



TC01586

Appeal number: TC/2011/04210

Penalty – Late submission of Employers’ Annual Return (P35) – Whether P35s filed without unreasonable delay after reasonable excuse ceased – No – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

Mr MASSEY

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 30 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 31 May 2011, HMRC’s Statement of Case submitted on 18 July 2011 and the Appellant’s Reply dated 9 August 2011.

DECISION

1. Mr Massey appeals against penalties totalling of £5,200 imposed under s 98A of the Taxes Management Act 1970 (“TMA”) for the late filing of an employers’ return (a “P35) for the following years:

- (1) 2005-06 (for which there is a penalty of £1,200);
- (2) 2006-07 (penalty of £1,200);
- (3) 2007-08 (penalty of £1,200);
- (4) 2008-09 (penalty of £1,200); and
- (5) 2009-10 (penalty of £400).

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 10 October 2011. On 24 October 2011, following receipt of the Decision Notice, Mr Massey wrote to the Tribunal requesting these full written findings of fact and reasons for the decision.

3. Although Mr Massey has a single employee, his gardener, as an employer he 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” containing the following information:

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

4. 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:

- (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...

(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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5. In this case Mr Massey was issued with blank P35 forms for 2005-06 to 2008-09 and a reminder to file the 2009-10 online in January of each year.

6. To comply with the legislation he was therefore required to file the P35 for 2005-06 by 19 May 2006, the 2006-07 P35 by 19 May 2007, the 2007-08 P35 by 19 May 2008, the 2008-09 P35 by 19 May 2009 and the P35 for 2009-10 by 19 May 2010.

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7. However, the P35s for each of these years were filed on 13 October 2010 leading to the following penalty notices being issued by HMRC:

2005-06

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(1) 12 March 2007 – penalty of £900 for the period 20 May 2006 – 19 February 2007; and

(2) 21 May 2007 – penalty of £300 for the period 21 February – 19 May 2007.

2006-07

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(1) 24 September 2007 – penalty of £400 for the period 20 May – 19 September 2007.

(2) 28 January 2008 – penalty of £400 for the period 20 September 2007 – 19 January 2008; and

(3) 26 May 2008 – penalty of £400 for the period 20 January – 19 May 2008.

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2007-08

(1) 29 September 2008 – penalty of £400 for the period 20 May – 19 September 2008;

(2) 26 January 2009 – penalty of £400 for the period 20 September 2008 – 19 January 2009; and

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(3) 25 May 2009 – penalty of £400 for the period 20 January – 19 May 2009.

2008-09

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(1) 28 September 2009 – penalty of £400 for the period 20 May – 19 September 2009;

(2) 25 January 2009 – penalty of £400 for the period 20 September 2009 – 19 January 2010; and

(3) 24 May 2010 – penalty of £400 for the period 20 January – 19 May 2010.

2009-10

27 September 2010 – penalty of £400 for the period 20 May – 19 September 2010.

5 8. Section 118(2) TMA, so far as it applies 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*”.

10 9. 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]).

15 10. Therefore, if Mr Massey has a reasonable excuse for failing to file the P35s by the due date, and if the P35s were filed without unreasonable delay after the reasonable excuse ceased, he will be deemed to have filed the P35s on time and, as such, will not be liable to the penalties.

20 11. Mr Massey explains in his Notice of Appeal that when he received a penalty notice in 2006 he telephoned HMRC to be told that it had been issued in error as a result of a “computer malfunction”. On receiving a similar penalty notice in 2007 he again contacted HMRC by telephone and was told that they “would look into it”. When he did not hear further from HMRC Mr Massey assumed that this penalty notice had also been an error. He made the same assumption in respect of the all subsequent penalty notices he received.

12. On 6 August 2010 HMRC wrote to Mr Massey to explain the position with regard to the penalty notices. In his Reply to HMRC Statement of Case Mr Massey writes:

25 “If HMRC had wished me to understand the original advice given to me in 2006 was erroneous why was no attempt made to contact me and follow up on these penalty notices before August 2010”

Once he had understood the situation Mr Massey filed the P35s on 13 October 2010.

30 13. In view of the delay between receipt of the letter from HMRC, which clarified the position regarding the penalties for the late submission of the P35s, and filing of the P35s by Mr Massey it is not necessary for me to consider whether the assumptions he made in relation to the penalty notices amount to a reasonable excuse for the late submission of the P35s.

35 14. Even if I were to find that Mr Massey’s assumption that the penalty notices had been issued in error by HMRC did amount to a reasonable excuse, I find that such a reasonable excuse would only have continued for until receipt of the explanatory letter in August or shortly thereafter. In the absence of evidence of a continuing reasonable excuse up until 13 October 2010, the date when the P35s were filed the P35s cannot have been filed without unreasonable delay after the reasonable excuse
40 had ceased.

15. In the circumstances I am compelled to dismiss the appeal and confirm the penalties.

16. 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.



JOHN BROOKS

TRIBUNAL JUDGE

RELEASE DATE: 21 NOVEMBER 2011