



TC01773

Appeal number: TC/2011/06309

Penalty – Late submission of Employers’ Annual Return (P35) – Whether reasonable excuse - Whether P35 filed without unreasonable delay after reasonable excuse ceased – Proportionality – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

KEY ONE PROPERTY (NI) LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 1 December 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 12 August 2011, HMRC’s Statement of Case submitted on 27 September 2011 and the Appellant’s Reply dated 30 October 2011.

DECISION

Introduction

1. This is an appeal by Key One Property (NI) Limited (the “Company”) against penalties of £1,200 imposed under s 98A of the Taxes Management Act 1970 (“TMA”) for the failure to file its 2009-10 Employers’ Annual Return (the “P35”) on time.
2. A Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released on 8 December 2011. On 20 December 2011, following receipt of the Decision Notice, the Company made an application for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal on the grounds that the “Tribunal did not consider all the evidence submitted”.
3. However, Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that before an application for permission to appeal can be made it is necessary to request full written findings of fact and reasons for the decision of the Tribunal. The application for permission to appeal has therefore been treated as a request for full written findings of facts and reasons and this decision has been provided to enable the Company to decide whether to apply for permission to appeal and to assist in formulating any such appeal.

20 *Law*

4. Paragraph (1) of Regulation 73 of the Income Tax (PAYE) Regulations 2003 requires an employer to deliver a P35 to HMRC “before 20 May following the end of a tax year” containing the following information:
- (a) *the tax year to which the return relates,*
 - 25 (b) *the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and*
 - (c) *the total net tax deducted in relation to those payments.*
- 30 5. Paragraph (10) of Regulation 73 provides that “Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).” Section 98A TMA which sets out the liability to penalties for non-compliance with the PAYE Regulations provides:
- 35 (1) *PAYE regulations...may provide that this section shall apply in relation to any specified provision of the regulations.*
 - (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...

5 (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...

10 6. For 2009-10 and subsequent years an employer “must” deliver its P35 to HMRC “by an approved method of electronic communications [ie online]” under Regulation 205 of the Income Tax (PAYE) Regulations 2003 (as amended by Regulation 5 of the Income Tax (PAYE)(Amendment No 2) Regulations 2009).

15 7. Section 118(2) TMA, so far as is material to this appeal, provides that “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.”

20 8. There is no definition in the legislation of a “reasonable excuse” which has been held to be “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

Evidence

9. The evidence before the Tribunal was contained in the following documents:

- (1) The Notice of Appeal.
- (2) HMRC’s Statement of Case.
- 25 (3) Documents attached to the Statement of Case, which included:
 - (a) Copies of the Company’s “Employer P35 Penalty History”;
 - (b) Copy of the Company’s original appeal to HMRC dated 14 February 2011;
 - 30 (c) Copy of HMRC’s view of appeal and offer of review dated 6 June 2011;
 - (d) Copy of Review Conclusion letter, dated 18 July 2011; and
 - (e) Copies of correspondence between the parties.
- (4) The Company’s Reply to HMRC’s Statement of Case, which was in the form of a Statement of Case written by Mark Colhoun a director of the Company.
- 35 (5) The following documents attached to, and as described in, the Company’s Reply:
 - (a) HMRC Notice of Penalty Determinations dated 27 September 2010;

- (b) Letter to HMRC from the Company dated 12 October 2011;
- (c) HMRC Debt Management Letter dated 24 January 2011;
- (d) Notice of Penalty Determination dated 24 January 2011;
- (e) HMRC letter dated 21 July 2011;
- 5 (f) HMRC letter dated 11 July 2011;
- (g) HMRC letter dated 16 August 2011;
- (h) HMRC letter dated 27 July 2011;
- (i) Extracts from Treasury Committee Report July 2011;
- (j) Letter from PCS Union Representative (undated);
- 10 (k) HMRC letter dated 31 August 2011 re non-existent 2011-12 debt;
- (l) HMRC letter dated 2 September 2011 re overseas landlord tax; and
- (m) HMRC letter dated 18 October 2011 re overseas landlord tax.

Facts

10. Having read and carefully considered all the evidence I make the following
 15 findings of fact:

- (1) The Company has been registered as an employer with HMRC since 1 January 2009.
- (2) Its 2008-09 P35 was submitted online on 6 May 2009 by the Company's payroll administrator, Mrs Brigid Beggan.
- 20 (3) The P35 for 2009-10 was required to be filed online by 19 May 2010.
- (4) An 'Employer Notification' which stated that the 2009-10 P35 "must" be filed "online" by "19 May following the end of the tax year 2009-10" was sent to the Company by HMRC on 31 January 2010.
- (5) In May 2010 Mrs Beggan experienced difficulty with HMRC's online
 25 systems and was unable to submit the P35 online.
- (6) As the P35 had not been filed HMRC issued a Penalty Notices, in the sum of £400, for the period 20 May to 19 September 2010 on 27 September 2010; in the sum of £400 for the period 20 September 2010 to 19 January 2011 on 24 January 2011; and in the sum of £400 for the period 20 January to 19 May 2011
 30 have on 30 May 2011.
- (7) In each of the Penalty Notices under the heading "About this notice" it states:

35 You are required by law to make an end of year return by 19 May each year. As you have not made your return by 19 May 2010 you are liable to a penalty. This notice gives details of that penalty. ...

If you do not understand why you have received this notice please ask me about it. My details are shown above.

The details shown are those of the Inspector who issued the Penalty Notice.

5 (8) On 12 October 2010, following receipt of the 27 September 2010 Penalty Notice, Mr Colhoun wrote to HMRC appealing against the penalty believing it to have been issued in respect of a company return. HMRC did not respond to this letter.

(9) The Debt Management Unit of HMRC wrote to the Company on 24 January 2011. The letter, which is headed "PAYE Penalties amount overdue £400 states and refers to payment of money to HMRC under PAYE, it continues:

10 As well as the timely payment of this money, you are also required to submit the year end return form P35 and any supporting documents by 19 May for the year in question. If you fail to do so, you will become liable to a penalty charge or charges for each late return

15 Our records show that you have not submitted all returns on time and as a result you have incurred one or more penalties in the above amount.

(10) On 14 February 2011, following receipt of the 24 January 2011 Penalty Notice, Mr Colhoun wrote to HMRC seeking a response to his 12 October 2010 letter.

20 (11) Although HMRC wrote on 8 March 2011 confirming that the penalties had been issued in respect of the non-submission of the P35 the letter was not received by the Company.

(12) A letter from HMRC, dated 29 March 2011, with a reminder to pay £800 was received by the Company.

25 (13) On 9 April 2011 Mr Colhoun wrote to HMRC asking for clarification of how the debt arose. No reply was received to this letter.

(14) Following a telephone call to HMRC's Debt Management Unit Mr Colhoun was informed that the £800 debt was for PAYE penalties for the non-submission of the P35.

30 (15) On 4 May 2011 Mrs Beggan delivered a (paper) copy of the P35 to the offices of HMRC at Beaufort House, Wellington Place, Belfast.

(16) On 16 May 2011 Mr Colhoun wrote to HMRC informing them that the P35 had been submitted by Mrs Beggan on 4 May 2011.

35 (17) There is no indication in HMRC's records that the copy P35 was delivered before 19 May 2010 or any copy being received until August 2011. These records indicate that a copy of the P35 was returned to the Company with a blank correct version on 15 August 2011.

(18) HMRC issued a decision letter on 6 June 2011 rejecting the Company's appeal in the absence of any reasonable excuse.

40 (19) On 18 June 2011 the Company requested a review of the decision on the grounds that the records were submitted but lost by HMRC.

(20) The review was concluded and the Company informed of the outcome by a letter dated 18 July 2011 from HMRC.

(21) In that letter HMRC advised:

5 You have not stated which method of submission you used. You successfully submitted your return for the previous year 2008-09 online. This department wrote to you on 30 January 2010 reminding you of your requirement to file online for 2009-10. The February edition of the Employer Bulletin carried guidelines on how and when to file your return. However there has been no activity on your account
10 until 12 May 2011 when you submitted your 2010-11 form P38A.

I must also point out that I have not received the copy of the return sent to Beaufort House by your bookkeeper Mrs Beggan; per your letter dated 16 May 2011.

15 As the return remains outstanding I must conclude that the decision to reject your appeal was correct and the penalty remains due and payable.

(22) As at 27 September 2011, the date HMRC's Statement of Case was submitted to the Tribunal, the Company had not filed its P35 online.

Discussion and Conclusion

20 11. Mr Colhoun, on behalf of the Company, has raised various matters which include allegations that HMRC has failed to disclose relevant copies of letters and information about losses of documents; allegations of poor communication and administration by HMRC including loss of documents; and whether the penalties are proportionate to the alleged "offence" of a failure to submit the P35 having regard to the amount of tax
25 payable.

12. Although it is contended, on behalf of the Company that the P35 was delivered to HMRC on time it is accepted that it was not, and has not subsequently, been filed online as required by the Income Tax (PAYE) Regulations 2003.

30 13. It is submitted, on behalf of the Company, that it was unable to file its P35 online due to an error in HMRC's system and that a paper version of the P35 was delivered to the offices of HMRC at Beaufort House, Wellington Place, Belfast by hand on 7 May 2010, although this is not supported by any documentary evidence.

35 14. However, given that there is mandatory requirement to file online, the filing of a paper return cannot meet the statutory requirements. I therefore find that the Company has not filed its P35 for 2009-10 and unless it has a reasonable excuse for this failure it is liable to the penalties.

40 15. Even if I were to find that an assumption by Mr Colhoun, and therefore the Company, that the P35 had been satisfactorily filed on 7 May 2010 did amount to a reasonable excuse, such an excuse could not have continued beyond January 2011 at the very latest.

16. The P35 was still not filed online, as required, and it took until 4 May 2011 for a further (paper) copy to be sent to HMRC's Belfast office which cannot be said to have been done "without unreasonable delay after the excuse had ceased" as required by s 118 TMA.

5 17. In my judgment it would have been clear that the P35 had not been filed on receipt of the first Penalty Notice in September 2010 as the information contained in the Penalty Notice was sufficient for the penalty to be identified as arising as a result of a failure to file a P35. Even if that was not the case, it would have been obvious in the light of the explanation from the Debt Management Unit of HMRC in their letter
10 of 24 January 2011 that the penalty had arisen because the P35 had not been filed.

18. As such, irrespective of any alleged failures by HMRC and despite their alleged poor level of communication and administration, the appeal cannot succeed.

19. With regard to proportionality, I agree with, and adopt the reasoning of, the Tribunal Judge (Rachel Short) in *Pickquick Carriers Ltd v HMRC* [2011] UKFTT 553
15 (TC) where she said, at [14 – 19]:

[14] The Appellant has also raised the separate argument that the £400 penalty levied here is disproportionate given that that tax due had already been paid and that the amount of tax due is small.

20 [15] Neither the Appellant nor HMRC have submitted detailed arguments on this question.

[16] The Tribunal has taken the approach that in order to consider whether this penalty is disproportionate it is important to be clear what offence the penalty is directed at. In this case the penalty under s 98A (2) (a) TMA 1970 relates not to the payment of the tax, but to the lateness of the return. To this extent the fact that the tax has already been paid, and that a relatively small amount of tax was due, is not relevant.

25 [17] The relevant question is whether the penalty is proportionate to the lateness of the return, which in this case was four months late. The relevant legislation (s 98A Taxes Management Act 1970) imposes a £100 penalty for every month for which a return is late.

30 [18] On the basis of decisions such as *Energys Holdings UK Ltd* ([2010] UKFTT 20 TC) this level of penalty in relation to the lateness of the return cannot be said to be "wholly unfair" and cannot be said to be disproportionate either in respect of the manner in which it is calculated, which is on a straightforward month by month basis, or in respect of HMRC's need to ensure that returns are made in a timely manner.

35 [19] The Tribunal has considered the alternative argument that the question of proportionality relates not just to the lateness of the payment, but should also take account of the broader question whether the legislation as a whole is proportionate in levying a penalty for failure to submit a return when the relevant tax has been paid and the amount of tax is small.

5 [20] The Tribunal's conclusion on that point is that HMRC have two discrete obligations, of which the collection of tax is only one. The provision of information about taxpayers on whose behalf tax has been paid is an equally important part of their statutory role. The fact that tax has been paid does not necessarily remove the need for HMRC to enforce their information collection powers, even when the amount of tax due is small. In this case we do not think that the fact that the tax has been paid alleviates the offence or impacts on the proportionality of the penalty.

10 20. The appeal is therefore dismissed and the penalties confirmed.

15 21. 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.

20 **JOHN BROOKS**

TRIBUNAL JUDGE
RELEASE DATE: 24/01/2012

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