



**TC01710**

**Appeal number: TC/2011/05158**

*Section 98A (2) and (3) Taxes Management Act 1970 – Employer’s End of Year return P35 late – Appellant unable to file online – no reasonable excuse – appeal not allowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**STUART BUTLER t/a LW LEISURE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 9 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 5 July 2011 and HMRC’s Statement of Case submitted on 20 September 2011.**

## DECISION

### 5 Decision under Appeal

1. This is an appeal by Stuart Butler t/a L W Leisure against the £100 penalty imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the tax year ending 5 April 2010.

2. An employer has a statutory obligation to make End of Year returns before 20  
10 May following the end of a tax year in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulation 2001.

3. In the case of an employer failing to make an End of Year return on time s 98A  
15 (2) and (3) Taxes Management Act 1970 provides for a fixed penalty at £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees. If the failure continues beyond 12 months a penalty can be imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.

4. Regulations 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003  
20 provides that an employer must use electronic communications to deliver their 2009/10 end of year return online.

#### The background facts

5.(i) The filing date for the Appellant's 2009/10 return was the 19 May 2010. This had to be filed online.

25 5.(ii) A pre-interim final penalty notice for £100 was issued on 28 February 2011 for the period from 20 May 2010 to 7 June 2010.

5.(iii) The 2009/10 return was filed online on 8 June 2010.

#### The Appeal

6. The Appellant says that he runs a small business employing only two people. He  
30 has always submitted his P35s manually and thought that because of the size of his business he would be able to do so for 2010. He did not have a computer at the time. He says that he received his Government Gateway activation code on 24 May 2010 and then asked his son to file the return. The return was filed on 8 June 2010. The Appellant says that he cannot afford the penalty and also questions why he was not  
35 notified of the penalty until February 2011, over eight months after the event.

#### HMRC's submissions

7. When a person appeals against a penalty they are required to have a reasonable excuse. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation.

8. It is necessary to consider the actions of the Appellant from the perspective of a prudent tax-payer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation.

9. Mr Butler has been registered as an employer since 8 October 1991 and is therefore considered to be aware of and able to comply with his employer obligations. A P35 PN Employer Notification was issued to Mr Butler on 10 January 2010. The notification clearly indicated to Mr Butler that the Employer's Annual Return had to be filed online by 19 May 2010 and the methods by which that could be achieved.

10. HMRC's website provides unambiguous guidance to employers on how to file their Employer's Annual Return. It explains that the employer must register as a user of the 'PAYE Online for Employers' and must wait to receive an activation code in the post before filing online. It states that the deadline for filing the Employer's Annual Return is 19 May, so the very latest the employer should register is a week before this. The P35 PN Notice issued to Mr Butler informed him that he had to register with HMRC first and as soon as possible as the registration process may take several days to complete.

#### Conclusion

11. The Appellant's appeal does not contain anything which shows that something exceptional prevented him from filing his Employer's End of Year Return on time. The Appellant would have been aware of the necessity to file his return online and to do so by 19 May 2010. He should have taken proactive steps to ensure that he was in a position to fulfil his filing obligations. The end of year return was submitted late and as a result the penalty determination has been correctly charged and issued.

12. The appeal is accordingly dismissed.

13. 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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**MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 4 January 2012**

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