



TC01677

Appeal number: TC/2011/05032

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

FIRST-TIER TRIBUNAL

TAX

THE KIDSGROVE LABOUR CLUB

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 30 June 2011 and HMRC's Statement of Case submitted on 19 August 2011.

DECISION

1. This is an appeal against a penalty totalling £1,200 imposed pursuant to Section 98 (2) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the Appellant’s P35 employer’s annual return (P35) for the tax year 2007/2008.

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 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:

(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, ...

4. Section 100(1) of the TMA provides for HMRC to make a determination 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:

(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.

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 2008. The return was filed online on 12 May 2009. The first interim penalty for £400 was issued on 29 September 2008 and the second interim penalty for £400 was issued on 26 January 2009. The final penalty for £400 was issued on 15 May 2009.

15 7. For clarity, this Tribunal is only concerned with the penalties imposed relating to the 2007/2008 return; penalties imposed in respect of 2008/2009 were discharged by HMRC following the Appellant's appeal received on 16 July 2009.

Submissions

20 8. The case for the Appellant as set out in the Notice of Appeal dated 30 June 2011 is as follows: "The penalty charged are for the tax year April 2008 which were originally appealed on 19 July 2009...Also around the similar time an appeal was submitted for the 2009 tax year...also enclosed is my correspondence dated 13 April 2011 regarding relevant 64-8's being in place and my finding that this was not showing on HMRC's systems and had to be reactivated by online services causing some correspondence to be returned with no action being taken. There seem to be a lot of conflicting issues with this matter mainly on the side of online services which I believe need investigating and the whole issue of these penalties quashed."

30 9. Correspondence from the Appellant to HMRC dated 13 April 2011 stated that at the time the returns were submitted by the Appellant's agent Mr Jeffries, he was trading as Gough and Jeffries Associates and HMRC failed to accept his correspondence dated 5 January 2011. Mr Jeffries stated that he was, at the time of writing, authorised as the Appellant's agent.

10. The letter from the Appellant's agent to HMRC dated 5 January 2011 queried why HMRC had all figures but allegedly no returns. All returns were submitted online for a number of years before and after the year relevant to this appeal.

35 11. HMRC's Statement of Case can be summarised as follows. In response to the query raised by the Appellant as to how HMRC could have details of tax and NIC due without documentation, details would have been taken from the payments made to HMRC throughout the year, prior to the receipt of the P35 on 12 May 2009. The successful receipt of online submission for reference 586/K362 relates to the submission of the 2007/2008 return on 12 May 2009 and not any alleged submission on or about 19 May 2008. The Appellant's representative has experience of filing

returns over a number of years and should be fully aware of the acceptance/rejection messages received. It is confirmed that the lack of authority to act on behalf of the Appellant would have had no impact on the agent's ability to submit the Appellant's return. The penalty charged is in accordance with legislation and mitigation is not applicable. There is no statutory timetable which HMRC must follow when issuing penalty notices nor is there any statutory obligation to issue reminders for the submission of P35s. The obligation to submit returns by the due date rests with the employer. The notifications issued should have indicated to the Appellant that the return had not been submitted.

10 **Decision**

12. The Tribunal accepted that HMRC could have had details of the Appellant's tax and NIC due without the P35 having been filed from the payments made to HMRC throughout the year.

15 13. The Tribunal found as a fact that the lack of authority to act on behalf of the Appellant would have had no impact on the agent's ability to submit the Appellant's return by the due date.

14. The Tribunal accepted that the penalties were correctly charged in accordance with the legislation set out above.

20 15. The Appellant's agent was familiar with the online filing process and the Tribunal inferred that he 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 Appellant to ensure that its obligations have been fulfilled. The Tribunal found as a fact that in the absence of any evidence to indicate that the return was successfully filed online by the due date, there is no reasonable excuse.

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

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

30 18. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE
RELEASE DATE: 20 December 2011

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