Annual return was successfully filed on-line on 25 September 2013 demonstrates that it had not been filed in the period 19 May 2013 to 24 September 2013.

30 27. HMRC do not recommend or endorse any one third party commercial software product or service over another and are not responsible for any loss, damage, cost or expense in connection with the use of that software. The HMRC website also advises customers who encounter any problems when using commercial software to contact the software supplier. In this instance, evidence of contact with the third party commercial software supplier has not been provided in support of the appeal.

35 28. There are a range of online filing methods available to employers and agents whereby Employer Annual Returns can be submitted online. An employer or agent is not restricted to using just one of those options. Therefore, the Appellant or their agents were not limited to using TAS or Sage 3rd party commercial software. HMRC maintain that if the Appellant or their agent experienced problems with the above software, the 2012-13 return could have been filed via HMRC's Basic PAYE Tools,
40 HMRC's free 'Online Return and Forms — PAYE Service' or an alternative commercial package. This information is shown on the HMRC website and would have been available to the Appellant and their agent.

29. In the submission to the Tribunal dated 17 January 2014 the agent stated that issues with the migration of data from Sage to TAS Payroll software caused a sudden disruption to their business and records. However, HMRC note that the agent filed 2012-13 Employer Annual Returns for other clients via TAS Payroll software on the due filing date of 19 May 2013. Therefore, HMRC contend that it has not been demonstrated that the failure of a commercial software package resulted in the late filing of the 2012-13 Employer Annual Return for The Langley Asset Management Ltd.

30. An employer or agent using third party commercial software to file a return can check the status of a submission by either referring to their third party software instructions or by contacting the HMRC Online Services Helpdesk. This information is shown on the HMRC website and would have been available to both the Appellant and their agent. HMRC would expect a prudent employer, exercising due diligence, to check that an Employer Annual Return has been submitted on time. HMRC contend that a perfunctory check of the submission status of the 2012-13 Employer Annual return would have alerted the employer and agent to the fact that it had not been filed.

31. 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 provided any such evidence in support of this appeal.

32. From 6 April 2013 all employers (or their agent) needed payroll software so that they could report PAYE information to HMRC in real time. Employers (or their agent) could send PAYE reports online using the HMRC free Basic PAYE Tools which is designed for employers with nine or fewer employees, or by choosing a commercial payroll software product. An Employer Annual Return for the 2012-13 year provided information for the period 6 April 2012 to 5 April 2013 and as a consequence was not part of the Real Time Information (RTI) reporting process. Therefore, HMRC contend that the agent was not forced to install a new payroll computer system in order to file his client's 2012-13 Employer Annual returns online by 19 May 2013.

33. HMRC has no statutory obligation to issue reminders for Employer End of Year Returns. The obligation to submit a return by the due date lies with the employer in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003.

34. Interim penalties are charged under s 98A (2) (a) & (3) TMA 1970 where a return remains outstanding after the due date. There is no statutory timetable HMRC must follow when issuing penalty notices. A penalty notification is not a reminder to submit a return but is a charge for not submitting the return by the due date.

35. HMRC maintain that it was the responsibility of the Appellant to ensure that they complied with their tax responsibilities by filing a 2012-13 Employer Annual return by the due date of 19 May 2013 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.

36. HMRC does not consider that dilatoriness on the part of an agent is a reasonable excuse. If the employer feels that the accountant has failed in his professional capacity or did not follow specific instructions then the employer should seek redress directly from the accountant.

37. In response to the tax cases referred to by the agent acting on behalf of The Appellant, other Tribunals have expressed a different view, for example:

In the case of *Durnbrae Ltd v HMRC*; Judge J. Blewitt stated in paragraphs 11, 12 and 15:

“The obligation to make End of Year Returns prior to the deadline of 20 May following the end of a tax year is set down by statute by virtue of Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001. It is a well-established principle of case law that the responsibility to ensure that all obligations are met lies with the taxpayer.

The penalties imposed as a result of failure to meet tax obligations are provided for by statute and this Tribunal has no discretion to mitigate those penalties unless it is considered that there is a reasonable excuse, in which case the penalties can be set aside.

There is no obligation upon HMRC to issue reminders to taxpayers or notify taxpayers that a P35 has not been received prior to the issue of penalty notices.”

In the case of *Hall Safety & Environmental Ltd v HMRC*; Judge K. Poole stated in paragraphs 13 and 14:

“Whilst we agree it is unfortunate that HMRC’s policy is not to issue first penalty notices until there is already a four month delay, we do not consider this can afford a reasonable excuse to the Appellant for its delay in delivering the return.

We have no power to mitigate the penalty simply as a result of the delay in its issue.”

In the case of *Fairmile Consulting Ltd v HMRC*; Judge J. Blewitt stated in paragraphs 11 to 14:

“The Tribunal accepts that the penalties were charged in accordance with the legislation set out above and therefore has no power to mitigate the penalties which appear to be correct. The Tribunal considered the amount of the penalties, and found as a fact that it could not be described as plainly unfair and therefore does not interfere with the penalties on grounds of proportionality.

The Appellant’s agent was familiar with the online filing process and the Tribunal infers that it was, therefore, also familiar with the acceptance/rejection message system. There is no statutory obligation on HMRC to issue reminders and the Tribunal found as a fact that it is ultimately the responsibility of the Taxpayer to ensure that its obligations have been fulfilled. The Tribunal found as a fact that the lack of knowledge that the

submission had not been successful and delay in receipt of the penalty notice do not amount to reasonable excuse.

5 The Tribunal also found as a fact that the issue as to whether all tax liabilities had been paid was a separate issue and did not provide the Appellant with a reasonable excuse for the late filing of the return.

The burden is on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal finds that the Appellant has not discharged that burden.”

38. In the case of *Stewarton Polo Club Ltd v HMRC*; Judge Dr C. Staker stated in paragraphs 14, 15 and 17:

10 “The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

15 The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It doesn’t require specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

20 The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal’s view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the Appellant to a third party of itself amounts to a reasonable excuse.”

39. Furthermore, in the case of *Schola UK Ltd v HMRC*; Judge M. Tildesley OBE stated in paragraph 7:

30 “The Appellant’s reason for not filing the return on time was essentially its agent made an honest mistake. The Appellant was bound by the actions of its agent and cannot avoid its responsibilities under the Tax Acts by transferring them to its agent. The agent’s mistake was that it did not check that it had received the acknowledgement of receipt of the return which HMRC sends by e mail. The mistake could have been avoided if the agent had exercised proper care. The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts. The Tribunal, therefore, finds that the Appellant did not have a reasonable excuse for the late filing of the 2008-09 end of year return.”

40. In the case of *The Cove Fish & Chip Restaurant Ltd v HMRC* (2011) UKFTT 625 (TC) Judge Dr Staker dismissed the appeal noting:

40 “The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant

5 uses an agent such as a bookkeeper, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as a bookkeeper cannot
10 relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the Appellant to a third party of itself amounts to a reasonable excuse.”

15 41. In the case of *Jeffers v HMRC* TC 2009/11281 it was held that there may be circumstances in which the taxpayer's failure, through his agent, to comply with, e.g., the obligation to make the return on time can amount to a “reasonable excuse”. To be such a circumstance it must be something outside the control of the taxpayer and his agent or something that could not reasonably have been foreseen. It must be something exceptional. HMRC submit that this appeal does not highlight any circumstances that prevented the Appellant from ensuring the return was submitted by
20 the due date.

25 42. HMRC submit that First-tier Tribunal decisions do not set precedents and as such each case must be considered on its own merits. However, Upper Tribunal decisions do set precedent, which are binding on all cases where similar issues are raised.

30 43. *Hok Ltd* appealed against fixed penalties totalling £500 charged under s 98A of Taxes Management Act (TMA) 1970 for the late filing of its employer's annual returns (forms P35 and P14) for 2009-10. The First-tier Tribunal (FTT) decided that HMRC had not acted fairly or in good conscience by issuing the first penalty until four months after the filing date. As a result they discharged all the penalties except for the £100 penalty for the first month the return was late. HMRC appealed this
35 decision and the Upper Tribunal found that HMRC's decision to charge *Hok Ltd* penalties for late filing of their employer annual return was correct and that the FTT acted beyond its jurisdiction in discharging the penalties.

40 44. The 2012-13 Employer Annual Return due on 19 May 2013 was not filed until 25 September 2013, therefore penalties have been correctly charged in accordance with s 98A(2) & (3) Taxes Management Act 1970.

Conclusion

45 45. When a person appeals against a penalty they are required to have a reasonable excuse. 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. A reasonable
35 excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation.

46. It is necessary to consider the actions of the Appellant from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation.

40 47. In this case, an employer PAYE scheme has been in operation since 13 December 2011. The employer and any agent acting on their behalf would have been notified of the PAYE and Accounts Office reference numbers shortly after that date. The Appellant has been submitting Employer Annual returns and making payments under those references for a number of years prior to 2012-13.

5 48. The Appellant and its agent were experienced with online filing including the acceptance and rejection messages provided as part of the process. As HMRC say, a copy of an acceptance message has not been provided in support of the agent's assertion that the Employer Annual Return was filed online prior to 25 September 2013. Neither the employer or agent have provided a copy of a rejection message to show that an attempt was made to file the 2012-13 Employer Annual return on or before the filing date of 19 May 2013. There is no record of an attempted online submission prior to 25 September 2013 and the agent has not provided a copy of any note made on file by his former colleague

10 49. 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 the P35 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.

15 50. 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 Annual return on time or throughout the failure period.

51. The appeal is accordingly dismissed and the £500 late filing penalties are confirmed

20 52 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.

30 **MICHAEL S CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 24 July 2014

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