



**TC01618**

**Appeal number: TC/2011/04628**

*Penalty for late filing of P35 – taxpayer’s genuine belief that it had been correctly filed – whether reasonable excuse - yes*

**WAYNE SEDDON AND STEVE McMINN**  
**t/a THE BRIDGE HOUSE BAR AND DINING ROOM** **Appellants**

**- and -**

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

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**

**The Tribunal determined the appeal on 7 November 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 11 May 2011 and HMRC’s Statement of Case submitted on 19 September 2011.**

## DECISION

1. This is the appeal by Wayne Seddon and Steve McMinn, trading as The Bridge House Bar and Dining Room (“the partnership”), against the penalties imposed for late filing of the 2009-10 end of year return of payments under PAYE (“P35”).
2. The Tribunal accepted the appeal and discharged the penalties.

### **The penalties under appeal**

3. There is no dispute that a penalty Notice for £400 was sent out in September 2010. This related to the period from 20 May 2010 to 19 September 2010.
4. There is a lack of clarity in the submissions to the Tribunal as to whether there is also an appeal against a further £400 of penalties relating to the period from 20 September 2010 to 21 December 2010.
5. HMRC say that these further penalties of £400 “have not yet been charged.” This implies that no penalty Notice has been issued. If so, there can be no appeal against the second £400.
6. However, the partnership have appealed against penalties of £800. If no penalty Notice was issued, it is unclear how the partnership knew about the further penalty.
7. As the partnership have appealed against penalties totalling £800, and as HMRC have said that penalties of £800 have accrued, I have treated this as an appeal against both the original £400 and the further £400. The underlying facts relating to both penalties are the same.

### **The law**

8. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires that P35s are filed on or before 19 May following the end of a tax year.
9. Taxes Management Act 1970 (“TMA”) s 98A sets out the liability to fixed penalties for non-compliance.
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), which, so far as is material to this appeal, provides:
  - “...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.”

12. 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 5 78 (TC) at [14].

### **The evidence**

13. The Tribunal was provided with the correspondence between the parties. In addition, HMRC supplied:

- 10 (1) A copy of the telephone conversations between HMRC and Mr Seddon from 12 November 2010 to 21 December 2010.
- (2) An exchange of emails between Ms Stewart of HMRC and Mr James Matthews, of HMRC’s Online Services Appeals Information department.
- (3) A document headed “Summary Search Results” which gives the partnership’s P35 filing history from 2006 to 2011.

### 15 **The facts**

14. On the basis of the evidence provided, I find the following facts.

15. HMRC’s “summary search results” show that the partnership filed its P35 returns online and in good time in each of the years from 2005-06 (the first year on the “search results” document) to 2008-09 inclusive.

20 16. On 14 April 2010 the partnership logged onto the HMRC system. Mr Seddon’s submissions and those of HMRC as to whether the P35 was filed on that date are given below.

25 17. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the P35. It charged the partnership £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The penalty was therefore £400.

18. Mr Seddon then had the following exchanges with HMRC:

- 30 (1) On 19 October he wrote to HMRC saying “we are surprised to receive [the penalty] as we have a copy on file of the above-mentioned P35 being filed by ourselves. We ask that you check your records again.”
- (2) Prior to 10.29am on 12 November, there was some contact between HMRC and the taxpayer. For reasons which have not been explained, this line in HMRC’s telephone record has been blacked out<sup>1</sup>.

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<sup>1</sup> The Tribunal notes, and is concerned by, HMRC’s unexplained redaction of part of its call record relating to the issue under appeal.

(3) On 12 November at 10.29 HMRC called Mr Seddon. The HMRC phone records say that:

5 “Mr Seddon adv that P35 09/10 was sub elec on 14-4-10 by ACC & he was there when it was submitted. States ACC has sent a lett to TD to appeal against this & penalties that have been received. WLA<sup>2</sup>”

(4) At 14.47 on the same day, the phone records state that the HMRC Officer:

10 “called Ptnr and adv him to send in copy of P35 so that this can be processed. Ptr adv that his ACC conf that he has confirmation slip with code on it stating that the elect P35 had been successful. Seddon conf that he will sub copy of the orig rtn to proc office. Not WLA as return already submitted on time.”

(5) The next phone call recorded by HMRC is 21 December 2010, which says:

15 “tele call from tp Wayne Seddon (partner) trying to submit P35 for 09/10 but experiencing problems. Online service helpdesk number given. Not WLA as call discontinued prior to WLA.”

19. The partnership filed the return online on 21 December 2010.

20. Following HMRC’s refusal of his appeal against the penalty, on 14 February 2011 Mr Seddon asked for a review of the refusal decision. His letter said:

20 “we original filed and received acknowledgment of such, however several months later you issued us with a penalty demand for late filing. We then had protracted conversations with several of HMR&C departments before you requested that we file such again...we again await your cancellation of the fines raised.”

25 21. On 18 April 2011, HMRC provided Mr Seddon with their review conclusions. They say that they accept that the partnership logged in on 14 April 2011, but that it:

“submitted Works Number Updates but did not submit a P35 return. Although you may have attempted to submit a return, you did not continue to the successful submission stage.”

30 22. HMRC derived the information about the Works Number updates from Mr Matthews’ email of 18 January 2011. Mr Matthews says in that email that he has “no idea how they could possibly have confused these [works numbers] with the EoY return, but unfortunately this is what seems to have happened.”

35 23. On 11 May 2011 the partnership appealed to this Tribunal. In their grounds of appeal, they say:

“We submitted the 2010 P35 online in line with previous years on the 14 April 2010. This was resubmitted on 21 December 2010 after eventual notification from HMRC that the P35 was not received. There is no reason for us not to file the P35 as there is no financial gain available to us. We therefore

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<sup>2</sup> The meaning of this abbreviation was not explained to the Tribunal.

appeal against the fines as HMR&C should have notified us earlier if they had not receive the P35.

In conclusion:

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- A. We submitted the P35 and it was incorrect and as such this would not be accepted by HMR&C.
- B. Our attempt to file a P35 was rejected but the notification of such was not received until 21 December 2010, thus incurring a larger fine.
- C. Why notification was not received from HMR&C on or thereabouts of the final filing date of 19 May 2010.
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- Because we received no notification from HMR&C in a reasonable period of time we could not correct an error we were unaware of.”

24. The further delay, from 20 September 2010 to the filing date, incurred an additional penalty of £400.

### **The parties' submissions**

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25. Mr Seddon's submissions are set out in the correspondence quoted above.
26. HMRC's submissions as to the reason why the return was not logged are also set out above.

27. In their Statement of Case, HMRC make further submissions:

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- (1) They seek to rely on Mr Seddon's statement, in his Notice of Appeal, that the 14 April filing was "incorrect". They say:

“As they state 'it was incorrect' HMRC contend that they should have taken action to rectify the errors and submit the return.”

- (2) HMRC refer to the guidance on the website which includes a page headed "Acceptance and Rejection messages when you file online". This states that:

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“After you file your Employer Annual Return online, you'll get an acceptance or rejection message through the software or service you use. If you've provided HMRC with an email address, you'll also get an email message. These messages are usually issued within a minute of filing, but it can take longer if your return covers a large number of employees.

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If your return is successful, you'll get the following messages:

- Software - '9004: the EOY Return has been processed and passed full validation'
  - Email - 'The submission for [your PAYE reference] was successfully received on [date]. If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed'
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If your return is rejected, you'll get the following message instead:

- Software - your message will highlight the area(s) of your return that have led to its rejection.
- Email - 'The submission for reference [your PAYE reference] was received on [date]. Unfortunately it could not be accepted as it failed data checks. To correct this, please use the help provided within the software you used to complete your form and send it again'

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(3) HMRC submit that “the fact that no message was received should have drawn the appellant to the fact that a successful submission may not have taken place.”

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(4) Finally, HMRC do not consider that the partnership had a reasonable excuse, which they consider:

“is normally an unexpected or unusual event, either unforeseeable or beyond a person’s control, which prevents him complying with an obligation when he otherwise could have done...it is necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard to their responsibilities under the taxes acts.”

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### **Decision**

28. I accept HMRC’s evidence that the return was not received by the due date, because of some error in the submission process. It was thus late.

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#### *Genuine belief*

29. However, it is clear from Mr Seddon’s evidence that he genuinely believed he had correctly filed the return on 14 April 2010. He printed out and kept a copy for his records. In his first letter, he describes himself as “surprised” to receive the penalty. His later conversations with HMRC reiterate this belief.

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30. By the time he sent the partnership’s Notice of Appeal to this Tribunal, he has been told by HMRC that they have not received the return, and has also been informed that, by some error, works numbers were updated on 14 April 2010. He says in his Notice of Appeal that the partnership “submitted the P35 and it was incorrect.”

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31. HMRC seek to rely on this statement, saying that “as they state ‘it was incorrect’ [the partnership] should have taken action to rectify the errors.”

32. In my judgment, this submission is wholly unjustified. Mr Seddon only became aware that the filing was “incorrect” after he received the information from HMRC in their letter dated 18 April 2011, some eleven months after the attempted filing of the return. Mr Seddon’s statement in his Notice of Appeal is made with the benefit of this later knowledge. It would have been impossible for him to use this knowledge to “rectify the errors” as HMRC suggest should have occurred.

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*The online guidance*

33. HMRC also say that the partnership should have been alerted by the absence of the electronic messages to the possibility that the return had not been successfully submitted.

5 34. However, these messages are binary – they say “if your return is successful you’ll get the following message...If your return is rejected you’ll get the following message instead.”

35. There is no mention of a third possibility – that if no message at all is received, the person filing the return should contact HMRC to see if there is a problem.

10 36. Furthermore, HMRC make no submissions to the Tribunal about the location of this guidance on their website; whether it forms part of the main input screens and whether there is a clear warning about the significance of the absence of these messages.

15 37. In this case the partnership did not receive an acceptance message, but neither did they receive a rejection message: they failed to realise the significance of not receiving either message.

*Reasonable excuse*

20 38. The legislation set out at the beginning of this Decision (TMA s 118(2)) makes it clear that if the partnership has a reasonable excuse for late filing, then there is no default either for the period covered by that excuse, or for the period after that, as long as there was no “unreasonable delay” in remedying the position once the excuse had ceased.

39. HMRC say that the partnership does not have a reasonable excuse, based on their understanding of that term. They say, rightly in my view, that:

25 “it is necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard to their responsibilities under the taxes acts.”

30 40. This echoes the formulation in *B&J Shopfitting Services*, set out earlier in this Decision, that an excuse would be reasonable where the taxpayer “acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act.”

35 41. In *RMD Response International v R&C Commrs* [2011] UK FTT(472) at [27], where the Tribunal found that the taxpayer’s “honest and genuine belief” was a reasonable excuse, “at least until such time as it was put on notice that the honest and genuine belief was incorrect.” I agree, with the further proviso that the “honest and genuine belief” should be a reasonable belief.

42. I now consider the partnership’s actions against the helpful guidance provided by this Tribunal in the cases listed above, as to the meaning of the term “reasonable excuse.”

43. The partnership logged onto the system in good time, and Mr Seddon printed out a copy of the completed P35. He genuinely believed the partnership had filed the return.

5 44. It is true that he didn't notice the absence of an email or online message. But there is no evidence that the importance of this absence was drawn to the attention of those filing online. This omission does not, in my judgment, prevent Mr Seddon's belief from being reasonable.

10 45. On the evidence, Mr Seddon's behaviour was that of someone who seriously intended to honour his tax liabilities, and, in my judgment, the partnership had a reasonable excuse for the late filing of the P35.

46. This excuse subsisted for the period from the date in late May when the partnership genuinely believed it had filed the return, through the period when Mr Seddon was seeking to persuade HMRC that it was HMRC's mistake, until he was clearly told that this was not the case, on or around 21 December 2010.

15 47. I find that once the partnership realised the return had not been filed, the situation was remedied "without unreasonable delay". The period from 27 September to the filing date is therefore also covered by the "reasonable excuse" defence.

48. I thus allow the appeal and discharge the penalties.

20 49. 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)"  
25 which accompanies and forms part of this decision notice.

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**Anne Redston**

**TRIBUNAL PRESIDING MEMBER  
RELEASE DATE: 2 DECEMBER 2011**

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