



**TC04646**

**Appeal number: TC/2015/02151**

*INCOME TAX – penalty – application for extension of time to appeal – extension allowed*

*INCOME TAX – penalty – PAYE - failure of employer to make annual return of payments subject to deduction of tax (P35) – mandatory on-line filing – reliance on guidance from HMRC – whether reasonable excuse – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MARY WALKER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ASHLEY GREENBANK  
MRS SHEILA CHEESMAN**

**Sitting in public at 8-10 Howard Street, Bedford on 5<sup>th</sup> August 2015**

**The Appellant did not appear and was not represented.**

**Stephen Goulding, officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

- 5 1. This is an appeal by the appellant, Mary Walker (“Ms Walker”), against penalty determinations made by the respondents (“HMRC”) for failure to make an annual return of amounts deducted from payments made to employees (“Form P35”) in respect of the tax year ended 5 April 2011 (the “tax year 2010/11”).
- 10 2. The total amount of the penalties is £1200. The penalties were raised in two separate determinations: the first of which was issued to Ms Walker on 3 February 2012 in the amount of £800; and the second of which was issued on 28 May 2012 in the amount of £400.

### The hearing

- 15 3. Ms Walker did not appear and was not represented.
4. We decided to proceed with the hearing in the absence of Ms Walker.
- (a) We were satisfied that Ms Walker had been given notice of the hearing or that reasonable steps had been taken to notify Ms Walker of the hearing.
- 20 (b) We noted from the materials on the Tribunal file that the date of the hearing was a date which Ms Walker had given as one of her “dates to avoid” when the hearing was re-arranged from its original date. However, Ms Walker had had adequate time to notify the Tribunal that she was unable to attend and had not done so.
- 25 (c) There was sufficient evidence of Ms Walker’s submissions from the correspondence on the Tribunal file, the documentary evidence provided to the Tribunal by HMRC and the Notice of Appeal to allow the Tribunal to reach a conclusion on the issues before it.
- 30 (d) There were no new issues being raised before the Tribunal of which Ms Walker would not have been aware from her correspondence with HMRC and the Tribunal in advance of the hearing.
- 35 (e) If the hearing were to be postponed, the resolution of the issues before the Tribunal would be delayed and HMRC and the Tribunal would be put to further cost and expense.

For these reasons, we took the view that it was in the interests of justice to proceed.

## **Evidence**

5. HMRC produced a bundle of documents for the hearing.

6. The bundle contains some correspondence between HMRC and Ms Walker and some details of telephone conversations between officers of HMRC and Ms Walker as  
5 taken from the contact database. The records of the communications between HMRC and Ms Walker were not comprehensive. For example, there are references to various letters between HMRC and Ms Walker in the contact database for which copies were not available. The other evidence also refers to telephone conversations which were not reflected in the contact database.

## 10 **Facts**

7. We have set out below a summary of the correspondence and telephone  
conversations between Ms Walker and HMRC regarding the Form P35 for the  
2010/11 tax year. It is drawn from the bundle of evidence provided by HMRC which,  
as we have just described, is not comprehensive. Extracts from the contact database  
15 are also in a form which contains numerous abbreviations which we have endeavoured to interpret. Taking into account all of these factors, we find the facts as set out in this decision on the balance of probabilities.

8. On 7 April 2011, in a conversation concerning primarily the return for the tax  
year 2009/10 which was at that time outstanding, the HMRC officer advised Ms  
20 Walker of the need to file her Form P35. It is not clear whether this is a reference to the Form P35 for the tax year 2009/10 or the tax year 2010/11, but, in context, we have taken it to be a reference to the tax year 2010/11.

9. On 27 May 2011, seven days after the filing date for the tax year 2010/11, Ms  
Walker telephoned HMRC. She had received an estimated assessment for the tax  
25 year 2009/10 and did not understand how it had arisen. She was informed that as a Form P35 for the tax year 2009/10 remained outstanding, the bill was payable. She was advised to submit her returns online as soon as possible. She told the HMRC officer that she did not have the passwords to file online. The HMRC officer gave her contact details for those at HMRC dealing with online filing. Ms Walker was warned  
30 that recovery action would continue if the Forms P35 for the tax years 2009/10 and 2010/11 were not filed by 8 June 2011.

10. On 16 June 2011, Ms Walker telephoned HMRC. She said that she had  
received the relevant codes for online filing but was still having difficulties in  
uploading the Forms P35 for the relevant years. She was given the telephone number  
35 for the helpline at HMRC. This telephone call is timed in the contact database at 9.44 a.m.

11. At 10.44 a.m. Ms Walker called HMRC again. She said that her problem had  
been diagnosed. She had the wrong passwords and had been told that she would have  
to wait to receive another Government Gateway password, which would take about  
40 five days. The report in the contact database suggests that Ms Walker was warned about the possibility of penalties arising. It is not clear whether this relates to the tax

year 2009/10 or the tax year 2010/11. Ms Walker was also warned that interest would be payable for both years. She made some payments on account on her debit card.

12. On 27 June 2011, Ms Walker called again. The database entry records that she was “very frustrated and upset”. She reported that she had tried to upload all the relevant information and file her returns online, but the system would not allow her to upload the information. She was advised to call an employer’s helpline number. She made a further payment on account using her debit card.

13. There is no record of Ms Walker’s telephone call with the helpline. We inferred from the other evidence that she did make that call and was advised to submit her information in paper form with an explanation of the difficulties that she was having.

14. The next relevant item on the contact database is dated 4 August 2011. It records the receipt of a letter dated 16 July 2011 from Ms Walker which included printouts from HMRC’s systems. We have not seen a copy of this letter, but the contact database reports that in the letter Ms Walker states that she has been unable to file online and has sent in the printouts which she hopes HMRC will accept. She also asked for time to pay any balance of the tax which remained outstanding.

15. On 8 August 2011, an officer of HMRC called Ms Walker to confirm receipt of the letter of 16 July 2011 and advised her that her “printouts of P35s for 2009/10 and 2010/11 had been passed to HMIT”. Ms Walker was told that HMRC would discuss time to pay with her once the returns had been processed and that any recovery action would be “on hold” whilst the returns were processed. She was also told that HMRC “will ring her if there is a problem” but she could make payments on account whilst she was waiting for the returns to be processed.

16. On 10 August 2011, Ms Walker called HMRC again. She made a further payment on account. She said that she would call again within a month to check that her returns had been processed and make a further payment. The contact database records that “once returns have been processed, we are to contact [the taxpayer] and discuss [time to pay]”.

17. The next relevant entry that we have seen is dated 6 December 2011. It refers to the contents of a letter received from the employer (Ms Walker), which we take to be a reference to Ms Walker’s letter dated 16 July 2011. The contact database records that a letter had been sent to Ms Walker advising her that her returns were not in the correct format. We have not seen the copy of this letter.

18. On 19 December 2011, Ms Walker called HMRC. She says that she had had computer problems in submitting the Forms P35 tax years 2009/10 and 2010/11 and had been advised to send in the printouts and an explanation, which she had done in her letter of 16 July 2011. She had received a letter dated 7 December 2011 (which we take to be a reference to the letter referred to in the HMRC records dated 6 December 2011) reportedly returning the Forms P35, but they were not enclosed.

19. The database also contains a reference to a letter dated 15 December 2011 from Ms Walker to HMRC, which was again not available and in which she requested that certain discs be resent to her so that she could “redo everything”.

5 20. On 2 February 2012, HMRC issued the first penalty notice in an amount of £800. The penalties are monthly penalties under section 98A(2)(a) of the Taxes Management Act 1970 (“TMA 1970”).

21. On 28 May 2012, HMRC issued the second penalty notice in an amount of £400. The penalties are again monthly penalties under section 98A(2)(a) TMA 1970.

10 22. There is then a significant gap in the evidence of the communications between HMRC and Ms Walker. We have seen no correspondence between Ms Walker and HMRC in the immediate aftermath of the issue of the notices. The first relevant communication of which we are aware is on 10 April 2013. On that date, Ms Walker wrote to HMRC providing details of information which she had submitted concerning her Form P35 for the tax year 2010/11. We have not seen a copy of this letter, but  
15 evidence of posting was provided by Ms Walker with her Notice of Appeal together with copies of the information necessary for her Form P35. It is not clear what communication from HMRC, if any, prompted Ms Walker to write this letter.

20 23. On 26 April 2013, the HMRC database records receipt of a letter dated 9 April 2013 from Ms Walker (which we take to be the letter that was posted on 10 April 2013). The record refers to the letter having been received on 11 April 2013 and relating to a “penalty appeal” regarding the late filing penalty of £1200 for the tax year 2010/11. The entry states:

25 “Correspondence in from taxpayer. Penalty appeal. Ltr dated 9/4/13 rec’d HMRC 11/4/13 signed by Mary Walker re lfp £1200 10/11 states 11/12 P35 filed on time and attached evidence of this.”

30 24. This entry suggests that the HMRC officer thought that the evidence accompanying the letter of 9 April 2013 related to the filing of the Form P35 for the tax year 2011/12 and not that for the tax year 2010/11. This does not accord with the information provided in the Notice of Appeal by Ms Walker. In the context of the other evidence to which we refer later in this decision, on the balance of probabilities, we inferred that the letter included evidence of information provided in relation to the tax year 2010/11 but not evidence of on-line filing of the Form P35.

35 25. There are various other entries on 26 April 2013. They refer to attempted calls to Ms Walker and a conversation with Ms Walker on that date. Ms Walker is told that she will need to submit a Form P35 before she can appeal. Ms Walker said that she will look into this matter and resubmit.

40 26. On 1 May 2013, HMRC wrote to Ms Walker advising that, if the penalties were not paid, HMRC would commence action to recover them. The letter refers to three other letters previously sent to Ms Walker demanding payments of the penalties. We have not seen any of these letters.

27. On 28 May 2013, HMRC contacted Ms Walker to confirm that HMRC were still pursuing the Form P35 for the tax year 2010/11.

28. On 5 June 2013, Ms Walker called HMRC. She said that she was advised that the Form P35 for the tax year 2010/11 had been filed. This call is not referred to in the extracts from the HMRC database. There is evidence of this call in Ms Walker's handwritten notes provided with her Notice of Appeal.

29. On 17 December 2014, Ms Walker wrote to HMRC. In that letter, Ms Walker expressed her objection to the penalties raised for the tax year 2010/11. She referred to a letter dated 8 December 2014 from HMRC, which, once again, we have not seen. She also referred to "numerous" recorded delivery letters which she said she had sent to HMRC providing the documentation that HMRC had requested. She suggested that her problems with filing her returns online were due to HMRC's software and that she had filed her returns on time.

30. HMRC treated the letter dated 17 December 2014 from Ms Walker to HMRC in which Ms Walker expressed her objection to the penalties as being an appeal.

31. HMRC wrote to Ms Walker on 20 January 2015 advising her that her appeal was out of time and that HMRC would not exercise its discretion under section 49 TMA 1970 to allow a late appeal. This was on the grounds that there was no reasonable excuse for her delay in making an appeal.

32. Ms Walker made an appeal to the Tribunal by a notice of appeal dated 13 February 2015.

### **Late appeal**

33. The first issue before the Tribunal was whether to permit Ms Walker an extension of time to appeal against the decision of HMRC to impose the penalties under section 49 of the Taxes Management Act 1970 ("TMA 1970").

### *Applicable law*

34. Section 49 TMA 1970 provides as follows:

#### **"49 Late notice of appeal**

(1) This section applies in a case where -

(a) notice of appeal may be given to HMRC, but

(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if -

(a) HMRC agree, or

(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

5 (4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

(5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

10 (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

(8) In this section "relevant time limit", in relation to notice of appeal, means the time before which the notice is to be given (but for this section)."

15 *HMRC's arguments*

35. Mr Goulding says that, under section 31A TMA 1970, a notice of appeal had to be given in writing within 30 days of the specified date. The specified date was the date of the issue of the determination (as determined by section 31A(4)).

20 36. He says that no formal appeal was made by Ms Walker to HMRC at any time. HMRC has treated Ms Walker's letter of 17 December 2014 as an appeal, but that appeal was out of time.

25 37. Mr Goulding says that HMRC considered whether or not to allow a late appeal. Under section 49(2)(a) TMA 1970, HMRC must agree to allow a late appeal when three conditions are met: that the appellant made a request in writing; that HMRC are satisfied that there was a reasonable excuse for the delay; and that the request was made without unreasonable delay after the excuse ceased. HMRC's view was that there was no reasonable excuse for Ms Walker's delay in appealing against the penalties in question.

30 38. Mr Goulding then turns to the Tribunal's power to permit a late appeal under section 49(2)(b) TMA 1970. In this context, he refers to the decision of Mr Justice Morgan in the case of *Data Select Limited v Revenue & Customs & Commissioners* [2012] UKUT 187 (TCC), in which he set out the criteria which a tribunal should take into account in deciding whether to exercise its discretion to permit a late appeal. Mr Goulding refers, in particular to paragraph [34] in which Morgan J states:

35 "Applications for extensions of time limits of various kinds are common place and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal

asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.”

39. Mr Goulding makes the following comments on the criteria set out in Morgan J’s decision.

(1) The purpose of the time limit is to bring finality to the appeal in the interests of all the parties. It permits HMRC to close its files and to move on to other cases. That is in the interests of HMRC and other taxpayers.

(2) The delay in this case was substantial. The letter of 17 December 2014 was 1,018 days after the penalty notice was issued on 3 February 2012 and 904 days after the penalty notice was issued on 28 May 2012.

(3) The Appellant has not provided any explanation as to why the appeal was so late.

(4) As to the consequences of the extension of the time limit, for the parties to the appeal, the consequence would be that the penalty subject to the appeal would not become final and the appeal would proceed. That would be unfair on other taxpayers who are expected to adhere to time limits.

(5) As for the consequences of a refusal to extend the time limit, the Appellant would be denied the opportunity to put forward her arguments in relation to her appeal against the penalties. But, in HMRC’s view, the evidence does not support those arguments and, in any event, they did not provide any reason for the lateness of the appeal.

#### *Discussion and decision*

40. We have decided to admit a late appeal in this case. Our reasons are set out below.

41. The legislation - in section 49(2)(b) TMA 1970 - does not set out any criteria by which the Tribunal is to determine whether or not to permit a late appeal. The approach that a tribunal should take when considering whether or not to permit a late appeal is set out in the decision of Morgan J in the *Data Select* case. His comments were endorsed by the Upper Tribunal in *Leeds City Council v HMRC* [2014] UKUT 0350 (TCC).

42. Those cases show that the correct approach is to consider the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to deal with cases fairly and justly and all the circumstances of the case. In adopting that approach, we refer not only to that part of paragraph [34] of the decision of Morgan J in *Data Select* to which we were referred by Mr Goulding, but also to the remainder of the passage, being paragraphs [34] to [38], referred to by Judge Bishopp in the *Leeds City Council* case.

43. If we apply that approach, we take into account the following considerations.

44. The purpose of the time limit is to ensure that the Appellant responds promptly. It also affords HMRC the assurance that, once the time limit has expired without any challenge to the penalty, it will not be contested. Mr Goulding referred to the desirability of finality in litigation as a reason for maintaining a time limit. We accept that may be an important criterion for time limits to appeal against a judicial decision, but we agree with the comments of Morgan J, at paragraph [37] of his decision in *Data Select*, that it is not directly relevant to cases involving an appeal against a decision of HMRC.

45. In this case, HMRC were aware throughout that Ms Walker was contesting the penalty determinations. There are various references in the contact database of Ms Walker's views on the penalties and to various letters sent by Ms Walker with details of the information on the Form P35. HMRC were unable to produce copies of all of the letters for the Tribunal but, in any event, we have no doubt that HMRC must have been aware that the penalties were being disputed long before HMRC received Ms Walker's letter of 17 December 2014.

46. Mr Goulding referred to the length of the delay. In doing so, he calculated the length of the delay by reference to Ms Walker's letter of 17 December 2014. As we have mentioned above, the correspondence provided to the Tribunal was not complete, but it is clear from the extracts from contact database that we have seen that HMRC was aware that the penalties were being disputed before that date. We refer by way of example to the entry for 26 April 2013 to which we have referred at [23] above, from which it is clear that HMRC was aware that the penalties were being disputed.

47. Mr Goulding says that no reason has been given for the delay. As we have mentioned above, there is a significant gap in the record of the communications between HMRC and Ms Walker. So we cannot say with any certainty whether or not Ms Walker has given a specific reason for any delay. In any event, in the circumstances, we do not find that surprising. Ms Walker's actions throughout have been consistent with her disputing the penalties.

48. If we permit an extension, there is no material prejudice to HMRC. HMRC should have been aware that the penalties were being contested. This is not a case where HMRC will be materially prejudiced by permission being granted because it had previously assumed that there would be no challenge to the penalties.

49. If we do not permit an extension, Ms Walker will be deprived of an opportunity to make her case. We are mindful of the need to avoid extending time limits in cases that will inevitably be dismissed. We do not believe that Ms Walker's case falls into that category.

## **Appeal against the penalty**

50. The other issues before the Tribunal were: whether the penalties imposed by HMRC were appropriate; and whether Ms Walker had a reasonable excuse for failing to file a Form P35 within the relevant time limit.

### 5 *Applicable law*

51. Regulation 73 of the Income Tax (PAYE) Regulations 2003 (the “PAYE Regulations”) provides, in part, as follows:

#### **73 Annual return of relevant payments liable to deduction of tax (Forms P35 and P14)**

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(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.

52. Most of the remainder of regulation 73 sets out details of the information that must be included in the annual returns. Sub-paragraph (10) provides:

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(10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).

53. The requirement for employers to file Forms P35 online for the tax year 2010/11 was at the time contained in regulation 205 of the PAYE Regulations. It provided:

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#### **205**

An employer ..... must deliver a relevant annual return by an approved method of electronic communications to HMRC.

54. For the tax year 2010/11, regulation 206A of the PAYE Regulations provided (in part):

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#### **206A**

(1) In this Chapter “relevant annual return” means the return and accompanying information required by regulation 73 (annual return of relevant payments liable to deduction of tax (Forms P35 and P14)).

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55. As we have referred to above, in the case of penalties for failure to file an annual return, regulation 73(10) refers to Section 98A TMA 1970. Section 98A provides, so far as relevant, as follows:

#### **98A Special penalties in the case of certain returns**

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(1) PAYE regulations or regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) 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 –

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(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, and

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(b) .....

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return –

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

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(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

56. The powers of the Tribunal in relation to appeals against penalties are set out in section 100B TMA 1970. It provides, in part:

### **100B Appeals against penalty determinations**

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(1) ....

(2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but -

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(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may -

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(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be correct, confirm the determination, or

(iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount.

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57. Sub-section (2) of section 118 TMA 1970 provides:

### **118 Interpretation**

5 (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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  
10 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 parties' arguments*

58. Ms Walker's arguments are set out in her Notice of Appeal and the correspondence with HMRC.

15 59. She says that:

- (1) she submitted her return on time;
- (2) if she had not filed the return then she would not have been able to make her filings in subsequent years;
- (3) she has been in regular contact with HMRC and had sent in the information as requested;
- (4) the problems with filing have been due to HMRC's software.

25 60. Mr Goulding for HMRC, says that the Form P35 was not filed correctly and has still not been filed: the papers attached to Ms Walker's letter of 26 April 2013 did not amount to a Form P35; the Form P35 has never been filed online as required by law; and, in any event, the information to complete the Form P35 was received after the  
30 relevant filing date, which was 19 May 2011.

61. Mr Goulding says Ms Walker did not have a reasonable excuse for failing to make the return on time and not filing in the correct format. She was warned about the need to file in advance. She was further advised on 27 May 2011 that she must file online and was provided with systems to enable her to file in the correct format.

### **35 Discussion**

62. Under regulation 73 of the PAYE Regulations, an employer is required to make an annual return of payments made to employees. This annual return is known as a Form P35. There is a similar requirement in paragraph 22 of Schedule 4 to the Social Security (Contributions) Regulations 2001 in relation to national insurance  
40 contributions. The annual return must be filed before 20 May following the end of the relevant tax year.

63. Under regulation 205 of the PAYE Regulations as it was at the time, an employer was required to file a relevant annual return by an approved method of electronic communication. The Form P35 was a “relevant annual return” for these purposes (regulation 206A, as it then was).

5 64. Ms Walker should therefore have filed her Form P35 for the tax year 2010/2011 before 20 May 2011. She did not. She was also required to file that return online by virtue of regulation 205 of the PAYE Regulations. She had not. As a result, a liability to a penalty arose.

10 65. The penalty for failure to file a Form P35 is set out in section 98A TMA 1970. The penalties for the first twelve months of any such failure, to which this appeal relates, are set out in sub-section (2)(a) and sub-section (3) of section 98A. In summary, for an employer who has fewer than 50 employees, the penalty is £100 per month or part of a month for which the failure continues, subject to a maximum penalty of twelve months.

15 66. Ms Walker failed to file her Form P35 on time. She did not file her return in the correct online format throughout the entire twelve month period following the filing date and so the maximum penalty under section 98A(2) of £1200 is, in principle, due.

20 67. As the penalty under section 98A TMA 1970 is a penalty which is required to be of a particular amount, the powers of the Tribunal on an appeal are limited under section 100B(2) TMA 1970. The Tribunal may set aside a penalty which has not in fact been incurred, or correct a penalty which has been incurred but has been imposed in an incorrect amount, but the Tribunal has no jurisdiction to adjust the penalty on the grounds that it is unfair for HMRC to impose the penalty in those circumstances or for any similar reason (see the decision of the Upper Tribunal in *Hok Limited v HMRC Commissioners* [2012] UKUT 363 (TCC)).

25 68. It follows that Ms Walker can only escape liability for the penalties if she can show that she should be treated as not having failed to file the return and not having continued to do so for the purpose of section 98A(2)(a) TMA 1970.

30 69. Ms Walker will be treated as not having filed her return or continued to do so if she has a reasonable excuse for failure to file a return or her continued failure to do so within section 118(2) TMA 1970. There is no statutory definition of the meaning of “reasonable excuse”. However, an excuse is likely to be reasonable where the taxpayer acts in the same way as someone who seriously intends to honour their tax liabilities and obligations would act (see, for example, *B & J Shopfitting Services Limited v HMRC* [2010] UKFTT 78 (TC)).

40 70. In this case Ms Walker was made aware, in advance of the deadline for the tax year 2010/11, that she would be required to file a Form P35. In any event, it was the second year of mandatory online filing for smaller employers so Ms Walker should have been aware of her obligations from the previous year. Mr Goulding explained that Ms Walker was not charged a penalty in relation to the tax year 2009/10 as HMRC adopted a policy of mitigating penalties in that year.

71. A reasonable taxpayer would have anticipated having to make an online return. It was only when she contacted HMRC on 27 May 2011, several days after the deadline to complete the return, that Ms Walker informed HMRC that she did not have the correct passwords in order to be able to file online. It was not until 16 June  
5 2011 that she told HMRC that she was having difficulty with the online filing system and sought assistance from HMRC.

72. From that time however, Ms Walker did seek to comply with her obligations. She contacted HMRC and was instructed to send her returns in paper form with an explanation of the difficulties that she had been experiencing. She submitted the  
10 Form P35 as requested by HMRC in paper form with her letter of 16 July 2011. HMRC acknowledged receipt of the Form P35 in paper form on 8 August 2011 and she was led to believe that HMRC would process the form for her.

73. At that point, Ms Walker thought that her Form P35 had been accepted by HMRC even though it was not in the correct online format. In our view, it was  
15 entirely reasonable for her to do so and, at that stage, for her to consider that she had discharged her obligations.

74. It was not until December 2011 that HMRC wrote to Ms Walker to inform her that the information that she had submitted was not in the appropriate format. It is then quite unsurprising that Ms Walker reacts in the way that she does having  
20 previously been given the impression that she had met the filing requirements. However, from that point onwards, and in particular having received HMRC's letter of 7 December 2011, Ms Walker must have been aware that HMRC were no longer treating the information that she had provided as being acceptable.

75. Section 118(2) provides that, for the purposes of TMA 1970, where a taxpayer  
25 has a reasonable excuse for not doing anything required to be done, the taxpayer is to be treated as not having failed to do it unless the excuse has ceased.

76. In this case, Ms Walker did not have a reasonable excuse for failing to file her return on time. She should have taken steps in advance of the deadline to prepare to file her returns online and to obtain the relevant passwords.

30 77. We take the view, however, that Ms Walker did have a reasonable excuse for her continued failure to file her Form P35 from 16 July 2011 when having been given the impression by HMRC that, if she supplied the information in paper form, she would be treated as having met the requirements, she sent her letter. That impression was confirmed in the conversation of 8 August 2011.

35 78. We acknowledge that the latter part of section 118(2) TMA 1970 might be read in a limited way to apply only to the initial failure to comply with the filing requirement, but, in the context of a penalty that is imposed on a monthly basis, such as that in section 98A(2)(a) TMA 1970, in our view, section 118(2) should be read as capable of applying to each monthly penalty. On that basis, for the purposes of  
40 section 98A(2)(a) TMA 1970, Ms Walker should not be treated as having failed to file

her Form P35 for the tax year 2010/11 with effect from 16 July 2011 until that excuse ceased.

79. In this case, Ms Walker became aware that HMRC was taking a different view when she received HMRC's letter dated 7 December 2011, which she must have done on or before 15 December 2011. At that point her excuse – that she had been given to understand that HMRC had accepted the information that she had provided - ceased to exist.

80. Section 118(2) also provides that, where a taxpayer had a reasonable excuse for failing to do anything required that has ceased, the taxpayer will continue to be treated as not having failed to do it even after the excuse ceased, if the taxpayer did it without unreasonable delay after the excuse had ceased. In this case, Ms Walker has still not filed her Form P35 online and so the period for which Ms Walker can be treated as not having failed to file her Form P35 for the purposes of section 98A(2)(a) TMA 1970 cannot be extended beyond the time at which the excuse ceased, which in our view was on 15 December 2011.

81. We have considered whether it would be possible to take the view that once Ms Walker had been given the expectation that she would be treated as having filed her Form P35 correctly, she should be treated as having a reasonable excuse even after HMRC acquainted Ms Walker of its change of view. That might be seen as a fairer result. However, we have come to the view that such an approach would trespass too far into the realms of reviewing the fairness of HMRC's actions. Following the decision of the Upper Tribunal in the *Hok Limited* case, those are matters which are not within the jurisdiction of this Tribunal.

82. On that basis, Ms Walker should be treated as having a reasonable excuse for not filing her Form P35 for the period from 16 July 2011 until 15 December 2011. She should therefore be deemed not to have failed to file her Form P35 for this period.

83. Under section 98A(2)(a) TMA 1970, Ms Walker is liable to a penalty for each month or part of a month during which the failure continued. Accordingly, for the purposes of section 98A(2)(a) TMA 1970, she is liable for a penalty for the months ended 19 June 2011 and 19 July 2011. She is not liable for a penalty for the months ended 19 August 2011, 19 September 2011, 19 October 2011 and 19 November 2011. She is then liable for a penalty for the months ended 19 December 2011, 19 January 2012, 19 February 2012, 19 March 2012, 19 April 2012 and 19 May 2012.

84. We allow this appeal in part. We reduce the penalties to £800 on the following basis:

- (1) we reduce the penalty determination issued on 3 February 2012 to £400; and
- (2) we confirm the penalty determination issued on 28 May 2012 in the amount of £400.

**Right to appeal**

85. 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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**ASHLEY GREENBANK**

**TRIBUNAL JUDGE**

**RELEASE DATE: 17 SEPTEMBER 2015**

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