



TC01613

Appeal number:TC/2011/03819

S98((2)(a) Taxes Management Act 1970:penalty for failure to file P35 (end of year return) on time; disputed on-line filing; “reasonable excuse” for failure.

FIRST-TIER TRIBUNAL

TAX

URBAN ILLUSTRATE LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: CHRISTOPHER HACKING (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 12 May 2011, HMRC’s Statement of Case submitted on 20 June 2011 and the Appellant’s Reply dated 4 July 2011

DECISION

The Appeal

1. This was an appeal against the imposition of a penalty of £400 under Section 5
98(2)(a) Taxes Management Act 1970 for the late filing of the Appellant company's
P35 (employers end of year return) for the year 2009/10. The appeal was heard as a
"paper" appeal which means that the Tribunal did not have the opportunity of hearing
argument from the parties other than that which appears in the appeal papers nor of
assessing the evidence by enquiry of those concerned with the appeal. This is a pity as
10 the testing of evidence at an oral hearing frequently allows issues which are not clear
to the Tribunal to be clarified. In this case the Appellant's agent chose not to elect for
an oral hearing stating in the Notice of Appeal that the costs of attendance given the
"long distance" involved "will outweigh the fine". The agent's offices are in Newport,
South Wales, Cardiff having been stated to be the preferred hearing centre. The
15 distance between the two does not seem to the Tribunal to be excessive. Nevertheless
the appeal has proceeded as a paper hearing.

2. The Appellant's P35 was due to have been filed by 19 May 2010. The Appellant
says that the filing was effected on-line on 15 April 2010. The Respondents say that
there is no record of the filing having been effected and that it was not until 11
20 November 2010 that the P35 was actually filed (again on-line). The November filing
was undertaken consequent upon the imposition of the penalty under appeal

3. The filing of the Appellant's return had been undertaken in previous years and in
the year in question by its accountants, Becketts Chartered Accountants of Newport,
South Wales as agent for the Appellant.

25 *The issues*

4. The issues for determination by the Tribunal were twofold. The first issue was
whether the Appellant's agent had in fact filed the return on-line on 15 April 2010 as
it asserts. The second issue, dependant on the outcome of the first, was whether in the
event that the filing had not been effected, as was believed by the Appellant's agent to
30 have been the case, there was a "reasonable excuse" for the failure to file by the due
date.

The facts and the competing arguments

5. The Appellant by its agent states that the P35 was filed on-line on 15 April 2010.
On 16 November 2010 the agent wrote to the Respondents stating that they enclosed
35 "*copies of the original P35 and P14's which were filed as indicated on the forms*".
The appeal bundle contains the copies (marked as Folio 3). The run date of the
document marked "P14 / P35 HMRC INTERNET FILING SUMMARY" is shown as
1 April 2010 and as having been printed at 14:38 that day. The copy bears the
signature "P Taylor" which the Tribunal takes to be that of Mr Peter Capnos-Taylor a
40 director of the company. The P11 tax deduction sheets appear to have been produced
on the previous day, 31 March 2010 at 14:02. None of this evidence appears to have

been in dispute and the Tribunal finds as a fact that these documents were prepared in a timely way clearly in anticipation of a filing before the due date, 19 May 2010.

6. There was before the Tribunal no evidence as to the actual on-line filing beyond the Appellant's agent's statement in its Notice of Appeal that it effected this on 15 April (2010). In a letter dated 11 May 2011 addressed to the Respondents, Becketts stated as follows

10 *"The fact that HM Revenue and Customs have no record of the return has never been disputed, the argument is simply that the return was filed by this office on 15th April. We assumed that HMRC had received the return and this was why no further attempt was made to file prior to notification from you that you had not received it. In light of this we believe this was beyond the employers control as he had acted reasonably throughout and complied fully with HMRC requirements"*

7. The Respondents case is simply that it has no record of an on-line filing having been submitted by the Appellant's agent as claimed. It so states after having made internal enquiries as to whether any evidence of the asserted filing exists. In this respect the Tribunal noted the exchange of e-mails on the Revenue's intranet between Catriona McCloskey and James Matthews dated 16 and 17 June 2011 which appears to suggest that other filings by the same agent were all safely received but that the filing for the Appellant was not.

20 8. The Tribunal is somewhat surprised that there is no detail at all as to the actual filing by Becketts. The person responsible for the filing is not identified nor is there any indication of when on the day in question the filing was made. More significant however is the fact that in the above letter to the Revenue Becketts state that they *"assumed that HMRC had received the return..."* If the return had in fact been correctly filed and Becketts had received an acknowledgment of a successful filing as they now assert there would be no need to refer to an assumption of receipt.

25 9. Becketts state in their letter to the Revenue of 16 November 2010 that the acknowledgment cannot be produced because *"Unfortunately due to a change in computer systems we are unable to retrieve the Inland Revenue acknowledgment....."*

30 *The Tribunals findings*

10. The Tribunal finds that Becketts had indeed prepared the necessary information required for completion of the Appellant company's end of year returns and having had this approved by their client as witnessed by Mr Taylor's signature on the printed copies. It finds however that there was a failure in the electronic filing of the returns so that there was no acknowledgment as suggested by the Appellant's agent. The Tribunal does not accept as credible the suggestion advanced by Becketts that the adoption of a change in a computer system would account for the loss of critical evidence as to the due filing of on-line returns. This view is supported by the agent's reference to an "assumption" of due filing as opposed to evidence of the same having been secured (see paragraph 8 above).

11. In the finding of the Tribunal the return was not in fact filed until after the problem had been identified by the Revenue's imposition of the penalty under appeal. As experienced accountants Becketts will have been aware of the essential need to retain evidence of filing on-line either in the form of the software acknowledgment issued by the Revenue or by receipt of an e-mail communication where an e-mail address has been supplied or, preferably, by both means. No such evidence has been provided nor has any reasonable explanation of its lack been forthcoming.

12. There remains the question whether in light of the facts as known and as found by the Tribunal it is open to the Appellant to contend that there was a "reasonable excuse" for the delay in the filing of its 2009/10 end of year returns. The Appellant's agents seek to rely on the principle that penalties should not be levied if the tax payer has acted reasonably. In the matter of the filing of its returns the Appellant has delegated this task to its accountants and is bound, according to the general principles of agency, by the acts and omissions of its agent. The Tribunal finds that the failure to effect a successful on-line filing of the Appellant's returns was due to one or more mistakes having been made by the Appellant's agent, Becketts. Whether they had simply omitted to effect the filing at all or had submitted an incomplete filing cannot now be determined. What is clear is that there is no satisfactory evidence of a successful filing having been effected until 11 November 2010 and that no excuse, reasonable or otherwise, has been advanced as to the delay.

13. The penalty is confirmed and the appeal dismissed.

14. 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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CHRISTOPHER HACKING

TRIBUNAL JUDGE

RELEASE DATE: 01/12/2011

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