



TC03002

Appeal number: TC/2012/04779

PAYE – penalty – late filing P35 – 4 month delay unfair – penalty notice unclear

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AUBREY BROCKLEBANK & ASSOCIATES LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

The Tribunal determined the appeal on 19 August 2013 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 2 April 2012 (with enclosures) and HMRC's Statement of Case submitted on 21 June 2013 (with enclosures). A Summary of the findings of fact and reasons for the decision was issued on 20 August 2013. By letter dated 4 September 2013 the Appellant has asked for full written findings.

DECISION

1. This is an appeal against penalties totalling £400.00 imposed under section 98A(2) and (3) of the Taxes Management Act 1970 (the 1970 Act) due to the late filing of the Employer's Annual Return (form P35) for the tax year 2010/11.

The Facts

2. The Appellant company was required to file a form P35 for the tax year 2010/11 by 19 May 2011. Since the tax year 2009/10 this form must be filed electronically. HMRC sent an electronic reminder to the Appellant company on 13 February 2011.

3. As no form P35 had been received by HMRC, a penalty notice was issued on 26 September 2011 imposing a penalty of £400.00. The legislation states that the penalty should be calculated at the rate of £100.00 per month. Accordingly this penalty was for the four month period from 20 May 2011 to 19 September 2011.

The Appeal

4. By letter dated 6 October 2011 the Appellant company appealed against the penalty on the grounds that the Penalty Notice dated 26 September did not state what return had not been filed and that over four months had elapsed since the filing deadline.

5. The Appellant believed it had filed its P35 return on 3 May when it also filed a change of office address and quoted the submission ID. It claims it was subsequently advised by a member of HMRC's staff that the Appellant had failed to press the 'submit' key below the form and that this was a very common mistake.

The Law

6. 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.

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

8. 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.

9. 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.

Evidence submitted by HMRC

10. HMRC's records show that the Appellant had logged in on 21 January, 28 April, 3 May, 20 July and 10, 11, 19 and 21 October 2011. However on none of these dates was the P35 submitted. The submission ID quoted by the Appellant was too long and should be only 32 digits.

11. HMRC had no information regarding problems with its website and other employers were able to access their systems and file on time. Although the Appellant logged in to HMRC's website on 28 April and 3 May it did not submit anything on either of these dates.

12. HMRC issues regular bulletins to employers and explains what forms are needed and by when.

13. The Appellant had successfully filed its P35 on line in the past.

The Decision

14. 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. When a return is filed successfully on line the filer receives a message, usually within a minute of submission, letting the filer know whether HMRC has accepted or rejected the return. The Appellant does not state anywhere that it received such a response after the claimed submissions on 28 April or 3 May

16. In order to have the penalty assessments set aside it is necessary for the Appellant to show a reasonable excuse.

17. The Notice of Penalty Determination clearly states that the employer has failed to make an end of year return. Even if this Notice was unclear the fact remains that the Appellant had not filed its P35 by the statutory deadline.

18. The Tribunal finds that no reasonable excuse has been submitted by the Appellant. If the Appellant was in doubt as to whether or not it had filed the return it should have contacted the online helpdesk operated by HMRC.

19. While HMRC have not provided any reason why the penalty notice was not issued until 26 September, 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.

20. The appeal is therefore dismissed.

21. 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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ALASTAIR J RANKIN
TRIBUNAL JUDGE

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RELEASE DATE: 24 October 2013