



TC01746

Appeal number: TC/2011/05262

*Section 98A (2) and (3) Taxes Management Act 1970 – Late Employer’s P35
End of Year return- Employer Scheme had ceased – Appellant relying upon
erroneous advice by HMRC – delay by HMRC in issuing penalty notice -
reasonable excuse shown – appeal allowed*

FIRST-TIER TRIBUNAL

TAX

MR PAUL MCSTAY

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 8 July 2011 and HMRC’s Statement of Case submitted on 21 September 2011

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DECISION

- 5 1. This is an appeal by the Appellant Mr Paul McStay against penalties totalling £700 imposed on him for the late submission of his Employer's Annual Return for the tax year ending 5 April 2009.
- 10 2. An employer has a statutory obligation to deliver a Employer's 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.
- 15 3. If the Return does not reach HMRC by 19 May following the end of the tax year HMRC may impose a penalty.
4. The Appellant's on-line filing notification in respect of the Employer's Annual Return for 2008-09 was issued on 5 January 2009 and was due to be filed by 19 May 2009.
- 20 5. On 26 March 2009 HMRC Debt Management issued an overdue payment letter to the Appellant who then contacted HMRC on 1 April 2009 advising that he had not had any employees since 30 September 2008 and did not plan to have any employees in the immediate future. He said that he would be lodging a request to close the employer scheme, which was duly closed on 29 April 2009.
- 25 6. On 11 November 2009 HMRC issued a penalty notice of £400 in respect of the four months from 20 May 2009 to 19 September 2009.
7. HMRC received a letter of appeal on 11 December 2009 but could not deal with the appeal until the Employer's Annual Return had been filed. The Appellant was duly notified of this by return of post and the return was delivered electronically on 17 December 2009.
- 30 8. On 22 December 2009 a final penalty notice of £300 was issued in respect of the period 20 September 2009 to 17 December 2009.
9. On 2 March 2011 HMRC Debt Management wrote to the Appellant with regard to the overdue penalty.
- 35 10. The Appellant says that he did not pay the initial penalty because he was not aware his appeal was not being considered. In the telephone conversation on 01 April 2009 the Appellant says that he asked if there was anything further he needed to do in respect of the one employee which he had employed until 30 September 2008 and he says he was told there was nothing further required.
- 40 11. The Appellant says that he only became aware that a P35 was required when he received the penalty notice of 11 November 2009. He says that he had acted in good faith and in reliance on the advice given by HMRC and in the circumstances believes that a penalty is not justified. He adds that although he had previously submitted an on-line Employer's End of Year Return he had found the Employer's Requirements complex and demanding and frequently telephoned HMRC for advice. He acknowledges that he may have received an electronic P35 reminder in January 2009 but believed that it did not apply to him as he had discussed with HMRC the fact that his employer scheme was to be closed down and agreed that no further action was required.
- 45 12. HMRC contend that an employer must complete and file an Employer's Annual Return if they have had to maintain a form P11 (or equivalent pay roll

deductions record) for at least one employee during a tax year and that this applies even if they did not have to make any deductions of PAYE tax or National Insurance contributions from their employees during the year.

5 13. HMRC further contend that the Appellant does not contest the fact that his Employer's Annual Return was filed late and submit that, believing that no further action was required once the employer scheme had closed, did not relieve the Appellant of his legal obligation to deliver the End of Year Return by the 19 May 2009. HMRC further argue that the Appellant's obligations in this regard did not require specialist knowledge or involve an obscure aspect of tax law. It is
10 contended that ignorance of relevant legislation cannot be deemed a reasonable excuse.

14. Reasonable excuse is not defined in legislation and depends on the circumstances of the appeal. It is normally regarded as being an unexpected or unusual event, either unforeseeable or beyond an Appellant's control, which
15 prevented him from complying with his obligations.

15. Taking all the material facts of this matter into account the Tribunal finds that the Appellant relied upon the advice he received from HMRC when he contacted HMRC Debt Management on 1 April 2009. The Appellant followed up the conversation with HMRC by writing to HMRC on 2 April 2009 to confirm that he
20 had had no employees for the period 6 October 2008 to 9 January 2009 and that he was not going to have any employees for the foreseeable future. He requested that the employer scheme be closed down as it was no longer needed.

16. HMRC did not issue a penalty notice immediately after the failure by the Appellant to file the End of Year Return by 19 May 2009 and says that the relevant legislation contained at s98A TMA 1970 sets no obligation on HMRC to
25 issue penalties in any particular pattern but that generally a first interim penalty is issued if the Return has not been received four months after the due date and a second interim penalty issued if the Return has still not been received after a further four months. Final penalties are issued under s98A(2)(a) TMA 1970 when
30 the Return is received.

17. Given that the Appellant had written to HMRC notifying closure of the employer scheme on 02 April 2009, HMRC should not have waited until 11 November 2009 to issue a first interim penalty notice of £400. In practice it is understandable that HMRC will require time to process returns, electronic or
35 otherwise, and resolve any exceptions arising in relation to returns that have been submitted on time but HMRC have not had time to fully process them. The Tribunal accepts that a penalty is not and should not be seen as a reminder and that there is no statutory timetable for HMRC to follow when issuing penalty notices. Nonetheless, HMRC should have provided correct advice in the telephone
40 conversation with the Appellant on 01 April 2009 or responded to his letter of 2 April 2009, whether by standard letter or otherwise, to the effect that a P35 Return was still required. Alternatively, HMRC should have issued a pre-interim final penalty notice soon after the failure to submit the Return by 19 May 2009 and
45 certainly should not have delayed issuing a penalty notice until 11 November 2009. Had then done so, monthly penalties of £700 would not have accumulated. It is clear to the Tribunal that the Appellant acted in good faith and relied upon

advice given to him by an officer of HMRC Debt Management when he spoke to them with regard to what formalities remained in connection with the closure of the employer scheme.

5 18. Taking all the circumstances into account the Tribunal finds that the Appellant has shown a reasonable excuse existed throughout the period of the default and the appeal is allowed.

10 19. 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.

15 **MICHAEL S CONNELL**

TRIBUNAL JUDGE
RELEASE DATE: 12 January 2012

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