



TC03909

Appeal number: TC/2014/01112

Penalty for late online filing of Employer's Annual Return - Appellant asserted that return filed - whether reasonable excuse for default - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Gba CONSULTING LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 28 May 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 18 February 2014, and HMRC's Statement of Case received on 18 March 2014, the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Gba Consulting Limited ('the Appellant') appeals against a £400 penalty imposed under Section 98A(2) & (3) Taxes Management Act 1970 for the late filing of the Employer's Annual return for tax year 2012-13.
2. The point at issue is whether or not the Appellant has a reasonable excuse for submitting the late return.

Background

- 10 3. Regulation 73(1) The Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 requires an employer to deliver a complete Employer's Annual Return - forms P35 & P14's before 20 May following the end of the tax year. The return must include
15 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).
4. Regulation 205 The Income Tax (Pay As You Earn) Regulations 2003 requires the mandatory use of electronic communications by employers who must deliver their
20 P35/P14 forms online using an approved method of electronic communications for 2009-10 onwards.
5. The full return i.e. the P35 and a P14 for each employee must reach HMRC no later than 19 May following the end of the tax year. If the return is not received by the due date the employer is liable to a penalty.
- 25 6. Where the employer does not file their annual return on time they will be charged a penalty in accordance with Section 98A(2)(a) & (3) Taxes Management Act (TMA) 1970.
7. Fixed penalties of £100 per month (or part month) for each batch (or part batch) of 50 employees are charged for the first 12 months the return is late.
- 30 8. Where the total duty (NICs/Tax) shown on the return is:
- equal to or more than the penalty amount, the employer is liable to the whole of the penalty amount;
 - more than £100 but less than the penalty amount, the employer is only liable to penalties in an amount equal to the total duty shown
35 on the return;
 - £100 or less, the employer is liable to a penalty of £100 only.
9. The Appellant was required to file an Employer's Annual return (P35 & P14s) for the year 2012-13. The filing date for the return was 19 May 2013. From 2009-10

onwards this had to be filed online using an approved method of electronic communication.

10. HMRC sent a P35N electronic reminder to the Appellant on 24 March 2013.

5 11. HMRC sent a further AR1N Employer Annual Return reminder to the Appellant on 28 April 2013.

12. HMRC says that the Employer's Annual Return was not filed by 19 May 2013.

10 13. From the 31 May 2013 over a five day period a P35 Interim Penalty Letter was issued to all employers who had not filed the Employer's annual return advising them that they had incurred a penalty and how they could avoid increasing it. This reminder also advised the employer "If you have already filed your return online, check you have submitted it correctly."

14. HMRC sent the Appellant a late filing penalty notice on 23 September 2013 for £400 for the period 20 May 2013 to 19 September 2013.

15 15. On 17 December 2013 HMRC Debt Management and Banking (DMB) sent the Appellant an overdue penalty payment letter.

16. On 30 December 2013 the Appellant contacted HMRC by telephone and as a result of this telephone call the employer address details were updated.

17. On 31 December 2013, Mr Norton on behalf of the Appellant wrote to HMRC saying:

20 "Further to my telephone call following receipt of your letter dated 17th December 2013,

Change of Address

25 Your letter was sent to our former address in Oakham. You said that you do not have our new address. We moved on 10th May 2013 and a change of address was sent to you. A HMRC Online confirmation message was received.

Annual PAYE Return 2012-2013

30 Before moving we completed our annual return P35, P14 on 8th May 2014 and copies are attached. We do not understand why these have not been registered.

Monthly PAYE Returns

35 In order to meet your new reporting requirements from April 2013 we purchased a compatible programme for our computer. On the telephone you said that you have not received any monthly returns from us this year.

We have not only sent the computer report each month (samples enclosed) but also sent by post P30B employer payment booklet forms in your official envelopes. Learning that none of these have been

registered concerns us. No salaries have been paid so far in 2013-2014 year and the notifications have been "nil" return.

Will you please confirm that:

1. you now have our current address,
2. that the 2012-13 PAYE return was received on time, and
3. that you have been receiving the 2013-14 monthly returns.”

18. HMRC issued a letter on 24 January 2014 treating the Appellant’s letter of 31 December 2014 as an appeal against their penalty determination of 23 September 2013 saying that the appeal was outside the statutory time limit and that HMRC could only accept a late appeal if there was a reasonable excuse. HMRC advised that the Appellant had the right to apply to the Tribunal for permission to make a late appeal.

19. The Appellant lodged its appeal with the Tribunal service on 18 February 2014.

20. The Employer's Annual return was filed online on 18 February 2014.

15 The Appellant’s contentions

21. The Appellant’s grounds of appeal as stated, are:

20 “Filed HMRC PAYE annual return on computer on 08th May 2013 before the deadline 19th May 2013. Printed copies of P14 and P35 details.

Notified HMRC of business address change from 10 May 2013. HMRC reference CNCD58U7W33Y.

25 HMRC claim to have written to us at 172 Braunston Road, our former address, on 23 September 2013, but letter never forwarded or received.

25 HMRC sent us a letter dated 17 December 2013 to 172 Braunston Road, our former address and the letter was redirected by Royal Mail to Brentwood and received on 30 December 2013.

30 Telephoned HMRC on 30 December 2013 and told to write to London Central DMB.

30 GBA-C Ltd letter to HMRC at London Central DMB posted first class 31 December 2013.

35 Telephone call to HMRC on 21 January 2014 as no reply to queries in letter dated 31 December 2013 and message left on HMRC voicemail. We wanted to resolve the matter.

Telephone call to HMRC on 27 January 2014 as no reply to queries in letter dated 31 December 2013. Told a reply will be sent but HMRC very busy.

HMRC letter dated 24 January 2014 received 28 January 2014.

1 Advised that PAYE Annual Return made on 8 May 2013 had not registered on their computer.

2 Too late to appeal as only 30 days grace from letter dated 23 September 2013

5 3 Request to revisit PAYE 2012-2013 annual return acted on and return confirmed. 9.4 No answer to our query that the monthly PAYE returns are being received ok (they claimed on the telephone that they had not been received and examples of acknowledgements sent to HMRC).

10 Telephoned HMRC on 10 February 2014 to advise:

1 HMRC letter dated 23 September 2013 never received and I queried whether a letter sent to the wrong address was good service. They said it made no difference. We have not seen sight of this letter to date.

2 Advised that HMRC cannot look at the case and advised to research Tribunal option.

15 We wish to appeal against the penalty of £400.”

General note.

20 Personally I have been paying income tax and national insurance stamps since January 1956 and except for two years when I was conscripted for National Service and only earning £1.5s.Od (£1.25) per week, I have completed annual tax returns on time. For example 2012-13 tax return completed in May 2013.

25 HMRC claim that the figures for the 2012-13 Annual PAYE return were not completed and I cannot argue against what they receive or do not receive on their office computer. The old paper system was much simpler and easier to complete”.

HMRC's contentions

22. On this occasion HMRC objects to the late appeal because although the initial penalty notice was issued on 23 September 2013 clearly stating that any appeal should be made in writing within 30 days of the date the original Notice of Penalty Determination was issued, no appeal was made until 31 December 2013.

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The penalty determination was issued to the Appellant's address as held by HMRC at the time and since 6 April 2004 under Taxes Management Act (TMA), Part XI, Section 115, it was deemed to have been validly sent.

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23. Undelivered correspondence is recorded by HMRC and there are no records held to show any mail was returned undelivered. Therefore the penalty determination was deemed to have been received within the ordinary course of post-delivery in line with Section 7 of the Interpretation Act 1978.

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24. Although the Appellant states they informed HMRC via Online Services of their new address on 8 May 2013 and received confirmation of same, this confirmation clearly shows that the only details changed by the Appellant were their contact

telephone number and email address. HMRC have no record of an address change until 30 December 2013.

5 25. In addition, the letter of appeal dated 31 December 2013 clearly shows the company's registered office to be 172 Braunston Road, Oakham the same address as held by HMRC when the penalty determination was issued.

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

10 27. With regard to the substantive issues, HMRC records show that GBA Consulting Ltd.'s Employer's Annual returns have been filed online since the end of the 2008 tax year; HMRC would consider them to be an experienced employer and fully aware of their tax obligations.

28. It is incumbent on employers to make sure that they have adequate internal procedures in place to meet their tax obligations.

15 29. The electronic P35N issued on 24 March 2013 clearly advised that the 2012-13 Employer's Annual return must be filed online by 19 May, explained how this could be achieved and warned of the consequences if the return was filed late.

20 30. Online filing software allows for the user to print or save a copy of the return for their records prior to submission, which the Appellant has done; however the return still needs to be correctly submitted and received by HMRC before it is deemed to have been validly delivered and the employer's filing obligation met.

31. There is no record of an Employer's Annual return being received for the year ending 5 April 2013 from the Appellant prior to 18 February 2014.

25 32. After filing the Employer's Annual return online, an acceptance or rejection message is issued via the software or service used and if HMRC has been provided with an email address an email message is also sent.

33. The fact that no message was received (either via software or email) should have alerted the Appellant to the fact that something was wrong and prompted them to recheck submission protocols or contact HMRC online services helpdesk for help or advice; however they chose not to.

30 34. HMRC have no records to indicate that there were any problems with their PAYE online filing system which is active 24 hours a day seven days a week.

35 35. Information about Employer tax responsibilities, the requirement to file an Employer's Annual return, acceptance & rejection messages, return filing dates, penalties, contact details for the online services helpdesk etc. is well within the public domain and widely available via the Internet including HMRC's website.

36. Although the Appellant states that the return was filed on 8 May 2013, no evidence in the form of a successful submission receipt has been provided and HMRC have no records to substantiate their claim.
- 5 37. Furthermore, as evidenced by the various RTI payment and Corporation Tax online submission receipts included with their letter of appeal, HMRC would deem the Appellant well versed in online filing and fully aware that a successful submission receipt would be sent if their 2012-13 Employer's Annual return had been received by HMRC.
- 10 38. In the case of *Paintball Challenge Ltd v HMRC*; Judge Baird stated in paragraph 5:
- 15 “The appellants were under an obligation to file their return on time and failed to do so. I accept that they tried to do it and had assumed that what they had sent had been received by HMRC but it seems to me to be reasonable when filing a return online to check that it has been received by HMRC. It is clear from the guidance that a message is sent. In these circumstances I find that the Appellants have not established that they have a reasonable excuse for their failure to file the return on time.”
- 20 39. There is no obligation upon HMRC to issue reminders or notify employers that an Employer's Annual return has not been received prior to the issue of a penalty notice. There is also no statutory obligation upon HMRC to issue penalty notices closer to the deadline date. It is well publicised on HMRC's website that penalties can be imposed for the late submission of returns and that a reminder will not necessarily be sent.
- 25 40. Non-receipt of a penalty notice, failing to provide HMRC with new address details until after the legislative filing date or having a previously good compliance record cannot be deemed a reasonable excuse for the Appellant's failure to file their 2012-13 Employer's Annual return on time.
- 30 41. HMRC have no discretion in the calculation of the penalty amount as it is set in statute, Section 98A TMA 1970. Employers who fail to submit their return on time will be subject to penalty under this section. The penalties were imposed in accordance with legislation as the return was filed late.
- 35 42. The total duty shown on the return exceeded the amount of the penalty; as such the Appellant is liable to the full penalty amount. In the case of *Hok Ltd v Revenue & Customs*, the Upper Tribunal found that HMRC's decision to charge Hok Ltd penalties for late filing of their Employer's Annual Return was correct and that the First-tier Tribunal acted beyond its jurisdiction in discharging the penalties. The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.
- 40 43. The legislation has been designed to treat all taxpayers fairly and equally placing responsibility for delivery of the Employer's Annual return squarely on the shoulders of the employer, as such it was the Appellant's responsibility to ensure that the

legislation was correctly followed and the 2012-13 return delivered on time. Their failure to do so resulted in the imposition of the penalties.

44. In relation to the monthly RTI returns, although these have no bearing on this appeal HMRC can confirm that ten returns for the year 2013-14 have been received.
5 If the Appellant requires further details they should contact the Employer or Online Services Helpline.

Conclusion

45. The Tribunal has considered the circumstances of the appeal and grants
10 permission to bring the late appeal.

46. The onus of proof rests with HMRC to show that the penalty was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late filing of its Employer's return. The standard of proof is the ordinary civil standard of the balance of probabilities.

- 15 47. When an employer files its Employer Annual Return online, the submission is received at the Government Gateway where an identity reference - called a 'correlation ID' - is attached. This allows HMRC to track the progress of the submission. Receiving the correlation ID does not indicate that the submission has passed the filing checks - just that it has been received at the Government Gateway.

- 20 48. The submission is then sent from the Gateway to HMRC to be checked for errors and omissions, after which the employer receives an acceptance or rejection message through the software or service it uses. These messages are issued almost instantaneously.

- 25 49. If an Employer's return is successful, it will receive a message that the EOY Return has been processed and passed full validation. If the return is rejected, the employer will get a message to that effect.

50. If the employer does not receive either an acceptance or rejection response, HMRC's guidance asks that the employer contacts HMRC's Online Services Helpdesk.

- 30 51. If the employer has provided HMRC with an email address, it will also get an email message. HMRC advises employers to take a screen print of any acceptance or rejection messages and keep a copy of any emails they receive

52. Employers can check the status of the submission using HMRC's Online Returns and Forms service, Basic PAYE Tools, or 3rd party commercial software.

- 35 53. The Appellant says that it filed its end of year return on line on 8 May 2013 and has produced a copy return bearing that date. However the Appellant has not produced either an acceptance or rejection acknowledgment. The Appellant would have a correlation ID if the submission had been received by the Government

Gateway. This indicates that the return was not successfully submitted and did not reach the Government Gateway.

5 54. A taxpayer acting in a reasonable manner would ensure that they adhered to their legislative obligations and in order to do so would acquaint themselves with the process of correctly filing their Employer's Annual Return.

10 55. The Tribunal accepts that the Appellant notified HMRC of change of contact details but possibly not its change of address. It is also unclear whether the Appellant arranged for its mail to be re-directed. The Appellant intended to file its return but was unaware that the submission had been unsuccessful until receipt of HMRC's letter of 17 December 2013.

15 56. 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. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

57. On the facts the Tribunal finds that the Appellant does not have a reasonable excuse for the late submission of its late Employer's Annual Return for 2011-12 and that the late filing penalties charged are in accordance with legislation.

20 58. The appeal is dismissed and the £400 late filing penalties are confirmed

25 59. 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: 11 August 2014

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