



TC03779

Appeal number: TC/2011/09311

**P35N – late filing penalty – activation code sought three days before due date –
no reasonable excuse**

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GENO SERVICES LTD

Appellant

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN

The Tribunal determined the appeal on 2 July 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 4 November 2011 (with enclosures) and HMRC's Statement of Case submitted on 6 January 2012 (with enclosures)

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DECISION

1. The Appellant company (Geno) is appealing against a penalty of £100.00 issued
5 by HMRC on 1 June 2011 for the late filing of its End of Year Return form P35N for
the tax year 2010/11.

2. Geno in its Notice of Appeal states that it logged onto the HMRC website well
before the filing deadline of 19 May 2011 and requested an activation code to enable
it to file the return online. It became aware of the need for an activation code to file
10 the P35 return and learnt at the same time that this activation code took several days
to arrive in the post.

3. HMRC's records show that the request for an activation code was made on 16
May 2011. HMRC's guidance notes indicate that the activation code will be sent by
post and will take up to a week to arrive.

4. The P35N return was filed online on 26 May 2011. As this was after the
15 deadline the penalty notice was issued on 1 June 2011.

5. Geno wrote to HMRC on 24 June 2011 in response to having received the
penalty notice requesting the penalty should be reversed. This letter was not received
by HMRC until 29 July, outside the time limit for appeal.

6. By letter dated 7 October 2011, over two months after having received the letter
20 from Geno, HMRC advised Geno that it was unable to accept the appeal as it was not
made within the time limit. Geno responded by filing its Notice of Appeal dated 4
November.

7. HMRC in its Statement of Case has confirmed that the lateness of the appeal is
25 not an issue in this instance.

The Law

8. Regulations 73 of the Income Tax (PAYE) Regulations 2003 (the 2003
Regulations) and paragraph 22 of Schedule 4 of the Social Security (Contributions)
Regulations 2001 impose a statutory obligation on an employer to make End of Year
30 Returns by the due date.

9. Regulation 205 of the 2003 Regulations provides that an employer must use
electronic communications to deliver its end of year return online.

10. Section 98A(2) and (3) provide for the imposition of a fixed penalty of £100.00
35 for each month or part month the return is late where, as with Geno, there are fewer
than 50 employees.

11. Section 118(2) of the 1970 Act provides statutory protection from a penalty if
the employer had a reasonable excuse for failing to file their return on time. There is
no statutory definition of reasonable excuse.

The Decision

12. In order to have the penalty assessments set aside it is necessary for Geno to show a reasonable excuse.

5 13. The Tribunal finds that no reasonable excuse has been submitted by Geno for the failure to file return P35N as by its own admission it did not request an activation code until 16 May, three days before the filing deadline.

14. In the view of the Tribunal Geno should have applied for the activation code much earlier and cannot rely on the delay in receiving the code as a reasonable excuse.

10 15. The Tribunal agrees with the views of Judge Colin Bishopp in the First Tier Tribunal case of Enersys Holdings UK Limited [2010] UIKFTT 20 that ‘it seems unlikely that a delay of only a day might ever, without more, amount to a reasonable excuse’.

15 16. Following the decision of the Upper Tier Tribunal in The Commissioners for Her Majesty’s Revenue and Customs and Hok Limited [2012] UKUT 363 (TCC) the Tribunal has no jurisdiction to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.

17. Accordingly the appeal is dismissed and Geno remains liable to pay the penalty of £100.00

20 18. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **ALASTAIR J RANKIN**
TRIBUNAL JUDGE

RELEASE DATE: 4 July 2014