



TC01334

Appeal number: TC/2010/09068

INCOME TAX - PAYE - late filing of P35 penalty - reasonable excuse for part of period - mistake by HMRC - whether penalty disproportionate - no - appeal partially allowed

FIRST-TIER TRIBUNAL

TAX

TOWER LEASING LTD

Appellant

- and -

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

Respondents

TRIBUNAL: Paulene Gandhi (TRIBUNAL JUDGE)

Sitting in public at Sutton on 9 March 2011

Umar Shariff, company secretary, appeared on behalf of the Appellant

Paul Reeve, Presenting Officer of HM Revenue and Customs appeared for the Respondents

DECISION

1 This is an appeal against a £300 penalty imposed on 12 August 2010 for the late
filing of P35 PAYE for the year 2009/10.

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2. The appellant, Tower Leasing Ltd (“the company”), requested full written
findings of fact and reasons for the decision.

3. This decision sets out my findings of fact and reasons.

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The evidence

4. I was provided with documentation by HMRC which related to both HMRC and
the company’s case. I have considered all the documentary evidence before me
with the following being the most pertinent to my decision:

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- Notice of penalty determination dated 12 August 2010
- Letters from the company to HMRC dated 19 August 2010, 7
September 2010, and 20 September 2010
- Letter from HMRC dated 16 September 2010
- HMRC’s response to the appeal dated 1 October 2010
- 20 • Request for a review dated 5 October 2010
- HMRC’s conclusion of the review dated 17 November 2010
- Notice of Appeal to the Tribunal dated 25 November 2010
- Email of Ms Janet Reynolds dated 28 February 2011
- Replacement password letter dated 3 June 2010
- 25 • P35 which initially failed to submit and was resubmitted on 9
August 2010
- P35 employer annual return for 6 April 2009 to 5 April 2010 for
Tower Leasing Ltd (TAS)

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5. I heard submissions from Mr Shariff and Mr Reeve.

The law

6. The Income Tax (Pay As You Earn) Regulations 2003 state:

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73.-(1) Before 20th May following the end of a tax year, an employer must
deliver to the Inland Revenue a return containing the following information.

(2) The information is...

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(10) Section 98A of TMA (special penalties in case of certain returns)
applies to paragraph (1).

7. The Income Tax (Pay As You Earn) (Amendment No. 2) Regulations 2009
Regulation 205 provides that all employers must deliver a relevant annual return
by an approved method of electronic communications to HMRC.

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8. Taxes Management Act 1970 (TMA) states:

98A(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable-

5 (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed...

10 98A(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return-

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100...

15 100(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

25 100(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

30 100(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

35 100B(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to sections 93, 93A and 95A of this Act and the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

40 100B(2) Subject to sections 93(8) and 93A(7) of this Act on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but-

(a) in the case of a penalty which is required to be of a particular amount, the first tier tribunal may-
45 (i) if it appears that no penalty has been incurred, set the determination aside,
(ii) if the amount determined appears to be correct, confirm the determination, or

(iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount...

9. 118(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

The Facts

10. There is no dispute between the parties as to the relevant facts. I therefore make the following findings of fact.
- a) Tower Leasing Ltd (“the company”) filed a manual P35-employer annual return for the tax year ended 5 April 2010 on 27 April 2010 i.e. before the due date of 20 May 2010.
 - b) For the tax year ended 5 April 2010 it was a mandatory requirement for the company to file their P35 on line.
 - c) The company did not file the P35 correctly i.e. on line until 9 August 2010.
11. Accordingly I find that the company filed their P35 for the tax year ended 5 April 2010 after the due date.

The company’s submissions in outline

12. 2009/10 was the first year the company had to file on line and it was their lack of experience of internet filing that led to their failure and not a disregard as to the filing requirements.
13. HMRC issued a P35 form showing an incorrect employer’s reference. The company did not notice this and completed and returned the P35 on 27 April 2010.
14. HMRC phoned and advised the company that the P35 submitted showed the wrong reference but agreed to send it to the right department as no payment was due.
15. The company were only made aware of their error in a phone call from HMRC on 27 May 2010. When HMRC advised them that the P35 must be filed on line on 27 May 2010 the company then applied for a user ID and password.
16. The company completed the P35 on line on 16 June 2010 and a copy was printed off but the electronic P35 did not transmit and they did not realise this until

HMRC phoned them in July 2010 to advise that they had still not received the P35. The P35 was transmitted after two attempts and a phone call to HMRC's helpline on 9 August 2010.

- 5 17. It is harsh to charge a penalty.

HMRC's submissions in outline

- 10 18. HMRC did not issue a P35 with an incorrect reference number. The P35 was correctly issued in respect of Tower Leasing Ltd (Taxed Award Scheme). It was the company's mistake to use that P35 for Tower Leasing Ltd.

- 15 19. The company knew that two returns were due (one for Tower Leasing Ltd and one for Tower Leasing Ltd (Taxed Award Scheme) because returns were completed for both companies in previous years.

- 20 20. The company should have been aware of its on line filing requirements due to HMRC publications sent to the company. It should also have known that any "successful transmission" report receipt is generated when the return is successfully transmitted.

- 25 21. The company should have been aware of its online filing responsibilities because it had registered for on line filing in 2008 and it was a duplicate user ID and password that was requested by the company on 27 May 2010.

Discussion

- 30 22. It is not in dispute that the correct P35 was filed in the right manner after the due date. I am therefore considering whether there is a reasonable excuse for the P35 being filed late and whether the P35 was then received "without unreasonable delay" once any "excuse" ended.

- 35 23. The penalty notice was issued on 12 August 2010 and charged penalties for the period 20 May 2010 to 9 August 2010. The penalties totalled £300 i.e. £100 for each month of the period covered by the penalty notice.

- 40 24. There is no definition in the legislation of a "reasonable excuse" which "is a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD). Although this is a VAT case the proposition set out is equally relevant to direct tax cases).

- 45 25. However *Stepto v R&C Commrs* [1992] STC 527 requires the Tribunal to take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence.

26. As set out in *Stephen Mutch v HMRC* [2009] UKFTT 288 (TC) the assumed reasonable competent business person must be taken to have exercised reasonable foresight. Then the reasonable business person must be taken to have exercised due diligence and a proper regard for their tax obligations.

27. Mr Shariff, who is responsible for completing and filing the company's P35, states that he was not aware of the legislation which made on line filing of the P35 for the tax year 2009/10 a mandatory requirement. This was because he had not read the documentation that he had been sent by HMRC because he receives a voluminous amount of correspondence from HMRC.
28. In my view the company cannot ignore documentation that has been sent to it and then claim that amounts to a reasonable excuse for not being aware of the on line filing requirements. A company who pays due regard to its tax obligations exercising 'due diligence' and with 'a proper regard for their tax obligations' ought to have known about the new on line filing requirements because HMRC have widely publicised these requirements both on their website and in fact by sending documentation to the company for example the P35PN sent in January 2010. Ignorance of basic law cannot amount to a reasonable excuse.
29. However, on the particular facts of this case, the company not being aware of the mandatory on line filing requirements is not determinative of whether there is a reasonable excuse for the late filing of the P35. This is because HMRC sent the company a manual P35 employer annual return to complete.
30. This manual P35 does not state that filing on line is a mandatory requirement. Instead it states that the company is required by law to file a P35 but if they are required to file the P35 online they must not complete and file this form. This manual P35 thus contradicts the other information sent to the company.
31. As has subsequently come to light HMRC sent this P35 to the company in error. They should in fact have sent the P35 Taxed Award Scheme (TAS) but instead sent the P35 - employer annual return for 6 April 2009 to 5 April 2010. This is clear from the email of Ms Janet Reynolds dated 28 February 2011.
32. Mr Reeve accepts that if HMRC sent the wrong P35 to the company then that would amount to a reasonable excuse. However he argues that the P35 which was sent was in the name of Tower Leasing Ltd (Taxed Award Scheme) and not Tower Leasing Ltd. Further the reference number on the P35 which was sent was different to the reference number for Tower Leasing Ltd and in fact related to Tower Leasing Ltd (TAS).
33. Mr Shariff's response is that Tower Leasing Ltd is one company and he did not check the reference number quoted on the P35. However he assumed, as it was the only P35 he had been sent, and as it stated that it was the employer annual return that he needed to complete and return it to HMRC as soon as possible. Further he states that the P35 (TAS) is very different in format to the P35 employer annual return which he was sent.
34. I accept that at the end of the tax year there are enormous pressures on the company to get their finances in order. Further the company is a small company

so it is only Mr Shariff who deals with HMRC deadlines. The company's priority was to make sure the P35 received was completed and filed on time and so Mr Shariff simply didn't have any time to waste. He was sent a manual P35 by HMRC and so completed this.

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35. In my view it was reasonable for Mr Shariff to assume that he had to complete the P35 for PAYE manually because the company is indeed one company. More importantly he had no way of knowing at that time whether HMRC had actually incorporated the incorrect details on the manual P35 or whether in fact they had sent the incorrect P35. The P35 sent to the company made no mention that on line filing was a mandatory requirement. Further Mr Shariff had previously been sent the wrong P35 by HMRC and had contacted Ms Reynolds who had assured him that she would correct this error. He therefore assumed, in my view reasonably, that the P35 sent by HMRC was the correct one. Under these circumstances I find that the company behaved as a reasonable tax payer who was exercising due diligence and had a proper regard for its tax obligations.

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36. I therefore find there was a reasonable excuse for the company to file its year ended April 2010 P35 manually rather than on line.

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37. However not only do I need to consider if there is a reasonable excuse for the P35 being filed manually i.e. incorrectly but also whether the P35 was filed correctly without unreasonable delay after the company was aware that it should have filed online.

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38. The P35 was due by 20 May 2010 and Mr Shariff found out on 27 May 2010 when HMRC rang him that he had to file online. He finally filed online on 9 August 2010.

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39. I need to consider what happened between 27 May 2010 and 9 August 2010.

40. In reaching my conclusions I adopt the reasoning in *Jonathan David Limited* [2009] UKFTT 289 (TC) that there are two limbs to s118(2) namely:

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'14. The first limb provides that the effect of a reasonable excuse is to deem non-failure up to the time the excuse ceases. Separately, the effect of the second limb is to deem non-failure after the excuse has ceased if the person in question does what is required to be done without unreasonable delay. The second limb provides a separate relief from that in the first limb; it is not an additional hurdle to be overcome for the application of the relief under the first limb.'

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'15.A deemed non-failure under the first limb ceases to be regarded as a non-failure with effect from the cessation of the excuse (for the future but not retrospectively), and that failure from that time can only be regarded as non-failure if the necessary action, in this case the making of the returns, is taken without unreasonable delay after the excuse has ceased.'

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41. I accept that the company had registered to file online in 2008 but had not used on line filing before so when Mr Shariff was informed by HMRC on 27 May 2010 that he needed to file the P35 online he needed to acquire a new password.
- 5 42. It is not in dispute that this was sent to the company by letter dated 3 June 2010. I accept that Mr Shariff received this letter sometime after this date. I also accept that he attempted to file online as soon as reasonably practicable after receiving the password i.e. 16 June 2010.
- 10 43. At this stage, it is not in dispute that, for an unknown reason, transmission of the P35 was not successful. I accept that Mr Shariff was not aware of this. He printed off a copy of the P35 he thought he had filed online. He was under the impression that this was sufficient evidence to show that the P35 had been successfully transmitted. It was only in July 2010, after another phone call from
15 HMRC, that Mr Shariff became aware that the P35 had not been successfully filed online.
44. However HMRC documentation, which Mr Shariff accepts he has not read, states that a “successful transmission” report will be produced upon successful
20 transmission. Mr Shariff did not receive any such successful transmission report.
45. In my view a reasonably diligent taxpayer would have been aware that the P35 is not received by HMRC unless a successful transmission report had been
25 generated because they would have read the relevant documentation. The company ought to have contacted HMRC when notification of successful transmission was not received.
46. As the company had not read the documentation regarding a successful
30 transmission report it was only in July 2010 that Mr Shariff became aware that he had not successfully filed the company’s P35 online. He finally managed to file the P35 online on 9 August 2010 because he had difficulties getting through to HMRC to obtain their assistance with filing online.
- 35 47. Applying *Jonathan David Limited* to the facts of this case although I accept that initially there was a reasonable excuse for the correct P35 not to be filed, in my view from 16 June 2010 the reasonable excuse ceased, and the P35 was not thereafter filed without “unreasonable delay”.
- 40 48. The company states that the penalty is ‘harsh’. However I find that that there is little evidence before me that the penalty is disproportionate in the sense of, as Simon Brown LJ put it in *International Transport Roth GmbH v Home Secretary* [2003] QB 728, “not merely harsh but plainly unfair”. The question
45 in that case was whether fixed penalties imposed on hauliers whose vehicles were found to contain clandestine entrants to the UK, with limited opportunity for escape from the penalty, no possibility of mitigation and no right of access to an independent tribunal, were disproportionate. As recently confirmed in

Energys Holdings UK Limited v The Commissioners for Her Majesty's Revenue and Customs MAN/09/0668 (a VAT case) there is no material difference between Community Law and Human Rights Convention concepts in this respect.

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49. I have been provided with no evidence of the company's financial circumstances, such as the company's profit/turnover and the amount of the penalty compared to the profit/turnover. I have not been provided with a copy of the company's bank statements to enable me to ascertain how paying £300 would affect the company. I would in any event find it difficult to accept, despite Mr Shariff's contention that they are a small company and £300 is a large amount, that a penalty of £300 would cause the company any serious financial difficulties. There is simply no evidence before me that the penalty is "not merely harsh but plainly unfair".

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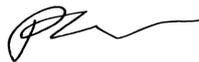
Conclusion

50. For these reasons the appeal should be allowed in part. The amount of the penalty of £300 is incorrect and I reduce that amount. The correct amount of the penalty, in light of the delay of almost two months in filing the P35, is £200.

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51. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 19 JULY 2011