



TC01510

Appeal number: TC/2011/04216

*P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—
Reasonable excuse—Appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

STEWARTON POLO CLUB LTD

Appellant

- and -

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

Respondents

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 3 October 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 31 May 2011, HMRC's Statement of Case dated 11 July 2011, and other papers in the case.

DECISION

Introduction

5 1. The Appellant appeals against penalties totalling £800 imposed in respect of the late filing of its P35 employer's annual return (P35) for the tax year 2008/09.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to
10 paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

15 (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, ...
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(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, ...
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4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the Tribunal may
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(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.
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5. Section 118(2) of the TMA provides as follows:

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a
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5 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 arguments of the parties

6. The Appellant's case as stated in a letter dated 21 March 2010 is as follows. The Appellant was surprised to receive the penalty notice because his accountant had informed him that he had sorted out all the Appellant's PAYE and that everything had
10 been taken care of. The Appellant leaves everything to do with PAYE to his accountant, and the Appellant pays the amount of PAYE that his accountant says is due. The Appellant trusted the accountant. Unfortunately, the accountant has died, so that it is it is not possible to ask him about it. The Appellant does not open from September to March so no PAYE was due for this period, and the accountant assured
15 the Appellant that he had informed HMRC of this.

7. The HMRC statement of case states amongst other matters as follows. The filing date for the P35 was 19 May 2009, and it was not filed until 18 May 2010. The total liability on the P35 return was £2,031.58. On 28 September 2009, a first interim penalty notice of £400 was issued in respect of the four months from 20 May 2009 to
20 19 September 2009. On 25 January 2010, a second interim penalty notice was issued in respect of the four months from 20 September 2009 to 19 January 2010. The Appellant did not appeal until after the deadline for so doing, but HMRC do not object to the late appeal. It is the responsibility of the employer to ensure that their tax affairs are up to date, and reliance on a third party or agent cannot be a reasonable
25 excuse. If the third party or agent has misadvised or failed to follow instructions, it is necessary for the employer to have recourse against the third party or agent. While payments for the year 2008/09 may have been made, there is a separate obligation to file the P35.

The Tribunal's view

8. The Tribunal must determine questions of fact on the evidence before it on the
30 basis of the balance of probability.

9. The Tribunal notes that the Appellant has not disputed that the return was filed late on 18 May 2010. The Appellant says that he entrusted his accountant with the responsibility for filing it. HMRC's position is, however, that reliance on a third
35 party such as a bookkeeper does not amount to a reasonable excuse.

10. The Tribunal notes that in *RW Westworth Ltd v HMRC* [2010] UKFTT 477 (TC) (which concerned an appeal against cancellation of gross payment status under the Construction Industry Scheme), the Tribunal said at [13] that "In view of Mr and Mrs Westworth's lack of experience and expertise in accounting, administration and tax
40 matters we consider that it was reasonable for the Company to retain the services of a consultant", and at [14] that "the Company had a reasonable excuse for the late PAYE payments".

11. The Tribunal has also considered *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199. That case similarly concerned an appeal against cancellation of gross payment status rather than an appeal against a penalty for late filing of P35 returns, although the “reasonable excuse” test in both contexts may be materially similar. In that case, the appellant company which had no knowledge of tax or VAT matters had relied on a company secretary to ensure compliance with tax obligations. However, various tax obligations were not complied with. The Tribunal found in that case at [20] that it had been “reasonable for the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations”. That decision concluded at [23], referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that “reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context”.

12. It is noted that this case concluded that reliance on a third party “can” be a reasonable excuse, not that it necessarily always *will* be a reasonable excuse.

13. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had “relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists”. It was further found in that case (at [8(q)]) that as the appellant “did not have the specialist knowledge and expertise herself she employed and relied upon persons whom she reasonably believed to have such specialist knowledge and expertise”.

14. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. However, in cases where no specialist advice is required, the Tribunal does not consider that a taxpayer can be absolved of personal responsibility to file returns and pay taxes on time through reliance on a specialist.

15. The Tribunal considers that in general, preparation of P35 returns is something that does not require specialist tax advice and is generally capable of being done by any lay employer. It certainly does not require any specialist tax expertise to check whether or not a P35 return has or has not in fact been submitted.

16. In *Schola UK Ltd v HMRC* [2011] UKFTT 130 (TC), the Tribunal said at [7] that mistakes by an agent did not amount to a reasonable excuse, in circumstances where “The mistake could have been avoided if the agent had exercised proper care” and where “The actions of the agent were not those of a prudent employer exercising reasonable foresight and due diligence with a proper regard for the responsibilities under the Tax Acts”.

17. The Tribunal considers that the obligation to ensure that the return is filed on time is on the Appellant. If the Appellant uses an agent such as an accountant, the Appellant is in general under an obligation to ensure that the agent files the return on time. Failure of the agent to meet his or her obligations to the Appellant might entitle the Appellant to some recourse against the agent, but in the Tribunal's view reliance on a third party such as an accountant cannot relieve the Appellant of its own obligation to file the P35 on time. The Tribunal does not accept that the bare fact that responsibility had been entrusted by the appellant to a third party of itself amounts to a reasonable excuse.

18. As each case turns on its own particular circumstances, the Tribunal does not consider it necessary to draw detailed comparisons with the cases referred to above.

19. The Tribunal notes what is said by the Appellant about the accountant's death. However, the Appellant states in the letter dated 21 March 2010 that the accountant died "in the Autumn", presumably a reference to Autumn 2009. However, the deadline for filing the P35 was in May 2009, some months before the accountant's death. The Tribunal is unable to conclude on the basis of the evidence that the accountant's death was the cause of the late filing.

20. In the present case, the Tribunal is not satisfied on the evidence that that the Appellant's claimed reliance on its accountant, and the claimed circumstance of the accountant's death, amounts to a "reasonable excuse". The Tribunal finds that the Appellant has advanced no other circumstances that would amount to a "reasonable excuse" for late filing under s.118(2) of the TMA. The Appellant has not sought to dispute the amount of the penalty, in the event that there is no reasonable excuse.

Conclusion

21. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

22. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE
RELEASE DATE: 20 OCTOBER 2011