



TC03932

Appeal number: TC/2014/02303

Return Form P35 – late filing penalty – appeal lodged over two years after first penalty notice – change of personnel – late appeal allowed - reasonable excuse for delay – two subsequent returns filed before due date and before late Return filed– appeal rejected as no reasonable excuse for extended delay

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HAMBLETON PLAY GROUP

Appellant

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

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 26 April 2014 (with enclosures) and HMRC's Statement of Case submitted on 3 June 2014 (with enclosures).

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DECISION

1. This is an appeal by Hambleton Play Group (Hambleton) against penalties of £370.00 imposed under Section 98A (2) and (3) Taxes Management Act 1970 for the late filing of the Employer's Annual Return P35 for the 2010/11 tax year.

2. On 13 February 2011 HMRC sent Hambleton an electronic notification to file a P35N. On 26 September 2011 HMRC issued a late filing penalty notice for £400.00 for the period 20 May 2011 to 19 September 2011. A further late filing penalty notice was issued on 30 January 2012 for £400.00 for the period 20 September 2011 to 19 January 2012. A third late filing penalty notice was issued on 28 May 2012 for £400.00 for the period 20 January 2012 to 19 May 2012.

3. The Return Form P35 was filed electronically on 18 February 2014. Where the total duty shown on the return is more than £100.00 but less than the penalty amount Hambleton is only liable to penalties in an amount equal to the total duty shown. Accordingly on 31 March 2014 the penalties were reduced to £370.00.

4. In the Notice of Appeal Hambleton states that the penalty would cause hardship to the group – they are a small villa group managed by volunteers. The reason for the late submission and failure to respond to HMRC correspondence was due to the change in the Committee and the person who left did not forward the mail on to the group. As soon as Hambleton became aware of the error they rectified it as soon as they could.

5. HMRC contends that no reasonable excuse has been provided as to why a late appeal should now be accepted.

The Law concerning late appeals

6. Following the decision of Judge Roger Berner in *Dominic O'Flaherty and The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 0161 9TCC this Tribunal must consider all material factors, including the reasons for the delay, whether there would be prejudice to HMRC if Hambleton were to be permitted to appeal out of time and whether there would be demonstrable injustice to Hambleton if permission were not to be given. The discretion given to this Tribunal is much wider than the simple 'reasonable excuse' available to HMRC.

7. As the various notices issued by HMRC appear to have been sent to a member of the Committee of Hambleton who left the organisation and did not forward the notices to the successor, Hambleton claims to have been unaware of the original failure to file the Annual Return and also of the issuing by HMRC of the subsequent penalty notices. As soon as Hambleton became aware of the failure it took steps to file the return.

8. Although the time between the due filing date of 19 May 2011 and the actual filing date of 18 February 2014 is considerable this Tribunal considers there has been

a good explanation for the delay and there will be little prejudice to HMRC in allowing the appeal to proceed. There is a distinction to be drawn between being aware of the failure to file the Return and being aware of the penalties imposed by HMRC. As will become apparent later in this decision the Tribunal considers the failure to file should have become apparent in May 2012 when the next Return was filed but the person filing this later Return would not necessarily have been aware that penalty notices had been issued. Accordingly the Tribunal will allow the late appeal to proceed.

The Law concerning filing Returns

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 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.

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.

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. Every employer knows, or ought to know, that certain formalities have to be observed including making returns to HMRC. By the time the 2010/11 Return was filed on 18 February 2014, returns for 2011/12 and 2012/13 should have been filed. The papers before the Tribunal appear to show the 2011/12 Return was filed on 18 May 2012 and the 2012/13 Return was filed on 14 April 2013.

14. There is no statutory definition of reasonable excuse. It is a matter to be considered in the light of all the circumstances of the particular case.

15. The Tribunal has decided that no reasonable excuse has been put forward by Hambleton for a delay of nearly three years in filing the return Form P35. The change in personnel on the Committee of Hambleton is not of itself a sufficient excuse. No explanation has been offered as to how two subsequent Returns were filed successfully on 18 May 2012 and 14 April 2013. When these Returns were filed it should have been obvious to the person filing them that the Return for 2010/11 had not been filed. If the 2010/11 Return had been filed in May 2012 at the same time as the 2011/12 Return it is possible the change in personnel might have been a reasonable excuse for the late filing but as this did not happen Hambleton ceased to

have a reasonable excuse from May 2012 onwards and even less of an excuse after the 2012/13 Return was filed in April 2013.

16. Following the decision of the Upper Tier Tribunal in *The Commissioners for Her Majesty's Revenue and Customs and Hok Ltd* [2012] UKUT 363 TCC 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 and the penalties totalling £370.00 remain due for payment by Hambleton.

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.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 19 August 2014