



Neutral Citation: [2022] UKFTT 190 (TC)

Case Number: TC08515

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/02982

*INCOME TAX – RTI returns – late filing penalties – returns filed before the relevant tax months
– whether reasonable excuse – yes – appeal upheld*

Heard on: 16 June 2022

Judgment date: 20 June 2022

Before

**TRIBUNAL JUDGE ANNE FAIRPO
REBECCA NEWNS**

Between

QUAYVIEWS LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Howard, director

For the Respondents: Mrs Edley, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. This is an appeal against three late filing penalties of £100 each charged under Schedule 55 of Finance Act 2009 for the RTI periods ending 5 November 2020, 5 December 2020 and 5 January 2021.

Evidence and submissions

2. The appellant, Quayviews, contended that each of these returns had been filed on 4 September 2020, together with other returns for the periods to the end of March 2021, and had provided printouts from HMRC's Basic PAYE Tools software which showed each return as submitted and marked "success".

3. Quayviews had previously incurred several penalties for late filing and had therefore decided in September 2020 to batch file a number of returns in advance, as HMRC's software now permitted this, in order to avoid penalties arising. They were not aware that returns should not be filed that early; they had previously tried to file early, in order to avoid penalties for late filing, but the software had not previously allowed RTI returns to be submitted more than three weeks before the payment date.

4. HMRC's review letter had upheld the decision to impose the penalties for these three period on the basis that the returns had been filed late. Their Statement of Case maintained that HMRC had not received the RTI returns for these periods at all.

5. In the hearing, HMRC agreed that the returns had been filed on 4 September 2020 and explained that the penalties had been issued because the returns had been filed too early and were therefore treated as not having been filed correctly and in time. The return for March 2021, also filed on 4 September 2020, had been accepted but HMRC were unable to explain in the hearing why this return had been accepted but the returns for the earlier periods, filed in the same submission, had not been accepted.

6. HMRC noted that Quayviews had been issued with an HMRC education letter in February 2018, which they submitted set out the correct procedure for filing RTI returns, given the previous penalties. In their Statement of Case, HMRC contended that Quayviews had not shown that they were not aware that they were filing the RTI returns incorrectly and, given the education letter, had no reason to believe that they were filing the returns correctly. As such, HMRC had considered that Quayviews had no reasonable excuse for their failure to file returns for the periods under appeal.

Discussion

7. There was no dispute that the penalties had been issued within time. As it was accepted by HMRC that the returns had been filed, the question was whether Quayviews had filed the returns in time, such that no penalty was due, or whether (if the returns were not filed on time) they had a reasonable excuse for the returns not having been filed on time.

Whether returns filed in time

8. The relevant law in respect of this is paragraph 6C(1) of Schedule 55 Finance Act 2009 which states that a penalty is due for a particular month if "P fails *during* a tax month to make a return on or before the filing date" (emphasis added). Although there is an exception for the first failure within a tax year, that exception does not apply in this case as Quayviews had failed to file returns on time earlier in the 2020-21 tax year.

9. We note that HMRC’s review letter states, in respect of “further information when filing your RTI submission” that “You must file [a return] for every one of the 12 monthly tax periods. When a [return] is filed the RTI system will allocate this to the appropriate tax month based on the employee payment date shown. If ... you file ... late HMRC will charge a penalty”.

10. It appears that the RTI system does not in fact allocate an RTI submission to the appropriate tax month when it is filed early, as HMRC had not treated the returns under appeal as allocated to any tax month even though they had accepted that the returns were filed.

11. As the legislation is specific as to the requirement to file a return *during* the tax month, the early filing by Quayviews means that it did not make a return during each of the RTI periods under appeal and so is liable to a penalty unless they have a reasonable excuse for the failure (paragraph 23 of Schedule 55 of Finance Act 2009).

Whether there is a reasonable excuse

12. The term “reasonable excuse” is not defined in the legislation, but the Upper Tribunal in *Perrin* [2018] UKUT 156 (TCC) held that “to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account” (at [75]).

13. We consider that the relevant circumstances in this case are that Quayviews intended to ensure that their returns were not late and so submitted several months’ information in a batch to HMRC, using HMRC software, in September 2020 in order to ensure that the information was received before the relevant payment dates. They were not aware that the legislation requires that an RTI return be filed within the relevant tax month.

14. Lack of awareness of the law is, as has often been stated, not sufficient in and of itself to be a reasonable excuse. As with the decision in *Perrin*, the decision in *The Clean Car Company Limited* [1991] VATTR 234 noted that the relevant test is to ask oneself whether “what the taxpayer did [was] a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time”, to do.

15. The question in this case is therefore whether Quayviews’ actions, in filing the returns early because they did not know that this was not permitted by law, were reasonable. We find that they were.

16. None of HMRC’s correspondence to Quayviews, including the education letter sent to them in February 2018, stated that RTI returns could not be made more than one month in advance; the concern in the correspondence is that the returns must not be made late. The education letter emphasises (as does HMRC guidance generally) that RTI returns must be made on or before the date of payment to the employees but does not explain that there is a cut-off before which returns cannot be validly submitted.

17. HMRC provided copies of their guidance on making RTI submissions in the tribunal bundle: this guidance states that an employer can send an RTI submission before their regular payday, if “for example ... payroll staff are going on holiday”. The guidance then cautions that the employer should not report too early, as they may need to send a corrected submission if an employee leaves or changes tax code. The guidance also states that an employer cannot send reports for the new tax year before March.

18. Nowhere does the guidance explain that a report must be made within the relevant tax month and cannot be made earlier. Indeed, the comment that an employer “cannot send reports for the new tax year before March” clearly means that a report for a payment made in the 6

April-5 May period could be reported during March and therefore before the relevant tax month. We consider that highlighting the fact that the first return for a tax year cannot be filed before March, without further explanation, also suggests that returns for other periods could be filed more than one month in advance.

19. Paragraph 6C(1), noted above, would mean that such a report during March should be regarded as a failure to make an RTI return, as it would not be made during the first tax month of the next tax year. Of course, the exception in the legislation from penalties for the first failure in a tax year would mean that a report in March for that first period would not give rise to a penalty and, as such, following the guidance in respect of that first period would not notify a taxpayer that they had filed incorrectly. Given that there is no explanation of this in the guidance, we consider that HMRC's own guidance would indicate to a reasonable taxpayer that it is possible to file returns early.

20. This failure to communicate that there is a 'start' date for filing as well as an 'end date' (the date of payment) continued even after the failure to file during the relevant months as the review letter received by Quayviews does not explain why HMRC had not accepted the returns as being on time – nor does the Statement of Case submitted in response to the appeal which states that the returns had not been received at all. Although the review and the Statement of Case both repeat Quayviews' grounds of appeal, that the returns had been submitted in September 2020, neither explains *why* this means that the returns were not correctly filed. It was not until the hearing that the provisions of paragraph 6C were discussed with Quayviews.

21. We note further that the HMRC software used by Quayviews allowed the returns to be filed earlier than is permitted by law and reported the submission state as "success" for each return. We note that HMRC's systems use the word "success" in this context to mean "received" rather than to indicate that the return has been correctly filed. This is not, perhaps, a model of clarity on the part of HMRC.

22. Following *Perrin* and *Clean Car*, we consider that a taxpayer attempting to comply with their obligations and therefore filing their RTI submissions in advance of the relevant months to ensure that the returns were not late would be regarded as acting reasonably in circumstances such as these where:

- (1) Quayviews has been advised repeatedly by HMRC that they must file their returns on *or before* the payment date; and
- (2) neither the education letter sent to the taxpayer or the HMRC guidance provided warns that returns cannot be made in advance of the relevant tax month and, indeed, the guidance suggests that returns can be made in advance; and
- (3) HMRC's software permits returns to be made early without warning that this is not permitted by law and, indeed, that software has apparently been changed to allow such early filing where it previously did not do so.

23. HMRC had suggested in their Statement of Case that, as Quayviews had been notified that the returns were late, Quayviews should have realised earlier that they had not correctly submitted the returns and should therefore have resubmitted the returns and could therefore have submitted at least the later returns on time.

24. However, as noted above, HMRC have consistently failed to explain *why* the returns were regarded as late. We do not consider that it was unreasonable for Quayviews, having filed the returns early in September 2020 in the circumstances set out above, to consider that the error lay with HMRC rather than with them. As such, we do not consider that the reasonable excuse can be regarded as having ceased when a penalty or late filing notification was issued.

25. We note also that HMRC confirmed in their Statement of Case that the purpose of the penalty legislation is to encourage compliance, rather than to punish defaults. We also note that HMRC have accepted that no penalty should apply to the March 2021 return filed in September 2020. It is somewhat inexplicable that they accepted that no penalty should apply in respect of that return whilst continuing to maintain in their statement of case that they consider that the returns under appeal should be treated as not having been made at all.

26. For all of these reasons, we find that Quayviews has a reasonable excuse for the failure to file their RTI returns during the tax periods under appeal.

Conclusion

27. The appeal is allowed such that no penalties are due for these three periods.

28. The Tribunal is grateful to Mrs Edley for taking over HMRC's case at very short notice and her assistance to the panel; any comments with regard to the Statement of Case and correspondence must not be regarded as a reflection on her. The Tribunal also suggests that HMRC's guidance, education letters, and software should be updated to make it clear to taxpayers that there is a statutory limit on how early an RTI return can be made.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 20 JUNE 2022