



TC01551

Appeal number: TC/2011/04475

Penalty for late submission of P35 –previous accountants ceased business – penalty notices not sent to new accountants – Appellant’s failure to notify change of address on a timely basis – whether reasonable excuse – no - appeal dismissed and penalty confirmed

FIRST-TIER TRIBUNAL

TAX

AJDS PULMONARY FUNCTION SERVICES LIMITED Appellant

- and -

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

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 21 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 13 June 2011 and HMRC’s Statement of Case submitted on 12 August 2011.

DECISION

1. This is the appeal by AJDS Pulmonary Function Services Limited (“the company”) against two penalties totalling £794 imposed for late filing of the 2009-10 end of year return of payments under PAYE (“P35”).
2. The company’s current accountants, Champion Consulting Limited (“Champion Consulting”), appealed the penalties on the company’s behalf.
3. The Tribunal dismissed the appeal and confirmed the penalties.

The law

4. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires employers to file their P35s before 20 May following the end of each tax year.
5. Taxes Management Act 1970 (“TMA”) s 98A(2)(a) sets out the liability to fixed penalties for non-compliance, which are £100 per month or part month during which the failure continues.
6. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2).
7. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal 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”, see *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14]. It has also 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].
8. TMA s 115 states that notices or forms which are to be delivered or served to a person under the Taxes Acts can be so delivered or served by being addressed to him at his usual or last known place of residence.

The issue in the case and the evidentiary burden of proof

9. The company did not file its P35 by the due date.
10. The issue in this case is whether it had a reasonable excuse. The burden of proof is on the company to establish such an excuse, and the standard of proof is the balance of probabilities.
11. The company’s evidence on this issue consisted of a single letter from Champion Consulting. HMRC have supplied screen prints showing the company’s two change of address notifications, and a copy of form AD01 “Change of registered office address” sent to Companies House.
12. On the basis of the evidence provided, I find the following facts.

The facts

13. The deadline for filing the 2009-10 P35 was 19 May 2010. It was not filed. At the time the company's accountant was Costelloe Business Services ("Costelloe").
14. On some unspecified date, Costelloe ceased to trade.
- 5 15. On 2 June 2010 the company informed Companies House that it had changed its registered office address to Worsely Court, Worsely, Manchester. This is the address of Champion Consulting.
16. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the 2009-10 P35. It charged the company £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The penalty for this period was therefore £400. The notification was sent to Costelloe's address.
- 10 17. On 12 November 2010, HMRC were informed that the employer's address had changed, also to Worsely Court, Worsely, Manchester.
18. On 24 January 2011, HMRC issued a second penalty notice for £400 for the four months from 20 September through to 19 January. Neither party has informed the Tribunal of the address to which this was sent.
- 15 19. On 21 February 2011, HMRC were notified that the correspondence address for payroll matters should be changed to Worsely Court, Worsely, Manchester.
20. In February 2011 Champion Consulting received the second penalty notice (the Tribunal assumes that this was a copy of the earlier notice HMRC had sent to out on 21 January 2011, but neither party provided evidence on this point. In any event, nothing turns on it). Champion Consulting say that "the first instance that we were aware of any outstanding PAYE was in February when your records had been updated and a penalty notice was sent to our address."
- 25 21. On 16 March 2011 Champion Consulting filed the company's P35, showing that the total PAYE and NICs for 2009-10 was £795.13
22. On 22 March 2011 HMRC issued an amended penalty notice for the second period, reducing the penalty from £400 to £394. Together with the first penalty of £400, the total penalty was £794, slightly less than the total PAYE and NICs for that tax year. HMRC say in their Statement of Case that this accords with their policy of mitigating penalties to a maximum of the total PAYE and NICs, subject to a minimum of £100.
- 30 23. On 7 April 2011 Champion Consulting, on behalf of the company, appealed the second, now reduced, penalty of £394. No appeal was made against the first penalty notice. In their Statement of Case HMRC have very fairly accepted that this appeal should be taken as being against both penalty notices.
- 35 24. HMRC also allowed the company's late appeal (the appeal was made more than 30 days after the issuance of the original penalty assessments).

Champion Consulting's submissions on behalf of the company

25. Champion Consulting say that the company “was under the impression” that the P35 form had been submitted by Costelloe.

5 26. Furthermore, until February 2011 all the HMRC correspondence about the penalty went to Costelloe’s address, and nothing was forwarded to the company; it “was therefore unaware of anything being outstanding” until the copy of the penalty notice was sent to Champion Consulting.

10 27. Champion Consulting say that at that point “we gathered all the relevant information from the client and submitted the P35 as soon as it was possible for us to do so.”

HMRC's submissions

28. HMRC say that the company has no reasonable excuse for late filing.

15 29. Specifically, the obligation to submit the P35 rests with the employer and cannot be transferred to an agent working on his behalf. If the actions of an agent excused the employer from its statutory obligations, this would be “unreasonable and unfair to employers who do adhere to this same obligation.”

30. They also point to the fact that the company changed its registered office to that of Champion Consulting on 2 June 2010, but that HMRC were not informed of the new correspondence address until 21 February 2011.

20 31. Finally, they say that the penalty has already been mitigated to take account of the company’s low level of PAYE and NIC.

Discussion and decision

The first penalty

25 32. The statutory obligation to file the P35 lies with the employer. The mere delegation of that duty to an agent does not absolve the employer from that obligation.

30 33. There are sometimes situations where the interaction of the agent and the employer can give rise to a reasonable excuse. But in this case the Tribunal has not been told when Costelloe ceased trading, when the company became aware of this fact, what actions (if any) were then taken by the company, and in particular, what it then did to ensure that its filing requirements for 2009-10 had been carried out in accordance with its statutory obligations. The only submission in relation to the late filing is that the company “was under the impression” that Costelloe had filed its P35.

34. I thus find that there is no evidence to support a reasonable excuse defence for the first penalty of £400.

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The second penalty

5 35. On 2 June 2010 the company changed its registered office, but failed for a further seven months to inform HMRC of its new correspondence address. The first notice was nevertheless deemed delivered to the company as it was sent to its last known address.

36. Had the company told HMRC about its new address on 2 June 2010, Champion Consulting would have received the first penalty notice in September 2010. This would have allowed the P35 to be filed soon afterwards.

10 37. It was the company's own failure to inform HMRC of its correspondence address which prevented the first penalty notice from being delivered to the new accountants, causing the further delay. This failure is the very opposite of a reasonable excuse.

Conclusion

38. The Tribunal thus finds that there is no reasonable excuse for the late filing of the P35 and the penalty is confirmed in the sum of £794.

15 39. 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
20 "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: 8/11/2011**

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