



TC03005

Appeal number: TC/2011/06168

INCOME TAX – PAYE – P35s filed late – Was a reasonable excuse shown? – No on the facts

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**LEGGETT PORTER & HOWARD PENSION SCHEME
(PORTER) FUND**

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT
CHARLES BAKER FCA**

**Sitting in public at Southampton Appeals Service, 83-85 London Road,
Southampton, SO15 2SH on 14 August 2013**

David Porter for the Appellant

Gill Cawardine, HM Revenue and Customs, for the Respondents

DECISION

5 1. This is an appeal by Leggett Porter & Howard Pension Scheme (Porter) Fund (“the Taxpayer”) against penalties imposed under section 98A TMA for the late submission of Employers’ Annual Returns (Form P35) for 2008-9 and 2009-10.

2. The penalties were for £2,400.00 in total. They consisted of:

	<u>Type</u>	<u>Year</u>	<u>Amount</u>	<u>Comment</u>
1	First interim penalty	2008-09	£400	Issued 28 September 2009
2	Second interim penalty	2008-09	£400	Issued 25 January 2010
3	Third interim penalty	2008-09	£400	Issued 24 May 2010
4	First interim penalty	2009-10	£400	Issued 27 September 2010
5	Second interim penalty	2009-10	£400	Issued 24 January 2011
6	Third interim penalty	2009-10	£400	Issued 30 May 2011
	TOTAL		<u>£2,400</u>	

10 3. Technically, the appeal was made out of time. The Respondents (“HMRC”) very properly did not want to take any point on this in the interests of fairness. We give such permission as may be necessary to allow the appeal to proceed.

15 4. We were provided with a number of bundles of documents and heard from Mr. Porter. We note that as a matter of law the returns needed to be filed online. HMRC had not imposed any penalties because the returns were not filed online as required by the legislation.

5. The appeal was originally determined as a default paper case. This determination upheld the imposition of penalties but reduce the penalties for each year by £100 to reflect the potential existence of a reasonable excuse in respect of a short period of time.

20 6. The Taxpayer applied for this decision to be set aside and it was set aside. This is the further appeal.

7. The monthly amount of the penalty under section 98A TMA in the case of a failure to make a return is £100 per month for each group of 50 persons in respect of whom returns are required to be made even if the returns are nil returns.
8. In respect of penalties required to be of a particular amount the Tribunal's jurisdiction is limited by section 100B TMA. Broadly, the Tribunal can consider whether the penalty has been incurred or whether the amount is correct. It does not have an inherent jurisdiction relating to fairness.
9. We note that this appeal was stood behind the appeal in *Hok*. This was determined in favour of HMRC. The Upper Tier Tribunal decided that the penalty regime at a high level is Human Rights Act compliant and this Tribunal has no general "fairness jurisdiction" but has the jurisdiction given to it by statute. Accordingly, we proceed in accordance with the *Hok* decision which is binding on us and with which we respectfully agree. There was no specific issue of proportionality raised before us and we do not consider the penalty to be disproportionate in the context and on the information before us.
10. The legislation provides in section 118 (2) TMA (inter alia) "...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 if he did it without unreasonable delay after the excuse had ceased":
11. Accordingly, if there was a reasonable excuse within the meaning of the legislation the conditions for the imposition of the penalty might not be fulfilled. The onus is on the Taxpayer to show this.
12. As noted above the legislation requires the filing to be made online for at least one of the years. This was not the case here.
13. The following factual matters were not disputed.
- 2008- 09 (paper filing permitted)*
- (1) The Form P35 was issued on 5 January, 2009.
 - (2) The return had to be filed by 19 May 2009
 - (3) The penalty notices were issued as set out above.
 - (4) A paper return was submitted on 23 March 2011.
- 2009-10 (electronic filing required)*
- (5) The Form P35PN (notice to file electronically) was issued on 25 January, 2010.
 - (6) The return had to be files by 19 May 2009
 - (7) The-penalty notices were issued as set out above.
 - (8) A paper return (i.e. in the wrong way) was submitted on 23 March 2011.
14. The grounds of appeal include the following:
15. "I have written letters to your organisation over the years in the same vein. If you do not send me a form I cannot fill it in. It is all very well saying that it is available on the Internet but if local connections are inadequate then you are wasting your breath".
16. It continued:
- "I have recently corresponded with Mr. Carter of your Markham office. I am sure that he will tell you that as soon as we had the forms we had given the information. I can also tell you that we have sent spread sheets to you with the information which you simply ignore".

17. It was also suggested that a cheque had been misallocated or lost in the post. However, as there was no evidence before us to support this we have been unable to consider it further.

18. In essence, the taxpayer contended:

- 5 (1) The taxpayer repeatedly asked for forms but HMRC did not send them
- (2) The taxpayer repeatedly told HMRC that the taxpayer had a poor Internet connection in the national park but despite many letters HMRC would not post forms to them
- 10 (3) The taxpayer had sent HMRC spread sheets with the relevant information but these have been ignored by HMRC.

19. Mr. Porter told us in addition that there had been health issues during the periods in question.

20. His daughter was in remission from cancer. She was studying at Bournemouth University during the period in question. She was studying nursing and went to Bournemouth University most week days during this period generally by car driven by her parents. She needed to be looked after.

21. Mr. Porter slipped discs got worse and he suffered from Lymes disease.

22. Mr. Porter also amplified on the Internet connection problems he referred to. However, there was no explanation why a visit each year to the library or an Internet cafe could not have been made to make the return.

23. In outline HMRC's were as follows.

- (1) The taxpayer had a statutory obligation to make End of Year returns in accordance with Regulation 73.
- 25 (2) The Regulations provide that a taxpayer must deliver the P 35 return on paper for the first year and online for the second.
- (3) There is a fixed monthly penalty where a tax payer has failed to make the return.
- (4) The returns here were not filed on time and no reasonable excuse has been shown for this.
- 30 (5) Accordingly, the penalties were properly imposed and must stand.

24. HMRC records show that the relevant notices were sent and under section 7 of the Interpretation Act 1978 are deemed to have been received. There was no evidenced before us to negative this.

25. We find that the returns were made late. The returns were to be delivered "before 35 20 May following the end of a tax year". The returns were both made on 23 March, 2011. On any analysis the returns were late and we so find.

26. Accordingly the penalties stand unless the Taxpayer discharges the onus of showing that there was a reasonable excuse. The Taxpayer has not discharged this onus and we so find.

40 27. We are sympathetic to the health issues the taxpayer referred to but it did not prevent him making the returns.

28. We acknowledge that poor broadband connection can be very frustrating but the Taxpayer could have gone to the library or an Internet café to file the returns. The Taxpayer could also have sent the returns from Bournemouth where he was driving 45 each weekday to take his daughter to University.

29. The Taxpayer could have got a third party such as his accountant to make the submissions.

30. The Taxpayer has not discharged the burden of showing that the taxpayer had “...repeatedly asked for forms but HMRC did not send them”. We find that HMRCs had sent out forms and the relevant Januaries.

31. We have found that:

- (1) The returns were late; and
- (2) No reasonable excuse has been shown.

32. Accordingly, the appeal is dismissed and the penalties stand in their original form

33. 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.

ADRIAN SHIPWRIGHT
TRIBUNAL JUDGE

RELEASE DATE: 25 October 2013