



**TC02854**

**Appeal number: TC/2012/04524**

*INCOME TAX – penalty for late submission of P35 – whether reasonable excuse – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL J FIELD SIPS**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JONATHAN CANNAN  
                  MR SIMON NEWTON**

**Sitting in public in Manchester on 20 August 2013**

**Mr Ralph Ellerton of Appletons Chartered Accountants appeared for the  
Appellant**

**Mr Anthony O'Grady of HM Revenue & Customs appeared for the Respondents**

## DECISION

### *Background*

5 1. This appeal relates to penalties for failure to deliver a P35 annual return for the tax year 2010-11. Penalties at the rate of £100 per month have been charged by the respondents for the period 20 May 2011 to 11 January 2012. The total penalties charged amount to £800.

10 2. Regulation 73(1) Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20 May following the end of each tax year. Regulations 205 to 205B provide that the return must be made electronically. Regulation 73(10) provides that s.98A Taxes Management Act 1970 (“TMA 1970”) applies in relation to the obligation to deliver a return.

15 3. Section 98A TMA 1970 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—*

20 *(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—*

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

30 4. Section 100(1) TMA 1970 authorises HMRC to make a determination imposing a penalty under s.98A in such amount as it considers correct or appropriate. Section 100B TMA 1970 provides for an appeal against the determination of such a 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,*

35 *(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 1970 provides as follows:

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.*”

10     6.     What is a reasonable excuse for these purposes is a question of fact. Both parties accept that we should examine the actions of the appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having a proper regard for his responsibilities under the Taxes Acts.

### ***Findings of Fact***

15     7.     Mr Ellerton, who appeared on behalf of the appellant, told us that the appellant carries on a large professional pensions practice in Manchester. The present appeal relates to its position managing a pension on behalf of a Mr Roy Lunt. This is a self-invested personal pension where the appellant is the employer and Mr Lunt is the sole employee. Payments from the pension commenced in tax year 2009-2010. At the request of Mr Lunt the payroll scheme was operated on behalf of the appellant by an  
20 accountant called Mr J Prescott. He was Mr Lunt’s personal accountant and had acted for him for many years.

25     8.     The pension is paid once a year. For present purposes in tax year 2010-2011 it was paid in November 2010 and the PAYE deducted was remitted to HMRC before 19 December 2010.

9.     On 13 February 2011 HMRC sent a notice reminding the appellant that it was required to file a P35 by 19 May 2011. It is not clear who this notice was sent to and we are prepared to accept that it was not received by the appellant.

30     10.    Some time during 2011 Mr Lunt asked Mr Ellerton of Appleton’s to take over responsibility for his tax affairs. Mr Ellerton could not be more precise as to when this was, however he was not asked to take over responsibility for the pension payroll. Mr Ellerton said that it would not have occurred to Mr Lunt that Mr Prescott was dealing with the payroll scheme for the personal pension.

35     11.    Mr Ellerton sent a professional courtesy letter to Mr Prescott but received no response. At some stage Mr Prescott was convicted of fraud. The fraud had nothing to do with Mr Lunt’s affairs.

40     12.    On 26 September 2011 a penalty of £400 for failing to lodge the P35 was imposed for the 4 months from May 2011 to September 2011. It is not clear where notice of the penalty was sent, but we accept that it was not received either by the appellant, Mr Lunt or Appletons.

13. At the beginning of December 2011 HMRC Debt Management sent a demand for payment of the £400 penalty which had previously been imposed. The demand was sent to the appellant. At this stage Mr Ellerton was instructed. However he did not have the necessary authorisation to access the online services of HMRC in respect of the payroll scheme. It therefore took some time for the formalities of appointing Mr Ellerton as an agent to be completed. As soon as they were completed Mr Ellerton lodged the form P35 on 11 January 2012.

14. Mr Ellerton told us that it was only when the demand was received at the beginning of December that he became aware of the existence of the payroll scheme.

15. On 16 January 2012 a final late penalty notice was sent imposing a penalty of £400 for the 4 months from September 2011 to January 2012.

16. Much of the background set out above came from Mr Ellerton. We accept his evidence and make findings of fact accordingly.

### *Decision*

17. Mr Ellerton's primary submission was that the appellant had a reasonable excuse for failing to lodge the P35 on time. The failure of the accountant then instructed to make the return was an unexpected and unforeseeable event beyond the appellant's control.

18. On the basis of our findings of fact we are unable to accept that submission. We have no evidence as to when Mr Prescott ceased acting or when Appletons commenced acting. On the basis of the evidence we do have, the most likely explanation for the failure to lodge the P35 was oversight on the termination of instructions to Mr Prescott and the appointment of Appletons. It had not occurred to Mr Lunt that Mr Prescott was operating the payroll for the pension scheme when he appointed Appletons in place of Mr Prescott.

19. In any event the appellant ought to have satisfied itself that the P35 was being dealt with by someone. We have no information about the appellant other than that which has been given to us by Mr Ellerton. From what we have been told the appellant is a large professional practice. However we have had no explanation from the appellant, who is liable to the penalty, as to what dealings it had with Mr Prescott in relation to the operation of the payroll.

20. The burden is on the appellant to satisfy us that it had a reasonable excuse for not lodging the P35 in time. On the basis of the evidence before us we cannot be satisfied that there is any reasonable excuse.

21. Mr Ellerton's secondary submission was that a delay on the part of HMRC in dealing with the form 64-8 authorising Appleton's to act as the appellant's agent caused a further 2 month penalty to accrue. We have seen no evidence as to when that form was first lodged with HMRC or the circumstances in which Appletons asked for and were given the necessary authorisations to utilise HMRC's online services. In the absence of such evidence we cannot be satisfied that there was any reasonable excuse

for the delay in lodging the P35 between the beginning of December 2011 and 11 January 2012 when it was finally lodged

22. In all the circumstances we are not satisfied that the appellant had any reasonable excuse for its failure to make the return. We must therefore dismiss the appeal.

23. 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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**JONATHAN CANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 5 September 2013**