



TC01691

Appeal number: TC/2011/04632

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

FIRST-TIER TRIBUNAL

TAX

H. S. FRENCH FLINT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: J. BLEWITT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 16 November 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 9 June 2011, HMRC's Statement of Case submitted on 29 September 2011 and the Appellant's Reply dated 24 October 2011.

DECISION

1. This is an appeal against a penalty totalling £900 imposed pursuant to Section 98 (2) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the Appellant’s P35 employer’s annual return (P35) for the tax year 2009/2010.

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 paragraph (1) of that regulation.

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

(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, ...*

(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, ...*

4. Section 100(1) of the TMA provides for 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 that 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:

(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.*

5. Section 118(2) of the TMA provides for reasonable excuse:

5 *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 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.*

Facts

10 6. The filing date for the end of year return was 19 May 2010. The return was filed online on 31 January 2011. A first penalty notification was issued on 27 September 2010 in the sum of £400 covering the period 20 May 2010 to 19 September 2010. A second penalty notice in the sum of £400 was issued on 24 January 2011 covering the period 20 September 2010 to 19 January 2011. A final penalty notice in the sum of
15 £100 was issued on 3 February 2011 for the period 20 January 2011 to 31 January 2011.

Submissions

20 7. The case for the Appellant as set out in the Notice of Appeal dated 9 June 2011 is as follows: it is accepted that the payroll manager knew that the P35 had not been submitted, but the Appellant was unaware due to the fact that the agency had lied by confirming to the Appellant that the return had been submitted. The Appellant was not notified until after 19 January 2011, by which time the penalty was £900. The Appellant had no way of knowing that the return had not been submitted as the previous notice sent on 27 September 2010 had been sent to the agent who caused the
25 problem.

30 8. By letter dated 24 October 2011 the Appellant confirmed that the facts set out in HMRC's Statement of Case are not in dispute except that HMRC were delinquent in failing to send a penalty notice until January 2011, at which stage the Appellant had no knowledge of the two previous penalty notices which had been sent to the payroll bureau. Had the Appellant been aware of the penalties, the problem would have been dealt with earlier. It is accepted that the Appellant was capable of completing the return, however it was part of a service offered by the payroll bureau, who had completed it for the three previous years and the Appellant had no reason to anticipate any difficulty. The agency has now stopped trading and the Appellant is unable to
35 seek redress from them. The Appellant may have to cease trading if the fine is upheld.

40 9. HMRC's Statement of Case can be summarised as follows: reliance on an agent or 3rd party is not a reasonable excuse (*The Cove Fish Restaurant Ltd v HMRC (TC/2011/03653)*, *Richfield Fashion Co Ltd v HMRC (TC/2010/02220)*). The penalty is not intended as a reminder and there is no obligation on HMRC to issue a reminder. It is the employer's responsibility to ensure that the return is filed by the due date.

Decision

10. The Tribunal notes that the Appellant accepts that the return was filed late. HMRC do not dispute the Appellant's explanation as to why the return was filed late; HMRC's position is that reliance on a third party such as an agent does not amount to a reasonable excuse.

11. The Tribunal is sympathetic to the Appellant's circumstances, but for purposes of this appeal, insufficient details or evidence of the claimed circumstances have been provided to enable the Tribunal to conclude that checks were made by the Appellant at the time the return was due. It is noted that the Appellant stated in his Notice of Appeal that an email confirmation of submission had been received by the Appellant from the agent, however this document has not been provided and the Tribunal is unable to determine when this email was received. In such circumstances, the burden being on the Appellant, the Tribunal is unable to conclude on the basis of the evidence that all reasonable efforts were made by the Appellant to file the return on time.

12. Every case turns on its own facts. In the present case, the Tribunal is not satisfied on the evidence that that the Appellant's reliance on its agent and that agent's dishonesty amounts to a "reasonable excuse".

13. The Appellant is solely responsible for filing the return on time. Even though the Appellant had delegated the responsibility to the Agent, the duty to ensure that the Agent had done all that was required of him to complete the transaction rested with the Appellant. There was no evidence before me that the Appellant exercised any control over the Agent.

14. There is no definition in the legislation of what amounts to reasonable excuse however case law has made clear that delegation to the Agent cannot absolve the Appellant from complying with the duty imposed upon him. The obligation to ensure that the agent files the return on time rests with the Appellant.

15. There is no statutory obligation on HMRC to issue reminders, and that penalty notices are not intended to serve as such. The Tribunal found as a fact that this did not amount to a reasonable excuse.

16. The Tribunal is sympathetic to the potential consequences of the penalty to the Appellant's business however the sole issue for this Tribunal to determine is whether or not there was a reasonable excuse for the late submission of the return. The Tribunal found as a fact that the penalties were charged in accordance with the legislation set out above and therefore has does not mitigate the penalties which were imposed in accordance with legislation.

17. The burden is on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal finds that the Appellant has not discharged that burden.

18. The Tribunal confirms the penalties and dismisses the appeal.

19. 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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TRIBUNAL JUDGE
RELEASE DATE: 20 December 2011

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