



TC01737

Appeal number: TC/2011/05109

*Section 98A (2) and (3) Taxes Management Act 1970 – late Employer’s P35
End of Year return – Employer unaware of obligation to file online – delay
in penalties imposed by HMRC – further delay by Appellant - reasonable
excuse shown for part of period of default – appeal allowed in part*

FIRST-TIER TRIBUNAL

TAX

ATLAS INDUSTRIAL SERVICES LIMITED PENSION SCHEME Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 18 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 4 July 2011, HMRC’s Statement of Case submitted on 17 August 2011 and the Appellant’s Reply dated 25 August 2011

DECISION

1. This is an appeal by Mr W McA. Robertson on behalf of the Appellant against penalties totalling £1,200 imposed under s 98A (2)(a) Taxes Management Act (TMA) 1970 for the late receipt of the Appellant's End of Year Employer's Returns.

2. An employer has a statutory obligation to deliver a Employer Annual Return before 20 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) Regulations 2001.

3. If the full Return, that is a P35 and P14, do not reach HMRC by 19 May following the end of the tax year HMRC may charge a penalty.

4. Interim penalties are charged under s 98A (2)(a) and (3) TMA 1970 where a Return remains outstanding after the due date. The penalties are fixed at £100 for each month or part of a month during which the failure continues.

5. Under s98A (2)(b) TMA 1970 if the failure continues beyond twelve months a penalty can be imposed up to the maximum of the amount outstanding at 19 April. In that respect it is a tax-geared penalty.

Factual Background

6. HMRC say that a P35PN reminder notice to complete and file a P35 Employer Annual Return was issued to the Appellant on 31 January 2010. The notice stipulated that the Return had to be filed on-line by 19 May 2010 and that a penalty would be charged if the Return was received by HMRC late and/or not filed on-line. The notice advised that in order for the Return to be filed on-line the Appellant must first register with HMRC. The notice also gave details of the methods by which a Return could be filed and explained where further information could be found on its on-line web site.

7. The Appellant had not filed its P35 End of Year Return by 20 May 2010 and on 27 September 2010 a penalty in the sum of £400 was issued for the period 20 May 2010 to 19 September 2010.

8. On 25 October 2010 the Appellant's agent appealed the penalty saying that the Appellant had not received a P35. The agent requested that a P35 be issued to him for completion. The agent was reminded that HMRC require form 64-8 signed by the Appellant authorising HMRC to liaise with its agent. A 64-8 was completed by the Appellant on 23 November 2010 and sent to HMRC but was returned twice by HMRC on 04 January 2011 and again on 25 January 2011 stating that it could not be accepted without a NINO. Mr Robertson, the beneficiary of the Appellant Pension Scheme, says that his agent's covering letter submitting form 64-8 clearly stated that the taxpayer was in fact a pension scheme and included its PAYE reference. Form 64-8 was returned to HMRC on 31 January 2011 with the appeal.

9. HMRC say that on 19 January 2011 the Appellant had telephoned HMRC's Debt Management to say that, in November 2010, he had sent a written appeal relating to the first penalty notification issued on 27 September 2010 but that he would be filing the P35 return that same day on-line.

10. On 24 January 2011 a second penalty notification was issued in the sum of £400 in respect of the period 20 September 2010 to 19 January 2011.

11. On 4 April 2011 HMRC rejected the Appellant's appeal in respect of the first and second penalty notifications and reminded the Appellant that the 2009-10 Return had to be filed on-line.

12. On 12 April 2011 the Appellant's agent requested a review of HMRC's decision and HMRC's Debt Management and Banking records show that on 13 April 2011 the Appellant contacted HMRC to say that he was late submitting the Return as he was not familiar with the on-line submission procedure. The Appellant informed HMRC that the P35 was in any event nil return, but that he would attend to submission of the Return on-line as required.

13. HMRC issued a review on 25 May 2011 but rejected the Appellant's appeal, advising that with the move to compulsory on-line filing P35s were not issued to employers but a P35PN had been issued on 31 January 2010 advising the Appellant to file on-line. HMRC say that its Employers Bulletin and Annual Pack also advised employers to file on-line.

14. On 30 May 2011 a final penalty notification was issued in the sum of £400 in respect of the period 20 January 2011 to 19 May 2011.

15. The Appellant's P35 Return was filed on-line on 13 June 2011.

Appellant's grounds of appeal

16. The Appellant is a self-administered pension scheme, the purpose of which is to provide a pension to Mr Robertson as sole beneficiary of the scheme. As such, Mr Robertson claims that he was unfamiliar with the PAYE requirements. He says that he received a letter from the pension trustees dated 29 April 2010 to advise that the pension scheme's Tax Return for the year ending 05 April 2010 had been filed. He was also aware that the PAYE liability had been settled in one lump sum on 28 October 2009 and therefore at that stage says he was under the impression that all filing and other obligations had been met.

17. The Appellant's grounds of appeal are that he had not received the P35PN reminder issued by HMRC on 31 January 2010 and therefore says he was unaware of his filing obligation. The Appellant says that, not having received the P35PN, he was unaware that a separate end of year Return for PAYE was required. He adds that the initial penalty determination issued on 27 September 2010 did not clearly state that the Return in question related to PAYE. The Appellant also says that he did not receive the Employers Bulletin which HMRC say was issued to him. He says that his agent asked HMRC to issue a P35 on 25 October 2010 but no response was received to that letter. He also says that he was not aware that he had to file on-line until 19 January 2011 when he spoke to HMRC's Debt Management and Banking Division.

18. The Appellant says that his appeal was not considered until 4 April 2011 due to delays in HMRC receiving signed form 64-8 which contributed to the delay in submitting the P35 Return and further increased the penalties imposed.

19. The Appellant also appeals on the ground that the first penalty notice was not issued until 27 September 2010 and therefore he did not become aware of his failure to file the Employers End of Year Annual Return until receipt of the penalty notice. He argues that HMRC unreasonably delayed sending out the first penalty notice until 27 September 2010, by which time penalties had been incurred at £100 for each month during which the failure had continued by which time they totalled £500. He says that HMRC should have issued the first penalty

determination soon after 19 May 2010, giving notice that he was in default and an opportunity of rectifying matters. He refers to the First-tier Tribunal case of *Dudley Electrical Contracts v HMRC [TC/2011/00510 and HMD Response International v HMRC [TC/2011/02979]* supporting the argument that HMRC should operate the penalty system fairly and not as a deterrent or as a means of raising additional revenue. The Appellant also refers to the First-tier Tribunal case of *Hok Limited v HMRC (TC/2011/01447)* in support of his contention that HMRC should exercise an element of discretion in issuing penalties and they should be proportionate and fair.

HMRC's submissions

20. HMRC contend that the P35PN was not shown on any HMRC records as having been returned undelivered and therefore it had to be assumed that the Appellant had in fact received it. HMRC further submit that articles were included in the February and April editions of the Employer Bulletin which covered on-line filing deadlines and penalties. Again, HMRC says that its records do not indicate that these were returned undelivered.

21. HMRC assert that the Appellant's agent must have been aware that it was mandatory for employers to submit 2009-10 returns on-line. The agent would have also been aware that HMRC could not liaise with him regarding an individual's tax affairs without a signed form 64-8 but in any event this would not have prevented the on-line submission of the Appellant's P35.

22. HMRC say that interim penalties are charged under s98A(2)(a) and are issued to all employers who have not filed by the due date using the following time structure :

A first interim penalty is issued if the Return has not been received 4 months after the due date

A second interim penalty is issued where the Return has not been received a further 4 months

A third interim penalty is issued where the Return is still outstanding after a further 4 months

Final penalties are charged under s98A(2)(a) TMA 1970 when the Return is received

Conclusions

23. The Appellant does not dispute that the P35 was submitted late. He asserts that he has a reasonable excuse for the late submission of the Return and that the penalties that have been imposed are excessive and unfair.

24. The law does not define reasonable excuse but it is normally regarded as an exceptional event beyond a person's control which prevented the Return from being filed by the due date. The Appellant must also show that the reasonable excuse existed throughout the entire period of default and that he acted promptly in remedying matters immediately the reasonable excuse came to an end.

25. When the penalty notice of £400 was issued on 27 September 2010 the Appellant became aware that the P35 Return had not been filed. In fact, the Appellant's agent lodged an appeal with HMRC and at that stage although he said that no paper P35 Return had been received, both he and in particular his agent should have been aware that the filing of an on-line Return was compulsory. Mr Robertson himself spoke to HMRC on 19 January 2011 when he was informed of

the need to file on-line, which according to HMRC's records he agreed to attend to that day.

5 26. HMRC should issue penalties as and when they fall due in order to ensure that the taxpayer/employer is put on notice that he is in default. However, HMRC did not send the first £400 penalty notice until 27 September 2010. There is no statutory obligation on HMRC to issue reminders, but there is plainly a common law duty on the part of HMRC not to act unconscionable. Because of a delay in the issue of the first penalty notice it is arguable that a penalty of no more than £100 should be charged on the basis that HMRC had not complied with its obligation to implement legislation relating to the issue of penalties in a timeous and fair manner.

10 27. It is understandable that HMRC require time to process Returns, electronic or otherwise, and resolve any exceptions arising in relation to Returns that have been made in order to reduce the risk of issuing penalties where Returns have been submitted on time but HMRC have not had time to fully process them.

15 28. After appealing the initial penalty of £400 in October 2010 and speaking to HMRC's Debt Management division in January 2011 (when the Appellant says he first became aware of the need to file on-line) he further delayed submission of his Employer's Return until 13 June 2011. There appear to have been a number of reasons for this but on balance it cannot be said that a reasonable excuse continued to exist throughout this further period of default, and to that extent the decisions referred to in paragraph 19 above can be distinguished.

20 29. Taking all the circumstances into account and considering the actions of the Appellant from the perspective of a prudent individual exercising reasonable diligence it cannot be said that a reasonable excuse existed throughout the entire period of default. The obligation to make End of Year Returns prior to the deadline of 20 May following the end of a tax year is set down by statute as referred to in paragraph 2 above. A tax payer must have proper regard for the responsibilities imposed upon him by legislation and it is established law that the responsibility to ensure compliance lies with the tax payer. Ignorance of obligations imposed by legislation does not amount to a reasonable excuse.

25 30. The delay on the part of HMRC in issuing the first penalty notice cannot be ignored. The Tribunal has a discretion to mitigate penalties where it considers that a reasonable excuse has been shown. On the facts of the case, although the Appellant has not shown that a reasonable excuse existed throughout the entire period of default, the Tribunal must recognise that part of the delay amounting to approximately 4 months was attributable to HMRC delaying the issue of the first penalty notice. The appeal is accordingly allowed in part and the penalties reduced to £800.

30 31. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 11 January 2012

5