



TC03597

Appeal number: TC/2012/05407

Section 98A(2) and (3) Taxes Management Act 1970 – failure to file Employer’s End of Year P35 return on time – whether reasonable excuse – yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROCKWELL MANAGEMENT LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 5 February 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 2 May 2012, HMRC’s Statement of Case submitted on 28 June 2013 and the Appellant’s response dated 13 July 2013.

DECISION

Decision under Appeal

1. This is an appeal by Rockwell Management Limited ('the Appellant') against penalties 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 2012.

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.

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 fifty employees. If the failure continues beyond twelve 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.

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

The background facts

5. The filing date for the Appellant's 2010/11 return was the 19 May 2011. This had to be filed online.

6. HMRC sent an electronic reminder to the Appellant on 13 February 2011.

7. On 26 September 2011 HMRC issued a late filing penalty of £330 for the period from 20 May 2011 to 19 September 2011. The penalty would normally have been £400, but as the Appellant company's PAYE for the year was only £330, the penalty was reduced to that amount.

8. The Appellant's Employer's Annual Return was filed online on 6 December 2011.

The Appellant's case

9. On 7 January 2012 Mrs L Ackerman, the company secretary, submitted an appeal against the penalty on the grounds that she was the person responsible for submitting the P 35 return, but that she had been on maternity leave at the time it should have been filed.

10. Mrs Ackerman said that the Appellant had never filed its P 35 return late before and the failure to submit the return on this occasion was entirely due to her absence

from the office on maternity leave and the fact that during her pregnancy she suffered complications (with the result that her baby was born by Caesarean section) It was not until she returned to the office in October/November 2011 and contacted HMRC on a routine query regarding PAYE, that she learned for the first time that a penalty had been issued because the P35 had not been filed.

11. To further compound and delay matters, the PAYE software used for the calculation of the employees' salaries was held on the company's computer and in May/June 2011, while Mrs Ackerman was on maternity leave, the company moved address and its computer's hard drive was damaged, with the result that the Appellant lost its entire database. Mrs Ackerman says that with HMRC's assistance she downloaded basic PAYE tools software and requested a Government Gateway Authorisation Code, which was received a week later, allowing the P 35 and P 14 to be filed online. It was not until November 2011 that HMRC's penalty notice of 26 September 2012 was eventually received at the company's new address.

12. Mrs Ackerman says that prior to going on maternity leave, she ensured that all the company's PAYE cheques were ready to be posted in advance. All monies owed had been paid on time. The company has less than five employees and a monthly PAYE bill of just £42 and the penalty is disproportionate.

13. Mrs Ackerman was also concerned that HMRC had not notified the Appellant of the first £100 monthly penalty, or indeed the three further £100 monthly penalties which followed, until September 2011. Had HMRC notified the Appellant of the accruing penalties, Mrs Ackerman says that she would, despite her condition, have endeavoured to remedy matters. She adds that if the penalties are intended as an incentive to employers to comply with their obligations, then if penalties are not notified to the employers their imposition, and the penalty regime generally, is not being adequately administered

HMRC's submissions

14. When a person appeals against a penalty they are required to have a reasonable excuse. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable excuse is normally an unexpected or unusual event, either unforeseeable or beyond a person's control which prevents the individual from complying with an obligation.

15. HMRC said that records indicate that the Appellant had been operating as an employer within the PAYE scheme for some years, and therefore it would have been aware of the obligation to file P 35 returns on time. It is necessary to consider the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for their responsibilities provided by legislation. The grounds of appeal put forward by Mrs Ackerman do not constitute a reasonable excuse for the late P35 return.

16. The penalty is not disproportionate. Parliament has decided that the penalty should be proportionate to the number of employees involved, and the delay in

submitting the return. As confirmed in *HMRC v Hok Limited* [2012 UKUT 363 (TCC) the First-tier tribunal has no jurisdiction to consider the issue of proportionality. HMRC are not under an obligation to issue reminders or indeed issue penalties to defaulting employers on a monthly basis.

5 Conclusion

17. Mrs Ackerman does not dispute that she was aware of the necessity to file the Appellant's return by 19 May 2011. The company's PAYE and company tax had been paid up to date. The fact that Mrs Ackerman, the company secretary with responsibility for returning the P 35, was expecting may not have been an
10 unforeseeable event, but the complications which she suffered doubtless were, and the Tribunal considers that this represents a reasonable excuse for the oversight.

18. We accept that HMRC are not under an obligation to issue penalties as and when they arise. However, the delay on its part in issuing the penalties for the periods to 19 June, 19 July, 19 August, and 19 September clearly contributed to the delay in
15 submission of the Appellant's P 35. It is arguable that Mrs Ackerman's condition and HMRC's failure to issue penalties as and when they accrued represented a combination of unforeseeable events which, when viewed together, constituted a reasonable excuse.

19. In all the circumstances the Tribunal allows the appeal and discharges the
20 penalties imposed.

20. 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
25 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
TRIBUNAL JUDGE**

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RELEASE DATE: 16 May 2014