



TC01676

Appeal number: TC/2011/05206

P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

FAIRMILE CONSULTING LTD

Appellant

- and -

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

Respondents

TRIBUNAL: J. BLEWITT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 16 November 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 6 July 2011, HMRC's Statement of Case submitted on 30 September 2011 and the Appellant's Reply dated 3 November 2011.

DECISION

1. This is an appeal against a penalty totalling £500 imposed pursuant to Section 98
(2) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the
5 Appellant’s P35 employer’s annual return (P35) for the tax year 2009/2010.

The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003
imposes on an employer the obligation to deliver to HMRC a P35 return before the
20th day of May following the end of a tax year. Paragraph (10) of that regulation
10 provides that s.98A of the Taxes Management Act 1970 (the “TMA”) applies to
paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

15 *(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, ...*

20 *(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, ...*

4. Section 100(1) of the TMA provides for HMRC to make a determination
25 imposing a penalty under s.98A of the TMA in such amount as it considers correct or
appropriate. Section 100B of the TMA provides for an appeal against the
determination of that penalty. Section 100B(2)(a) provides that in the case of a
penalty which is required to be of a particular amount, the Tribunal may:

30 *(i) if it appears ... that no penalty has been incurred, set the
determination aside,*

*(ii) if the amount determined appears ... to be correct, confirm the
determination, or*

*(iii) if the amount determined appears ... to be incorrect, increase or
reduce it to the correct amount.*

- 35 5. Section 118(2) of the TMA provides for reasonable excuse:

5 *For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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.*

Facts

10 6. The filing date for the end of year return was 19 May 2010. The return was filed online on 21 September 2010. On 15 February 2011 a final penalty notice of £500 was issued, calculated for the 5 months from 20 May 2010 to 21 September 2010.

Submissions

15 7. The case for the Appellant as set out in the Notice of Appeal dated 6 July 2011 is as follows: “We consider the penalty amount to be disproportionate...Orange and Gold Accountancy fled the P35 online on 15 May 2010 along with P35s for nine other clients. There were no issues with the other nine and it only became apparent that the P35 for Fairmile Consulting wasn’t submitted successfully when the penalty notice was issued in September, by which time the penalty was £500. The P35 was filed
20 again as soon as we were made aware that the original submission was unsuccessful. No tax has been outstanding at any point. Considering the fact that an attempt was made to file the P35 on time, and we had no reason to believe it wasn’t successful, a £500 penalty is disproportionate.”

25 8. By letter dated 3 November 2011, in response to HMRC’s Statement of Case, it was submitted on behalf of the Appellant that the delay of 4 months before sending out penalty notices is not “regular” and could be seen as an attempt to maximise penalty contributions. It is unreasonable that HMRC wait until September to process penalties when it is not overly sophisticated for an IT system to generate a list of unfiled returns and issue reminders. There was no intention of filing the P35 late and
30 as all tax had been paid and the Appellant believed the return had been submitted, a settlement of £100 should be accepted by HMRC.

35 9. HMRC’s Statement of Case can be summarised as follows. There had been no record of any problems with HMRC’s system at the time of the attempted submission and therefore the suggestion that the system had crashed, as set out in the Appellant’s request for review, was not accepted. If the submission had failed an error message would have been displayed, which has not been evidence by the Appellant. HMRC are unaware of any problems arising out of the other nine P35s submitted by the Appellant’s agent. The HMRC Online Service confirms that the Appellant’s agent submitted for a number of clients on 15 May but there was no submission on behalf of
40 the Appellant until 21 September 2010. The Appellant’s agent should be experienced with the online filing system and acceptance/rejection messages. The penalties were correctly charged in accordance with the legislation. It is the responsibility of the

employer to ensure that their tax affairs are up to date, and reliance on an agent cannot be a reasonable excuse. The fact that the Appellant's PAYE was up to date is a separate issue.

5 **Decision**

10. The Tribunal notes that the Appellant accepts that the return was filed late and that a penalty is due.

11. The Tribunal accepts that the penalties were charged in accordance with the legislation set out above and therefore has no power to mitigate the penalties which appear to be correct. The Tribunal considered the amount of the penalties, and found as a fact that it could not be described as plainly unfair and therefore does not interfere with the penalties on grounds of proportionality.

12. The Appellant's agent was familiar with the online filing process and the Tribunal infers that it was, therefore, also familiar with the acceptance/rejection message system. There is no statutory obligation on HMRC to issue reminders and the Tribunal found as a fact that it is ultimately the responsibility of the Taxpayer to ensure that its obligations have been fulfilled. The Tribunal found as a fact that the lack of knowledge that the submission had not been successful and delay in receipt of the penalty notice do not amount to reasonable excuse.

13. The Tribunal found as a fact that the issue as to whether all tax liabilities had been paid was a separate issue and did not provide the Appellant with a reasonable excuse for the late filing of the return.

14. The burden is on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal finds that the Appellant has not discharged that burden.

15. The Tribunal confirms the penalties and dismisses the appeal.

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.

35

TRIBUNAL JUDGE
RELEASE DATE: 20 December 2011

40