



TC03285

Appeal number: TC/2012/10922

*PAYE — P35 return — Penalty for late return — Reasonable excuse —
Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BEXLEY CENTRE FOR THE UNEMPLOYED LIMITED Appellants

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR JOHN ROBINSON**

Sitting in public in Sutton on 21 January 2014

No appearance by or on behalf of the Appellants

Paul Reeve, presenting officer, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty of £100 imposed under section 98A of the Taxes Management Act 1970 in respect of the late submission by the Appellant of its employer annual return for tax year 2011-2012. The deadline for filing was 19 May 2012. The HMRC statement of case contends that the employer annual return was filed electronically on 15 June 2012. It was a requirement that the return be filed online.

2. The Tribunal originally heard and determined this case as a default paper case. That earlier determination was set aside, on the Appellant's application, on the ground that the Appellant had in the notice of appeal requested a hearing. In setting the earlier determination aside, the Tribunal directed that the appeal would be heard at Sutton, being the nearest Tax Tribunal venue to Bexleyheath where the Appellant is based. By a letter to the Tribunal dated 21 November 2013, the Appellant requested a change of venue to Bexleyheath due to travelling difficulties. In a letter dated 28 November 2013, HMRC responded that the Tax Tribunal does not have a venue at Bexleyheath, and that Sutton was the nearest venue. A letter from the Appellant dated 5 December 2013 expressed the Appellant's disappointment, stated that the Appellant would not be attending the hearing, and enclosed further written submissions.

3. On the day of the hearing, there was no attendance by or on behalf of the Appellant. The Tribunal requested the clerk to call the Appellant's telephone number as stated in the notice of appeal to confirm whether the Appellant still did not intend to attend. The clerk informed the Tribunal that there was no answer on that telephone number. The Tribunal was satisfied that the requirements of Rule 33 of the Tribunal's Rules were met, and decided to hear the appeal in the Appellant's absence.

4. The HMRC case was presented by Mr Reeve. The Tribunal has considered all of the written material submitted by the Appellant, and the evidence in the case as a whole.

The relevant legislation

5. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the "TMA") applies to paragraph (1) of that regulation.

6. Section 98A of the TMA relevantly 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—

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

7. Section 100(1) of the TMA authorises HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA 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,
- (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.

8. Section 118(2) of the TMA provides as follows:

- (2) 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.

The Appellant’s case

9. The Appellant’s notice of appeal states as follows. On 19 April 2012, the Appellant’s administrator, witnessed by her line manager, submitted the return. No rejection notice was received, and it was therefore assumed that the submission was successful. The Appellant was registered for the e-mail notification service, but did not receive any e-mail notification that the submission was unsuccessful. The Appellant received notice from HMRC on 31 May 2012 that the return had not been filed, and immediately logged into the system to see that there was a “submission rejected” notice there. Although the Appellant understands now that the original submission was unsuccessful, the Appellant tried in good faith to file the submission on 19 April 2012, in plenty of time. The Basic Tools programme let them down. The Appellant is a very small charity unable to access expensive payroll systems. It has only two staff members paying a minimal amount of tax. The Appellant relies on donations and fundraising and the penalty will hit it hard. It is unfair for the

Appellant to be penalised in this way. Officers of the Appellant are willing to swear under oath.

10. These points have subsequently been elaborated upon in the Appellant's written submission dated 5 December 2013.

5 **The HMRC case**

11. The HMRC case is as follows. HMRC computer system records indicate that the return was not submitted by the 19 May 2012 deadline, and the Appellant's belief that the return was submitted on 19 April 2012 was not a reasonable belief. The Appellant has been filing returns online for several years, and would be aware as an
10 experienced user of the system that where a submission is successful, a confirmation receipt is sent. Employers are also made aware of this by public guidance issued by HMRC. Furthermore, every time that a person accesses the HMRC computer system, this leaves an access "footprint" that cannot be edited by HMRC staff. The computer system records indicate that the Appellant did not log on to the system as claimed on
15 19 April 2012, or on 31 May 2012. The computer system records indicate that the first time that the Appellant accessed the system was on 14 June 2012 and that the return was submitted on 15 June 2012, and there would have been no rejection notification on the system for them to see, contrary to what the Appellant claims. The Appellant does not in the circumstances have a reasonable excuse. It makes no
20 difference that the Appellant is a charity because the legislation applies to all employers. The penalty has been imposed in accordance with the legislation.

The Tribunal's findings

12. The Tribunal must determine the appeal on the basis of the material before it, on a balance of probabilities. The burden is on HMRC to establish that the return was
25 not filed until 15 June 2012. If HMRC establishes this, the burden is on the Appellant to establish the existence of circumstances constituting a reasonable excuse for the late filing.

13. The Tribunal is not satisfied on the evidence that there were any particular problems with the HMRC computer system. The Tribunal is satisfied on a balance of
30 probability that there was no computer malfunction, and that if the Appellant had taken the correct steps to submit the return on 19 April 2012, or at any other time before the deadline, it would have been received by HMRC on that day. If used correctly, the HMRC computer system would have generated a confirmation of submission.

35 14. The Tribunal is not persuaded that the Appellant, acting diligently, would have been unable to submit a return successfully, after referring where necessary to available guidance or contacting HMRC helpdesks. The Tribunal also takes into account that the Appellant has been filing return online for several years, and would be familiar with the submission of online returns.

15. The HMRC computer records indicate that the Appellant did not log onto the computer system on 31 May 2012 as claimed, and certainly did not file a return on that day. The Tribunal is satisfied on a balance of probability that the Appellant did not log onto the system on 31 May 2012.

5 16. The Tribunal finds on consideration of the material as a whole that the return was not received by HMRC until 15 June 2012.

17. The question is then whether the Appellant has a reasonable excuse for the late filing. Given the findings in paragraph 14 above, the Tribunal finds that even if the Appellant took steps to file the return online on 19 April 2012 but failed to do so successfully due to some inadvertence or oversight, such inadvertence or oversight
10 does not amount to a reasonable excuse.

18. The Tribunal is also not satisfied that any of the other circumstances advanced by the Appellant amount to a reasonable excuse. The penalty has been imposed in accordance with the legislation. Having regard to the Tribunal's established case law,
15 it finds that the penalty is not disproportionate or plainly unfair.

19. The appeal is therefore dismissed.

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
20 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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DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

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RELEASE DATE: 23 January 2014