



**TC01465**

**Appeal number: TC/2011/03860**

*P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—  
Reasonable excuse—Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**THE WALLIS COMPANY**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Dr Christopher Staker (Tribunal Judge)**

**The Tribunal determined the appeal on 14 September 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 16 May 2011, HMRC's Statement of Case dated 29 June 2011, and other papers in the case.**

## DECISION

### Introduction

5 1. The Appellant appeals against penalties totalling £400 imposed in respect of the late filing of its P35 employer's annual return (P35) for the tax year 2009/10.

### The relevant legislation

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to  
10 paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

15 (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—

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

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, ...  
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4. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of such a penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the 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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5. Section 118(2) of the TMA provides as follows:

(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  
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5 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 arguments of the parties**

6. The Appellant's case as stated in the notice of appeal is in brief as follows. The Appellant sought twice to submit the return online within the deadline. It is said that "What appears to have happened, but unbeknown to me, was that due to a computer  
10 glitch at the time at HMRC the return was never downloaded into their system". The Appellant denies receiving an error message at the time alerting it to the system error, and would have reacted if such a system error had been received. It was only in February 2011 that the Appellant was advised by HMRC that the return had not been received. The return was then submitted without amendment on 14 February 2011. It  
15 took HMRC four months to advise the Appellant that there had been an error. In that four months, the Appellant could not have been aware of this. A penalty of £400 causes economic hardship to the Appellant in the current economic climate.

7. A letter from the Appellant to HMRC dated 1 December 2010 contains the further details. The Appellant submitted the return on 17 May 2010, and received at  
20 the time two reference numbers.

8. The HMRC statement of case states amongst other matters as follows. The HMRC online services team confirm that the "reference numbers" supplied by the Appellant actually have written on them "Sorry the system is unavailable please try later or contact HMRC Online Services Helpdesk quoting Ref No ...". HMRC accept  
25 that its computer system had a glitch at the time in question but do not accept that the Appellant would have been unaware that the return had not been submitted. HMRC also questions why the Appellant would try to submit the return twice if it was unaware that it had not been successfully submitted the first time. HMRC have no discretion in the calculation of the penalty which is fixed by legislation. There is no  
30 obligation on HMRC to issue reminders, and penalty notices are not intended to serve as reminders. Adequate guidance to employers is published by HMRC on how to file online and what to expect if a submission is not completed correctly or if the online system is unavailable. A reasonable excuse must exist throughout the period of default. The Appellant does not have a reasonable excuse that existed throughout the  
35 period of default.

### **The Tribunal's view**

9. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability.

10. The Tribunal has considered all of the material before it as a whole. Evidence  
40 submitted by HMRC includes a e-mail with attachment dated 29 June 2011 from HMRC's Customer Contact Online Customer Service Team 2. The e-mail indicates that the "error messages clearly state that it was an error, not a success response".

The e-mail accepts that there was a computer glitch on 17 May 2010, and that a number of other employees were also affected. The e-mail goes on to state that “Those who contacted OSH were advised to keep trying as it was intermittent and volume related” and that “For those employers who did keep trying and submitted a bit late (June/July, perhaps August) we have been asking for their appeals to be upheld”. The e-mail goes on to express the view that the Appellant in this particular case did not fall within the “keep trying category”.

11. Upon its consideration of the material as a whole, the Tribunal finds on a balance of probabilities as follows. The Appellant attempted to submit the P35 twice on 17 May 2010. Due to a computer problem at HMRC, the submission was not successful. On both occasions, the Appellant received error messages on the computer indicating that the submission had been unsuccessful, and that the Appellant should try again later. The Appellant therefore should have been aware on 17 May 2010 that the online submission had not been successful. If the Appellant through inadvertence did not notice that the submission was not successful, such inadvertence would not constitute a reasonable excuse. The Tribunal does not find that there was anything in any subsequent exchanges that the Appellant had with HMRC in the period to 14 February 2011 that would have entitled the Appellant to consider that the P35 had been filed or that the Appellant did not need to file the P35.

12. The Tribunal accepts the HMRC submission that there is no obligation on HMRC to issue reminders, and that penalty notices are not intended to serve as reminders.

13. The Tribunal finds that the argument that the penalties would cause financial hardship to the Appellant does not amount to a reasonable excuse. Even if such financial hardship could be a reasonable excuse, which the Tribunal does not accept, the Appellant has not submitted detailed evidence of the current financial position of the Appellant that would enable the Tribunal to form its own view of the degree of actual hardship.

14. The Tribunal finds that the Appellant has advanced no other circumstances that would amount to a “reasonable excuse” for late filing under s.118(2) of the TMA.

15. The Tribunal considers that a reasonable excuse must exist throughout the period of default. The Tribunal finds that the Appellant does not have a reasonable excuse that existed throughout the period of default.

16. The Tribunal finds that the amount of the penalties imposed is in accordance with what is prescribed by legislation. The Appellant has not sought to dispute the amount of the penalty, in the event that there is no reasonable excuse. The legislation gives the Tribunal now power to mitigate the prescribed penalties.

### **Conclusion**

17. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

18. 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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**DR CHRISTOPHER STAKER**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 20 SEPTEMBER 2011**