



**TC02662**

**Appeal number: TC/2012/08552**

*INCOME TAX – penalty for late submission of P35 – disputes as to the facts – Tribunal making further findings of fact – whether HMRC had sent out a “failed transmission notice” – no – whether company reasonably believed the return had been filed on time – yes – appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ECLIPSE GENERIC LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: ANNE REDSTON (TRIBUNAL  
PRESIDING MEMBER)**

**The Tribunal determined the appeal on 4 March 2013 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 11 September 2012 (with enclosures) and HMRC’s Statement of Case submitted on 17 December 2012 (with enclosures).**

## DECISION

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1. This was the appeal by Eclipse Generic Limited (“the company”) against a penalty of £600 for late filing of its 2010-11 Employer’s Annual Return (“P35”).
2. The Tribunal decided to **allow the appeal** and set aside the penalty of £600.

### 10 **The late appeal**

3. The review conclusion letter was dated 10 August 2012. The appeal to the Tribunal was made on 11 September 2012, slightly later than the statutory time limit of 30 days. RSM Tenon, the company’s agent (“the agent”) has said that it did not receive the review conclusion letter until 11 September 2012, the day on which the  
15 appeal was made to the Tribunal.

4. The Tribunal considered the overriding objective as set out in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and also the case law on late appeals, and decided to allow the company to make a late appeal.

### **The law**

- 20 5. The statutory provisions, so far as relevant to this case are set out below.
6. Regulation 73 of the Income Tax (PAYE) Regulations 2003 is headed “annual return of relevant payments liable to deduction of tax (Forms P35 and P14).”
7. 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.
- 25 8. Regulation 205 states that employers “must deliver a relevant annual return by an approved method of electronic communication.”
9. 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.”
- 30 10. Regulation 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.
- 35 11. 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.”

12. The taxpayer's right of appeal against the penalty and the Tribunal's powers are at TMA s 100B.

13. 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:

“...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.”

#### 10 **The evidence**

14. The Tribunal was provided with the correspondence between the parties, and between the parties and the Tribunals Service. In addition, HMRC supplied a print-out from the Government Gateway relating to the company's PAYE and headed “PAYE for Employers”.

#### 15 **Facts not in dispute**

15. The company was due to file its 2010-11 P35 on or before 19 May 2011. The company's parent, Mawdsleys, tried to file the return before the due date.

16. On 3 August 2011 Mawdsleys made a call to HMRC's employer helpline and was told that the company's P35 had not been received by HMRC.

20 17. On 4 August 2012 Mawdsleys successfully submitted the company's return.

#### **Submissions for and on behalf of the company**

18. Mawdsleys say that they submitted the company's return “on the Monday 4 April and confirmations were received to confirm that they had been accepted”.

19. In relation to their conversation with HMRC on 3 August 2011 they say:

25 “when Mr Tony Ginge, who we spoke to, was informed of the date [the P35s for the companies in the Mawdsleys group] were sent, he suggested that it was a fault of your [ie HMRC's] interface as that was the date you were having an update on your system and suggested we send them again which we did on 4 August 2011.”

30 20. Mawdsleys also say that “our file, which contained the confirmations, has been mislaid, which means we cannot provide proof of receipt.”

21. The agent says that the appeal should be allowed because:

- (1) the burden is on HMRC to prove a default;
- (2) the company reasonably believed that the return had been submitted; and

5 (3) the penalty was excessive because HMRC could have sent out the penalty sooner. In its Notice of Appeal, the agent relies on various *dicta* from other Tribunal cases. These are not attributed, but at least one of these derives from the case of *Hok v R&C Commrs* [2011] UKFTT(433) (“*Hok*”), where the First-tier Tribunal found that HMRC had acted unfairly by delaying the issue of a penalty for late submission of a P35.

### HMRC’s submissions

10 22. HMRC say that the P35 was not filed correctly and that a “failure response” was sent to Mawdsleys by the HMRC computer system. They produce the Government Gateway print out as evidence. The details on the printout include the following:

(1) On 5 April 2011 at 15.37, under the heading “form type” the printout states “IR PAYE EXB”; under the heading “status” are the words “failure response received from Department”.

15 (2) On 30 June 2011, under the heading “form type” the printout reads “IR-PAYE-EXB”; under the heading “status” is “Success – Document deleted from gateway.”

(3) On 4 August 2011, under the heading “form type” is “IR-PAYE-EOY” and under “status” is “Success – Document deleted from gateway.”

20 23. HMRC say that the HMRC system only allows each P35 return to be filed once, so the fact that the agent could file the P35 on 4 August 2011 means that it cannot have been filed earlier.

25 24. They also say that the company has not put forward any evidence to support its case that it reasonably believed the return had been submitted on 4 April 2011. Furthermore, it should have been alerted by the “failed transmission” message. As a result, HMRC say the company does not have a reasonable excuse.

25 25. In relation to unfairness, HMRC say that when *Hok* was appealed to the Upper Tribunal as *HMRC v Hok* [2012] UKUT 363(TC), that Tribunal overturned the decision of the First-tier Tribunal on the grounds that it had “acted beyond its jurisdiction in discharging the penalties”.

### 30 Further findings of fact

26. The Tribunal’s first task is to make further findings of fact.

#### *Whether the return was successfully filed before 4 August 2011*

27. The first question is whether the return was successfully filed before August 2011.

35 28. HMRC say that the HMRC system only allows each P35 return to be filed once, so the fact that the agent could file the P35 on 4 August 2011 means that it cannot have been filed earlier. The company does not dispute this.

29. The Tribunal accepts as a fact that HMRC's statement that their computer system can only accept a return on a single occasion, and that it was not accepted before 4 August 2011.

5 30. PAYE 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." The consequence of this finding of fact is therefore that the return was not delivered until 4 August 2011 and was thus late.

*Whether there was a computer upgrade on 4 April 2011 and if so, its consequences*

10 31. Mawdsleys believed they had filed the return on Monday 4 April 2011. HMRC say that the company failed to file the return at 15.37 on 5 April 2011.

32. Mawdsleys also say they were told by a specific named employee of HMRC, one Tony Ginge, to whom they spoke on 3 August 2011, that on 4 April there was an update to the HMRC system.

15 33. HMRC do not provide any evidence either about this call, or the upgrade. Specifically:

(1) They do not deny that the call took place.

20 (2) They do not provide notes of telephone calls between Mawdsleys and HMRC. The Tribunal notes that this is unusual, as these notes are routinely provided as evidence in Tribunal hearings. In this case both the name of the HMRC employee and the date are available, making it relatively easy to trace the call.

(3) They do not deny Mawdsleys' statement that there was an HMRC computer update on 4 April 2011.

25 34. On the basis of Mawdsleys' uncontested evidence, the Tribunal therefore finds that there was a computer update on 4 April 2011.

35. Further, Mr Tony Ginge attributed the company's P35 filing failure to the upgrade of HMRC's system. This too is uncontested by HMRC.

30 36. The Tribunal therefore makes a further finding of fact that the cause of the failure to file the P35 was HMRC's computer upgrade on 4 April 2011.

*Whether HMRC issued a "failed transmission" notice to the company*

37. HMRC say that the company was provided with a "failed transmission" notice, and provide as evidence the printout reading "failure response received from Department."

35 38. However, the Government Gateway printout does not support HMRC's case. Although the Tribunal have not been provided with the meaning of the abbreviations used, it is reasonably to infer that the P35 form type is "IR-PAYE- EOY". There was

no “failed transmission” message on 5 April 2011 for a P35 – instead, it was given for a form “IR-PAYE-EXB”.

39. HMRC have therefore not provided any evidence to support its case that it sent a failed transmission message to the company: the evidence relates to a different type of return. The Tribunal therefore makes a finding of fact that no failed transmission message was made in relation to the P35.

*Whether a successful confirmation receipt was provided*

40. Mawdsleys says that it received a confirmation that the company’s return had been accepted, but has lost the file containing the confirmations.

41. The Tribunal has already found as a fact that the return was not successfully received by the HMRC computer. Is this fact compatible with the receipt by the company of a document indicating that the return had been successfully filed?

42. Given that the HMRC computer was undergoing an upgrade, the Tribunal accepts that it is possible that Mawdsleys received a document which they reasonably believed indicated that P35 had been successfully filed– whether this was sent by the Government Gateway, or by proprietary software, or by HMRC themselves during the updating of their computer system.

43. The Tribunal also takes into account that the evidence provided by Mawdsleys generally is particularised, detailed and credible. It would be inconsistent with the general tenor of their evidence to find that Mawdsleys had invented the existence of the confirmation receipt.

44. Having weighed the evidence, and also taking into account the fact that no “failed transmission” message was sent to the company, the Tribunal finds as a fact that a message was received by Mawdsleys which they understood meant the return had been successfully filed .

**Discussion and decision**

45. On the basis of these further findings of fact, the Tribunal finds that it was reasonable for the company to believe that the return had been successfully submitted.

46. 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. 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.

47. This tribunal held, following those authorities, that a reasonable belief may be a reasonable excuse, see *Bellchambers v R&C Commrs* [2012] UKFTT 204(TC). In *Thakrar v R&C Commrs* [2011] a differently constituted tribunal found that while a

reasonable and honest belief potentially provided Mr Thakrar with a reasonable excuse, it found no evidence that he actually held such a reasonable belief.

48. In this case, too, the Tribunal finds that the company's reasonable belief provides it with a reasonable excuse.

5 49. Thus, although as HMRC say, the case of *Hok* decided that the First-tier Tribunal has no jurisdiction to discharge a penalty for the late submission of a P35 on the grounds that the Tribunal thinks the penalty is unfair, this is not a case which depends on an unfairness argument. Instead, it depends on the facts of the case and on the company's reasonable excuse, which is based on those facts.

10 50. As a result of the foregoing, the Tribunal allows the appeal and sets aside the penalty.

15 51. 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**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 18 April 2013**