



**TC01583**

**Appeal number: TC/2011/04090**

*P35 return – reasonable excuse –unfair penalty*

**FIRST-TIER TRIBUNAL**

**TAX**

**Mr H B and Mrs E Davenport**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Rachel Short (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 26 September 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 25 May, HMRC's Statement of Case submitted on 5 July 2011 and the Appellant's Reply dated 3 August 2011.**

## DECISION

1. The Tribunal decided that the Appeal should be ALLOWED IN PART.

2. This is an appeal against late filing penalties of £800 for a P35 return for the 2009 – 2010 tax year. The return was due on 19 May 2010 but was not filed until 14 May 2011. The penalties under appeal relate to the periods from 20 May 2010 to 19 January 2011. The relevant legislation is s 98A (2) and (3) Taxes Management Act 1970.

### *Agreed Facts*

3. The Appellant's agent explains that they submitted P35 returns on line using a commercial payroll system, ISIS, on 8 April 2010. They received a first penalty notice from HMRC on 27 September 2010.

4. On receipt of the September penalty notice the Appellant's agent sent hard copy print outs of all relevant PAYE information to HMRC on 12 October 2010, but a full on line return was not made until 14 May 2011.

5. The Appellant has been making on line PAYE returns since 2006.

### *The Arguments*

6. The Appellant's agent says that they were unaware that the on-line submission had not been accepted until they received HMRC's penalty notice on 27 September. The reason for the failure to make the return on time is a systems failure which is beyond their control.

7. The Appellant's agents ask that the penalty be reduced to £100 to reflect the level of penalty which would have applied had they been notified of their error by HMRC at the end of the first month of default.

8. They state that they consider the level of the penalty to be harsh and in this regard they refer to the recent tribunal decision of *Hok Ltd* (TC 1286) concerning the reasonableness of HMRC delaying issuing penalty notices for four months for late P35 returns.

9. HMRC say that they have no evidence of the Appellant's agent attempting to make an on line return until 14 May 2011, no record of an attempt to make a return on 8 April 2010 and no record of any problems with their system on that date.

10. HMRC argue that the Appellant's agent was experienced in making on line returns for the Appellant and should have been aware that no notice of successful submission had been received for the 8 April 2010 return. In their view it is not HMRC's obligation to issue timely reminders about the submission of P35 returns, the obligation is on the taxpayer to make returns on time.

11. The Appellant should have been aware that simply sending print outs of relevant PAYE information to HMRC did not constitute the making of a valid return. A hard copy return, if one was valid at all, should have been in the prescribed format, which these print outs were not.

5 ***Decision***

12. In order for the Appellant to successfully appeal against these penalties it is necessary for him to demonstrate that they have a “reasonable excuse” for non submission of the P35 return throughout the period of default under s 118(2) Taxes Management Act. The relevant period is 20 May 2010 to 19 January 2011.

10 13. There is no statutory definition of “reasonable excuse” for these purposes, but there are numerous decisions of this Tribunal and the higher courts as well as guidance from HMRC. It is clear from these decisions and guidance that ignorance of the law is not a “reasonable excuse” and the test to be applied is whether a particular taxpayer has “exercised reasonable foresight and due diligence” and acted in a “fair  
15 and businesslike manner” (see *Mutch v HMRC* [TC 232])

14. Applying these principles, the Tribunal considers that the Appellant has a reasonable excuse for late submission for the period from 20 May to 20 September 2010 because the Appellant’s agent had no reason to believe that a successful return had not been made via its commercial software package until HMRC’s penalty notice  
20 was issued on 27 September and genuinely believed that the on line P35 return had been properly made.

15. To this extent the Tribunal is taking account of the approach of the Tribunal Judge in the *Hok* decision. When as here, the Taxpayer is relying on an on line filing system to confirm that a return has been properly made, the Tribunal agrees that it is  
25 “below the standard of fair dealing” for the Taxpayer to have no other means of verifying that the return has not been properly made than HMRC’s penalty notice, which is received only after a significant period of delay and when it is too late to mitigate the penalties which have been incurred.

16. The Tribunal therefore considers that the £400 penalty for the 20 May 2010 to the  
30 20 September period should be dismissed.

17. However, on receipt of the first penalty notice, the Appellant’s agent should have ensured that a valid return was made and should have been aware that merely submitting print outs of P35 returns was not sufficient. The Appellant has not provided any specific reasons why he, or his agent, believed that sending print outs of  
35 PAYE information was sufficient for these purposes.

18. As an experienced on line filer the Appellant’s agent should have been aware of his obligations and ignorance of the law is not a reasonable excuse in cases such as this. By this time the Appellant’s agent was already aware that penalties were being levied, but nevertheless did not take care to ensure that the submission of the  
40 information to HMRC was in the correct format. This Tribunal considers that this

falls below the standard which could be expected of a reasonable business person, particularly one who knows that he already has penalties pending.

19. The only explanation which the Appellant's agent has offered for failing to submit a proper return until May 2011 is that he was waiting for the outcome of his appeal application. This appeal application was not submitted until March 2011 and therefore cannot be relevant to the period of default in question.

20. In respect of the Taxpayer's argument that the penalties are "harsh", the Tribunal has considered recent decisions in this area, including *Energys Holding Limited* [2010 SFTD 387] but does not consider, given the lateness of the returns in this instance that the penalties are "plainly unfair".

21. The fact that the relevant tax had already been paid does not alter this view. The Tribunal considers that HMRC has a discrete obligation to collect information about taxpayers on whose behalf tax has been paid as well as to collect the tax due and that the penalties cannot be treated as "unfair" just because they relate only to an information return rather than an actual tax payment.

22. Therefore the Tribunal does not consider that a "reasonable excuse" exists for the period from 20 September 2010 to 19 January 2011 and determines that the £400 penalty for these months should be upheld.

23. 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.

**Rachel Short**

**TRIBUNAL JUDGE**  
**RELEASE DATE: 18/11/2011**