



TC01384

Appeal number: TC/2011/02482

Penalty for late filing of P35 – failure to obtain activation code – whether reasonable excuse – no - whether return filed once activation code received – on the facts, yes – penalty reduced and appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

TAH MANAGEMENT SERVICES LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 28 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 28 March 2011, HMRC's Statement of Case submitted on 27 April 2011 and the Appellant's Reply dated 23 May 2011.

DECISION

1. This is the appeal by Tah Management Services Limited (“the company”) against a penalty imposed for late filing of the 2009/10 end of year return of payments due under Pay As You Earn (“P35”).
2. The Tribunal decided to allow the appeal in part, and reduced the penalty to £100.

The law

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, which so far as relevant to this appeal, are as follows:

“(1) An appeal may be brought against the determination of a penalty under section 100 above and...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...

(2) ...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—

(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...”

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

6. The statute does not define “reasonable excuse”, but this Tribunal has held 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 obligations would act” *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC).

The issues

7. There is no dispute that the return was filed late. The issues are:

- (1) whether the company filed the return on 27 May 2011;
- (2) whether it had a reasonable excuse for the late filing of its P35; and
- (3) whether the penalty of £400 for the period from May to September 2010 should be confirmed.

5 **The evidence**

8. The Tribunal was provided with copies of the correspondence between HMRC and Mr Nathoo, Financial Controller of the company, in relation to this Appeal.

9. Mr Nathoo also provided:

- 10 (1) a copy of an email dated 18 May 2010 entitled “Gateway enrolment notification”;
- (2) a screenprint from Sage, headed “HMRC intranet submission viewer”;
- (3) an email exchange between Mr Nathoo and Mr Ciaran McNamee of Sage, dated 16 and 17 May 2011 respectively; and
- 15 (4) a further email exchange between Mr Nathoo and Mr McNamee dated 20 May 2011.

10. HMRC provided extracts from its web guidance headed “Acceptance and rejection messages when you file online” and an email exchange between Ms Annette Raffetty of the Appeals and Reviews Unit and Mr James Matthews of the Online Services Appeals Information Unit, both of HMRC.

20 **The facts**

11. HMRC has gone to considerable lengths to make employers aware of the move to online filing. In particular, letters were issued to employers in both November 2008 and November 2009 advising them of the change. The HMRC website also provides extensive support and advice.

25 12. The company tried to file online on 18 May 2010 but belatedly realised that it needed an activation code. It contacted HMRC to see if they could submit the P35 on paper but were told this was not permitted. The activation code was requested, but by the time it was received, the filing deadline had passed.

30 13. The company says that it then filed online on 27 May 2010. HMRC reject this, saying that the return was not filed. This is the first issue in the case, and is discussed below.

35 14. By letter dated 27 September 2010, HMRC issued a Penalty Notice for not filing the P35. It charged the company £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. The Notice did not say that the return was still outstanding.

15. The company contacted HMRC by phone and followed this up with a letter dated 21 October 2010. The letter explained the delay in obtaining the activation code and asked that the penalty be waived.

5 16. By letter dated 24 December 2010 HMRC wrote to the company chasing the penalty and saying that the company “has not submitted all returns on time”.

10 17. This letter was received by the company after the Christmas and New Year break, and Mr Nathoo called Mrs Grantham at HMRC’s Chesterfield office. He asked about the reference to returns not having been received, but Mrs Grantham could not confirm this either way. She provided an HMRC helpline number and Mr Nathoo then spoke to a Mr Evans, who confirmed that the P35 was not showing in the company’s “folder” but that “there could be many reasons for this”.

18. Sage then assisted Mr Nathoo to file, or refile, the P35, on 14 January 2011.

19. By letter dated 7 January 2011 the company’s appeal was rejected.

15 20. By letter dated 17 January 2011 Mr Nathoo asked for the appeal to be reconsidered and received a reply from HMRC dated 25 January stating that “we have noted what you say and will write to you shortly with our reply.”

20 21. Some three weeks later, the company received a letter dated 9 February 2011 from HMRC’s Debt Management and Banking department threatening that the company’s goods would be seized and sold at public auction, that its credit rating would be affected and that the company “may find the seizure and sale of assets embarrassing.” Mr Nathoo contacted HMRC and was told the letter had been automatically produced and should be ignored.

22. However, by letter dated 24 February HMRC’s Debt Management and Banking wrote again, saying that:

25 “you have chosen to ignore our efforts to resolve the matter of your outstanding liability. Your debt has been transferred to our distraint department to schedule a visit to your premises with a view to seizing your goods so they may be sold at public auction. If you wish to stop this visit you must telephone the above number within 48 hours of receiving this letter.”

30 23. The company again contacted HMRC and were told to ignore the letter.

24. By letter dated 1 March 2011, the HMRC Review Officer rejected the company’s appeal.

35 25. HMRC say that a further £400 of penalties have accrued for the period between September 2010 and 14 January 2011, but these have been held over pending this Appeal.

The first issue

26. The first issue – whether the P35 was filed on 27 May 2010 - is a question of fact.

The company's submissions

27. The company say that it filed its return online on that day. The Sage "HMRC intranet submission viewer" screenprint was obtained by the company on 14 January 2011, long after the penalty had been levied.

5 28. In the box labelled "received date/time" it shows 21/05/2010 and a time of 13:34:09. At the bottom of the page is a box headed "submit date/time", which says "01/04/2010 00.00.00". Underneath this box is another, headed "correlation ID" which is blank.

29. Mr McNamee of Sage has confirmed to Mr Nathoo that "Received Date/Time" is
10 "the date and time that the submission has physically been sent" and "submit date" is "the process date that the payroll was logged into at the time."

HMRC's submissions

30. HMRC accept that the online filing system was accessed by the company on 27 May, but say no return was submitted because none was received. They say that the
15 HMRC website makes it clear that an acceptance message is sent out when the return has been correctly submitted, and that as the company is part of a larger group, it "would be expected that you would know to ensure that the return has been submitted successfully."

31. Mr James Matthews of HMRC says that if the return had been received, the
20 correlation ID would have been completed with a 32 character reference number, and adds:

"It is possible that the Sage date actually refers (like our online forms and the CD-ROM) to the date the return was last updated or accessed, rather than submitted."

25 *The company's responses to HMRC's submissions*

32. Mr Matthew's proposition - that the "received" box might mean the date the return was last accessed - was forwarded to Mr McNamee of Sage and was denied.

33. Mr Nathoo rejects HMRC's submission that the company should have been aware of the filing message because it is part of a larger group, saying that had he
30 been aware of the need to receive a submission receipt he "would have rectified forthwith".

34. He also says that the company's obligation "was to *send* the return, not to check with HMRC that it was received."

35. Finally, he states that the company has an impeccable filing and payment history,
35 and this is not disputed by HMRC.

Discussion and decision on the first issue

36. The company have provided independent third party evidence, in the form of the screen print and the explanatory emails from Mr McNamee, that the return was submitted by the company's software.

5 37. It is clear that it was not received by HMRC, but that does not mean that it was not submitted.

38. I find that, on the balance of probabilities, and relying on the evidence provided, that the company's P35 was submitted online on 27 May 2010, notwithstanding that, for whatever reason, it was not stored in HMRC's computer. It follows that there was no default after 27 May 2010.

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39. The Tribunal has the power to confirm the penalty if it is correct; to set it aside, if it appears no penalty has been incurred, or "if the penalty appears to them to be incorrect, increase or reduce it to the correct amount."

40. The penalty is not correct, because the return was filed on 27 May 2010. The part of the penalty relating to the period after that date must be discharged.

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Discussion and decision on the second issue

41. In view of the findings above, there is no need for me to consider, in relation to the period after 27 May, whether the company had a reasonable excuse for late filing – though had this still been in issue, I would have found that the company acted in the same way as "someone who seriously intends to honour their tax liabilities and obligations would act" - they did everything they reasonably believed was necessary in order to file online.

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42. However, it is also necessary to consider the period before 27 May, as the due date was 19 May. The return was therefore filed eight days late.

25 43. I have thus considered whether the company had a reasonable excuse for not filing the return on the due date.

44. The move to online filing had been widely advertised, and all employers had been notified. A person who behaved in the same way as "someone who seriously intends to honour their tax liabilities and obligations would act" would have been aware of the need for the activation code, rather than leaving it to the last minute.

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45. I therefore find that there was no reasonable excuse for the late filing on 27 May 2010.

46. Taking the two periods together, it is not the case that "no penalty has been incurred". I reduce the penalty to £100, in relation to the period from 19 May to 27 May 2010.

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47. The further £400 of accrued penalties are not part of this Appeal, but the Tribunal's finding that the return was filed on 27 May means no further penalties are exigible in relation to the 2009/10 P35.

5 48. Although not a factor which the Tribunal is able take into account in setting the correct level of penalties, I record my concern at the threatening tone of the letters sent by HMRC's Debt Management and Banking Department, and note that the return was under appeal when both these letters were issued.

10 49. 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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Anne Redston

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**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 8 AUGUST 2011**

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