



TC01616

Appeal number: TC/2011/02957

Section 98A (2) and (3) TMA 1970 – late submission of employer’s end of year return – parish clerk thought return had been submitted – whether reasonable excuse – no – appeal disallowed

FIRST-TIER TRIBUNAL

TAX

DENT PARISH COUNCIL

Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

Sitting in public at 11 Albion Street Leeds on 4 August 2011

Mr G W Dalton for the Appellant

Mr J Osborne, Senior Officer of HM Revenue and Customs, for the Respondents

DECISION

Decision under Appeal

- 5 1. This is an appeal by Dent Parish Council against the £400 penalty imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the year ending 5 April 2010.
2. An employer has a statutory obligation to make End of Year returns 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.
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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 imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.
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4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 provides that an employer must use electronic communications to deliver their 2009/10 end of year return online.
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The background facts

5. (i) The filing date for the Appellant's 2009/10 return was the 19 May 2010. This had to be filed online.
- (ii) A first interim penalty of £400 for the period 20 May 2010 to 19 September 25 2010 was issued on 27 September 2010.
- (iii) The 2009/10 return was filed online on 20 January 2011

The Appeal

6. Mr Dalton on behalf of the Parish Council said that at the time the Employer's End of Year return was due to be filed a new Parish Council clerk had been appointed. As part of the handover process she and her predecessor completed the annual submission online together and they had a print off of what they understood to be confirmation of submission of the online return dated 20 April 2010. They did not receive any confirmation either of acceptance or rejection and therefore were unaware of any problem until the Parish Council received a penalty notice. Mr Dalton emphasised that the Parish Council used its best endeavours to comply with its obligations and that it acted reasonably in all good faith assuming that the filing process had been completed successfully. He submitted that it was possible that a fault in HMRC's software may have meant that although the Parish Council submitted the return, HMRC had nonetheless not received it. He contends that the Parish Council should not be penalised if the online system is difficult to use. He also says
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that on 20 January 2011 it was necessary for the Parish Council to seek help from HMRC when they had further difficulties attempting to file the return online and having been taken through a number of technical issues this eventually resulted in a successful electronic submission.

5 7. Mr Dalton was also concerned that HMRC had not issued any reminders that the
P35 return had not been filed. He says that if a reminder had been issued then the
Parish Council would have been immediately aware of the default and filed the return.
Mr Dalton also referred to the case of *Hok Limited v HMRC TC/01286* which
10 similarly concerned an appeal against a penalty of £400 for the late filing of a P35.
The Tribunal in that case took the view that there could be no logical reason for
HMRC delaying sending out penalty notices for four months so that in effect a £400
or possibly £500 minimum penalty would be levied unless the tax-payer had
unilaterally realised that it had failed to undertake the necessary filing. The Tribunal
15 in that case concluded that HMRC had not acted fairly or in good conscience in
deferring the issue of penalty notices and that a £100 penalty for the first month of
default was an appropriate penalty.

HMRC's submissions

8. HMRC say that the penalties are issued in September in order to give HMRC
time to process all returns, electronic or otherwise, and resolve any exceptions arising
20 in relation to returns that have been made, which they say helps to reduce the risk of
issuing penalties where returns have been submitted on time but HMRC have not had
the time to fully process them or those who had already told HMRC they had no
return to make. HMRC say that the penalty is not and should not be seen as a
reminder and that there is no statutory timetable for HMRC to follow when issuing
25 penalty notices.

9. HMRC further submits that in earlier years Dent Parish Council had completed
and submitted its end of year returns online. On successful electronic submission an
acceptance message acknowledging the submission is generated and failure to receive
this message should have alerted the Parish Council clerk to the fact that the return
30 had not been filed successfully. HMRC further submit that if the Appellant was
experiencing technical difficulties or required assistance they could have contacted
HMRC's online telephone helpline for assistance.

Conclusion

10. When a tax-payer appeals a penalty they are required to have a reasonable excuse
35 which exists throughout the whole period of default. There is no definition in law of
reasonable excuse, which is a matter to be considered in the light of all the
circumstances of each particular case. A reasonable excuse is normally an unexpected
or unusual event whether unforeseeable or beyond the tax-payer's control, which
prevents them from complying with an obligation which otherwise would have been
40 complied with.

11. The Tribunal takes the view that ordinarily when a penalty falls due HMRC should notify the tax-payer, as a matter of course, so that the default is not repeated and penalties accumulated unnecessarily. However in this particular case, even after imposition of the penalty, there was a further delay from notification of the penalty on 5 27 September 2010 to 20 January 2011 when the return was finally filed. Consequently it cannot be said that the Parish Council has exercised due diligence and expedition in dealing with the default. Therefore, any reasonable excuse which might have existed did not continue throughout the entire period of default and the Tribunal cannot accept that a reasonable excuse has been shown. Accordingly the appeal is 10 dismissed and the penalty is confirmed.

12. 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 15 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

RELEASE DATE: 2 December 2011

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Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 9 December 2011