



TC01808

Appeal number: TC/2011/06319

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

FIRST-TIER TRIBUNAL

TAX

PONTYBEREM COMMUNITY COUNCIL

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 26 July 2011, HMRC’s Statement of Case submitted on 23 December 2011 and the Appellant’s Reply dated 18 October 2011.

DECISION

Introduction

1. This is an appeal by Pontyberem Community Council (the “Council”) against penalties of £400 imposed under s 98A of the Taxes Management Act 1970 (“TMA”) for the failure to file the 2009-10 Employers’ Annual Return (the “P35”) on time. Although the Council did not appeal against the penalty within the statutory time limit this is not an issue in this case as HMRC have agreed to the late notice of appeal being given (see s 49 TMA).

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 9 December 2011. On 15 December 2011, following receipt of the Decision Notice, R A Ure & Co. Chartered Certified Accountants wrote to the Tribunal on behalf of the Council explaining that the Council “is considering seeking permission to appeal to the Upper Tribunal” and requesting “full written findings of fact and reasons for the decision”.

3. This is in accordance with Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which 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. This decision has therefore been provided to enable the Council to decide whether to apply for permission to appeal and to assist in formulating any such appeal to the Tax and Chancery Chamber of the Upper Tribunal.

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,*

(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.*

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:

(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—*

5 (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—*

10 (a) *where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100...*

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
15 Income Tax (PAYE)(Amendment No 2) Regulations 2009).

7. Section 118(2) TMA, so far as is material to this appeal, provides:

20 ... *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.*

It is therefore necessary for a reasonable excuse to continue throughout the period of default for a person to be deemed not to have failed to do what was required of him.

8. There is no definition in the legislation of a “*reasonable excuse*” which has been
25 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]).

Facts

9. Having read the Notice of Appeal, HMRC’s Statement of Case and the Council’s
30 Reply together with all additional documents provided to the Tribunal by the parties I make the following findings of fact:

(1) On 31 January 2010 HMRC sent the Council a ‘Notification to Complete form P35 Employer Annual Return’ (form P35PN). This informed the Council that it was required to file its 2009-10 P35 online by 19 May 2010. It was the first time that the Council was required to file its P35 online.

35 (2) On 5 May 2010 the then Clerk to the Council completed the P35 form but, although he honestly believed otherwise, the P35 was not successfully filed online.

(3) As the P35 had not been filed online, on 27 September 2010 HMRC issued the Council with a Penalty Determination in the sum of £400 for the four months from 20 May to 19 September 2010.

5 (4) On 20 October 2010 the current Clerk to the Council wrote to HMRC to appeal against the Penalty Determination on the grounds that the P35 was “duly submitted to you [HMRC] online on 5 May 2010 and the balance owing ... paid by direct transfer on the same date.”

10 (5) HMRC replied on 21 December 2010 rejecting the Council’s appeal. The letter explained that HMRC’s system “still shows the P35 as not having been received” and offered the Council a review of the decision to uphold the penalty.

(6) On 14 March 2011 the Council successfully submitted its P35 for 2009-10 online.

(7) A formal request was made to HMRC by the Council for a review of the imposition of the penalty on 27 May 2011.

15 (8) Having undertaken the review HMRC wrote to the Council on 28 June 2011 to confirm that the review had been completed and that the conclusion was that the decision to reject the penalty appeal was correct.

(9) On 26 July 2011 the Council appealed to the Tribunal.

Discussion and Conclusion

20 10. It is clear from the legislation that, unless it has a reasonable excuse which continued throughout the period of default, as the Council did not file its 2009-10 online by 19 May 2010 it is liable to the £400 penalty.

25 11. The Notice of Appeal explains that 2009-10 was the first time that the Council had filed its P35 online and when the previous Clerk had completed the form and paid tax due on 5 May 2010 he had honestly believed that it had been successfully filed. The Council had only become aware that this was not the case when it received the Penalty Determination in September 2010. The grounds of appeal (prepared by the Council’s accountants) also refer to the penalty of £400 being “extortionate in relation to tax due which was paid on time”; and as the Council is a public body and “the sum of £400 could be put to good use in the local community for which the Council is responsible.”

30 12. 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 (TC) where she said, at [14 – 19]:

35 [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.

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

5 [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.

10 [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.

15 [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.

20 [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.

25 [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.

35 13. As to whether the £400 could have been put to “good use”, I accept that the Council has responsibilities to the local community. However, it also has a duty to comply with its statutory obligations. This includes the legal requirement to file its P35 online and on time as required by the relevant legislation.

40 14. In this case the Council did not comply with its legal obligation to file the 2009-10 P35 online by 19 May 2010 but if there was a reasonable excuse for that failure, which continued throughout the period of default, it will be deemed not to have failed to have done so. I therefore have to consider whether the mistaken belief of the then Clerk, that he had successfully filed the 2009-10 P35 online on 5 May 2010, amounts to a reasonable excuse and if so whether it continued throughout the period of default.

45 15. In its Reply to HMRC’s Statement of Case the Council refers to *HMD Response International v HMRC* [2011] UKFTT 472 (TC) in which the Tribunal Judge (Geraint Jones QC) held, at [27]:

“... that if a person genuinely and honestly believes that a successful online filing has been completed” it would amount to a reasonable excuse.

5 However, the Tribunal Judge (Dr Christopher Staker) noted in *Intelligent Management UK Ltd v HMRC* [2011] UKFTT 704 (TC) at [22]:

10 “If honest and genuine belief that the filing had taken place within the deadline can be a reasonable excuse, the Tribunal considers that there must be some reasonable basis for the honest and genuine belief. The Tribunal does not consider that that an irrational or unreasonable belief, even if honest and genuine, would suffice.”

15 16. In the present case I accept that, as it was the first time that the P35 had been filed online, there were reasonable grounds for an honest and genuine belief that it had been filed within the deadline. Therefore, I find that there was a reasonable excuse and that this excuse continued notwithstanding the receipt of the Penalty Determination, dated 27 September 2010, given that the Council appealed to HMRC on the grounds that the P35 had already been filed.

20 17. However, in my judgment, following HMRC’s rejection of that appeal, in their letter of 21 December 2010 (which stated that HMRC’s system showed that the P35 had not been filed), any reasonable grounds for an honest and genuine belief that the P35 had been filed and therefore a reasonable excuse could no longer exist.

18. As it took until 14 March 2011 to file the P35 I am unable to find that the reasonable excuse continued throughout the period of default. In the circumstances the appeal cannot succeed.

19. I therefore dismiss the appeal and confirm the penalties.

25 20. 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
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **JOHN BROOKS**
TRIBUNAL JUDGE
RELEASE DATE: 8 February 2012