



TC01832

Appeal number: TC/2011/01139

Penalty for late submission of P35 – return sent in “test” mode – whether the return “delivered” within the meaning of the PAYE Regulations – no - taxpayer’s genuine belief that return was delivered – whether reasonable excuse – yes – appeal allowed and penalty discharged

**FIRST-TIER TRIBUNAL
TAX**

LIFESMART LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 30 January 2012 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 10 February 2011, HMRC’s Statement of Case submitted on 25 March 2011 and the Appellant’s Reply dated 14 April 2011.

DECISION

1. This is the appeal by Lifesmart Limited (“the company”) against the penalty of £400 imposed for late filing of the 2009-10 end of year return of payments under PAYE (“P35”).
2. The Tribunal accepted the appeal and discharged the penalties.

Review of previous Tribunal Decision

3. The company previously appealed this penalty to the First-tier Tribunal on 10 February 2011. That appeal was determined on 16 May 2011 as a default paper case under Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”).
4. A full Decision was issued to the parties on 30 July 2011.
5. On 16 September 2011 the company sought to appeal that Decision to the Upper Tribunal.
6. On receiving an appeal against a Decision of the First-tier Tribunal, Rule 40(1) of the Tribunal Rules requires the Tribunal to consider whether to review the Decision. The Tribunal may only review a Decision if it is satisfied that it contains an error of law.
7. On receiving the company’s appeal, the Tribunal was satisfied that there was an error of law (within the meaning determined by *Edwards v Bairstow & Harrison* (1955) 36 TC 207) in the Decision, and that it should therefore be reviewed.
8. The outcome of that review was that the Decision was set aside. The Tribunal directed that the appeal be considered afresh (again as a default paper case) by a differently constituted Tribunal. The parties were notified of this on 20 December 2011.
9. This Notice sets out the Decision of that differently constituted Tribunal.

The issues in the case

10. The issues in the case are whether the return was delivered late; if so, whether the company had a reasonable excuse, and whether HMRC’s delay in sending out the penalty notices was “fair.”

The law

11. The statutory provisions, so far as relevant to this case, and as they applied for the tax year 2009-10, are set out below.

12. Regulation 73 of the Income Tax (PAYE) Regulations 2003¹ is headed “annual return of relevant payments liable to deduction of tax (Forms P35 and P14).”

13. Regulation 73(1) requires that an employer “must deliver to the Inland Revenue” its P35 return on or before 19 May following the end of a tax year.

5 14. Regulation 205 states that employers “must deliver a relevant annual return by an approved method of electronic communication.”

15. Regulation 192 states that “for the purpose of these Regulations, information is taken to have been delivered to an official computer system by an approved method of electronic communications only if it is accepted by that official computer system.”

10 16. Reg. 73(10) states that Section 98A of Taxes Management Act 1970 (“TMA”) applies if the obligation to deliver returns, set out in Reg 73(1), is not complied with.

17. TMA s 98A provides for fixed penalties which apply “where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision.”

15 18. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B.

19. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2), which, 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.”

The evidence

25 20. The Tribunal was provided with the correspondence between the parties, and between the parties and the Tribunals Service. In addition, HMRC supplied:

(1) A page headed “HM Revenue & Customs. Summary search results” for the company.

30 (2) A page headed “Frequently asked questions: can I send a test submission of my employer annual return” from the HMRC website.

(3) A screenshot from the BusinessLink website headed “File your Employer Annual Return online: P35 and P14s: acceptance and rejection messages when you file online.”

35 21. The company supplied two emails from gateway.confirmation@cabinet-office.x.gsi.gov.uk. The first is dated 18 May 2010, the second, 3 November 2010.

¹ All references to Regulations in this Decision are to these PAYE Regulations.

The facts

22. On the basis of the evidence provided, I find the following facts.

23. The company logged onto the HMRC site on 18 May 2010, a day before the statutory deadline of 19 May. After sending the return, the company received an email from the HMRC website which read:

“Successful receipt of online submission for Reference []

Thank you for sending the PAYE End of Year submission online.

The submission for reference [] was successfully received on 18-05-2010. If this was a test submission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.”

24. The company understood from this email that the return had been submitted successfully.

25. By Notice dated 27 September 2010, HMRC issued a penalty for not filing the P35. It charged the company £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The penalty was therefore £400.

26. By letter dated 7 October 2010, Mr Alan Sharp, the company’s Finance Director, wrote to HMRC saying:

“This morning I received the penalty notice for £400...I attach a copy of the online successful submission reference received from HMRC on 18 May 2010. This proves our submission was on time and I therefore look forward to receiving revised correspondence eliminating the penalty notice.”

27. By letter dated 22 October 2010, under the heading “why I do not think you have a reasonable excuse” HMRC informed the company that “the P35 that you submitted on 18 May 2010 at 13.43pm was a test submission.”

28. This letter was received by the company in the final week of October. On 3 November 2010 the company submitted the return in “live mode”.

29. HMRC responded to the submission by sending an email which (apart from the date of receipt) was identical to that received by the company on 18 May 2010.

Mr Sharp’s submissions on behalf of the company

30. Mr Sharp says that the company believed it had made a successful, timely submission of the P35. Since no message was received “highlighting any errors and no email was received informing the company that the submission had errors or was unsuccessful” the company reasonably concluded that it had complied with its statutory duty.

31. He said that “the replies from the HMRC website are identical and confirm a successful submission of the P35”. Their identical nature “makes it impossible for an employer to know whether their submission is successful.”

5 32. He asks “how can a reply that states ‘successful receipt of online submission’ be in actual fact unsuccessful?” and “how can a company prevent a penalty if it is not aware that its submission has been unsuccessful?”

10 33. He also complains that the penalty is unfair as “the penalty increases on a monthly basis but the company only receive notification of the penalty four months after it has started accumulating. The system does not offer the employer the possibility of remedying the situation, thus mitigating the penalty.”

34. Finally, he says that was not until the company received the HMRC letter dated 22 October 2010 that Mr Sharp realised that the original submission had not been accepted as a live return.

15 35. The company filed the return on 3 November, soon after the HMRC letter had been received, and thus the reasonable excuse continued throughout the period.

HMRC’s submissions

36. HMRC say that the return was delivered in “test” mode and that:

20 “if an employer chooses to send a test submission the test submission will check against HMRC quality standards and tell of any mistakes. The message sent by HMRC advises if this is a test submission you must ensure you send a live return. This information is available on the HMRC website.”

25 37. They also say that information about online filing and the messages is available on the HMRC website and the BusinessLink website. The BusinessLink page includes the following:

“Acceptance and Rejection messages when you file online

30 After you file your Employer Annual Return online, you'll get an acceptance or rejection message through the software or service you use. If you've provided HMRC with an email address, you'll also get an email message. These messages are usually issued within a minute of filing, but it can take longer if your return covers a large number of employees.

If your return is successful, you'll get the following messages:

- 35
- Software - '9004: the EOY Return has been processed and passed full validation'
 - Email - 'The submission for [your PAYE reference] was successfully received on [date]. If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed'

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If your return is rejected, you'll get the following message instead:

- Software - your message will highlight the area(s) of your return that have led to its rejection.
- Email - 'The submission for reference [your PAYE reference] was received on [date]. Unfortunately it could not be accepted as it failed data checks. To correct this, please use the help provided within the software you used to complete your form and send it again'

Returns filed before the start of the new tax year

If you file your annual return before 6 April...HMRC will still let you know straight away whether the return has been accepted or rejected..."

38. The web guidance (provided without a heading or other indication of where it is located on the HMRC site) repeats the text above, but without the final paragraph.

39. HMRC also provided the Tribunal with the following FAQ, which is identified as coming from the "Online Services" part of their website. It says:

"Can I send a test submission of my Employer Annual Return.

Yes, if your software allows you to send a sample of P14s and a P35 as a test HM Revenue & Customs will check them against our quality standards and tell you about any mistakes. This service is aimed at large employers who may find it convenient to check for errors before making a complete return.

If your test submission passes HMRC quality checks and you receive an acceptance message and an email acknowledgement, you must ensure that you send a live return. If you are not sure if you have sent a test or live return, please telephone the HMRC Online Services helpdesk to check the position. This is particularly important when you need to meet a statutory deadline."

40. HMRC submit that the company does not have a reasonable excuse, which they define as "an exceptional event beyond a person's control which prevented the return from being filed by the due date, for example, severe illness or bereavement."

41. In response to Mr Sharp's criticisms of the delayed issuance of the penalty notice, they say that the penalties are provided for by statute and "do not depend on HMRC giving reminders".

42. Furthermore, they say (quoting verbatim):

"This is a structured programme designed to enable penalties to be issued regularly throughout the year, rather than waiting for the late Return to be submitted and then issue a final penalty. These penalties, although aimed at encouraging compliance and will have the effect of reminding are not designed to be reminders for the outstanding return."

The first issue: was the return “delivered”

43. There is no penalty if the return was “delivered” to HMRC on or before the due date of 19 May 2010.
- 5 44. HMRC say that the return was sent in “test” mode. It is clear from the company’s evidence that it intended to submit a “live” return. However, I accept HMRC’s evidence that it was, as a question of fact, sent in “test” mode.
45. The first issue is whether a return in “test” mode has been “delivered” within the meaning of the Regulations.
- 10 46. Regulation 192 states that “for the purpose of these Regulations, information is taken to have been delivered to an official computer system by an approved method of electronic communications only if it is accepted by that official computer system.”
47. Was the return “accepted” by the HMRC computer system? The word “accept” is not defined in the Regulations, but it is clear from the context that it means something more than “delivered”.
- 15 48. The Oxford English Dictionary’s primary definition of “accept” is “to take or receive (something offered) willingly.” The secondary definition is archaic and obsolete; the third reads:
- 20 “To consider or recognize (a person or thing) to be a specified thing, or to have a specified quality; to take as authentic, valid, or adequate; to believe (a statement or theory).”
49. The fourth definition can be summarised as “to consent”, while the fifth is “to agree (in the context of a writ) to consider as validly served.”
50. These definitions show that for a proffered item to be “accepted”, the recipient must agree or consent to take the item: mere receipt is insufficient.
- 25 51. How does this linguistic analysis apply in the context of a P35 sent in “test” mode? Has that return been “accepted” by the HMRC computer?
52. We know from the “successful submission receipt” that “the submission...was successfully received.” But the P35 was not actioned by the HMRC system because it was not treated as a final submission. It was not “taken as...valid or adequate.”
- 30 Through its computer system, HMRC did not “consent” to treat it as a submitted P35.
53. Taking into account both the statutory context and the dictionary definitions of “accept”, I find that the P35 was not “accepted” by the HMRC computer.
54. As a result it was deemed not to have been delivered even though it was, as a question of fact, received by the HMRC computer.
- 35 55. As a result, I find that the company’s P35 return was not delivered until 3 November 2010 and so was late.

The second issue: reasonable excuse

56. I move on to consider whether the company has a reasonable excuse for the late delivery.

The online guidance

5 57. HMRC imply that a reasonable person who had properly considered its online guidance, would thereby have been prevented from believing a return had been delivered when it had, accidentally, been submitted in “test” mode.

58. I do not agree. The guidance on the BusinessLink site, and replicated somewhere (although the Tribunal was not told where) on the HMRC website, makes no mention
10 of the fact that an employer can receive a successful submission receipt (without in fact having made a successful submission) because he has accidentally sent the return to HMRC in “test” mode.

59. The messages employers receive from HMRC are binary in nature:

15 “you'll get an *acceptance or rejection* message through the software or service you use”

and

“*If your return is successful, you'll get the following messages...if your return is rejected, you'll get the following message instead.*”

20 60. The extra paragraph in the BusinessLink text also reflects this binary approach: “If you file your annual return before 6 April...HMRC will still let you know straight away whether the return has been *accepted or rejected*...”

61. It is only if the employer reads the FAQ on “Can I send a test submission” that he finds a hint that there might be a problem. He is told:

25 “if you are not sure if you have sent a test or live return, please telephone the HMRC Online Services helpdesk to check the position. This is particularly important when you need to meet a statutory deadline.”

62. But this begs an important question: why would the a reasonable employer, uninterested in test returns, read this FAQ at all?

30 63. Moreover, the reasonable employer who has received a “successful submission receipt” and believes he has sent a live return, is not *unsure* whether he has sent a live return – he has no reason to think he has sent a test return at all.

64. I therefore reject HMRC’s submission that the reasonable employer would have been alerted by this online guidance to the risk of accidentally sending a test return.

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Is reasonable belief a reasonable excuse?

65. There is no doubt that Mr Sharp believed that he had submitted the company's P35 on 18 May. Given the quality of the online guidance, and his receipt of the "successful submission" receipt, I find that this belief was reasonable.

5 66. The next question is whether a reasonable belief can be a reasonable excuse.

67. HMRC say that a reasonable excuse is "an exceptional event beyond a person's control which prevented the return from being filed by the due date, for example, severe illness or bereavement."

10 68. This is clearly too narrow. This Tribunal has held that the meaning of "reasonable excuse" is "a matter to be considered in the light of all the circumstances", see *Rowland v HMRC* [2006] STC (SCD) 536 at [18], and, more recently, that "an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act", see *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14].

15 69. That a genuine, honest and reasonable belief provides a defence in common law has long been accepted, see *Reg v Tolson* (1889) 23 QBD 168, 181; this principle was more recently expanded to include a genuine but mistaken belief by the House of Lords in *R (ex p B) v Director of Public Prosecutions* [2000] UKHL 13.

20 70. In the recent case of *R v Unah* [2011] EWCA Crim 1837, while noting the caveat in that case that "it is only with caution that one should seek to draw analogies with other statutory contexts where the concept of reasonable excuse is employed", the Court of Appeal found that a genuine and reasonable belief was sufficient to amount to a reasonable excuse.

25 71. On the facts provided, Mr Sharp genuinely and honestly believed that the P35 had been filed. I have found that his belief was reasonable, and I also find that it provides the company with a reasonable excuse for the late filing of the return.

72. I also find that the P35 was then filed "without unreasonable delay" after Mr Sharp discovered the problem, and so the requirements of TMA s 118(2) are satisfied.

The third issue: fairness

30 73. Mr Sharp argued that HMRC's approach was not fair. In view of my decision on reasonable excuse, it has not been necessary for me to consider this question.

Decision

74. The appeal is allowed and the penalty of £400 set aside.

35 75. 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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Anne Redston

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**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 16 February 2012**