



TC02077

Appeal number: TC/2011/04097

*Section 98A(2) and (3) Taxes Management Act 1970 – late Employer’s P35
End of Year Return – Appellant says had difficulty obtaining on-line
activation PIN from HMRC – whether reasonable excuse shown for period
of default – whether affected by delay in penalties imposed by HMRC - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PHILIP STEWART

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 9 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 Appellant’s notice of appeal dated 26 May 2011, HMRC’s statement of case submitted on 5 July 2011 and the Appellant’s Reply dated 14 September 2011

DECISION

Decision

5 1. This is an appeal by Mr Philip Stewart against penalties of £400 imposed under s 98A (2) and (3) Taxes Management Act 1970 following the late submission of the Appellant's Employer's P35 Annual return for the tax year ending 5 April 2010.

2. An employer has a statutory obligation to deliver an Employer's Annual return before the 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. If the full return does not reach HMRC by 19 May following the end of the tax year HMRC may impose a penalty. Interim penalties are charged under s 98A (2)(a) and (3) TMA where a return remains outstanding after the due date. Penalties are fixed at £100 per month or part of a month during which the failure continues.

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3. The filing date for the Appellant's P35 End of Year Return was 19 May 2010. The return had to be filed on-line. The return was not filed until 25 October 2010.

4. Interim penalties are charged under s 98A(2)(a) and (3) TMA 1970 where a return remains outstanding after the due date. Penalties are fixed at £100 for each month or part of a month during which the failure continues. HMRC issued a first interim penalty notice of £400 on 27 September 2010 in respect of the period 20 May 2010 to 19 September 2010. A final penalty notice for £200 mitigated to £41 was issued on 1 November 2010. The penalty was mitigated because the total tax and NIC payable by the Appellant for the tax year ending 5 April 2010 was £442 which had been paid in full by June 2010.

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Factual background

5. HMRC say that a P35 PN reminder notice to complete and file a P35 Employer's Annual return was issued to the Appellant on 24 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 gave details of the method by which a return could be filed and explained where further information could be found on its on-line website.

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6. Regulation 205-205B of the Income Tax (PAYE) Regulations 2003 provides that an employer must use electronic communications to deliver the 2009-10 Employer's Annual return on-line. The Government first announced in 2002 that small employers would be required to file on-line by 2010. HMRC have issued various communications to customers in more recent times informing them of the changes. There have been articles in the Employer Bulletin from April 2008 right up to April 2011. HMRC also issued a letter direct to employers in November 2008,

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November 2009 and a similar letter was issued in November 2010 providing further information.

7. The Appellant says that whilst he was aware of the need to file the Employer's P35, this was the first year that he had attempted to do so using the on-line facility. He says that this was his first attempt at on-line filing and failure to file and return the P35 on time arose because of difficulties encountered with the HMRC website. The Appellant says that he was of the opinion that the PIN number had been successfully requested on-line, but that he had been unable to confirm this by telephone with HMRC's telephone help line due to high call volume. The Appellant says that he had no intention to be non-compliant and that he considers the penalty to be disproportionate to the error. He only had one employee and the total tax and NIC for the year was £442.

8. The Appellant also complains that the penalty notice was not issued and sent to him until 27 September 2010, by which stage penalties had accrued for four months to a total of £400. The Appellant says that the penalty notice could have been issued sooner, which would have alerted him to the penalty regime, thus potentially minimising the penalties falling due. The Appellant refers to the case of *Hok Ltd v HMRC (2011)UKFTT 433 (TC) (30 June 2011)* with which he says comparisons can be drawn to his appeal. In that case the First-tier Tribunal Judge Geraint Jones QC criticised HMRC for delays in sending out penalty notices and held that penalties should be reduced where there had been unconscionable delay on the part of HMRC in issuing the notices.

9. HMRC's review conclusion letter of 11 May 2011 upheld the original decision not to allow the appeal and summarises its reasons. HMRC say that although 2009-10 was the first year in which the Appellant was required to file on-line, the Appellant had been notified to do so on 24 January 2010 and therefore there was sufficient time for him to register and file his on-line return by 19 May 2010. HMRC say the various communications, a dedicated help line to assist employers, and in particular the HMRC's on-line services help desk had been available to assist employers with on-line filing queries. HMRC on-line services say that the first registration attempt by the Appellant was not made until 15 October 2010. HMRC say they have no record of any earlier attempt being made.

10. It is HMRC's normal procedure to issue a penalty notice after a four month period. HMRC say that it is necessary to update their relevant computer systems once returns have been submitted and that this takes time as they have to ensure that penalty notices are not issued when they have had the return in. They add that a penalty notice is not a reminder, but notification summarising the amount of penalties outstanding at a given date. Ultimately it is the employer's duty to ensure that all End of Year returns are submitted by the 19 May deadline, and in this case the Appellant had filed a paper P35 for previous years and therefore would have been aware of his responsibility. The Appellant did not take any action to ensure that his P35 Return for 2009-10 was filed on time, and despite the problems to which he refers in obtaining the PIN activation code in March 2010, no further attempts appear to have been made

until the penalty notice was issued in September 2010, the P35 finally being filed on 25 October 2010.

11. HMRC say that with regard to interim penalties there is no statutory timetable which they must follow when issuing penalty notices. When issuing penalty notices the first interim penalty notice is issued if the return has not been received four months after the due date and the second and third interim penalty notices are issued at four monthly intervals where the return is still outstanding. HMRC say that it has no statutory obligation to issue a reminder to employers to submit their End of Year returns. The obligation to submit returns by the due date lies with the employer in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003.

12. The penalties have been imposed to promote the efficient operation of the taxation system and a wide margin of appreciation is allowed in framing and implementing taxation policies. HMRC submit that the penalties have been correctly charged in accordance with legislation. HMRC therefore argue that the penalties imposed are not disproportionate and in any event have been mitigated so as not to exceed the amount of tax and NIC payable by the Appellant.

Conclusion

13. When a person appeals a penalty they are required to have a reasonable excuse which must have existed throughout the entire period of default, - Section 118 (2) TMA 1970. 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 if he did it without unreasonable delay after the excuse ceased. There is no definition in law of “reasonable excuse” which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally regarded as an unexpected or unusual event either unforeseeable or beyond the tax-payer’s control which prevents him from complying with his obligations when he would otherwise have done.

14. It is the responsibility of an employer to ensure that his tax affairs are up to date and correct returns are submitted by the due date. Any excuse must exist throughout the entire period of default.

15. The Appellant submits that HMRC should issue penalties as and when they fall due in order to ensure that the tax-payer/employer is put on notice that he is in default and penalties are accruing.

16. Although there is no statutory obligation on HMRC to issue reminders, there is plainly a duty on the part of HMRC not to act unconscionably by unreasonably delaying the issue of a penalty notice. Because of the delay in the issue of the first penalty notice it is arguable that HMRC has not complied with its obligation to operate and implement legislation relating to the issue of penalty notices in a timeous and fair manner.

17. It is recognised by the Tribunal 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 in fact been submitted on time, but HMRC have not had the time to fully process them.

18. Clearly the Appellant encountered difficulties because of his lack of familiarity with the on-line filing system. However it is made clear on HMRC's website that confirmatory messages are issued only once a return has been successfully filed on-line. Furthermore HMRC operate a help line to provide further assistance. The Appellant was aware that he had been unable to obtain the on-line PIN activation code. He suggests in his appeal that the PIN number had been successfully requested on-line but that he had been unable to confirm this by telephone. HMRC on-line services however say that there is no record of this. The Appellant would have been aware of the 19 May 2010 deadline, but took no further action until receipt of the £400 penalty notification in September 2010.

19. 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, despite the delay on the part of HMRC in issuing the penalty notice. 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 and a taxpayer must have proper regard for the responsibilities imposed upon him by legislation. It is established law that the responsibility to ensure compliance lies with the taxpayer. Ignorance of obligations imposed by legislation does not amount to "reasonable excuse."

20. The appeal is accordingly dismissed and the penalty of £441.00 confirmed.

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.

MICHAEL S CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2012