



TC06760

Appeal number:TC/2017/4568

Income Tax – penalties for failure to deliver form P35

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GEORGE EDWARDS CONSULTING LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
ELIZABETH BRIDGE**

Sitting in public in Bristol on 21 September 2018

George Edwards, Director of the Appellant, for the Appellant

Stuart MacLeod for the Respondents

DECISION

Introduction

5 1. The company appeals against penalties totalling £1,200 assessed under section 98A Taxes Management Act 1970 (“TMA”) for the late filing of a form P35 for the year 2010/11

2. Regulation 73 of the Income Tax (Pay As You Earn) Regulations 2003 (the “PAYE Regulations”) required a person such as the company who had been an
10 employer in 2010/11 to deliver a form P35 to HMRC on or before 20 May 2011.

3. Mr Edwards accepts that the PAYE Regulations obliged the company to deliver a form P35 by 20 May 2011 and that the company’s form P35 was delivered more than 3 years late, being dated 30 January 2015 and being received by HMRC a few days later.

15 4. Section 98A TMA provides that a person who fails to make a return in accordance with the PAYE Regulations shall be liable to a penalty for each month up to the 12th month for which the failure continues. In the case of a company with less than 50 employees such as the Appellant in 2010/11 the penalty is £100 for each month. Section 118 TMA provides that a failure is to be ignored if there is a
20 reasonable excuse for it.

5. HMRC assessed penalties under section 98A in three instalments of £400 each, on 26 September 2011, 30 January 2012 and 28 May 2012, a total of £1,200. The company appeals against these penalties.

The Evidence and Other Findings of Fact

25 6. From Mr Edwards’ oral evidence and the documents in the bundle we find as follows.

7. It appears that for a number of years before 2011 the company overpaid PAYE and NICs, and that Mr Edwards had attempted to secure repayment in telephone calls with HMRC’s officers in which he pressed his case for repayment and was asked for
30 details of how and why the overpayments had arisen. As part of this campaign, on 26 June 2012 Mr Edwards wrote to HMRC, recording that he had been told by an officer that the overpayments were:

2007/8	£963.50
2008/9	£1,841.01
35 2009/10	£2,590.61,

and seeking reimbursement and the application of part of the amount due against a corporation tax liability for 2009/10.

8. It took some time for Mr Edwards to discover how the overpayments had arisen because the accounting staff who had been responsible for them had left the company. But he eventually found that they had occurred because the staff had worked out the tax which would be due for each month at the beginning of a tax year on the basis of
5 an assumption that there would be regular monthly payments to the employees; and had arranged for these predetermined payments to be made to HMRC. Apparently this had worked in earlier years when the company's business was regular and stable but when its business changed for the worse its payments to employees became less with the result that more had been paid than should have been to HMRC. Mr Edwards
10 explained this to HMRC in 2013.

9. HMRC's computer record of their dealings in the period 2010 to 2014 with Mr Edwards and his claim to repayment indicates that the matter was not dealt with particularly quickly despite Mr Edwards' requests for repayment. It seems likely that HMRC were suspicious of overpayment being made in three successive years.
15 However the notes in the record indicate that after Mr Edwards' explanation of the reasons for the overpayment he was told, at some time later, that when his P35 for 2010/11 was submitted repayment would be made.

10. In a letter to HMRC of 28 September 2017 Mr Edwards says that in April and May 2011 he had discussions with his accountant about the preparation of the P35 for
20 2010/11. He said that it became clear that its preparation was "a cost without benefit" so long as HMRC persisted in their stated policy of "no refunds without detailed explanation".

11. In answer to questions from the tribunal Mr Edwards said that he had not tried to lever HMRC into making payment by saying that he would complete the P35 only
25 if he obtained refunds: he said it was difficult to "negotiate with HMRC".

Mr Edwards' submissions

12. Mr Edwards argues that for many years HMRC had unreasonably refused to make repayment of the overpaid PAYE and NIC. The vast majority of the delay in providing the form P35 was due to HMRC's refusal to make repayment. Further he
30 says that HMRC unreasonably and heavy-handedly attempted enforcement action in relation to the penalties and other taxes at a time when money was in fact owed by HMRC to the company which exceeded what they claimed from him. The monies the company was owed related to periods before 2010/11 and were unaffected by whatever might have been shown as due to HMRC by that the P35 for that year. He
35 acted reasonably and commercially and should not be penalised for doing so in these circumstances.

Discussion

13. Our job is to decide whether, under the law, the company is liable to the penalties which have been assessed. If under the terms of the legislation and on the
40 facts as we find them the penalties are due we must dismiss the appeal.

14. We have described the legislation earlier. Given the admitted lateness of the return there is no doubt that the penalties are due unless there is a reasonable excuse for the failure to deliver the return. Neither the obligation to deliver the return nor the liability to the penalties are conditional in any way on HMRC acting reasonably in relation to this or any other matters. In particular neither are conditional upon HMRC having repaid monies due to the taxpayer. In these circumstances the only way we could allow the appeal would be if we found that there was a reasonable excuse for the failures.

15. Mr Edwards suggested that for three-quarters of the period of delay the reason for the lateness was HMRC's truculence in relation to repaying the overpaid PAYE and NI. That might be a reason for the failure in the sense that HMRC's attitude may have caused Mr Edwards not to wish to comply with his obligations or to think that there was little point in doing so, but it is not in our view a reasonable excuse for the failure to comply with a duty imposed by Parliament.

16. Mr Edwards did not say that he had used or tried to use HMRC's need for the P35 as a bargaining chip to persuade them to make the repayment. Rightly in our view he recognised that HMRC did not go in for that kind of negotiation. But even if he had done so we do not think that it would have been a reasonable approach – because the obligation to deliver the P35 is a statutory obligation rather than the voluntary provision of something which HMRC are desirous of receiving: failure to comply with the legislation would not persuade them to be willing to pay monies they owed.

17. Nor in our view was the stance which Mr Edwards took in concluding that it was not worth the expense of his accountant preparing the P35 a reasonable excuse. The obligation to submit the form is absolute; it is not dependent upon it being commercially advantageous. It was not reasonable to weigh the cost of preparation against the obligation. And even if a reasonable excuse could arise by virtue of such a commercial weighing exercise, in this case the balance lay on the side of compliance for the cost of compliance was £400 and the penalties for non compliance would be £1,200.

18. We therefore find that the company had no reasonable excuse for its failure. Therefore we dismiss the appeal.

Rights of Appeal

19. 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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CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 10 October 2018

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