



TC02897

Appeal number: TC/2012/06934

Penalties for late filing of P35 and P14 returns - whether HMRC were under an obligation to impose penalties earlier – no – Appellant claimed this to be unfair – whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN NORMINGTON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 18 April 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 Appellant's Notice of Appeal dated 26 June 2012 and HMRC's Statement of Case submitted on 30 January 2013

DECISION

1. This is an appeal by Mr Ian Normington ('the Appellant') against penalties of £400 imposed under s 98A (2) & (3) Taxes Management Act 1970 for the late filing of the Employer's Annual return for the tax year 2010-2011.

Background legislation

2. Regulation 73(1) The Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulation 2001 requires an employer to deliver a complete Employers Annual Return forms P35 & P14's before 20 May following the end of the tax year. The return must include specified information relating to relevant payments made during the tax year to employees for whom they had to prepare or maintain deduction working sheets (form P11 working sheet or equivalent payroll deductions record).
3. Regulation 205 The Income Tax (Pay As You Earn) Regulations 2003 requires the mandatory use of electronic communications by employers who must deliver their P35/P14 forms online using an approved method of electronic communications for 2009-2010 onwards.
4. The full return ie the P35 and a P14 for each employee must reach HMRC no later than 19 May following the end of the tax year. If the return is not received by the due date the employer is liable to a penalty.
5. Where the employer does not file their annual return on time they will be charged a penalty in accordance with s 98A (2)(a) & (3) Taxes Management Act (TMA) 1970.
6. Fixed penalties of £100 per month (or part month) for each batch (or part batch) of 50 employees are charged for the first 12 months the return is late.
7. Where the total duty (NICs Tax) shown on the return is:
- (1) equal to or more than the penalty amount, the employer is liable to the whole of the penalty amount.
 - (2) more than £100 but less than the penalty amount, the employer is only liable to penalties in an amount equal to the total duty shown on the return.
 - (3) £100 or less, the employer is liable to a penalty of £100 only.

Factual background

8. The Appellant was required to file an Employer Annual return (P35 & P14s) for the year 2010-2011. The filing date for the return was 19 May 2011. From 2009-2010 onwards this had to be filed online using an approved method of electronic communication.
9. HMRC sent an electronic notification to the Appellant on 13 February 2011. HMRC sent the Appellant a late filing penalty notice on 26 September 2011 for £400 for the period 20 May 2011 - 19 September 2011.

10. The Employer Annual return was filed online on 17 May 2012

11. On 30 November 2011 the Appellant's agent, Hanley & Co, appealed against the penalties, on the grounds that they submitted the 2010-2011 Employer Annual return on 12 July 2011 and the penalty should be cancelled.

5 12. HMRC replied on 13 January 2012 rejecting the appeal, offering a review and stating that the return for 2010-2011 was still outstanding.

10 13. Hanley & Co requested a review of HMRC's decision, saying that they submitted the Employer Annual return on 12 July 2011. They believed HMRC's records to be inaccurate. They said that the penalty should be amended to show the correct liability of £200 (the claimed filing date of 12 July 2011 was two months after the filing deadline of 19 May 2011).

15 14. On 17 April 2012 an officer from HMRC telephoned Hanley & Co to explain that there appeared to be some confusion as there were two separate PAYE reference numbers involved. PAYE reference 065/5Z15091 referred to the limited company, Ian Normington Plastering & Rendering Ltd, which was noted as ceased on 12 May 2010 and PAYE reference 065/MA45291, which commenced on 3 November 2009, and refers to the Appellant as a sole trader.

20 15. The HMRC officer said that the return made on 12 July 2011 referred to the limited company reference 065/8Z15091 which was a nil return with no entries and therefore there were no penalties issued, even though filed after the deadline of 19 May 2011. The officer confirmed that the return for 065/MA45291 was still outstanding and asked for confirmation that the appeal referred to reference 065/MA45291.

25 16. HMRC issued their review conclusion on 23 April 2012. The outcome of the review was that HMRC's decision should be upheld.

30 17. On 4 May 2012 Hanley & Co, wrote to HMRC stating that they now accepted HMRC's reasons for rejecting their appeal and would submit the correct Annual return immediately. However they argued that the £400 penalty was incorrectly calculated. They said that if they had received a prompt penalty notice within one or two months of the filing deadline they would have been able to rectify the situation immediately by submitting an Employer Annual return to the correct reference and paying a penalty of just £100 or £200

18. On 15 June 2012 HMRC replied to Hanley & Co's letter of 4 May 2012 stating that: -

35 (1) the legislation at s 98A of TMA 1970 sets no obligation on HMRC to issue penalties in any particular pattern, although the first interim penalty was generally issued if the Annual return had not been received four months after the due date.

40 (2) There is no obligation upon HMRC to issue reminders to taxpayers or notify taxpayers that an Annual return has not been received prior to issue of the penalty notices HMRC were currently awaiting the outcome of the appeal to the Upper Tier Tribunal in *Hok Ltd v HMRC*.

The Appellant's case

19. On 26 June 2012 Hanley & Co notified their appeal to the Tribunal stating that:

5 (1) They accepted HMRC's reasons for rejecting their appeal but must argue that the £400 penalty was been incorrectly calculated. If Hanley & Co had received a prompt penalty notice within one or two months of the filing deadline they would have rectified the situation immediately by submitting an Employer Annual return to the correct PAYE reference and paying a penalty of just £100 or
10 £200.

(2) They accepted that there is no obligation upon HMRC to issue reminders or notify that an Employer Annual return has not been received prior to the issue of a penalty notice. They therefore accepted that the initial penalty notice should have been £400. However they felt it unfair that the penalty could not be reduced
15 to the correct amount of £200 because they submitted the Annual return P35 only two months after the deadline in July 2011.

20. Hanley & Co requested that the appeal be stayed behind the ruling in *Hok Ltd v HMRC*.

HMRC's case

20 21. HMRC's records demonstrate that an electronic notification was issued to the Appellant on 13 February 2011. This clearly indicated that the Employer's Annual return had to be filed online by the 19 May 2011 and the methods by which this could be achieved. This would have alerted the Appellant to the fact that an Employer
25 Annual return for 2010-2011 was required.

22. HMRC contend that the Employer Annual return for the tax year 2010-2011 was submitted late. The return included details of one employee and both tax and NIC were due for the year in question. HMRC submit that fixed penalties have been correctly charged in accordance with legislation. The penalties may only be set aside
30 if the taxpayer has a reasonable excuse which existed for the whole period of default.

23. The 2010-2011 Employer Annual return for the Appellant was not submitted to HMRC until 17 May 2012. In the Appellant's case there were two separate PAYE schemes involved for year 2010-2011. As previously stated above one PAYE reference, 065/S215091, referred to the limited company named Ian Normington
35 Plastering & Rendering Ltd, which was closed by HMRC on 12 May 2010. The second PAYE reference, 065/MA45291, commenced on 3 November 2009 and referred to the Appellant as a sole trader. These were clearly two separate PAYE reference numbers in respect of two different businesses.

40 24. Firstly HMRC contend that both the Appellant and Hanley & Co should have known that an Annual return for 2010-2011 was due in respect of his sole trading business at reference 065/MA45291. The electronic notification issued on 13 February 2011 was issued under that reference. HMRC would also state that an Annual return for year 2009-2010 was successfully submitted for the sole business at

reference 065/MA45291 in May 2010 so the Appellant and Hanley & Co were both aware that a return for that PAYE reference was required for 2010-2011.

25. Secondly HMRC submit that the Appellant and Hanley & Co should have been aware that the return that was submitted on 12 July 2011 did not refer to the Appellant's sole business at PAYE reference 065/MA45291. The figures on the return submitted on 12 July 2011 at reference 065/8215091 bore no relation to the correct return for reference 065/MA45291 submitted on 17 May 2012. The return submitted on 12 July 2011 at 065/8215091 shows that there were no deductions for tax or national insurance due for the year 2010-2011 whereas the correct return submitted on 17 May 2012 shows total tax and NIC due of £6698.73.

26. HMRC therefore contend that it is clear that an Annual return for 2010-2011 was required for the sole trading reference 065/MA45291 and it is also clear that the return submitted on 11 July 2011 did not refer to that reference. There was nothing issued by HMRC to suggest that a 2010-2011 return had been successfully received for reference 065/MA45291 until the return was filed on 17 May 2012.

27. HMRC contend that the initial penalty notice issued on 26 September 2011 for £400 was correct.

28. HMRC would also submit that when Hanley & Co received the penalty notice of 26 September 2011 they did not rectify the situation immediately by submitting the return to the correct reference. Furthermore, HMRC's letter of 13 January 2012, a copy of which was sent to Hanley & Co, also stated that the 2010-2011 Annual return for reference 065/MA45291 remained outstanding. However the completed return was not submitted to the correct reference until 17 May 2012.

29. In *Hok Ltd v HMRC* the Upper Tier Tribunal found in HMRC's favour. In that case Hok Ltd originally appealed against fixed penalties totalling £500 charged under s 98A of Taxes Management Act (TMA) 1970 for the late filing of its Employer Annual return (forms P35 and P14) for 2009-2010. The First-tier Tribunal decided that HMRC had not acted fairly or in good conscience by issuing the first penalty notice four months after the filing date of 19 May. As a result the First-tier Tribunal discharged all the penalties except for the £100 penalty for the first month the return was late. HMRC appealed this decision and the Upper Tribunal heard the appeal in July 2012 and released its decision on 23 October 2012. The Upper Tribunal found that HMRC's decision to charge Hok Ltd penalties of £500 for late filing of their Employer Annual return was correct and that the First-tier Tribunal acted beyond its jurisdiction in discharging the penalties of £400. The First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is properly due because it thinks it is unfair.

Reasonable excuse

30. Section 118(2) TMA 1970 provides statutory protection from a penalty if the employer had a reasonable excuse for failing to file their return on time.

31. There is no statutory definition of reasonable excuse, which "is a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v*

HMRC [2006] STC (SCD) 536 at paragraph 18). This was confirmed by the First –tier Tribunal, in *Anthony Wood trading as Propaye v HMRC* (2011 UK FTT 136 TC 001010).

5 32. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the employer's control, and which prevents the employer from complying with their obligation to file the return on time. A combination of unexpected and foreseeable events may, when viewed together, be a reasonable excuse.

10 33. The actions of the employer should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. If the employer could reasonably have foreseen the event, whether or not it is within their control, they would expect them to take steps to meet their obligations.

34. If there is a reasonable excuse it must exist throughout the failure period.

15 **Conclusion**

20 35. The Appellant’s grounds of appeal are that penalties imposed by HMRC, whilst accepted as correct, are unfair for reasons outlined in paragraph 19. The legislation at s 98A of TMA 1970 imposes no obligation on HMRC to issue penalties in any particular pattern. There is no obligation on HMRC to issue reminders to tax payers that their Annual return has not been received prior to the due date. The Upper Tribunal case of *Hok Ltd v HMRC* clearly states that the First-tier Tribunal does not have the power to discharge or adjust a fixed penalty which is due whether or not it is perceived as unfair. The Appellant has not shown that he had a reasonable excuse for the late filing of his return.

25 36. The appeal is accordingly dismissed.

30 37. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 20 September 2013

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