Quayviews: a company penalised for submitting its RTI returns early

Employment Tax | Personal tax



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In the case of *Quayviews Ltd*, HMRC sought to penalise a company for making its RTI returns too early.

Key Points

What is the issue?

Quayviews Ltd sought to avoid the risk of penalties by submitting a batch of RTI returns for the 2020/21 year in a single go. Its diligence backfired as HMRC issued penalties, arguing that the returns had been submitted too early.

What does it mean for me?

HMRC acknowledged that it had received the returns but that they were not received at the right time (they were too early) and that is why HMRC's computer

did not process them properly.

What can I take away?

Advisers are now on notice that RTI returns should not be made before the beginning of the relevant tax month. The cautious approach must now be to wait until the relevant month has begun before submitting each return.

I suspect that few readers will disagree with the proposition that, as a matter of principle, HMRC should have the power to issue penalties in cases where tax returns are submitted late. Indeed, the company in the present case (*Quayviews Ltd v HMRC* [2022] UKFTT 190 (TC)) had previously incurred penalties for late Real Time Information (RTI) returns. As a result, it sought to avoid the risk of further penalties by submitting a batch of RTI returns for the 2020/21 tax year in a single go. Nevertheless, its diligence backfired as HMRC issued penalties, arguing that the returns had been submitted too early.

The facts of the case

Before 2018, the company had experienced difficulties in making its RTI submissions in time, receiving penalties for its failures. In February 2018, the company received a letter known as an ‘HMRC education letter’ which (per HMRC) set out the correct procedure for making RTI returns.

In the subsequent two years, the company had tried to avoid the risk of further penalties by filing in advance but HMRC’s software did not seem to accept such early returns. However, on 4 September 2020, the company tried again and submitted returns for the three PAYE months ending on 5 November 2020, 5 December 2020 and 5 January 2021. HMRC’s software responded to say that the returns had been successfully sent.

Initially, HMRC denied having received the three returns and, accordingly, issued three £100 penalties. At the hearing, however, HMRC acknowledged that it had received the returns but that they were not received at the right time (they were too early) and that is why HMRC’s computer did not process them properly. Nevertheless, HMRC maintained that (because the returns were not received at the right time) penalties were due.

HMRC acknowledged that the company would have no penalty liability if it could show a reasonable excuse for its failures. However, HMRC argued that the terms of the education letter sent to the company in early 2018 explained how to make a correct RTI return and, therefore, the company had no excuse not to have filed the returns properly.

The First-tier Tribunal's decision

The case was heard by Tribunal Judge Anne Fairpo and Member Rebecca Newns. The tribunal referred to the relevant paragraph in the penalty provisions (Finance Act 2009 Sch 55 para 6C) which states that a penalty is payable if the person due to make an RTI return 'fails during a tax month to make a return on or before the filing date'. (The tribunal noted that there is an exception for the first failure in the tax year but noted that that this statutory relaxation had already been used up by the company. I wonder, not that it is critical, whether that was in fact the company's RTI return for the month ended 5 October 2020, which is not mentioned in the decision.)

Given the wording of para 6C, the tribunal accepted HMRC's principal argument being that there had been a failure and so, subject to the question of reasonable excuse, the liability for the three penalties had been established.

As the tribunal summarised, reasonable excuse focuses on whether the company had acted 'as a reasonable [person] conscious of and intending to comply with [its] obligations regarding tax, but having the experience and other relevant attributes of the [company] and placed in the situation that [it] found [itself] at the relevant time [would do]'. Accordingly, the tribunal asked itself whether filing early was reasonable, given the company's ignorance that this was not permitted by law.

In this regard, the tribunal noted that there was nothing in any of the HMRC correspondence previously sent to the company (including the education letter in 2018) that said that RTI returns should not be sent in advance. Indeed, the education letter (as well as HMRC's general guidance) emphasises the last date for returns but does not explain that there is also a cut-off before which returns may not be validly submitted. The message repeatedly given to the company by HMRC was that it must file its RTI returns 'on or before the payment date'.

Furthermore, HMRC's guidance makes it clear that RTI submissions may be made before a worker's regular payday if 'for example … payroll staff are going on

holiday’. This guidance makes the point that an employer should not file too early because there is a risk that codes might change or an employee might leave. The only express restriction in the guidance is that returns cannot be made for a period within a new tax year before the March at the end of the previous tax year. As the tribunal noted, this strongly implies that there is no other restriction on submitting returns early. As the tribunal concluded, ‘HMRC’s own guidance would indicate to a reasonable taxpayer that it is possible to file returns early’.

The tribunal learned from HMRC that it considers a ‘successful’ submission is one that is received by the HMRC computer, not necessarily one that has been filed correctly and therefore not one that will necessarily be processed as a return by HMRC’s software. As the tribunal concluded, ‘this is not a model of clarity on the part of HMRC’.

For all these reasons, the tribunal concluded that the company did indeed have a reasonable excuse for its failure and, therefore, the appeal against the penalties was allowed.

Commentary

When I first read this case, my immediate reaction was a combination of ‘Why?’ and ‘How on earth?’ How did a government department actually think that this was a case that should be taken to the tribunal? For these reasons, I am glad that the tribunal’s intervention means that common sense has eventually prevailed.

However, the more I think about the case, the more questions arise.

I will first address the point arising from my initial reaction to this case. Is there anyone at HMRC who has sufficient oversight of cases going to the tribunal and who can make the decision to stop a case going that far? This is the type of case that gives HMRC a bad name and this is something that someone in the process should take into account.

By way of contrast, let’s look at some of the most aggressive tax avoidance cases that might still be being touted. We, as advisers, might (despite any initial reservations) be persuaded that the schemes are in fact fully compliant with the law (let’s leave the GAAR and PCRT on one side for the time being) and that there is indeed a gap which provides a very favourable tax outcome for our clients. However, as professionals, we must also step back and ask whether our client wishes to be

associated with something of this nature. Indeed, HMRC would want us to do just that. On that basis, why should HMRC not aspire to the same high standards of common sense?

But, on further reflection, is the solution really to stop these cases going to tribunal? Indeed, that risks sweeping a deeper problem under the carpet. The real problem here is that penalties should simply not be issued in the first place. Why should common sense prevail in these cases only if the taxpayer feels empowered (or sufficiently irritated) to go to the tribunal?

Of course, I am assuming that the upper echelons of HMRC would not want penalties being issued in cases where otherwise correct returns are made ‘early’ and that the problem is insufficient oversight of the system further down the hierarchy. However, we are regularly assured that the senior management of HMRC do reflect on tribunal defeats with a view to changing the way that things are done in the future.

Given the regularity with which cases such as these are appearing in the tribunal, there can be only two real possibilities: either HMRC’s internal processes are not working properly or it is indeed a deliberate policy for such cases to be taken. I would suggest that an urgent clarification of HMRC’s approach should be sought.

Moving back to the facts of the case itself, I was somewhat disturbed to read HMRC’s submission that the contents of its education letter meant that the company could not reasonably believe that sending the returns before the beginning of the relevant tax month was an acceptable thing to do. As the tribunal noted, there was nothing in the guidance that made this clear and, furthermore, the guidance implied that early returns were generally permissible. This strongly suggests that HMRC officers were using stock responses bearing no relationship to the actual facts of the case. Again, I must ask whether this is the reflection of a deliberate policy within HMRC to win at all costs or merely a consequence of allowing correspondence to be sent by HMRC officers without sufficient quality checks over the process?

Finally, I will address a technical point that arises from the case and where I respectfully reach the provisional view that the tribunal reached the wrong conclusion as to the company’s primary liability for the penalties. As the tribunal correctly noted, the consistent message from HMRC’s guidance was that the obligation on employers is to submit RTI returns ‘on or before the payment date’. In other words, the guidance gives no impression that there is any earlier cut-off.

Readers might not be surprised to learn that guidance is usually written with the underlying legislation in mind. And, if one looks at the Income Tax (Pay As You Earn) Regulations 2003, which is where the RTI obligations may be found, regulation 67B sets out the duty as follows:

> ‘on or before making a relevant payment to an employee, a Real Time Information employer must deliver to HMRC the information specified in Schedule A1 in accordance with this regulation.’

In other words, it is not just that the company followed the guidance, but the guidance actually adhered to the underlying law.

What seems to have happened is that the penalty provisions inserted an additional requirement, being that the return must be submitted during the tax month itself. I just wonder whether that was in fact a slip and that the statutory words ‘during a tax month’ were actually meant to say ‘in respect of a tax month’. After all, it is strange that there are two separate temporal requirements (‘during the tax month’ and ‘on or before the payment date’) within para 6C which are expressed in such different ways and in different parts of the sentence.

However, even if we have to take as read the statutory wording as it was enacted, there is still an argument that no penalty should be payable. After all, para 6C is said to apply only in the case of a failure. In respect of any tax month, regulation 67B imposes an obligation on an employer to make a return on or before making a payment to an employee. If, at the beginning of the tax month, no return has yet been made, then of course the return must be made ‘during’ the tax month (and on or before payment). However, if the return has already been made, then there is no longer any obligation to make the return ‘during’ the tax month and, therefore, there cannot be any failure. On that basis, no penalty is due and there is no need to consider reasonable excuse.

What to do next

Subject to the point made in the preceding paragraph, advisers (and, therefore, their clients) are now on notice that RTI returns should not be made before the beginning of the relevant tax month. This could, in due course, lead to a reduction of the availability of the reasonable excuse defence going forward. Accordingly, the cautious approach must now be to ensure that one waits until the relevant month

has begun before submitting each return.

It is noteworthy that the tribunal has suggested that HMRC modify its guidance to make its position clearer. However, before it does so, I wonder whether the better approach would be to modify the penalty legislation so that it aligns more closely with the underlying obligation. Or as the Mikado puts it, let the punishment fit the crime.