



TC01365

Appeal number: TC/2011/01139

Penalty – Late submission of Employers’ Annual Return (P35) – Whether reasonable excuse on facts – No – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

LIFESMART LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 16 May 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 10 February 2011, HMRC’s Statement of Case submitted on 25 March 2011 and the Appellant’s Reply dated 14 April 2011.

DECISION

1. This is an appeal by Lifesmart Limited, against a penalty of £400 imposed under s 98A of the Taxes Management Act 1970 (“TMA”) for the late filing of an employers’ return, the P35, for 2009-10.

2. Having considered the papers provided by both parties, a Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released on 20 May 2011. On 20 June 2011, following receipt of the Decision Notice, an application was made for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal. Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that before an application for permission to appeal can be made it is necessary to request full written findings of fact and reasons for the decision and therefore this decision has been provided to enable the company to decide whether to apply for permission to appeal and to assist in formulating any such appeal.

3. An employer, such as Lifesmart Limited, is required, by paragraph (1) of Regulation 73 of the Income Tax (PAYE) Regulations 2003, to deliver a P35 to HMRC “before 20 May following the end of a tax year” containing the following information:

- (a) *the tax year to which the return relates,*
- (b) *the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and*
- (c) *the total net tax deducted in relation to those payments.*

4. Paragraph (10) of Regulation 73 provides that “Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).” Section 98A TMA which sets out the liability to penalties for non-compliance with the PAYE Regulations provides:

- (1) *PAYE regulations...may provide that this section shall apply in relation to any specified provision of the regulations.*
- (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—*
 - (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...*
 - (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...

5. Section 118(2) TMA, so far as is material to this appeal, provides that “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.”.

6. There is no definition in the legislation of a “reasonable excuse” which has been held to be “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

7. In this case the P35 was due to be filed on 19 May 2010. On 18 May 2010 Mr Alan Sharp, the Company Secretary of Lifesmart Limited, believed he had submitted the company’s P35 online. Following what he understood to have been the successful submission of the P35 he received an automatically generated email. The “subject” of the email was “Successful Receipt of Online Submission for Reference ...” The email continued:

Thank you for sending the PAYE end of year submission online.

The submission for reference ... was successfully received on 18-05-2010. If this was a test transmission, remember that you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.

8. However, unbeknown to Mr Sharp the P35 which he believed he had submitted was in fact a “test” transmission and the company’s P35 had not been filed. As the P35 remained outstanding, on 27 September 2010, HMRC issued a Penalty Notice in the sum of £400 which was calculated for the four months from 20 May to 19 September 2010.

9. Mr Sharp wrote to HMRC on 7 October 2010 stating that the P35 had already been submitted online and asking that the penalty be “eliminated”. This was rejected by HMRC on 22 October 2010 on the basis that on 18 May 2010 there had been a “test” and not a “live” submission of the P35. On 3 November 2010 Mr Sharp filed the P35 online and received an automatic email which, other than refer to the date it was received (ie 3 November 2010), was in identical terms to that received on 18 May 2010.

10. Having regard to these facts, the issue for me to determine is whether Lifesmart Limited had a reasonable excuse for failing to file its P35 on time and, if it had a reasonable excuse which did not continue throughout the period of default, whether the P35 was filed without unreasonable delay after the excuse had ceased.

11. I accept that there does not appear to be any material distinguishing feature between a “test” and “live” submission of a P35 and therefore find that the company did have a reasonable excuse for the late submission of the P35 until it received the Penalty Notice that was issued on 27 September 2010 or shortly thereafter.

12. However, as it would have been clear from the Penalty Notice that the P35 had not been filed, I consider that the company should have taken steps to ensure that the P35 was filed as soon as possible after receiving the Penalty Notice rather than writing to HMRC, as it did, stating the P35 had already been filed and not waited for a response from HMRC, which it received in October 2010, before filing the P35 on 3 November 2010.

13. I therefore find that although there was a reasonable excuse it did not continue throughout the period of default. As such the penalty must stand.

14. The appeal is therefore dismissed and penalty confirmed.

15. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 30 JULY 2011