



TC01417

Appeal number: TC/2011/02452

Penalty for late filing of P35 – company applying in good time for authorisation code – difficulties with HMRC helpdesk – appointment of agent – whether agent needs to be authorised before filing the P35 – whether reasonable excuse – held, yes

FIRST-TIER TRIBUNAL

TAX

THE MANAGEMENT AND DESIGN COMPANY LIMITED Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON PRESIDING MEMBER)

The Tribunal determined the appeal on 19 August 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 and HMRC's Statement of Case submitted on 28 April 2011.

DECISION

1. This is the appeal by The Management and Design Company (“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”). The Tribunal decided to allow the appeal.
2. The issues in the case were whether the company had a reasonable excuse for the late filing of the P35, and whether the penalty of £400 for the period from May to September 2010 should be confirmed.

10 **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. Regulations 205-207 state that it is mandatory for employers (with a few of exceptions, none of which apply in this case) to file their 2009/10 P35s online.
5. 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.
6. The taxpayer can appeal a penalty on the grounds of reasonable excuse under TMA Section 118(2), which, so far as is material to this appeal, provides:

“...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 evidence

7. The Tribunal was provided with the correspondence between HMRC and Mr Thompson, the company’s director, and also between HMRC and Mr Inglis, who was appointed as the company’s agent. Mr Inglis also provided a copy of the company’s P35 dated 24 June 2010.

The facts

8. Based on the evidence provided, the Tribunal finds the following facts.
9. The company’s sole director, Mr Thompson, registered online on 7 May 2010. He had applied for an activation code in ‘plenty of time’ but when it arrived its validity had expired.
10. Mr Thompson spent several hours talking to the HMRC helpline and found this a difficult process. HMRC’s records show that three separate requests were made on a

single day, 13 May, for replacement activation codes. Mr Thompson decided that the process was too difficult for him and appointed Mr Inglis as his agent.

5 11. Mr Inglis understood that he had to go through the Online Agent Authorisation procedure to be recognised as the company's agent. He spent many hours trying to get through on the phone to HMRC before making contact.

12. He registered for the company to file online on 24 May and, with an new code, activated the HMRC online filing system on 3 June. On 24 June, he believed he had successfully filed the return and he printed out a copy. However, no return was registered by HMRC.

10 13. The P35 showed that too much PAYE and NICs had been deducted from the employment earnings in the year and that thus that HMRC had been overpaid.

15 14. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the P35. It charged a penalty of £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.

15. The company appealed the penalty, but did not realise that the P35 had not been logged by HMRC. By letter dated 6 December 2010 HMRC informed the company that no return had been received.

20 16. At some subsequent date, but before 1 March 2011, the company was informed that the reason for the non-receipt was that the company's address had not been correctly entered on the return.

17. The return was successfully filed online on 24 March 2011. HMRC's Statement of Case records that as a result of the further delay "the liability due has doubled".

HMRC's submissions

25 18. HMRC say that:

"The legislation does not say what a reasonable excuse is, but HMRC takes the view that it is an exceptional event beyond the taxpayer's control which prevented the return from being filed by the due date, for example because of severe illness or bereavement."

30 19. Specifically, in relation to Mr Thompson's difficulties, they submit that "system problems including a lack of understanding accessing the systems are not treated as a reasonable excuse."

20. In relation to Mr Inglis's delay while he organised agent registration, they say:

35 "the agent seemed to think he needed to go through the Online Agent Authorisation process prior to filing, but this isn't the case as there is a link to submit 'Filing Only' returns when you log in."

21. They add that if the return had been successfully filed online the company would have received two messages stating that it had been logged, and that information about this “is available on the HMRC website”.

22. They thus submit that the company did not have a reasonable excuse.

5 23. In relation to quantum, HMRC say this is fixed by statute. The return had been outstanding for four months at the time the penalty was issued and it was rightly charged at £400.

Submissions on the company’s behalf

10 24. Mr Thompson said that he applied in good time for the authorisation code but that by the time it arrived it was out of date. He says:

15 “At the time we went on line to initially submit the return, we were well within the time. Your system, and particularly your call centre, was obviously under extreme pressure and the whole registration process became very frustrating and time consuming. As a one person company, it was nearly impossible to deal with, something that your organisation did not seem to account for.”

25. He further says “at no time does HMRC accept that their system could be at fault or obscure” and says “assistance should have been given or directed if they saw that the filing was incomplete and why this was the case.”

20 26. The company’s agent, Mr Inglis, said he had made “several attempts...at registration as the transmission of the codes were necessarily transferred and were out of date”. He also confirmed his belief that he “needed to go through the Agent Authorisation process prior to filing.”

Decision

25 *What is a reasonable excuse?*

27. HMRC are right to say that “reasonable excuse” is not defined in the legislation. However, 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 Comms* [2010] UKFTT 78 (TC). It has also been held to be “a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* [2006] STC (SCD) 536).

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

35 “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.”

5 29. 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. Specifically, HMRC are wrong to assert that “problems with online systems including a lack of understanding and problems accessing the online systems” cannot
10 be a reasonable excuse.

31. As to whether a reasonable excuse existed, the facts for each of three time periods must be considered separately.

The period before the appointment of Mr Inglis

15 32. Mr Thompson applied for the activation code in good time, and he tried to file the return well ahead of the deadline. He made many attempts to sort the problems out with HMRC. He finally gave up and appointed Mr Inglis as his agent.

33. I find that find that he behaved as “someone who seriously intends to honour their tax liabilities and obligations would act” and that the company thus has a reasonable excuse for this period.

20 *The period to 24 June 2010*

34. Once Mr Inglis had been appointed, he had to sort out the activation code. This appears to have been in place by 3 June. However, the return was not filed for a further three weeks.

25 35. Mr Inglis believed that he needed to obtain agent authorisation before he could act for the company. He made several attempts to communicate with the HMRC helpline and did finally obtain this authorisation.

36. HMRC say that this authorisation was not necessary “as there is a link to submit ‘Filing Only’ returns when you log in.”

30 37. They have, however, provided no evidence that this information – that the normal requirements for agent authorisation are suspended in the case of online filing – was made available in an accessible way to Mr Inglis. I thus find it reasonable of Mr Inglis to believe that he had to be authorised before being allowed to submit the company’s returns.

35 38. The key issue, however, is whether the absence of the access code caused the further delay which lasted from 3 June 2010, when Mr Inglis had the access code, and 24 June, when the return was eventually filed.

39. Neither party has provided the Tribunal with the date on which authorisation was received. Mr Inglis does not explicitly state that he was waiting for the authorisation, although this can be implied from his submissions.

5 40. In penalty cases, the burden of proof is on HMRC (*Jussila v Finland* (73053/01) ECtHR (Grand Chamber)) and they have not provided any evidence that Mr Inglis received his agent authorisation before 24 June.

41. I thus find, on the balance of probabilities, that for this period Mr Inglis was waiting for his authorisation to act on the company's behalf, and that the company had a reasonable excuse for this further delay.

10 *The period after 24 June*

42. Mr Inglis believed that he had submitted the P35 return, and he printed off the completed document to support this. HMRC say that he should have realised that it had not been logged with HMRC, because the two acceptance messages were not received.

15 43. There is no evidence before the Tribunal that the online filing process made it clear – for instance, on the opening or closing screens – that non-receipt of these messages meant that there had been a failure to file the return. HMRC say only that “this information is available on the HMRC website.”

20 44. The company was unaware until December 2010 that the return had not been lodged within the HMRC system, and it was only at some later date that the company was informed of the problem with the company's address.

45. A person cannot correct a mistake if he does not know it has been made, and I thus find that there was a reasonable excuse for the period between 24 June until the 19 September 2010.

25 *Conclusion*

46. In relation to the £400 penalty for the period from 20 May to 19 September, which has been appealed to this Tribunal, I accept the appeal and discharge the penalty.

30 47. Penalties of at least equal amount have been “stored up” within the HMRC computer system. These are not before this Tribunal and I cannot make any decision in relation to them.

35 48. 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

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

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