



TC01567

Appeal number: TC/2011/03242

Penalty for late filing of P35 – obligation to file online – agent’s software license allowing limited number of returns – quota exceeded - licensor blocked submission of return – agent sent paper return to HMRC – penalty received – further paper copy submitted – whether reasonable excuse – no – appeal dismissed and penalty confirmed

FIRST-TIER TRIBUNAL

TAX

CHI INTERNATIONAL 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 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 19 April 2011, HMRC’s Statement of Case submitted on 19 May 2011 and the Appellant’s Reply dated 22 June 2011.

DECISION

1. This is the appeal by Chi International Limited (“the company”) against two penalties, one of £400 and one of £200, imposed for late filing of the 2009-10 end of year return of payments due under PAYE (“P35”).

2. The Tribunal decided that the appeal should be dismissed and the penalties confirmed.

The law

3. The regulations which apply to the filing of P35 returns, and in particular the online filing requirements, changed with effect from 2009-10, and have subsequently been amended again. The provisions set out in this Decision are those which applied to the 2009-10 tax year.

4. Regulation 73 of the Income Tax (PAYE) Regulations 2003¹ (SI 2003/2682) requires that P35s are filed on or before 19 May following the end of a tax year.

5. Regulation 205 read as follows:

“An employer...must deliver a relevant annual return by an approved method of electronic communication to HMRC.”

6. A “relevant annual return” was defined in Regulation 206A as “the return and accompanying information required by regulation 73 (annual return of relevant payments liable to deduction of tax (Forms P35 and P14))”.

7. Under the Income Tax (Pay as You Earn) (Amendment No 2) Regulations 2009 (SI 2009/2029), Regulation 1(6), the online filing requirement did not apply to an employer who:

- (a) is not a specified employer²;
- (b) ceases paying PAYE income during the year 2009-10; and
- (c) submits the return and accompanying information, required by regulation 73, before 6th April 2010.

8. Regulation 206(2) set out further exceptions to the online filing requirements. These applied to practising members of a religious society whose beliefs are incompatible with the use of electronic communications; those who have been authorised to use the simplified deduction scheme for personal employees and “care and support” employers³.

¹ Unless otherwise specified, references to “a Regulation” or “the Regulations” in this Decision refer to the Income Tax (PAYE) Regulations 2003.

² A specified employer is defined at Reg 206(1) as a large or medium sized employer.

³ Defined in Reg 206(3).

9. Taxes Management Act 1970 (“TMA”) s 98A sets out the penalties for non-compliance with the Regulations; so far as relevant to this decision it reads as follows:

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

5 (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—

10 (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...

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

15 (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100...”

10. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B.

11. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2).

20 12. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal in *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) (“*B&J Shopfitting*”) at [14] 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”. It has also been held to be “a matter to be
25 considered in the light of all the circumstances of the particular case”, see *Rowland v HMRC* [2006] STC (SCD) 536 (“*Rowland*”) at [18].

The evidence

30 13. The Tribunal was provided with the correspondence between the parties. The Appellant’s agent, D Chakrabarti & Co (“the agent”), also provided an email from Ms Turner of Sage (UK) Limited (“Sage”), headed “Sage Payroll Software Breach email”, addressed to Mr Chakrabarti and dated 16 February 2011..

The facts

14. Based on the evidence set out above, I find the following facts.

35 15. The agent is a firm of accountants and auditors. It had a license agreement with Sage for the submission of a fixed number of P45 returns using Sage software. The

terms of the license allowed an unlimited number of users as long as only the agreed fixed number⁴ of returns were submitted.

16. The agent had four computers in its office. It incorrectly thought that the four computers could each be used to submit the fixed number of returns, so that the total submitted returns could be the fixed number multiplied by four.

17. The agent entered the company's return into the Sage transmission system some time before 23 April 2010.

18. In its reply to the HMRC Statement of Case, the agent explains what happened next⁵:

10 “During the continuing submission time, Sage stop our process the
 submission P35 to HMRC which we were not aware at that time. When we
 phoned Sage to help, Sage explained to us that we can only use for 10
 companies online submission even we have four computers in our office, they
15 also warned us that [the company's PAYE reference number] did not go
 through. We were panic and so sent the P35 in paper version straightaway to
 HMRC.”

19. The email from Ms Turner of Sage⁶ confirms that Sage stopped the transmission of those returns which exceeded the agent's license. She refers to “the submissions made by D Chakrabarti & Company at payroll year end” and says that the agent has a license for the submission of 25 returns, but tried to submit 34 returns. It continues:

 “from the information submitted during the online Payroll Year End return, it
 would appear that D Chakrabarti & Company are using their payroll software
 for more companies that they are licensed for. Additional submissions will
 not be accepted once this number has been exceeded.”

20. A paper copy of the P35 return for the company was despatched to HMRC on 23 April 2010.

21. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the 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 total penalty was therefore £400.

22. On 11 October 2010 the agent sent a further paper copy of the company's P35 return to HMRC. By letter dated 15 October 2010 HMRC rejected the paper return as it was not in the required electronic format.

⁴ The agent's Reply to the HMRC Statement of Case gives this fixed number as 10; the email from Sage, quoted below, gives it as 25. This discrepancy is not explained, but no part of this Decision turns on the exact number of returns agreed as between the agent and Sage.

⁵ Passage transcribed verbatim.

⁶ This email is not contemporaneous with the events, but appears to have been requested by the agent to attach to his appeal documentation – it is dated the same day as the agent appealed to HMRC.

23. The return was filed online on 20 October 2010 using HMRC's software.

24. A final penalty notice of £200 was issued on 1 November 2010, being £100 for the month from 20 September to 19 October, and a further £100 because the return was not filed until 20 October 2010, one day into the following month.

5 **The agent's submissions on behalf of the company**

25. The agent said that a paper return was sent to HMRC as soon as it was aware that Sage had not logged the company's P35. A further paper version was sent when the penalty notice was received in September 2010. At this point HMRC told the agent that "the paper version format was not acceptable".

10 26. The agent submits that the penalty is unfair "for a struggling small practice" because it says that the problem was partly caused by Sage, and because "it is difficult when human being have to face change (from paper submission to online submission)".

HMRC's submissions

15 27. HMRC say that the agent's submissions do not constitute a reasonable excuse because:

(1) the employer had a statutory obligation to submit its 2009-10 P35 online. This obligation had been well publicised; and

20 (2) the problem with Sage did not prevent the agent from filing online – HMRC provides free software, and it was this software which the agent used in October 2010 to submit the return.

28. They also say that reliance on the agent does not provide the company with a reasonable excuse, as "the responsibility for filing the return rests solely with the employer."

25 **Decision**

The statutory obligation

29. For the 2009-10 fiscal year, online filing of P35s was compulsory for all except a small number of businesses. There is no evidence before the Tribunal that the company satisfied any of the exceptions which are set out in the earlier part of this
30 Decision.

30. The company thus had a statutory responsibility to file its 2009-10 P35 online, and this obligation could not be satisfied simply by despatching a paper return to HMRC.

The agent's actions on the company's behalf

31. The references in the agent's submissions to the difficulties of having to "face change (from paper submission to online submission)" is evidence that the agent was
35 aware of this new requirement. But even had the agent not known that online filing of

P35s had become compulsory, ignorance of the law does not constitute a reasonable excuse.

32. The agent submits that its failure to file was partly the fault of Sage. The Tribunal does not agree. It is clear from the agent's Reply (quoted earlier in this Decision) that Sage informed the agent on or before 23 April 2010 that the company's online return had not been delivered to HMRC. There was plenty of time, before the filing deadline of 19 May, for the agent either to extend the Sage license or to use HMRC's free online filing software.

33. In *B&J Shopfitting* set out earlier in this Decision, the Tribunal 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". This is not a statutory definition, and is persuasive rather than binding on this Tribunal, but is nevertheless helpful.

34. Taking the same approach to the concept of reasonable excuse, and applying it to the facts of this case, the Tribunal is in no doubt that simply despatching a paper return instead of making alternative arrangements to comply with the online filing obligation is not the behaviour of a person who is doing his best to comply with his statutory obligations.

35. Taking the less prescriptive route suggested by *Rowland*, and considering all the circumstances of the case, this Tribunal finds nothing which provides a reasonable excuse for the agent's failure to file online by the due date.

The company's reliance on its agent

36. The agent's behaviour thus does not provide the company with a reasonable excuse. But could the company have a reasonable excuse because it relied on its agent?

37. Reliance on a third party agent was held to provide a reasonable excuse in *Rowland*, a case involving a "difficult and complex area of tax law", including "the arcane matters of film finance partnerships".

38. A similar decision was reached in *The Research and Development Partnership Ltd v HMRC* [2009] UKFTT 328 (TC), which concerned complicated questions of research and development tax credits. The judge said that when considering whether reliance on a third party constitutes a reasonable excuse "it is proper to have regard to the nature of the task."

39. The Tribunal has taken a different view in more straightforward situations (see, for example, *Richfield Fashion* [2010] TC 00957).

40. In the instant case it would have been a simple and straightforward matter for the agent to use the HMRC software, or to extend the Sage license. The situation is not analogous to *Rowland*. The company's reliance on its agent thus does not constitute a reasonable excuse.

41. The Tribunal therefore dismisses the appeal and confirms the penalties.

42. 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

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**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 11 NOVEMBER 2011**