



TC03338

Appeal number: TC/2012/04523

INCOME TAX – late application for full decision – late application to appeal against HMRC penalty decision for late submission of P35 – reliance on agent – whether reasonable excuse – no – whether penalty should be reduced for part-month – no – appeal dismissed and £500 penalty upheld.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FAVOURTECH SYSTEMS LIMITED

Appellant

- and -

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

Respondents

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

The Tribunal determined the appeal on 11 November 2013 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 2012 (with enclosures) and HMRC's Statement of Case submitted on 12 June 2013 (with enclosures).

DECISION

1. This is the appeal of FavourTech Systems Limited (“the company”) against a penalty of £500 for late filing of its 2009-10 Employer’s Annual Return (“P35”).
2. The Tribunal decided that **the appeal was dismissed** and confirmed the penalty.

The late application for a full decision

3. A summary decision was issued to the parties on 20 November 2013. A party wishing to appeal a summary decision must first make an application to the Tribunal for a full decision.

4. This application must be made within 28 days of the date of issue of the summary decision¹. Once that full decision has been received, the party has a further 56 days to request permission to appeal.

5. Mr Mark Anderson, director of the company completed an Application for Permission to Appeal to the Upper Tribunal. This document was dated 20 December 2013 but received by the Tribunals Service on 21 January 2014. The Tribunals Service advised Mr Anderson that his application was being treated as a request for a full decision and asked why it had been received over a month after the 28 days allowed for such requests. Mr Anderson replied on 27 January 2014 saying that he posted the application on 20 December 2013 “which was within the allocated time allowed.”

6. It is self-evident that an application posted on 20 December 2013 could not have been received by the Tribunal within 28 days following the issuance of the summary decision on 20 November 2013.

7. Morgan J in *Data Select Limited v R&C Commrs* [2012] STC 2195 (“*Data Select*”) gave guidance as to how applications for extensions of time are to be dealt with. At [37] he held that the Tribunal should consider the overriding objective to deal with cases fairly and justly, and do so in the context of all the circumstances of the case. At [34] he said:

“As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.”

¹ Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”)

8. I accept Mr Anderson's statement that he posted the application on 20 December 2013. This means the delay was short. I also bear in mind that there may have been some confusion between the 28 day and 56 day time limits, especially as he was using the Upper Tribunal form.

5 9. The purpose of the 28 day time limit is to allow for the efficient and timely
administration of justice. This must however be weighed in the balance against the
consequences for the parties. If I were to refuse to allow a late application, the
company would not only be prevented from asking permission for the decision to be
10 appealed, it would not be in possession of a full statement of the reasons as why it did
not succeed at the First-tier Tribunal. On the other hand, the prejudice to HMRC
would be slight.

10. Taking into account all the circumstances of the case, I have decided that it is in the interests of justice to allow the company's late application. This document is the full decision.

15 **The late appeal**

11. The company was not only late in requesting a full decision. It was also late in appealing to the Tribunal.

12. By way of a statutory review letter dated 11 March 2011, HMRC confirmed its decision to refuse the company's appeal against the penalty. The company then had
20 30 days to appeal against that decision to the Tribunal. Instead, Mr Anderson continued to correspond with HMRC. HMRC repeatedly advised Mr Anderson that its decision was final and any further appeal must be to the Tribunal. In their third letter, dated 31 January 2012, HMRC reminded Mr Anderson of how to contact the Tribunal. This information had also been included in the statutory review letter. By a
25 Notice of Appeal dated 7 March 2012 Mr Anderson made a late appeal to the Tribunal.

13. I have considered the guidance given in *Data Select* in the context of these facts. The purpose of the 30 day time limit is to allow HMRC to deal with matters within a reasonable period of time. Here the delay was significant, being almost year. I find
30 that the reason for the delay was Mr Anderson's confusion over how to appeal the decision. Although he had been provided with the relevant information by HMRC, I also take into account the fact that he is not a tax adviser or accountant, and that his correspondence shows that he was genuinely trying to resolve the matter with HMRC. If I refuse the late appeal application, the consequence for the company is serious: it
35 will have lost its chance to appeal the decision, while the consequence for HMRC is less significant, though it will of course bear the administrative burden of dealing with the appeal.

14. Taking all the circumstances into account, I decided that it is in the interests of justice to allow the company to make its appeal after the statutory deadline.

The issue in the case

15. The company accepted that its P35 online return had been submitted after the due date. The issue in the case was whether the company had a reasonable excuse for the late submission.

5 **The law**

16. Regulation 73 of the Income Tax (PAYE) Regulations 2003² is headed “annual return of relevant payments liable to deduction of tax (Forms P35 and P14).” Regulation 73(1) requires that an employer “must deliver to the Inland Revenue” its P35 return on or before 19 May following the end of a tax year.

10 17. For the year 2009-10, Reg 205 stated that employers “must deliver a relevant annual return by an approved method of electronic communication.” This was the first year electronic filing of P35s was required: in previous years employers could either file on paper or online. The regulations allowed certain limited exceptions but none applied to the company.

15 18. Reg 73(10) states that s 98A of Taxes Management Act 1970 (“TMA”) applies if the obligation to deliver returns, set out in Reg 73(1), is not complied with. TMA s 98A provides for fixed penalties which apply to “any person who fails to make a return in accordance with the provision.” For employers with 50 or fewer employees, the penalties are £100 “for each month (or part of a month) during which the failure
20 continues.”

19. The taxpayer’s right of appeal against a penalty and the Tribunal’s powers are at TMA s 100B.

20. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2), which, so far as is material to this
25 appeal, provides:

“...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
30 delay after the excuse had ceased.”

The facts

21. On 31 January 2010, HMRC issued the company with a Notice to file its 2009-10 P35 online (a “P35N”).

22. Miss L Boateng, the company’s agent, was registered by HMRC on 14 May
35 2010 and activated her registration on 19 May 2010. However, no online return was filed for the company; instead she filed a paper return.

² All references to “Reg”, “Regs” or “regulations” in this decision notice is to these regulations

23. At some point after that date, the P35 was rejected because it was not an electronic return. By letter dated 28 July 2010 HMRC provided Miss Boateng with an authorisation code. The letter contains the warning that “this code must be used by 27 August 2010.” Miss Boateng did not use the code within that period.

5 24. On 27 September 2010 HMRC issued a £400 penalty notice, being £100 for each month between 20 May 2010 (the day after the filing due date) and 19 September 2010.

10 25. The return was filed online on 30 September 2010. On 6 October 2010, HMRC issued a further £100 penalty for the part-month from 20 September to 30 September 2010.

Submissions on behalf of the parties

26. Mr Anderson, on behalf of the company, says that:

- 15 (1) Miss Boateng did file on time, albeit on paper.
- (2) The company was not informed by HMRC that an online return was required, in advance of the filing deadline.
- (3) The authorisation code was sent after the P35 filing deadline and “didn’t work”, which caused further delays.
- (4) The tax itself was paid on time.
- 20 (5) The return was filed on 30 September 2010 but the company was still charged a penalty for the final month; this month “surpasses the date that the submission was received”. As a result, the Tribunal should at least reduce the penalty by removing this final £100.

27. On HMRC’s behalf, Mr Mooney says that:

- 25 (1) Although the company relied on the agent, this is not the sort of case where reliance on an agent provides a reasonable excuse.
- (2) The company was informed via the P35N as to its obligation to file online; moreover there was extensive publicity about this requirement.
- 30 (3) Miss Boateng had been registered with HMRC since 14 May 2010. Once she was registered, she did not need an authorisation code in order to file the P35 online, but could have used the “filing only” option available on the HMRC website.
- 35 (4) The final £100 penalty was due because the law states that the penalty is charged for each month or part-month for which the return is outstanding, and the period from 20 September to the filing of the return formed part of the fifth month after the filing deadline of 19 May 2010.

Discussion and decision

28. The legislation does not define a reasonable excuse, but this Tribunal has held that “an excuse is likely to be reasonable where the taxpayer acts in the same way as someone who seriously intends to honour their tax liabilities and obligations would
5 act.” *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14].

29. The company in this case largely delegated responsibility to Miss Boateng, so I consider first whether their actions (taken together) were reasonable, and secondly whether the company has a reasonable excuse as a result of relying on an agent.

30. The company’s first argument is that HMRC did not inform it (and/or Miss
10 Boateng) of the requirement to file online. The company was in fact issued with a P35N on 31 January 2010, which stated that online filing was a requirement for the year in question. As Mr Mooney says, HMRC also informed people of this change via their website and the Employer Bulletins. Furthermore, even if HMRC had failed to tell the company, ignorance of the law cannot provide a reasonable excuse.

15 31. The company’s second argument is that the authorisation code “didn’t work”. As Mr Mooney also says, this is irrelevant, as the P35 could be filed online without needing an authorisation code.

32. Furthermore, the reason the authorisation code “didn’t work” was because Miss
20 Boateng did not activate it by the date stated on the letter. HMRC had told her, in a letter dated 28 July 2011, that it had to be activated by 27 August.

33. The reasonable taxpayer would, in my judgment, have realised from the P35N
and the Employer Bulletins that there was new an obligation to file online; he would then either have looked on the website or called the HMRC helpdesk. Either would have allowed him to discover that no authorisation code was needed. In the
25 alternative, it would have been reasonable to ask for the code in good time before the filing deadline, and then activate the when it was received.

34. I have no hesitation in finding that the actions taken by the company, or on its behalf by Miss Boateng, are not those of a reasonable taxpayer who seriously intends to honour its tax liabilities and obligations.

30 *Reliance on agent*

35. I have gone on to consider whether the company has a reasonable excuse on the basis that it relied on an agent.

36. This question was recently discussed in *Michael Lithgow v R&C Commrs* [2012] UKFTT 620(TC). At [6] the Tribunal judge, Geraint Jones QC, says:

35 “I cannot take the view that the failings of a professional agent can ordinarily be considered objectively reasonable as an excuse. If that was the position, then professional agents would be able to ignore deadlines for filing or undertaking other tasks safe in the knowledge that their clients could not be penalised because the clients would
40 simply point to the failings of their various professional agents.”

37. Nevertheless, there are some situations in which a company can be found reasonably to have relied on its accountant. Judge Jones distinguishes the two situations at [14]:

5 “If a taxpayer claims that his accountant has been negligent, for
example, by failing to meet a deadline for filing a return or undertaking
some or other administrative task, then the negligence of the
accountant will not usually provide a defence to a penalty because the
accountant is simply acting as the taxpayer's agent or functionary in
10 filing the document that needs to be filed by a particular deadline. In
other words, he is acting as an agent or functionary for his principal;
but not as an independent professional adviser. However, in a situation
where a professional adviser is not retained simply to act as a
functionary, but is retained to give professional advice based upon the
15 best of his skill and professional ability, he is not then a functionary or
agent for his principal. He is a professional person acting under a
retainer to give professional advice upon an identified issue. He is
bound to provide that advice to the best of his professional skill and
ability, whilst taking reasonable care in and about preparing and giving
20 that advice. In other words, he is acting as a true professional, rather
than as an agent or functionary.”

38. I agree with this analysis. A similar approach has also been adopted in a significant number of other Tribunal judgments.

39. Here, Ms Boateng was acting as “agent or functionary”, carrying out a task which is the statutory obligation of the company as employer. The agent stands in the shoes of the employer, and the employer cannot escape liability for the penalty simply by engaging an agent to carry out the task. As a result, reliance on the agent does not provide the company with a reasonable excuse.

Whether the £100 for the final month should be cancelled

40. The penalty is calculated on the basis of each complete month *or part month* after 19 May. So filing the return on 30 September is four complete months and the part month from 20 September to 29 September. That is the penalty set by parliament.

41. In *Hok v R&C Commrs* [2011] UKFTT(433) (“*Hok*”), the First-tier Tribunal found that HMRC had acted unfairly in relation to the levying of a P35 penalty, and they reduced that penalty. HMRC appealed that decision to the Upper Tribunal, which found (*HMRC v Hok* [2012] UKUT 363(TC)) that this Tribunal has no power to change the P35 penalties which apply to a period of late filing simply because we think they are unfair. This Tribunal can change or remove a P35 penalty if:

- (1) the taxpayer has a reasonable excuse for the late filing (TMA s 118(2));
- 40 (2) the taxpayer was not in fact late in filing the return (TMA s 100(2)(a)(i));
- (3) HMRC have miscalculated the penalty – for instance, by counting the wrong number of months (TMA s 100(2)(a)(iii));

(4) HMRC have applied the penalty to the wrong person – for instance, if the business has been transferred to another person before the end of the relevant tax year (Reg 102(4) and TMA s 100(2)(a)(i)).

5 42. Thus, even if I thought that the £100 penalty charged in relation to the part-month of September were unfair (which I do not), I have no power to change it on that ground. The law clearly states that a P35 penalty is due for each month or part-month that the return has not been filed. The company did not file its P35 for four full months and one part month, and the penalty has been correctly calculated in accordance with the legislation.

10 *Other matters*

43. The company also says that the tax was paid on time. However, the penalty is for not filing the return by the due date; had the PAYE also been late a further penalty might have been due.

15 44. It is a matter for the company as to whether it has any redress against Ms Boateng. That is not a matter for this Tribunal.

Decision and appeal rights

45. As a result of the foregoing, I find that there is no basis on which the penalty should either be removed or reduced. I dismiss the appeal and confirm the penalty of £500.

20 46. 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.

25 47. 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**

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RELEASE DATE: 10 February 2014