

Chapter 11 Department of Enterprise, Trade and Employment

11.1 Administrative Oversight at Companies Registration Office

The Appropriation Account for 2002 for the Vote for Enterprise, Trade and Employment, records that fee income to the Companies Registration Office (CRO) in 2002 was in excess of €20.26m. The Department had originally estimated these fees at €7.86m. Fees for the late filing of annual returns by companies alone amounted to over €12.75m for the year. The explanation given in the Notes to the Account for the increased level of fees collected was that it was 'due to a vigorous enforcement campaign with the aim of forcing companies to bring their filing of returns up to date'.

The Company Law Enforcement Act 2001 altered the rules relating to the filing of annual returns with the CRO. Section 60 of the Act, which came into effect on 1 March 2002, set out a new deadline for filing the first annual returns after this date.

The Act and subsequent statutory instruments implemented significant changes in the factors which govern the late filing penalty, if any, that a company must pay in respect of the filing of its annual return.

These factors are:

- The rules that determine when the annual return is due to be filed with the CRO
- The rules that determine when the late filing penalty commences
- The amount of the late filing penalty itself and how it is calculated.

The Act provided that:

- Every company should have a statutory annual return date⁷⁶
- The annual return should be filed within 28 days of the date up to which it was made, which date should be no later than the annual return date
- Companies should be allowed three months to prepare and file their first return under the new rules (the transitional arrangement).

The new provisions relating to the annual return date came into effect on 1 March 2002⁷⁷ and affected only those returns made up to a date on or after 1 March 2002. However, because of the three month transition provision, returns dated after 1 March which would otherwise have been due to be filed within 28 days could be filed any time up to and including 4 June 2002 without incurring a late filing penalty. New late filing penalty provisions to reflect the end of the transition period on 4 June should therefore have been made to take effect on 5 June 2002. Due to an administrative oversight the required new fees order was not made. The administrative oversight was not discovered until early December 2002. A new fees order was made by the Minister on 5 December 2002 to apply the 28 day rule.

Arising from the oversight in June, a number of companies were overcharged late penalties in respect of their annual returns. Audit inquiries established that some 9,876 companies were identified by the CRO as being affected and that the total amount to be refunded was €1,371,752 inclusive of interest at 8% - €37,780.

⁷⁶Every company in existence on 1 March 2002 was assigned an annual return date by law. New companies incorporated on or after 1 March 2002 have an annual return date triggered by their date of incorporation.

⁷⁷ SI No 438 of 2001.

The CRO wrote to each company involved setting out the amount due to be repaid by the CRO enclosing a credit note for the amount. Each company was offered the option of:

- Using the credit note for future filing or company search fees in the CRO
- Lodging the credit note to an account in the CRO to pay filing fees or for online company searches
- Surrendering the credit note in exchange for a Payable Order.

Inclusive of interest, cash refunds totalling €498,670 have been made to companies. The Department has not yet computed the value of credit notes availed of.

I sought the views of the Accounting Officer as to how the administrative oversight arose and the steps taken to rectify the situation.

The Accounting Officer informed me that the Act was implemented in phases and required 19 statutory instruments to date to give legal effect to its various provisions. In order to ensure that as many as possible of the returns due under the existing provisions were filed before the new provisions took effect, a fees order⁷⁸ was made increasing the late filing penalty to €100 for the first day the return was late, plus €3 per day thereafter up to a maximum for any return of €1,200.

He agreed that a fees order to govern late filing penalties incurred after the 3 month transition period elapsed should have been made to take effect on 5 June 2002. However, no such order was made and the Statutory Instrument of 26 October 2001 remained valid for all annual returns. Hence, as and from 5 June 2002, the late filing penalty should legally have been calculated from 78 days after the date up to which the annual return was made (to remain compliant with the fees order which gave 77 days between the date the annual return was due and the date of applicability of the late filing penalty). However, the CRO proceeded on foot of a Ministerial decision to introduce the 28 day rule, which had been announced some time earlier, and as and from 5 June 2002, calculated the late filing penalty accordingly.

The Accounting Officer stated that the error came to light when the CRO's legal advisor, while examining a separate and unrelated matter, discovered that an order had not been made in respect of the 28-day filing period. The new fees order came into effect on 6 December 2002. With effect from that date, the late filing penalty applies to annual returns made up to 1 March 2002 or later which are delivered to the CRO more than 28 days after the newly defined statutory annual return date.

The only annual returns in respect of which an excessive late filing penalty had been charged were:

- Returns filed with the CRO between 5 June 2002 and 5 December 2002 and
- With an effective date of 1 March 2002 or later and
- Which were received late (more than 28 days after the statutory return date).

The Accounting Officer pointed out that the category of annual returns affected was clear-cut in that it only included annual returns with statutory return dates and received dates within specific ranges. These cases were readily identifiable on the CRO database. The CRO is satisfied that all potential cases have been identified.

⁷⁸ SI No. 477 of 26 October 2001.

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With regard to the determination of the interest rate, legal advice requested by the CRO was that the then current Courts Act interest rate of 8% was appropriate. The approval of the Department of Finance was not sought. However, the Department of Finance had sanctioned the repayment of overpayments.

The CRO have made refunds in 3,376 cases to date. Requests for cash refunds have been received in 39 cases since the end of May 2003. These have not yet been processed. It was anticipated that small numbers of requests for cash refunds would continue to be received in the short term. Any amounts unclaimed will be brought to account as Appropriations in Aid of the Enterprise, Trade and Employment Vote for 2003.

He estimated that the administrative cost of rectifying the oversight amounted to €24,850.

The Accounting Officer concluded by stating that the chain of events that led to this oversight was extremely unusual and a similar combination of events should not occur in the future. A procedure has now been agreed with the CRO and Company Law Administration Section to prevent a similar oversight. When new legislation is due to be enacted a schedule will be drawn up detailing the sections of the Act and their commencement dates. In the future, any statutory instruments required in relation to each section will be identified and closely monitored. He is satisfied that this procedure is sufficient to prevent similar oversights occurring.