



**TC03776**

**Appeal number: TC/2011/07931**

**P35 – late filing penalties – accountant believed it had filed online – no proof of filing – no reasonable excuse**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**XSESS 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 Letter of Appeal dated 29 September 2011, HMRC's Statement of Case submitted on 18 November 2011 (with enclosures) and the Appellant's reply dated 12 December 2011.**

**© CROWN COPYRIGHT 2014**

## DECISION

1. The Appellant company (Xsess) is appealing against penalties issued by HMRC  
5 of £400.00 issued on 28 September 2009 and £200.00 issued on 26 October 2009 for failure to file form P35 for the tax year 2008/9

2. Xsess employed a firm of chartered accountants to file its returns to HMRC. The firm believed it had filed the form P35 for the year ending 5 April 2009 before the due deadline of 19 May 2009. However it has produced no evidence in support of  
10 its contention and HMRC records do not show any attempt at filing online until the return was filed on line on 21 October 2009.

3. HMRC claims to have issued form P35 to Xsess on 11 January 2009. Xsess, via its accountant has been filing forms on line since the tax year ending 5 April 2006. The accountants should have been aware that after filing a form online HMRC  
15 automatically send an acknowledgment. No such acknowledgment has been produced by the accountants or by Xsess.

4. Xsess operates from a kiosk in a shopping centre and claims a lot of its post is not received. Also the accountants changed address though it is not clear from the papers when this change actually took place. The Tribunal considers it is for Xsess  
20 and the accountants to ensure they receive all their post.

5. It appears that the first penalty notice dated 28 September 2009 had been received by either Xsess or the accountants as the return was filed online on 21 October 2010. No explanation has been offered as to what prompted this online filing and the Tribunal therefore assumes that it was the receipt of the first penalty notice  
25 which alerted either Xsess or the accountants to the fact that the return had not been filed.

6. The first penalty notice of £400.00 was in respect of the period 20 May 2009 to 19 September 2009. Once the return had been filed online a further final penalty notice for £200.00 was issued in respect of the period 20 September 2009 to 21  
30 October 2009.

7. Nothing appears to have happened following the issuing of the second penalty notice until HMRC issued a penalty reminder addressed to Xsess on 16 May 2011 as a result of which the accountants wrote to HMRC on 21 June 2011 appealing against the penalties claiming receipt of the reminder was the first time Xsess or the  
35 accountants had become aware of the penalties.

8. HMRC issued a letter on 18 September 2011 addressed to Xsess advising that it considered the appeal to be out of time.

9. As a result the accountants on behalf of Xsess appealed to this Tribunal by letter dated 29 September 2011.

## **The Law**

10. Section 98A(2) and (3) Taxes Management Act 1970 provides for a fixed penalty of £100.00 to be charged for each month or part month where an employer fails to submit a return by the due date.

5 11. Regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 require an employer to deliver a completed return not before 20 May following the end of the tax year.

10 12. 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**

13. HMRC does not appear to be objecting to the Tribunal hearing the appeal despite the fact that the initial request to HMRC by the accountants was out of time.

15 14. There is no statutory obligation on HMRC to advise employers that they have failed to file their P35 form on time. It is necessary that HMRC is seen to be consistent in its approach.

20 15. In order to have the penalty assessments set aside it is necessary for Xsess to show a reasonable excuse. The accountants in their letter dated 12 December 2011 state that they believed they had filed the return on time. Their systems showed that it had been filed within time. However no evidence has been produced in support of this information and no explanation has been forthcoming as to why the return was in fact filed online on 21 October 2009 shortly after the first penalty notice had been issued.

25 16. The Tribunal finds that no reasonable excuse has been submitted by Xsess for the failure to file for the period 20 May 2009 to 21 October 2009.

17. Following the decision of the Upper Tier Tribunal in Hok Ltd the Tribunal has no jurisdiction to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.

30 18. The appeal is therefore dismissed. The penalty payable by Xsess remains at £600.00.

35 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.

**ALASTAIR J RANKIN  
TRIBUNAL JUDGE**

5

**RELEASE DATE: 4 July 2014**