



TC01692

Appeal number: TC/2011/05654

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

FIRST-TIER TRIBUNAL

TAX

THURMASTON TOOL & DIE RETIREMENT BENEFIT Appellant

- and -

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

TRIBUNAL: J. BLEWITT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 17 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 12 July 2011, HMRC's Statement of Case submitted on 20 September 2011 and the Appellant's Reply, undated.

DECISION

1. This is an appeal against a penalty totalling £800 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. On 27 September 2010 a first penalty notice of £400 was issued, calculated for the months from 20 May 2010 to 19 September 2010. A second interim penalty of £400 was issued on 24 January 2011 for the period 20 September 2010 to 19 January 2011. The P35 remained outstanding at the date of HMRC's review, however penalties accruing
15 between 20 January 2011 and 19 May 2011 have not yet been issued.

Submissions

7. The Appellant's agent appealed to HMRC by letter dated 8 February 2011. The letter stated that the Appellant did not understand why a penalty had been issued and believed that if documents were required by HMRC he would be notified by post. All
20 tax had been paid and the ordeal has been very stressful as the Appellant does not have the capacity to understand the obligations. The agents had been authorised to assist and awaited the code to file the return online.

8. HMRC responded on 11 March 2011 requesting that a 64-8 form be completed to give the agent authority required to deal with the Appellant's tax affairs.

25 9. On 19 May 2011 HMRC rejected the Appellant's appeal on the basis that no reasonable excuse was given.

10. A review was requested by Mr Gaffney on 13 June 2011 in which it was stated that the agent's authorisation code had not been received, despite attempts over 12 months to get the information. 34 calls had been logged and following a visit to a
30 local office, the Appellant was advised to access information online. The Appellant's accountant has been supportive but is at a loss in this case due to HMRC's system failure. The stress has caused the Appellant to close the self-administered pension scheme. A response is awaited to the request for an activation code.

11. By letter dated 30 June 2011 HMRC upheld their decision. The letter informed
35 the Appellant that there is no requirement for a client to authorise an agent online in order for an agent to file a return on their behalf. All software can send PAYE forms without a client being authorised. Online services confirmed that authorisation codes were sent to the Appellant following requests on 9 February and 15 March. It is irrelevant that all monies due have been paid. The 2009/2010 P35 return has still not
40 been filed and penalties continue to accrue.

12. The Appellant appealed to the Tribunals Service by Notice of Appeal dated 12 July 2011. The grounds of appeal relied upon are as follows:

5 (a) When the pension was taken out it was possible to tender returns by post. The fact that this is no longer the case is the prime flaw in the whole process;

(b) Over the past 8 months unsuccessful attempts have been made to make contact with HMRC. After endless telephone calls and expense, the Appellant made an appointment with the local tax office. No one could assist and the advice was to call again or look online, despite limited computer skills. This added to the stress and confusion;

10 (c) The pension provides a small “top up” income. The Appellant Company’s factory was sold as a result and the pension closed. An annuity was purchased which provides a lower income;

15 (d) All possible steps have been taken to find the relevant information. As a last resort the Appellant telephoned the review officer and was re-directed to another number. The whole frustrating process started again.

13. An undated letter from the Appellant to the Tribunals Service in response to HMRC’s Statement of Case reiterated the grounds relied on as stated in the Notice of Appeal and added that all taxes have been paid.

20 14. HMRC’s Statement of Case can be summarised as follows. The Government announced in 2002 that small employers would be required to file online by 2010. Communications were sent to customers by HMRC to inform them of the changes. The online process is straightforward and designed for small employers and assistance is widely available. HMRC have no record of the Appellant or agent sought assistance
25 by telephone from the Online Services Helpdesk which exists to assist employers in the registration process and submission of the return. No comment can be made on the attempts to contact HMRC as it is unknown the dates, times and telephone numbers used. The Appellant did not attempt registration and there was no requirement for the agent to be registered for the Online Agent Authorisation service to file the return
30 online. Online Agent Authorisation codes were issued on 9 February 2011 and 15 March 2011 but both would have been returned undelivered as the Appellant had left its premises and the address was not updated until 4 May 2011. It is the Appellant’s responsibility to ensure that HMRC are notified of the correct address. The Appellant has not notified HMRC of the date when the pension scheme ceased. Notification to
35 complete a P35 was sent to the Appellant on 17 January 2010 which contained a warning of penalties charged if the return is submitted late/not online. The penalties have been calculated in accordance with legislation. A penalty notification is not a reminder but a charge for late submission.

40 **Decision**

15. The issue for the Tribunal to determine is whether there is a reasonable excuse for the late submission of the 2009/2010 P35 lasting the period of the default. The

Tribunal is sympathetic to the difficulties experienced by the Appellant however case law has made clear that in assessing the issue of reasonable excuse, the responsibility rests with the taxpayer to ensure that its tax obligations are met.

5 16. The Tribunal finds 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. It is noted by the Tribunal that the agent does not appear to have been instructed until after the expiry of the due date and this cannot therefore provide the Appellant with a reasonable excuse throughout the period of default with which the Tribunal is concerned, namely 20 May 2010 to 19 January 2011. The
10 Tribunal accepted HMRC's submission that the Appellant did not attempt registration and there was no requirement for the agent to be registered for the Online Agent Authorisation service to file the return online. It is accepted Online Agent Authorisation codes were issued on 9 February 2011 and 15 March 2011 but both would have been returned undelivered as the Appellant had left its premises and the
15 address was not updated until 4 May 2011. The Tribunal finds as a fact that it is the Appellant's responsibility to ensure that HMRC are notified of the correct address and therefore this cannot provide the Appellant with a reasonable excuse.

20 17. 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.

18. 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 finds as a fact that the Appellant does not have a reasonable excuse in this regard.

25 19. The Tribunal is sympathetic to the inability of the Appellant to understand and complete the online filing process, and accepts that attempts were made to contact HMRC for assistance. However, information is widely available in bulletins and the Online Services Helpdesk specifically assists employers in the registration process and submission of the return. The Appellant had a significant period of time in which
30 to seek clarification. No specific information is provided as to when the Appellant sought help and the advice that was received. In the absence of any such evidence taken together with the lack of records showing that the Appellant or his agent sought help from Online Services Helpdesk, the Tribunal finds as a fact that the Appellant's lack of knowledge cannot amount to a reasonable excuse.

35 20. 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.

40 21. The fact that the pension provided a small "top up" which was more than is currently received from the annuity is a separate issue which the Tribunal finds does not provide grounds for a reasonable excuse.

22. The Tribunal finds that the fact that when the pension was taken out it was possible to tender returns by post does not provide the Appellant with a reasonable excuse.

5 23. 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.

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

10 25. 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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