

ERS: Being unaware is not a good excuse



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Catherine Gannon reviews the excuses given by Talkative Ltd (TC07172 (<http://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j11133/TC07172.pdf>)) for late filing of employee share tax returns and warns employers to file the annual returns on time or face penalties.

Talkative Ltd set up two employee share schemes in early 2018. They were required to submit an annual return for each scheme by 6 July 2018. They failed to do so.

The company eventually submitted a return for the first scheme 12 months late and a return for the second scheme three months late.

Penalties imposed

As Talkative did not file their returns on time, HMRC had authority to issue a penalty for late filing.

HMRC imposed a fixed penalty of £100 for each scheme for failure to file the return on time. It imposed a further fixed penalty of £300 for each scheme for failure to file the returns within three months of the filing deadline. The late filings cost Talkative £800 in penalties for both schemes.

Why did Talkative appeal?

HMRC has the discretion to consider whether there is a reasonable excuse for the late filing.

Talkative appealed against the penalty on the basis that it was unaware the company was required to file a return. Therefore, the company claimed it had a reasonable excuse for the late filings.

What was HMRC's case?

The returns for shares and options provided to employees are known as employment related securities (ERS) returns. Guidance on [how to complete an ERS tax return \(https://www.gov.uk/guidance/tell-hmrc-about-your-employment-related-securities\)](https://www.gov.uk/guidance/tell-hmrc-about-your-employment-related-securities) is available on gov.uk.

Reportable events include: grant, exercise, lapse or replacement of shares or options. The guidance states that employers must submit an annual return for all shares and options provided to employees every year, even if there is no reportable event – i.e. there has been no grant, exercise, lapse or replacement.

A major problem is that the guidance is unclear and it doesn't cover everything an employer may need to know. For example, many employers are not aware that securities cease to be employment related securities only seven years after the employee leaves employment. Up until that time the employer needs to continue to file ERS returns for those options.

What is a reasonable excuse?

The legislation does not provide a definition of “reasonable excuse”. Whether or not an employer had a reasonable excuse is an objective test. It is a matter to be considered in the light of all the circumstances of the particular case.

HMRC considers a reasonable excuse to be something unexpected or unusual that stops the employer from meeting their obligation to file the return on time despite having taken reasonable care to meet that obligation.

HMRC will assess the employer’s actions from the perspective of a prudent person who is exercising reasonable foresight, due diligence and regard for their responsibilities according to the law.

In order for a reasonable excuse to apply, it needs to exist throughout the failure period.

Decision

The tax tribunal found that Talkative did not provide a reasonable excuse for its failure to file the return on time. The information on what to do when an employee share scheme is registered is readily available. It is the employer’s job to know the law. On this basis, the penalties imposed by HMRC were justified and correctly charged. The penalty amount is fixed and outlined in the legislation.

Can a penalty be reduced?

If special circumstances apply HMRC can reduce the amount of the penalty the employer pays. What constitutes a special circumstance is undefined. It must apply to the particular individual and must not be a general situation that

applies to most. In most circumstances, it is held to mean something out of the ordinary run of events or something that is unusual, exceptional or abnormal.

The tax tribunal rejected the argument that as a small business which had incurred no tax liability in the relevant tax year the penalty was disproportionate. The mere fact that Talkative had no tax liability for the relevant tax year does not justify a reduction in the penalty on grounds of proportionality nor does it amount to special circumstances. The tribunal held that in the matter of Talkative Ltd, special circumstances did not apply.

Lessons learned

Ignorance of the law is not an excuse! This rule applies across the tax spectrum and is not confined to ERS tax returns.

Do not ignore penalty notices. Had Talkative Ltd paid attention to the original penalty of £100 and rectified the situation immediately by submitting the late returns the company would have saved £600. The penalties can rack up quickly! Act quickly before they triple.

The filing deadline for ERS returns for 2018/19 is 6 July 2019.

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About Catherine Gannon



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Catherine Gannon is the founder and managing partner of Gannons which is a boutique commercial law firm in London. More information about the firm can be found [on their website \(https://www.gannons.co.uk/\)](https://www.gannons.co.uk/).

After qualifying in the accountancy profession as a Chartered Tax Advisor (CTA), Catherine qualified as a solicitor and gained experience at a major US international law firm before

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