



TC01581

Appeal number: TC/2011/04196

Penalty – Late submission of Employers’ Annual Return (P35) – Whether reasonable excuse on facts – No – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

**THE ROYAL BRITISH LEGION SCOTLAND
DUNS BRANCH CLUB**

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 26 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 2 June 2011 and HMRC’s Statement of Case submitted on 8 July 2011.

DECISION

Introduction

1. This is an appeal by the Royal British Legion Scotland, Duns Branch Club (the “Club”) against a penalty of £400 imposed under s 98A Taxes Management Act 1970
5 for the late submission of an Employers’ Annual Return (the “P35”) for 2009-10.

2. A Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released on 29 September 2011. On 6 October 2011, following receipt of the Decision Notice, the Branch Chairman, Mr Donald Stokes Lieutenant Commander RN, wrote to the
10 Tribunal stating that “the officials of this organisation feel there is a case for re-appraisal of the matter, and wish to make an application to the Upper Tribunal where we wish to re-state the case.” The letter continues by requesting full written findings of fact and reasons for the decision.

3. This is in accordance with Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which provides that before an application for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal can be made it is necessary to request full written findings of fact and reasons for the decision of the
15 Tribunal.

Evidence

20 4. The evidence before the Tribunal was contained in the following documents:

- (1) The Club’s Notice of Appeal dated 2 June 2011.
- (2) HMRC’s Statement of Case submitted on 8 July 2011.
- (3) The following documents attached to the Statement of Case:
 - 25 (a) copy of HMRC’s ‘Employer P35 Penalty History’ for the Club showing a penalty of £400 was issued on 27 September 2010;
 - (b) copy of the Club’s 2009-10 P35 showing it was filed on 14 June 2011;
 - (c) print out from HMRC confirming receipt of an appeal against the penalty was received on 2 November 2010;
 - 30 (d) copy of a letter, dated 29 March 2011, from HMRC to the Club rejecting the Club’s appeal and offering a review of the decision to confirm the penalty;
 - (e) copy of a request, dated 5 April 2011, by the Club for a review of the decision by HMRC to uphold the penalty;
 - 35 (f) copy of a letter, dated 18 May 2011, from HMRC to the Club confirming the decision;
 - (g) the Notice of Appeal;

(h) copy of an ‘Employer Notification’ issued by HMRC “to complete form P35 Employer Annual Return” by “19 May following the end of the tax year 2009-10” which warns that “**we will charge a penalty if any part of your return is received late and/or not filed online**”; and

5 (i) copy of a print out from HMRC showing that such notification was sent to the Club on 10 January 2010.

Facts

5. Having considered this evidence I make the following findings of fact:

10 (1) The Club is a part-time, voluntary, non-profit-making, charitable organisation which does not have an internet connection.

(2) Only one person had been employed by the Club and his employment ceased on 31 August 2009.

(3) All payments of tax and NIC due in respect of that employee were made on time.

15 (4) HMRC issued the Club with an Employer Notification on 10 January 2010 requiring the submission of its 2009-10 P35 online by 19 May 2010.

(5) The Club’s treasurer who, was under the impression that, as the Club no longer employed anyone it was not necessary to submit a P35 for 2009-10, resigned in March 2010.

20 (6) On 27 September 2010 HMRC issued the Club with a penalty notice in the sum of £400.

(7) The Club’s appeal against the penalty was received by HMRC on 2 November 2010.

25 (8) HMRC rejected that appeal in a letter to the Club dated 29 March 2011 stating that “it is the responsibility of the employer to ensure that the P35 is correct and submitted on time. To date the P35 has not been received.”

(9) HMRC’s letter of 29 March 2011 also offered the Club a review of the decision to reject the appeal against the penalty.

30 (10) On 5 November 2011 the Club accepted HMRC’s offer of a review on the basis of the facts referred to above (in (1) – (3) and (5)). In addition the letter stated that had it been aware of a penalty in May the Club would have paid the sum due “without dispute.”

(11) The Club was notified of the outcome of the review, which upheld the decision of HMRC to impose a penalty, in a letter dated 18 May 2011.

35 (12) On 2 June 2011 the Club appealed to the Tribunal on the following grounds:

(1) This small, part-time charitable organisation (which does not have internet access) only had one employee for whom tax and NIC were payable. These sums were regularly paid until he ceased to be employed on 31 August 2009;

40

(2) In March 2010, the then treasurer resigned and was under the impression that no further action was required as the Club no longer had employees;

5

(3) Nothing was heard from HMRC until September 2010 when we were informed that £400 in late fees [ie the penalty] was due;

(4) We queried that sum on the grounds that we consider that HMRC should have warned us sooner than four months after the due date. We paid £100 in acceptance of the late fee, but appealed against the additional £300;

10

(5) This appeal has been denied, hence to application for [the] Tribunal decision

15

This may seem to be a claim for what is a fairly insignificant sum but the Duns Club is struggling to survive in the present financial climate with an elderly and rapidly dwindling membership. £400 would greatly help its finances and loss of this sum would only increase the possibility of this charitable organisation having to close its doors with the subsequent loss to the Duns community of an important social facility.

20

We do not dispute that we were in error in not filing the necessary document in time and have already paid £100 for that error.

We are requesting that on this occasion the remaining balance claimed by HMRC should be waived.

(13) On 14 June 2011 the Club filed its 2009-10 P35 online.

Law

25

6. Paragraph (1) of Regulation 73 of the Income Tax (PAYE) Regulations 2003 requires an employer to deliver a P35 to HMRC “before 20 May following the end of a tax year” containing the following information:

30

(a) *the tax year to which the return relates,*

(b) *the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and*

(c) *the total net tax deducted in relation to those payments.*

35

7. Paragraph (10) of Regulation 73 provides that “Section 98A of TMA (*special penalties in case of certain returns*) applies to paragraph (1).” Section 98A TMA which sets out the liability to penalties for non-compliance with the PAYE Regulations provides:

(1) *PAYE regulations...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—*

5 (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...*

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

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

8. Section 118(2) TMA, so far as is material to this appeal, provides that “*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*
15 *ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.*”

9. There is no definition in the legislation of a “*reasonable excuse*” which has been held to be “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

20 *Discussion and Conclusion*

10. The Club’s P35 for 2009-10 should have been filed by 19 May 2010 but was not received by HMRC until 14 June 2011. Therefore, the issue for me to determine is whether there was a reasonable excuse for the late submission of the P35 which continued throughout the period of default.

25 11. In considering this issue I note that there is no statutory requirement requiring HMRC to issue a warning of a potential liability to a penalty and that it is the duty of an employer, under the Regulations, to submit a P35 by the due date irrespective of whether that employer has complied with its duty to pay tax and NIC.

30 12. Given that the Club received notification from HMRC, dated 10 January 2010, requiring it “to complete form P35 Employer Annual Return” by 19 May 2010 which warned, in bold print, that a penalty “will” be charged “if it is received late and/or not filed online”, I am unable to find that the Club has a reasonable excuse on the basis of its reliance on the impression of the former treasurer that it was not necessary for a P35 to be filed for 2009-10 especially as he must have known that the Club had an
35 employee during that tax year.

13. Even if this was not the case and, notwithstanding the 10 January 2010 Employer notification from HMRC, the former treasurer’s impression did constitute a reasonable excuse, I find that it could not have continued throughout the period of default.

14. This is because when the Club received the penalty notice from HMRC in late September or early October 2010 it would have served as a reminder to the Club that it was required to file a P35 for 2009-10 and made it aware that it had not done so. However, even after receiving the penalty notice it took the Club until 14 June 2011 to file its P35.

15. Although I do appreciate the difficulties faced by the Club following the imposition of the penalty I find that these cannot amount to a reasonable excuse for the failure to file the P35 on time. The penalty is a result of the failure to file the P35 by the due date and not a reason for the failure to do so.

16. As I have not been provided with evidence of any other matter that could be regarded as a reasonable excuse for the late submission of the Club's P35 for 2009-10 its appeal cannot succeed.

17. I therefore dismiss the appeal and confirm the penalty.

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.



JOHN BROOKS

TRIBUNAL JUDGE

RELEASE DATE: 15 NOVEMBER 2011