



TC01711

Appeal number: TC/2011/05159

Section 98A (2) and (3) Taxes Management Act 1970 – Employer’s End of Year P35 late - £100 mitigated penalty – Appellant’s agent had mistakenly filed P35 for wrong year – appeal not allowed

FIRST-TIER TRIBUNAL

TAX

BLACKWATER BINDERY LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 9 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 5 July 2011, HMRC’s Statement of Case submitted on 19 September 2011 and the Appellant’s Reply dated 27 September 2011.

DECISION

5 Decision under Appeal

1. This is an appeal by Blackwater Bindery Limited against the £400 penalties, subsequently reduced to a £100 penalty, imposed for the late submission of the Employer's Annual Return (P35) under s 98A (2) and (3) Taxes Management Act 1970 for the tax year ending 5 April 2010.

10 2. An employer has a statutory obligation to make End of Year returns before 20 May following the end of a tax year in accordance with Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001.

15 3. In the case of an employer failing to make an End of Year return on time, s 98A (2) and (3) Taxes Management Act 1970 provides for a fixed penalty at £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees. If the failure continues beyond 12 months a penalty can be imposed up to a maximum of the amount outstanding at 19 April i.e. it is a tax geared penalty.

20 4. Regulation 205 to 205B of The Income Tax (Pay As You Earn) Regulations 2003 provides that an employer must use electronic communications to deliver their 2009/10 end of year return online.

The background facts

25 5.(i) The filing date for the Appellant's 2009/10 return was the 19 May 2010. This had to be filed online.

5.(ii) A first interim penalty of £400 for the period 20 May 2010 to 19 September 2010 was issued on 27 September 2010.

5.(iii) A second interim penalty for £400 for the period 20 September 2010 to 19 January 2011 was issued on 24 January 2011.

30 5.(iv) The 2009/10 return was filed online on 6 April 2011.

5.(v) The £800 penalties imposed by HMRC were mitigated to £100 as the liability on the return was nil.

The Appeal

35 6. The Appellant's representative Harvey Smith & Co, Chartered Certified Accountants, appealed on behalf of the Appellant against the 2009/10 penalty on the grounds that the return had been made on 12 April 2010 and that they received a

confirmation from HMRC confirming acceptance. They say that it was not until six months later that the first penalty for £400 was notified to them. They say that upon receipt of the penalty they replied and appealed the decision on the grounds that they had submitted the return within time. They add that it was a further five months later
5 that they received a letter from HMRC rejecting the appeal on the grounds that a reasonable excuse for the late submission of the Employer's Return had not been given and that the P35 for the 2009/10 year had still not been submitted. They say that they had to resubmit the 2010/11 return. They explain that at that stage they had not re-submitted the 2010/11 return and therefore it was not clear precisely what HMRC
10 were saying. They add that they immediately contacted HMRC to be informed that the return submitted on 12 April 2010 had been allocated to the 2010/11 year and the 2009/10 return was still outstanding. They therefore immediately lodged the 2009/10 return and requested an independent review in respect of the imposition of the penalty on the basis that the P35 submitted on 12 April 2010 had been allocated to the wrong
15 year. They contend that a year end return allocated against a tax year that was only six days old should immediately have been recognised and flagged up as a mistake, and therefore queried by HMRC. They argue that had they been contacted between the submission date and the filing deadline the return could have been allocated to the correct period and no penalty would have been incurred. They contend that the whole
20 process spanning seventeen months could have been avoided.

7. The details contained in the return that was eventually submitted for 2009/10 online agreed exactly with those on the return submitted for 2010/11. They request that the penalty be waived given that the P35 was the annual return.

HMRC's submission

25 8. HMRC say that the Employer's Return was 322 days late and that any complaint the Appellant may have about 'not knowing that they were submitting for the wrong year .. should be addressed to their software provider ..'. HMRC say that although it acknowledged successful receipt online of the return dated 12 April 2010, this would not have confirmed the year in respect of which the submission was made, but that it
30 is the taxpayer's responsibility to ensure submission of the correct return. HMRC add that it has no statutory obligation to issue reminders to employers in respect of End of Year returns, the obligation lies with the employer pursuant to the Regulations.

9. HMRC ask the Tribunal to find that there is no reasonable excuse throughout the period of default for the late submission of the Employer's Return and for the appeal
35 to be dismissed. They submit that the actions of a third party do not relieve the employer from their legal obligation to ensure that their returns are filed on time.

10. Taking all the circumstances into account the Tribunal considers that the mitigated penalty of £100 has been correctly imposed. There is no definition in law of a reasonable excuse which is a matter to be considered in the light of all the
40 circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond a person's control, which prevents him from complying with an obligation. Clearly the Appellant's agent made a mistake in submitting the wrong end of year return. It is not incumbent upon HMRC to check

every Employer's Return immediately it is received, or to do so prior to the deadline for the filing date. In the circumstances a mitigated penalty of £100, which is equivalent to a fixed penalty for a one month or part of month delay in submitting the return, is appropriate.

5 11. The appeal is accordingly dismissed and the penalty determination of £100 confirmed.

10 12. 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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MICHAEL S CONNELL

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TRIBUNAL JUDGE
RELEASE DATE: 4 January 2012