



TC03869

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Appeal number: TC/2011/06731

End of year Form P35 – submitted late – computer malfunctioned – previous returns and subsequent return filed electronically on time – incentives received – no reasonable excuse

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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MURRAY CHEETHAM OPERATIONS

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALASTAIR J RANKIN

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The Tribunal determined the appeal on 29 July 2014 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 24 August 2011 (with enclosures), HMRC's Statement of Case submitted on 17 October 2011(with enclosures) and the Appellant's Reply dated 29 October 2011.

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DECISION

1. This is an appeal by Murray Cheetham Operations (MCO) against a penalty issued under section 98A(2)(a) Taxes Management Act 1970 for the late filing of the
5 2009/10 P35 Return.

2. The filing date for the P35 Return for the tax year 2009/10 was 19 May 2010. An electronic reminder had been sent to MCO by HMRC on 17 January 2010. The Return was filed electronically on 11 November 2011. As this was between five and six months after the due filing date HMRC issued a penalty notice on 3 March 2011
10 of £600.00 calculated at the rate of £100.00 per month or part month the Return was late.

3. By letter dated 12 April 2011 Mr Cheetham on behalf of MCO appealed against the penalty on the grounds that he believed he had submitted the return by the due date and referred to an overpayment notice for 2009/10 received from the
15 Cumbernauld Collector of Taxes which referred to 'amounts shown on your Employer Annual return'. HMRC rejected the appeal and offered a review.

4. MCO requested a review on 17 May 2011 on the grounds that it was a small business and the pressure to move communications online had caused acute difficulties as it had no PC or computer skills. In 2010 it relied on a five year old PC
20 which started to malfunction. Eventually the PC was replaced in January 2011 which enabled it to file the return for the year 2010/11 promptly on 24 April 2011.

5. By letter dated 4 August 2011 HMRC, having reviewed the decision, confirmed the penalty on the grounds that the reasons given for the late filing of the return did not constitute reasonable excuse.

6. The reasons contained in the Notice of Appeal dated 24 August 2011 are basically the same reasons as given when the review was requested on 17 May 2011 with the additional point that a penalty of £600.00 was a severe burden on a business the size of MCO and represented 3.84% of the gross wages for the year.
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7. HMRC contend that MCO was given seven years warning that the return would have to be filed electronically and in fact started to do so for the tax year 2005/6. As a result MCO received a total of £675.00 in incentive payments from HMRC for filing online. In addition MCO has stated different times for the commencement of the PC malfunctioning.
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8. HMRC maintain that a malfunctioning computer is not a reasonable excuse as MCO could have enlisted the help of an online filing agent, used an internet café or borrowed a computer from a friend or relation.
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The Law

9. Regulation 73(1) of The Income Tax (Pay As You Earn) Regulations 2003 (the 2003 Regulations) and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 require an employer to deliver a completed form
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P35 together with a form P14 for each employee before 20 May following the end of the tax year.

10. Regulation 205 of the 2003 Regulations makes it mandatory for each employer to file the form P35 electronically.

5 11. Sections 98A(2)(a) and (3) provide for the imposition of a fixed penalty of £100.00 for each batch or part batch of 50 employees for each month or part month the return is late.

10 12. Section 118(2) of the 1970 Act provides statutory protection from a penalty if the employer had a reasonable excuse for failing to file their return on time. There is no statutory definition of reasonable excuse.

The Decision

13. There is no statutory obligation on HMRC to advise employers that they have failed to file their P35 forms on time. It is necessary that HMRC is seen to be consistent in its approach.

15 14. In order to have the penalty assessments set aside it is necessary for MCO to show a reasonable excuse.

20 15. The Tribunal finds that no reasonable excuse has been submitted by MCO. As MCO had received £675.00 from HMRC prior to the PC malfunction it had received incentives which it could have used to buy a functioning PC. In any event there were other means open to it to file the Return on time but it did not do so.

16. Following the decision of the Upper Tier Tribunal in Hok Ltd the Tribunal has no jurisdiction to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.

17. The appeal is therefore dismissed.

25 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
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

Alastair J Rankin
TRIBUNAL JUDGE

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