



TC01403

Appeal number: TC/2011/00640

Income tax – PAYE – employer’s end of year return – penalty for late submission – whether attempted electronic submission successful – on facts, no – whether reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

DJ WINDSOR & CO

Appellant

- and -

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

Respondents

**TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
JACQUELINE DIXON**

Sitting in public at Southampton on 23 June 2011

David Windsor for the Appellant

David Glassonbury, HM Revenue and Customs Appeal Team, for the Respondents

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DECISION

1. DJ Windsor & Co appeals against a penalty of £1,200 for the late submission of the 2007-08 end of year P35 PAYE return.

5 *The facts*

2. The evidence consisted of a bundle of documents including a letter provided by Richard Morris. In addition, Mr Morris gave evidence. Mr Windsor provided information in the course of his argument on DJW's behalf; although this was not formal evidence, we have taken this information into account.

10 3. From the evidence and that information we find the following facts. We consider disputed facts later in this decision.

4. The Appellant, to which we refer either as "DJW" or "the Firm", is a small firm, described as "Accountants and Tax Consultants", and has always had only one employee at any one time.

15 5. The Firm had been registered on line with HMRC since 2005, but for years before 2007-08 had filed P35 returns in paper form.

6. The Respondents ("HMRC") issued a paper P35 return to DJW on 13 January 2008. Despite the issue of the paper return, DJW was requested at some later stage by HMRC to file the 2007-08 P35 return electronically.

20 7. Mr Morris provided support services to DJW through his firm R Morris and Co; these services included dealing with the day to day operation of DJW's PAYE through the IRIS payroll system, including dealing with the end of year returns. Unlike the problems which arose for the subsequent year 2008-09 (see below), Mr Morris did not encounter any problems when on 13 May 2009 he attempted to file on
25 line the forms P14 and P35 for 2007-08.

8. On 29 September 2008 HMRC issued a first interim penalty notice in respect of the non-submission of the completed P35 return, covering the period from 20 May 2008 to 19 September 2008. DJW subsequently stated that it was not aware of this notice; we consider this later.

30 9. On 26 January 2009 HMRC issued a second interim penalty notice in respect of the non-submission of the completed P35 return, covering the period from 20 September 2008 to 19 January 2009. Again, according to DJW, it was not aware of this notice; we consider this later.

35 10. DJW did not hear anything to indicate that there had been a problem with the attempted filing until receipt of a Notice of Penalty Determination dated 25 May 2009. This stated that penalties of £400 had been charged in respect of the period from 20 January 2009 up to 19 May 2009.

11. On 8 June 2009 Mr Windsor wrote on behalf of his firm to HMRC, referring to the notice issued on 25 May 2009. He stated that the 2007-08 P35 and accompanying P14s were submitted at 09:52 on 11 April 2008 under the sender ID set out in his letter.

5 12. He referred to the position for the subsequent year, 2008-09. An attempt had been made on 13 May 2009 to file the 2008-09 returns through HMRC's internet filing service. As problems were experienced with the attempt to file, DJW contacted IRIS Software, who attempted to assist the Firm through the process. However, after 3 attempts the Firm was "locked out". DJW then contacted the HMRC advice line and
10 was told that there were certain problems with the process and that in all probability as the Firm had not typed in its password but instead left it from the previous year, this was causing the problem.

13. He explained that DJW had then attempted to log in on 14 May 2009 and experienced the same problems. HMRC's advice centre told DJW that there was a
15 problem in relation to the implementation of the password. DJW had therefore subsequently delivered in person to HMRC's Salisbury office paper returns for 2008-09.

14. Mr Windsor then stated:

20 "The point of the above is that when we submitted the information for the year ended 5th April 2008 no such rejection problems arose and therefore as far as we are concerned the information was submitted to you. . . In the circumstances we find that we did submit the information in a correct and timely manner for the year ended 5th April 2008 and in the circumstances the penalty should be revoked."

25 (He then referred to problems experienced by other firms in filing returns for the year ended 5 April 2009.)

He also mentioned certain medical problems; we consider these later. At the end of his letter he expressed the view that HMRC should compensate him for the time which his firm had had to spend on the matter "due to the failures of HMRC's
30 systems and in respect of the considerable distress caused to me personally".

15. The document recording what the Firm understood to be the filing of the 2007-08 returns was headed "P14/P35 Internet Filing Summary". [We consider this later in this decision.]

35 16. On 1 September 2009 Mr Aitken, a Penalty Officer of HMRC, wrote to DJW: part of his letter stated:

40 "Unfortunately, I have not been able to trace your online submission. Please let me have a copy of the email acknowledgment that would have been issued in response to this. Please also confirm the correlation ID (a unique combination of 32 letters and numbers) so I can investigate the position further.

If you do not have these then the 2008 P35 has not been submitted and accepted. If this is the case please arrange to submit the return and confirm once this has been done. The printout you supplied [ie the Internet Filing Summary] is not evidence the return was submitted and accepted.

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I confirm I have received the 2009 return.”

17. On 23 September 2009 DJW wrote to HMRC’s Dorset and South Wilts office, enclosing (at Mr Aitken’s request) a duplicate of the form P35 for the year 2007-08 which Mr Windsor stated had been filed on 11 April 2008. He explained that his firm had been asked by Mr Aitken to check its emails for the original confirmation, but this was not possible as its emails were automatically deleted after 12 months.

18. On 10 December 2009 Mrs Thomas of HMRC’s PAYE and Self Assessment Customer Operations office in Dover acknowledged DJW’s letter of 23 September 2009 enclosing the 2008 P35. She apologised for the long delay in replying. She regretted that she was still unable to process the firm’s 2008 return because it had not sent the forms P14 for the three employees shown on the P35. She asked for these to be forwarded, or for duplicate details to be provided, so that she could process the return. Blank forms could be obtained from the Employer’s Orderline. On receipt of the information she would review the firm’s appeal against the penalty charged.

19. On 11 August 2010 Mrs Crooks, an Employers officer in HMRC’s Employers Office in Derby, wrote to Mr Windsor referring to the penalties. She stated: “In the continuing absence of the completed return the late filing penalties have been released for collection. Will you please ensure a Return is submitted online at your earliest opportunity?”

20. On 18 August 2010 Mr Windsor telephoned HMRC’s Derby office, asking to speak to Mrs Crooks. As she was not in the office, Mr Windsor asked to speak to her manager (David Lewis, Technical Inspector). Mr Windsor told Mr Lewis that he wished the matter to be dealt with as a formal complaint. Mr Windsor complained that there was a lack of consistency and continuity with regard to the offices and HMRC staff with whom he had had to deal. He stated that no-one would accept his explanation that he had “e-filed” the 2007-08 return on time and originally had a copy confirming that it had been sent, now no longer available as it had been deleted from his computer. Mr Windsor acknowledged to Mr Lewis that he should have waited for an email confirming receipt, but pleaded ignorance of this requirement.

21. Mr Lewis explained that HMRC’s consistent approach in such cases was that ignorance was no reasonable excuse and that any appeal would be rejected. Mr Windsor complained that it had taken HMRC more than 12 months to notify DJW that the P35 had not been received. Mr Lewis was unable to comment on this, as he did not have access to the information in question and was not aware of the normal notification arrangements. He told Mr Windsor that the P35 had still not been filed, as P14s remained outstanding. Mr Windsor claimed that this was HMRC’s fault, as he was still waiting for duplicate P14s to be issued to him, and stated that the last ones issued were for a completely different year.

22. Mr Windsor said that he could not afford to pay £1,200; he claimed that the stress of dealing with this matter had caused him ill health. He was concerned that enforcement action would only compound the matter. Mr Lewis explained that there was a formal process for dealing with appeals and that this could only apply once the period of default had ended; this would require the P35 to be fully filed. It was agreed that Mr Lewis would arrange for three 2007-08 P35s to be sent to DJW. Mr Lewis agreed that in the circumstances he would consider further postponement of penalty enforcement to allow Mr Windsor time to submit the P14s; thereafter the penalty position would have to be formalised.

23. On 25 August 2010 Mr Windsor wrote to Mr Lewis “enclosing the duplicate forms P14 for 2007/08 as discussed”. Mr Windsor requested the cancellation of the penalty notices for the reasons already stated. He commented in detail on the history of the matter.

24. On 22 September 2010 Mrs Crooks wrote to Mr Windsor setting out HMRC’s view of the Firm’s appeal against the penalty for sending in late the return for 2007-08. She referred to the requirements that there must be a reasonable excuse and that it must have continued throughout the whole period for which the return was overdue, and stated:

“The grounds on which you have appealed do not appear to me to satisfy these requirements because the period of lateness has not ended as the employers Return has not yet been received.”

25. On 27 September 2010 Mr Windsor telephoned Mr Lewis. Mr Lewis had only “recently” referred Mr Windsor’s correspondence to Mrs Crooks, which was why she had issued an earlier “view of the matter” letter. Mr Lewis said that, assuming Mrs Crooks was now satisfied that the return had been fully completed, she could reconsider the penalty appeal and would no doubt be in contact with Mr Windsor in due course. Mr Windsor questioned whether in view of the obvious earlier confusion relating to the completion of the return and the delay in passing on the latest letter to Mrs Crooks, Mr Lewis would now agree to waive the penalties. Mr Lewis said that he could not and that he was neither the decision maker nor Mrs Crooks’ manager; an decision relating to the appeal would rest with Mrs Crooks, although Mr Lewis was willing to discuss the case with her and give her technical assistance in relation to consideration of the facts.

26. Mr Windsor wrote a long and detailed letter to Mrs Crooks on 7 October 2010, commenting that he had tried on three separate occasions to speak to someone on the telephone number which she had given him; on each occasion he had been left listening to recorded music and recorded messages. In his letter he referred to a number of matters and in particular to his medical condition. He asked that this should be taken into account when giving further consideration to the matter.

27. On 13 October 2010 Mrs Crooks wrote to Mr Windsor with her view of the matter; she stated that the grounds on which DJW had appealed did not appear to her to satisfy the reasonable excuse requirements because no evidence had been received to show that an employers return had been submitted on line before 19 May 2008. She

referred to Mr Aitken's letter dated 1 September 2009. She set out the options relating to the matter, including requesting a review.

28. On 10 November 2010 DJW requested a review. In the additional notes attached to the request form, DJW commented:

5 “It is also unreasonable for HMRC to charge ‘time’ penalties when they themselves have caused delays.”

29. On 24 December 2010 the Review Officer, Mr McGarry, wrote to DJW with his conclusion following his review. His view was that the decision to reject the penalty appeal was correct. He set out in detail the matters taken into account, and dealt in
10 detail with the points which Mr Windsor had raised.

30. On 20 January 2011 Mr Windsor sent a fax to Mr McGarry stating that DJW did not accept his conclusion, and commenting on HMRC's approach. On the same day, Mr Windsor wrote to the Head of Customer Operations of HMRC's Customer Operations PAYE Employers Office, expressing dissatisfaction with the review and
15 setting out detailed comments on various matters arising from the review.

31. DJW's Notice of Appeal to the Tribunal was dated 21 January 2011. However, it did not reach the Tribunal's office until 24 January 2011. In response to the office's request for reasons for the late appeal, received more than 30 days after the date of the review letter, DJW indicated that it had been posted by first class post on Friday 21
20 January and that the Firm had good reason to believe that it would arrive on 22 January, which would have been one day before the deadline. DJW referred to the date of HMRC's review letter, which had not arrived at the Firm's office until 31 January.

32. As HMRC had raised no objection to the lateness of the appeal, and as the receipt
25 by DJW of the review letter had been delayed, we allowed the appeal hearing to proceed without any discussion of the appeal having been made out of time; thus DJW's application for it to be made out of time was granted. Although the case was allocated to the “Default Paper” category, DJW had requested an oral hearing.

Arguments for DJW

30 33. Mr Windsor explained that he had been in practice for almost 26 years as a general accountant and tax and financial adviser. His firm had never been late with a return before or since the return under consideration in this appeal. HMRC were suggesting that, in effect, he was ignoring his responsibilities.

34. He explained that in April 2009 he had had a serious heart attack, requiring open
35 heart emergency surgery with a triple bypass and valve. Initially his prognosis had been 75 per cent, but had been reduced. On 11 May 2009 he had been discharged from hospital and had then had to live with his mother, as he was not regarded as safe living alone. Towards the end of May, he was presented with a document from HMRC, which was the first indication which he had received relating to a penalty. He
40 had been able to respond to it; the date of the letter was not the date of its despatch.

He referred to a notice issued to a client, which was dated 7 February 2011 but had been received by DJW on 8 March.

5 35. He explained that he would not have ignored the two previous penalty demands if he had been aware of them. It was not clear to him whether they had been despatched by HMRC; he had not received them. Until he received the Notice of Penalty Determination dated 25 May 2009, he had had no reason to believe that the filing of the 2007-08 P35 return had not been done.

10 36. HMRC had not notified DJW until after 12 months. In relation to reasonable excuse, the Firm had had no reason to believe that it had not complied with the filing obligation until it received that Notice. He had responded within 14 days, whereas HMRC took three months.

15 37. There had been various unfortunate events since with HMRC; they had not acted on letters, for example by not passing them on to the appropriate officer. DJW advised its clients to comply with their tax obligations within the relevant time limits; the Firm had done nothing wrong in relation to the relevant P35. He submitted that HMRC had not proved that DJW had not submitted the 2007-08 P35 on time. He asked for the penalties to be cancelled.

20 38. In reply to HMRC's case, on the day in question Mr Morris had followed the procedures. Mr Windsor questioned why a professional adviser would prepare the information and yet not submit it. Mr Windsor submitted that there had been a systems failure at HMRC. He referred again to the position in 2009; Mr Glassonbury intervened to discuss whether this amounted to evidence. In relation to obtaining a confirmation that a return had been successfully sent, Mr Windsor argued that as this had been the first year, there had been no reason to assume that it was imperative to get a printout. He emphasised that if he had received the earlier penalty notices, he would have acted straight away.

Arguments for HMRC

30 39. Mr Glassonbury referred to HMRC's records, which clearly showed that the first P35 return filed electronically by DJW was that for 2009-10. In relation to the return under appeal, there would be two options where the attempt to file electronically succeeded in reaching HMRC's system. If the filing was erroneous for any reason, it would be rejected and a rejection email message sent to the employer. If the filing was successful, an acceptance email would be generated.

35 40. He emphasised that HMRC could not issue an acceptance or rejection if nothing was received by HMRC. He would expect an accountant to keep the email as part of the business records.

40 41. The "Internet Filing Summary" had been queried with HMRC's Information Technology experts, one of whom had stated that it was a printout of the P35 summary from DJW's third party software. All software (including HMRC's own online forms) could print a copy of the return prior to submission to allow it to be

checked and signed by the company director(s). The “give-away” was the lines at the bottom for the printout to be signed and dated, etc. The date at the top was the date on which the P35 had been finished within the software and the file had been created, ready to be submitted. It was not a date of submission. Also, the “Sender ID” was just the “customer’s” ID as saved in the customer’s software. The expert had described the process which should have been followed in filing the return; we consider this below.

42. HMRC was satisfied that the non-filing of the P35 return was no fault of HMRC’s system. The reason why Mr Morris received emails when attempting to file the 2008-09 return in 2009 was that HMRC’s system was receiving and rejecting the attempted filing.

43. In relation to the earlier penalty notices, HMRC’s records showed that they had been sent. Mr Glassonbury explained that such notices were computer generated, enveloped and posted, and “not touched by human hands”. A copy of HMRC’s record of the issue of the penalty notices was included in the bundle.

44. HMRC accepted that there had been problems in relation to the P14 returns, and therefore these had had no bearing on the penalty.

45. In response to the Tribunal’s questions, he confirmed that a paper P35 for 2007-08 had been issued to DJW, as had been the case for all employers. He also explained that the total penalty of £1,200 had been calculated from 19 May 2008; the delay in correspondence did not affect the penalty. HMRC had not “covered themselves with glory”, but this had had no effect on the offence and the penalty.

Discussion and conclusions

46. The appeal concerns the question whether DJW’s P35 return for 2007-08 was filed late, and if so, whether the penalties imposed by HMRC for late filing should stand. This raises two separate issues. The first is whether the return was filed by internet on 11 April 2008. If it was, as DJW contends, then the penalties cannot stand. If it was not, as HMRC contend, the second issue becomes relevant. This second issue is whether DJW had a reasonable excuse for the late filing of the return.

47. Both these issues raise the question of the burden of proof. This does not fall on HMRC; it is for DJW to satisfy the Tribunal on the balance of probabilities that it did file the return on 11 April 2008. If it does not succeed in doing so, it must satisfy the Tribunal on the balance of probabilities that it had a reasonable excuse for the late filing of the return.

48. The first issue entails examining what actions DJW took in relation to that return. The difficulties which DJW and Mr Morris had in attempting to file the 2008-09 P35 return electronically do not prove that the procedure which they had followed in relation to the 2007-08 P35 return was the correct one. In his correspondence and telephone discussions with Mr Lewis, Mr Windsor was adamant that the 2008 return had been filed electronically on time and that he had had an email message confirming that it had been filed (that message having since been automatically

deleted from DJW's computer). We therefore consider the way in which DJW sought to file the 2007-08 return.

49. Mr Morris' evidence was that the software in use was Sage. On 11 April 2008 he had put onto the computer the update disk; he had printed off the P60s and copies of the National Insurance and PAYE details. He had then logged on to the internet, checked the P35 and submitted it. There had been no indication that it had not been filed. No difficulties such as those encountered for the 2008-09 return had been encountered; had any difficulties arisen with the 2007-08 return, he would have adopted the procedure followed for the next year, and would ultimately have submitted paper returns if needed. He emphasised that it was not his practice to follow the "test transmission" procedure for clients; he always submitted the return itself. He did not recall seeing an acknowledgment email following his submission, but explained that he had no access to DJW's emails, as he did not have a password.

50. Mr Windsor explained that the Firm received between 80 and 100 emails a day, apart from "spam". This was the first year for online submission. Many emails were deleted. He could not say that he clearly remembered seeing an email confirmation, as this was three years ago and he had since had his heart operation. He thought it quite likely that he might have seen such message and deleted it; it would not have occurred to him to keep it. He would have seen it as merely an acknowledgment, and therefore not important for him to print off. He referred to the automatic deletion of old emails.

51. We have already referred to the message sent to Mr Glassonbury by one of HMRC's Information Technology team (James Matthews). We set out an extract from this message:

"The process they [ie Mr Morris on behalf of DJW] should have followed in filing this was to create the return (which they did), print off a copy for their records (which they did), get a director to check it and sign it (which they didn't do), then use third-party software to connect to the Internet and submit the return (which they also didn't do). As they used third-party software we're not privy to the exact screens they would have seen, but they would have probably been asked to enter their password – their User ID was stored in their software, it's possible but not common for their password to also be stored – and it would then have displayed a message that it was connecting to the Government Gateway and submitting the return. If it had been successful they would have received a success response on-screen and (provided they had entered their email address in the software) a confirmation email. If it had failed, they would have received a failure response and email in a similar manner.

The on-screen success response would have been saveable by the customer as a receipt and would include a 32-character Correlation ID as an auditable tracking reference.

We have no record of any online submissions by this customer until their 2009/10 return on 19 May 2010. They've been registered online since 2005."

52. In the light of, respectively, the evidence of Mr Morris and Mr Windsor, and the evidence contained in the message from Mr Matthews, we find on the balance of probabilities that DJW's P35 return was not successfully submitted on line on 11 April 2008, despite the impressions to the contrary of both Mr Windsor and Mr Morris. For us to have made a contrary finding that it had been submitted, we would have needed to be satisfied that an email confirmation had definitely been received. As Mr Windsor could not be sure that he had received such a message, we cannot regard his evidence as persuasive. In any event, we find of very considerable weight the evidence that HMRC had no record of any on line filing submission for 2007-08. We are persuaded that some form of error was made in the course of the attempt to submit the return, and that as a result no contact was made with HMRC and nothing registered within HMRC's system.

53. As the return was ultimately submitted in paper form, it is not possible for us to discover what would have happened if that ultimate submission had been attempted electronically. We understand from HMRC's evidence in relation to other appeals that once a return has been successfully submitted electronically for a particular year, it is not possible to make a further electronic submission for that same year. If the return had been successfully submitted on line at the later stage, this would therefore have clearly established that the originally attempted submission had not been successful.

54. In the absence of such information, we have to arrive at our conclusion on the basis of weighing the respective parties' evidence. On the first issue, therefore, we hold that the return was not submitted on time.

55. On the second issue, of reasonable excuse, we have to consider whether DJW had a reasonable excuse for the late filing, and whether that reasonable excuse continued for the whole period of default. Although we can understand why Mr Windsor and Mr Morris had the impression that the filing had been successful and therefore DJW did not do anything further in relation to the return until it became aware of the third interim penalty notice issued on 25 May 2009, the lack of success in following the submission procedure does not in our view amount to a reasonable excuse for not submitting the return on time. Nor does the lack of awareness of the unsuccessful submission amount to a reasonable excuse; thus the question whether DJW was or was not told or reminded of the non-submission, whether by the earlier penalty notices or the P35 reminder shown in HMRC's records as issued on 31 December 2008, does not affect the position. The filing date for the return was 19 May 2008, and DJW did not take adequate steps to ensure that it had been filed by that stage, despite the attempt made on 11 April 2008.

56. As DJW did not have a reasonable excuse for the late filing of the return, the penalty of £1,200 must be confirmed and the appeal dismissed.

57. Although we have no specific jurisdiction in relation to the wider issue, we invite HMRC to consider, in the light of the admittedly unsatisfactory history of this case, whether there is justification for an adjustment to the amount of the penalty. During the hearing Mr Brown, as HMRC's representative, admitted that their administration of this tax matter had had significant failings. He stated that HMRC 'had not covered

5 themselves in glory'. From the documents submitted in evidence, this is a view which we would share. We understand that a complaint has been made under the formal complaints procedure. We would ask HMRC to give serious consideration to reducing the penalties demanded in this case, and bring both the appeal and the complaint to a timely close.

Right to apply for permission to appeal

10 58. 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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JOHN CLARK

TRIBUNAL JUDGE

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RELEASE DATE: 19 August 2011