



TC01358

Appeal number: TC/2011/01961

Penalty for failure to file P35 – whether reasonable excuse – yes – appeal allowed.

FIRST-TIER TRIBUNAL

TAX

PONTYBEREM RUGBY FOOTBALL CLUB

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 7 July 2011 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 8 March 2011 and HMRC's Statement of Case submitted on 6 April 2011

DECISION

1. This is the appeal by Pontyberem Rugby Football Club (“the Club”) against a penalty imposed for late filing of the 2009/10 end of year return (P35). The Tribunal
5 decided that the appeal should be accepted.

2. The issues in the case were whether the Club had a reasonable excuse for late filing of the P35, and if there was no such reasonable excuse, whether the penalty of £400 should be confirmed.

The law

10 3. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires that P35s are filed on or before 19 May following the end of a tax year.

4. Taxes Management Act 1970 (TMA) s 98A sets out the liability to fixed penalties for non-compliance. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B.

15 5. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at s 118(2) TMA.

6. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal that “an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and
20 obligations would act”, see *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC). Whether there is a reasonable excuse is “a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v R&C Commrs* [2006] STC (SCD) 536).

7. Section 118(2) TMA also states that “for the purposes of this Act, a person shall
25 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...officer concerned may have allowed.”

The evidence

8. The Tribunal was provided with the correspondence between the parties. In
30 addition the Club’s treasurer, Mr Harries, supplied a copy of the Club’s P35; the date printed in the corner is 26 May 2010. HMRC provided the following documents:

- (1) extracts from their web guidance on online filing and an email from the HMRC Customer Services Department dated 15 February 2011;
- (2) a page headed “employee actions” which refers to the Club’s sole
35 employee; and
- (3) a copy of the Club’s P35 return dated 15 March 2011.

The facts

9. Based on the evidence provided, I found the following facts.

10. Pontyberem RFC is a small village rugby club with a single employee. The total PAYE for the 2009-10 fiscal year was £421.74 and the NICs £315.83.

5 11. Until 2009-10 the Club submitted its returns by post and it had an excellent compliance record. In April 2010 Mr Harries had two conversations with HMRC and was told that he had to file online.

10 12. He did not have a computer and so sought the assistance of a third party. He subsequently realised he needed a user ID. He called HMRC to say that the Club's submission would be a little late and HMRC said that this would be acceptable as long as it was not "going into months over". I was unclear whether this meant that an extension had been granted to the end of May, or for a month.

15 13. The P35 return was due on 19 May 2010, but its completion was delayed until 26 May 2010 because of the need to obtain the user ID. Mr Harries filled in the P35 online and printed off a copy which he retained. However, he then omitted to press the "submit" button.

20 14. There is a dispute between the parties as to whether the related PAYE and NICs were paid on 15 May (as the Club asserts) or later than this: HMRC say that the amount was not received by them until 24 May 2010. In any event, the money was paid on or before 24 May 2010.

15. By letter dated 27 September, HMRC issued a penalty notification for not filing the P35. It charged the Club £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The total penalty was therefore £400.

25 16. On 15 October Mr Harries appealed, saying that the P35 had been filed online and attaching a copy of the return dated 26 May 2010.

17. By letter dated 8 December, HMRC rejected the appeal and on 30 December the Club wrote requesting a review of the decision.

30 18. By letter dated 15 February HMRC confirmed the penalty, saying that "it appears that you did not press the submit button" and that "your 2009-10 return remains outstanding and should be submitted online immediately."

19. The company filed the P35 on 15 March 2011.

20. Further penalties of £600 have accrued for the period from 19 September to 15 March 2011, but they have been suspended until the outcome of this Appeal is known.

Mr Harries' submissions on behalf of the Club

21. Mr Harries submitted that all the relevant details were accurately and completely recorded on the P35, and he believed it had been submitted to HMRC on 26 May 2010. He says:

5 "We did not press the submit button. This was not done intentionally but on oversight on completing the document for the first time and a lack of computer literacy on myself and a third party whose computer we used. The first we knew of this was a letter dated 27 February 2010."

10 22. He said that the Club paid the amount due of £737.57 by 15 May 2010 and that "paying the sum due without completing the end of year return makes no sense whatsoever. Why would I have paid the amount due without completing the return?"

15 23. He asks that HMRC should exercise "leniency and understanding" given the Club's "previous exemplary record" and the fact that his "intentions were honourable".

24. Mr Harries also asks why it took four months to be notified of a problem and then a further five months before he was told that the submit button had not been pressed.

HMRC's submissions

20 25. HMRC "does not accept being computer illiterate as a reasonable excuse." In their view a reasonable excuse is "an exceptional event outside a person's control which prevented the return from being filed by the due date, for example severe illness or bereavement."

26. They also say that:

25 "HMRC's online filing for employers campaign has been in existence for the past 5 years with a clear indication that online filing for 2010/11 would be obligatory. It is suggested that this period was more than adequate to familiarise yourself with the requirements regarding your end of year filing obligations or alternatively solicit the help of a third party."

30 27. They specify that two articles in Employer Bulletin and letters sent in November 2008 and November 2009 all provided online filing information to small employers.

28. HMRC also say that their website contains demonstrations and tutorials regarding online filing, and "explains errors and common mistakes in detail and the messages that you will receive from our online services once a successful submission is made."

35 29. The fact that Mr Harries was able to print off the return "does not prove that the return was submitted." HMRC point to the fact that "if a return is successfully filed, the operator will get two messages, one to software and one to the email address, this information is available on the HMRC website."

30. In relation to the time taken to inform the Club of the problems with the return, they say “there is no statutory timetable HMRC must follow when issuing penalty notices.”

5 31. Finally, HMRC disagree that the PAYE and NICs were paid on 10 May, saying that their records show that it was paid on 24 May “which was in fact late.”

Discussion and decision

32. Mr Harries believed he had filed the return on 26 May, a week after due date of 19 May.

10 33. HMRC had given him an extension of time and this delay therefore does not constitute “late filing”, because it is covered by TMA s 118(2), as set out earlier in this decision.

34. The question is thus whether the Club had a reasonable excuse for not filing its return by this extended deadline.

15 35. In the recent decision of *N A Dudley Electrical Contractors Ltd v R&C Commrs* [2011] UKFTT 260 (TC) (“*Dudley*”), the Tribunal explicitly rejects HMRC’s formulation of the “reasonable excuse” defence, saying:

20 “HMRC argues that a ‘reasonable excuse’ must be some exceptional circumstance which prevented timeous filing. That, as a matter of law, is wrong. Parliament has provided that the penalty will not be due if an appellant can show that it has a ‘reasonable excuse’. If Parliament had intended to say that the penalty would not be due only in exceptional circumstances, it would have said so in those terms. The phrase ‘reasonable excuse’ uses ordinary English words in everyday usage which must be given their plain and ordinary meaning.”

25 36. I too consider that HMRC’s formulation of the “reasonable excuse” defence is too narrow and reflects neither the normal and natural meaning of the term (per *Dudley*), nor the earlier *dicta* of this Tribunal quoted above.

30 37. In order to establish whether the Club has a reasonable excuse, I thus considered whether Mr Harries, on behalf of the Club, acted in the way someone who “seriously intends to honour their tax liabilities and obligations would act” (per *B&J Shopfitting*). I sought to answer that question “in the light of all the circumstances of the particular case”, as recommended by *Rowland*.

38. Mr Harries did not have a computer and had no computer skills. He asked a third party for help – exactly as HMRC suggested he should have done.

35 39. With the help of this third party he believed he had filed the return, and he printed off a paper copy as evidence of his filing. Mr Harries did this before 24 May, within the extended deadline provided by HMRC (whether it was the end of May or the 19 June). This was his first experience with online filing and I find that he carried out the requirements to the best of his ability.

40. HMRC say Mr Harries should have been aware that the return had not been properly submitted, because he did not receive an acceptance message.

41. That the absence of an acceptance message meant that the return had not been submitted was clearly key information. Yet there is no evidence before the Tribunal that this point was included in either of the paper advisory routes (the Employer Bulletins or the November letters) which HMRC used to alert small employers of the online filing obligation.

42. It is true that the HMRC website guidance does indicate that an acceptance or rejection message will be received. But this medium is unfamiliar to those migrating to online filing for the first time. Moreover, even here there is no explicit, highlighted warning at either the beginning or end of the e-filing process, that failure to receive the acceptance message means that the return has not been delivered. Instead this information is contained within a block of guidance material relating to online filing.

43. Although being computer illiterate is not, of itself, a reasonable excuse, Mr Harries' lack of experience with computers is a factor to consider when assessing whether he behaved as a "taxpayer who seriously intended to honour his tax liabilities would act." I also take into account the fact that he asked a third party for help. And I include in the balance both Club's excellent compliance record and HMRC's failure to highlight the requirement for a receipt.

44. Taking all these circumstances into account, I find that the Club has a reasonable excuse for its late filing and that this subsisted throughout the period from May to September 2010. I thus set aside the £400 penalty which is at issue in this Appeal.

45. Further penalties of £500 will now be reviewed by HMRC in the light of this decision. These penalties are not under appeal before me, but I note that it was not until February 2011 that Mr Harries finally understood that the return had not been submitted.

46. 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.

Anne Redston

**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 26 JULY 2011**