



TC01398

Appeal number: TC/2011/01202

P35 return – reasonable excuse - proportionality

FIRST-TIER TRIBUNAL

TAX

PICKQUICK CARRIERS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: RACHELL SHORT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 25 May 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 14 February 2011, HMRC's Statement of Case submitted on 7 March 2011 and the Appellant's Reply dated 24 March 2011.

DECISION

1. The Tribunal decided that the appeal should be DISMISSED

Facts

- 5 2. This is an appeal against a penalty for late filing of a P35 under s 98A (2) (a) Taxes Management Act 1970 amounting to £400.
3. The Appellant's on line P35 for the 2009 – 2010 tax period was due on 19 May 2010 but was not filed until 2 December 2010. HMRC issued a penalty notice on 27 September 2010 for late submission of the return under s 98A (2) (a) Taxes
10 Management Act 1970 for the four months from 19 May to 19 September 2010.
4. The Appellant previously traded as Pickwick Carriers but was purchased by Pickwick Carriers Limited on 31 July 2009.
5. The Appellant employed a book-keeper who it relied on to make its tax returns.

Arguments

- 15 6. The Appellant argues that it has a reasonable excuse under s 118(2) Taxes Management Act 1970 for not filing the return on time because it was the first time that the P35 had been filed on -line and it had had notification from its book- keeper that the return had been filed.
7. The Appellant was unaware that the return had not been filed until they received
20 the penalty notice from HMRC of 27 September 2010.
8. This was the first time that the Appellant had been required to make an on- line P35 return.
9. The Appellant has also argued that the fine is disproportionate given the relatively small (£3750.95) amount of tax due for this period and the fact that the tax
25 was paid on time.
10. HMRC argue that it is the responsibility of a taxpayer to ensure that returns are made on time. The fact that the Appellant's agent failed to make the return on time does not remove responsibility from the Appellant.
11. HMRC have no obligation to issue reminders to taxpayers of their obligations to
30 make P35 returns. Penalty notices are not intended to operate as reminders.

Decision

(a) Reasonable Excuse

12. In order to successfully appeal against this penalty the Appellant has to demonstrate that it has a “reasonable excuse” for not making the return under s 118(2) Taxes Management Act 1970.

5 13. There is no statutory definition of a reasonable excuse but there are a number of decided cases as well as HMRC’s own guidance. It is generally accepted that save in extreme cases where an agent has acted in a criminal or fraudulent manner, reliance on a third party does not constitute a reasonable excuse for these purposes. There is no evidence to suggest that the Appellant’s agent has been engaged in such behaviour here. The Tribunal therefore agrees with HMRC that the failure of the Appellant’s
10 book- keeper to make the return on time is not a reasonable excuse.

(b) Disproportionality

14. The Appellant has also raised the separate argument that the £400 penalty levied here is disproportionate given that that tax due had already been paid and that the amount of tax due is small.

15 15. Neither the Appellant nor HMRC have submitted detailed arguments on this question.

16. The Tribunal has taken the approach that in order to consider whether this penalty is disproportionate it is important to be clear what offence the penalty is directed at. In this case the penalty under s 98A (2) (a) TMA 1970 relates not to the payment of
20 the tax, but to the lateness of the return. To this extent the fact that the tax has already been paid, and that a relatively small amount of tax was due, is not relevant.

17. The relevant question is whether the penalty is proportionate to the lateness of the return, which in this case was four months late. The relevant legislation (s 98A Taxes Management Act 1970) imposes a £100 penalty for every month for which a return is
25 late.

18. On the basis of decisions such as *Energys Holdings UK Ltd* ([2010] UKFTT 20 TC) this level of penalty in relation to the lateness of the return cannot be said to be “wholly unfair” and cannot be said to be disproportionate either in respect of the manner in which it is calculated, which is on a straightforward month by month basis,
30 or in respect of HMRC’s need to ensure that returns are made in a timely manner.

19. The Tribunal has considered the alternative argument that the question of proportionality relates not just to the lateness of the payment, but should also take account of the broader question whether the legislation as a whole is proportionate in levying a penalty for failure to submit a return when the relevant tax has been paid
35 and the amount of tax is small.

20. The Tribunal’s conclusion on that point is that HMRC have two discrete obligations, of which the collection of tax is only one. The provision of information about taxpayers on whose behalf tax has been paid is an equally important part of their statutory role. The fact that tax has been paid does not necessarily remove the
40 need for HMRC to enforce their information collection powers, even when the

amount of tax due is small. In this case we do not think that the fact that the tax has been paid alleviates the offence or impacts on the proportionality of the penalty.

21. For these reasons the Tribunal has concluded that this appeal should be dismissed.

5 22. 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
10 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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RACHEL SHORT

TRIBUNAL JUDGE

RELEASE DATE: 17 AUGUST 2011

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Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on **17 October 2011**.