



**TC01325**

**Appeal number: TC/2011/01911**

*Penalty for late filing of P35 – failure to “untick” the test return box –  
whether reasonable excuse – held, yes*

**FIRST-TIER TRIBUNAL**

**TAX**

**WRITTLE COLLEGE SERVICES LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**

**The Tribunal determined the appeal on 7 July 2011 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 7 March 2011, HMRC’s Statement of Case submitted on 6 April 2011 and the Appellant’s Reply dated 19 April 2011.**

## DECISION

- 5 1. This is the appeal by Writtle College Services Limited (“the company”) against a penalty imposed for late filing of the 2009/10 end of year return of payments due under Pay As You Earn (P35). The Tribunal decided that the appeal should be accepted.
- 10 2. The issues in the case were whether the company had a reasonable excuse for the late filing of the P35, and if there was no such reasonable excuse, whether the penalty of £400 for the period from May to September 2010 should be confirmed.

### **The law**

3. Regulation 73 of the Income Tax (PAYE) Regulations (SI 2003/2682) requires that P35s are filed on or before 20 May following the end of a tax year.
- 15 4. Taxes Management Act 1970 (TMA) s 98A sets out the liability to fixed penalties for non-compliance. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B.
5. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at section 118(2) TMA.
- 20 6. The legislation does not define a reasonable excuse. It has recently been held by this Tribunal that “an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act.” *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC).

### **The evidence**

- 25 7. The Tribunal was provided with the correspondence between the parties. The company also provided a copy of the email received from the HMRC computer system, dated 8 April 2010. HMRC provided a copy the “Summary search results” and “submission details” for the company.

### **The facts**

- 30 8. Based on the evidence provided, the Tribunal found the following facts.
9. On 8 April 2010 the company completed their P35. It was submitted to HMRC but the company was not aware that, in order to make a successful submission, it was necessary to “untick” the “test submission” box.
- 35 10. After sending the return, the company received the following email from the HMRC website:

**“Successful receipt of online submission for Reference []**

Thank you for sending the PAYE End of Year submission online.

5 The submission for reference [] was successfully received on 08-04-2010. If this was a test submission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed.”

11. Since the company did not realise that they had submitted a test return, they assumed that their P35 had been filed.

10 12. By letter dated 27 September 2010, HMRC issued a penalty notification for not filing the P35. It charged the company a penalty of £100 per calendar month for the period from 20 May 2010 to 19 September 2010, a period of four months. The penalty appealed against was therefore £400.

15 13. The company appealed on 7 October 2010; this was rejected by HMRC on 25 November 2010. In the rejection letter HMRC say “our online services have confirmed that you did log on 8 April 2008, however the P35 was not fully submitted and therefore not received at HMRC.”

14. A review was requested by the company on 20 December 2010, and HMRC rejected the appeal on 8 February 2011.

20 15. The return was successfully submitted on 27 January 2011. HMRC’s Statement of Case states that further penalties of £400 have been accrued in relation to this further delay, but they have been suspended pending this Appeal.

**HMRC’s submissions**

16. HMRC say that their computer records:

25 “show that the submission...on 8 April was in fact a test submission. The test box must not have been un-ticked...it is your responsibility as an employer to ensure that a live return had been submitted rather than a test one.”

30 17. As a result, they say that the company did not have a reasonable excuse. In relation to quantum, they say this is fixed by statute. The return had been outstanding for four months and so the fixed penalty was rightly charged at £400.

**The company’s submissions**

18. The company wrote to HMRC saying that the return:

35 “was in fact submitted before the due date. We received an email from HMRC...confirming receipt. The email confirms that if the data submitted was not a test (which it was not) then confirmation of receipt could be taken from their email. As the data submitted was not a test as far as the college was concerned, submission had been made on time.”

19. The company says that it relied on the email received from HMRC (and set out at paragraph 10 of this Decision). They “had no reason to consider that we had not submitted a complete and final return before the due date.”

### **Decision**

5 20. An excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act. Here, the company completed the online return in good time, and believed it had been successfully submitted.

10 21. On the evidence provided, the default position is that a P35 filing is treated as a test rather than a live submission. The company had to “untick” the test submission box before the P35 became a final and complete submission; it is clear that the company did not realise that the box needed to be “unticked”.

15 22. HMRC have not provided any evidence to the Tribunal which shows that taxpayers were warned of the significance of this tick box, but rather the reverse: the email sent to the company was headed “successful receipt of online submission”. In the Tribunal’s view, this message could easily mislead taxpayers who had not noticed that they had to ‘untick’ a box in order successfully to file a return.

20 23. I find that it was reasonable for the company to have thought that the P35 had been filed correctly online; that its actions were those of “someone who seriously intends to honour their tax liabilities and obligations” and thus that it has a reasonable excuse for not filing the return by the due date.

24. Since the company did not learn of its mistake until the penalties were issued in September, I therefore find that there was a reasonable excuse throughout the period under appeal before this Tribunal, and I set aside the £400 penalty.

25 25. I am unable to consider the further penalties which have accrued from 20 September to 27 January as they were not part of this Appeal.

30 26. 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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**Anne Redston**  
**TRIBUNAL PRESIDING MEMBER**  
**RELEASE DATE: 15 JULY 2011**