



TC01540

Appeal number: TC/2011/03578

Penalty – Late submission of Employers’ Annual Return (P35) – Whether reasonable excuse on facts – No – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

BRYAN NICHOLLS

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 23 August 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 4 May 2011 and HMRC’s Statement of Case submitted on 3 June 2011.

DECISION

1. This is an appeal by Mr Bryan Nicholls, against penalties of £600 imposed under s 98A of the Taxes Management Act 1970 (“TMA”) for the late filing of his
5 Employers’ Annual Return, the P35, for 2009-10.

2. Having considered the papers provided by both parties, a Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released on 31 August 2011. On 26 September 2011, following receipt of the Decision Notice, Mr Nicholls wrote to the Tribunal stating
10 that he “did not accept” the decision of the Tribunal.

3. Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that before an application for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal can be made it is necessary to request full written findings of fact and reasons for the decision of the Tribunal. Although the
15 letter from Mr Nicholls did not expressly ask for permission to appeal against the Tribunal’s decision it has been treated as a request for full written findings of fact and reasons.

4. This decision has therefore been provided to enable Mr Nicholls to decide whether to apply for permission to appeal and to assist in formulating any such
20 appeal.

5. An employer, such Mr Nicholls, is required, by paragraph (1) of Regulation 73 of the Income Tax (PAYE) Regulations 2003, to deliver a P35 to HMRC “*before 20 May following the end of a tax year*” (which, in this case was 19 May 2010) containing the following information:

25 (a) *the tax year to which the return relates,*

(b) *the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and*

30 (c) *the total net tax deducted in relation to those payments.*

6. Paragraph (10) of Regulation 73 provides that “*Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).*” Section 98A TMA which sets out the liability to penalties for non-compliance with the PAYE Regulations provides:

35 (1) *PAYE regulations...may provide that this section shall apply in relation to any specified provision of the regulations.*

(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...

5 (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...

10 7. Section 118(2) TMA, so far as is material to this appeal, provides that “*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.*”

15 8. There is no definition in the legislation of a “reasonable excuse” which has been held to be “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

20 9. In this case Mr Nicholls who should have filed the P35 by 19 May 2010 actually submitted it online to HMRC on 20 October 2010. Therefore, the issue for me to determine is whether Mr Nicholls has a reasonable excuse for the late submission of the P35.

25 10. Mr Nicholls who had been filing his P35 online since 2007, attempted to file the 2009-10 P35 online on 22 May 2010, a few days after the due date of 19 May 2010. However, HMRC records show that it was not successfully submitted and that Mr Nichols did not receive the instant notification or email confirming receipt of the P35 that follows a successful online submission.

30 11. In his Notice of Appeal Mr Nicholls explains that he was not aware that, in the absence of an email or notification from HMRC stating otherwise, the P35 had not been successfully submitted and that he only realised that there was a problem when he received the first Penalty Notice. He then filed the P35 online “as soon as [he] was informed of the situation” on 20 October 2010. The Penalty Notice to which Mr Nicholls refers was issued by HMRC in the sum of £400, on 27 September 2010, in respect of the period 20 May to 19 August 2010.

35 12. Mr Nicholls also mentions the difficulties experienced by HMRC’s website in May 2010 which prevented him from printing a P60 for his employee and that he was able to print a notice on website informing him of this problem.

13. In addition he complains that HMRC took four months to issue the Penalty Notice that informed him that the P35 had not been filed stating that “it is totally unreasonable for HMRC to act this way” giving him the impression “that they are trying to make money out of the situation.”

14. After the P35 had been submitted a final Penalty Notice in the sum of £200, for the period from 20 August to 20 October 2010, was issued by HMRC on 1 November 2010.

5 15. Given that Mr Nicholls has had experience of filing his P35 online since 2007, I find that he should have realised that unless he received an email or online notification that it had been successfully submitted he should have known that it had not been received by HMRC.

10 16. As such, despite the fact the HMRC did not issue a Penalty Notice until September 2010, I am unable to find that Mr Nicholls has a reasonable excuse for the late submission of the P35.

17. The appeal is therefore dismissed and the penalties confirmed.

15 18. 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 BROOKS

TRIBUNAL JUDGE

25 **RELEASE DATE: 2 NOVEMBER 2011**

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