



TC01690

Appeal number: TC/2011/1591

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

FIRST-TIER TRIBUNAL

TAX

MILES GOODWORTH

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 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 24 February 2011, HMRC's Statement of Case submitted on 1 April 2011 and the Appellant's Reply dated 12 April 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 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 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 2010. The return was filed online on 13 October 2010. A first penalty notification was issued on 27 September 2010 in the sum of £400 covering the period 20 May 2010 to 19 September 2010. A final penalty notice in the sum of £100 was issued on 1 November 2010 covering the period 20 September 2010 to 13 October 2010.

15 **Submissions**

7. The case for the Appellant as set out in the Notice of Appeal dated 24 February 2011 can be summarised as follows:

- 20 (a) The Appellant wrote to HMRC on 29 December 2009 with an outstanding amount of tax/NIC due following the Appellant's only employee ceasing employment and a request was made that the account be closed;
- (b) No communication was received from HMRC until the first penalty notice on 27 September 2010. No reminder or notification of an accruing penalty had been sent;
- 25 (c) Immediate steps were taken to dispute the penalty and submit the P35, during which time the penalty increased to £500;
- (d) No fair account was taken by HMRC of the request to close the account or that reminders had not been sent. No fair account was taken of the lack of notification given to the Appellant about the accruing penalty.
- 30 (e) In the absence of any correspondence from HMRC it was reasonable expected that the matter had been closed. Had the Appellant been notified earlier, he would have dealt with it earlier;
- (f) The Appellant is not an experienced employer; the employee was a nanny. The Appellant's actions were not unreasonable and if a penalty is due, it should not be as high as £500 bearing in mind the lack of notification.
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40 8. By letter dated 12 April 2011 the Appellant confirmed that HMRC's Statement of Case is not disputed. The Appellant highlighted that the legislation does not provide detail as to what constitutes reasonable excuse, but does provide that where a person has a reasonable excuse, he shall be deemed not to have failed to do anything required of him if he does it without reasonable delay after the excuse has ceased. It is

submitted by the Appellant that matters were expedited as soon as it became clear that there was an issue, especially given that records had to be retrieved from a third party. It is submitted that a reasonable excuse exists because the Appellant and his wife are not experienced employers and were genuinely unaware that a P35 had to be submitted when the final amount of tax had been paid and there were no other employees. No notification was received for a period of 4 months. After the reasonable excuse ended, the Appellant promptly corrected the failure. £500 is a significant sum for a hard working family to pay for a simple oversight. An analogy is drawn with payment of bills, where reminders are provided as consideration is allowed for busy families juggling many responsibilities.

9. HMRC's Statement of Case can be summarised as follows: HMRC's records confirm that a P45 was submitted to HMRC by the Appellant on 29 September 2009. Regulation 73 (1) of the Income Tax (Pay As You Earn) Regulations 2003 requires an employer to complete a P35 and P14 if they have had to maintain a form P11 for any employee during the year. This applies even where deductions of PAYE/NICs were not made and where an employee ceased employment during the year. It is submitted that penalty notification are not reminders and that there is no obligation on HMRC to issue reminders; the responsibility rests with the employer. It is submitted that the Appellant has no reasonable excuse.

20 **Decision**

10. The Tribunal notes that the Appellant accepts that the return was filed late.

11. The Tribunal is sympathetic to the fact that HMRC's policy is not to issue first penalty notice until after a number of penalties have accrued, however the sole issue for this Tribunal to determine is whether or not there was a reasonable excuse for the late submission of the return. The Tribunal found as a fact 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 accepts that the penalty of £500 is a significant sum, but on the facts of this case the Tribunal did not find that it was plainly unfair and therefore does not interfere with it on grounds of proportionality.

12. 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 notifications and inexperience on the part of the Appellant did not amount to a reasonable excuse. The legislation gives the Tribunal no power to mitigate the prescribed penalty as a result of the delay in its issue.

13. Having found as a fact that the Appellant's oversight arising from the lack of notification did not amount to a reasonable excuse, the Tribunal did not accept the Appellant's submission that after the reasonable excuse ended, the Appellant promptly corrected the failure.

14. The Tribunal accepted that the Appellant wrote to HMRC on 29 December 2009 with an outstanding amount of tax/NIC due following the Appellant's only employee ceasing employment and a request was made that the account be closed. The Tribunal found as a fact that this was a separate issue and did not negate the Appellant's responsibility to submit its End of Year return by the due date. The penalty relates to the late filing of the return and the Tribunal found as a fact that payment of monies due or closing the account did not provide the Appellant with a reasonable excuse for the late submission of the P35.

15. 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.

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

17. 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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TRIBUNAL JUDGE
RELEASE DATE: 20 December 2011

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