



TC01441

Appeal number: TC/2010/09301

*late filing of P35 – penalty - unintentional and administrative error -
whether reasonable excuse – no - appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

CAPRICORN FILM PRODUCTIONS LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS (INCOME TAX)**

Respondents

TRIBUNAL: Andrew Long (Tribunal Judge)

The Tribunal determined the appeal on 28 February 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 9 December 2010 and HMRC's Statement of Case submitted on 7 January 2011.

DECISION

1. The Appellant, a small film production company, appeals against a penalty of £300 imposed by HMRC for the late submission of form P35 for the tax year 2009 – 2010. The form was due by 19th May 2010, but did not arrive until 10th August 2010. The Tribunal considered the appeal as a default paper case and now gives its full reasons pursuant to the Appellant's request.
2. Most of the facts, as set out by each party, are not seriously in dispute, including the fact that the form was delivered more than two months late for the relevant 50 employees. The Appellant explained in the request for a review "the computer software used was Sage Payroll. The problem with this software was one purely of lack of familiarity. The input of salary information and daily use of the software was carried out by a temporary employee who was no longer with the company at the time of submission of the P35. I attempted to finalise the year-end and submit the return. I had never used the software before and had never submitted an online return. I worked through the required stages and clicked on the "submit" button. I had no knowledge of what to expect following this and when the screen returned to the normal screenshot I assumed that the P35 had been submitted. This may have been naive on my part however I had no reason to assume otherwise".
3. In the Notice of Appeal the Appellant states "based on the fact that this is actually the first-time in which a P35 return has been late and the reason it was late was due to a simple mistake I think the penalty should be cancelled. We are also a very small company struggling to survive in a very difficult industry and £300 is a significant amount money to us"
4. The grounds of appeal set out in the notice of appeal include that "I explained to HMRC that this was an administrative error, however they have not accepted this" and "my original letter also explained that the P35 calculation resulted in a repayment due to us of approximately £4,700. We are a small company with extremely limited cash resources and my original appeal asked why any company in our position would choose not to submit their return on time". The grounds of appeal also set out that in relation to the two previous years there had been penalties for late submission which had subsequently been rescinded. The Appellant states that there had been a catalogue of administrative errors by HMRC which had cost the Appellant time and money. The penalties, it was stated, had been rescinded because they have been issued in error.
5. The late submission was discovered when the Appellant wrote to HMRC to chase the refund of the £4700 due to the Appellant. The form was over two months late and related to exactly 50 employees (and therefore no more than 50) resulting in the penalty being imposed of £300.
6. The above facts are not challenged by HMRC, save that the HMRC response states "HMRC notes show that earlier penalties for 2007/2008 and 2008/9 were issued correctly by HMRC as the returns were not shown as received by HMRC by the due dates. Subsequently the penalties were discharged by HMRC". It was not possible for the Tribunal on a default paper case to resolve any conflict as to why the penalties for

earlier years were withdrawn. However, as will be seen below, that issue is not relevant to the outcome. For the purposes of this decision it will be assumed that the Appellant's version is correct.

5 7. The Tribunal accepts that the late submission was an administrative error, unintentional, accidental, did not result in a loss of tax and was contrary to the Appellant's interests as the Appellant was due a refund.

10 8. The law. 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 the tax year .The Taxes Management Act 1970 (TMA) s98A 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 9. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at s 118(2) TMA which states:- '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..'

20 10. "Reasonable excuse" is not defined. 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 Commissioners* [2006]STC (SCD) 536)The Tribunal considers that for there to be "a reasonable excuse" the Appellant must have acted as would a reasonable business in their circumstances. The Tribunal rejects the HMRC submission that "reasonable excuse" is limited to "an exceptional event beyond the person's control which prevented the return from being filed by the due date e.g. severe illness, bereavement "

25 11. The Tribunal considers that a reasonable business in the position of the Appellant would have done more. The key facts include that the task had been left to an individual who was not familiar with the software. There was a history whereby the business knew that a penalty would result if the P35 was not received on time. Most importantly, there was no evidence that the material inputted had been despatched (by way of screenshot, e-mail or other print record. -the only screenshot merely showed the material that had been inserted) or received by HMRC.

35 12. In those circumstances, the Tribunal concludes, a reasonable business would have done more to check that the form had been submitted. It was unsafe and unreasonable, without more, to rely on an unfamiliar software package which had not demonstrated evidence of despatch or receipt. There are a variety of further steps that the Appellant could reasonably have taken, at the Appellant's choice. A check could have been undertaken as to whether the process used ought to produce evidence of despatch or receipt, advice sought from someone else, resubmission attempted or some other further step.

40 13. The Tribunal concludes that in these circumstances, albeit this constitutes a one off administrative error which was unintentional, it does not here amount to a "reasonable excuse".

14. The appeal must therefore be dismissed. The Tribunal finds that there is no "reasonable excuse". The outcome is course unfortunate for the Appellant particularly in the light of the findings set out at paragraph 7 above. However, that is the proper outcome of the application of the statutory test as to "reasonable excuse". If the
5 Appellant remains dissatisfied with HMRC's earlier administrative failings then that is something that may (or may not) be the subject matter of a complaint but is not within this Tribunal's jurisdiction.

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
10 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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20 **TRIBUNAL JUDGE**
RELEASE DATE: 14 SEPTEMBER 2011