



**TC03392**

**Appeal number: TC/2012/04413**

*INCOME TAX – two penalty notices for late filing of employer’s annual return under Regulation 73 PAYE Regulations – section 98A(2) and (3) Taxes Management Act 1970 – whether returns submitted – delay by HMRC in notifying appellant of penalties – whether penalties fair - whether reasonable excuse – HMRC v Hok Limited [212] UKUT 363 considered and applied – appeal dismissed – HMRC’s discretion to mitigate penalties*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BLETCHINGLEY SKILLS CENTRE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN  
MS REBECCA NEWNS**

**Sitting in public at Bedford Square, London on 18 February 2014**

**Terence Dillon for the Appellant**

**Stephen Goulding for the Respondents**

## DECISION

### Introduction

- 5 1. The appellant, the Bletchingley Skills Centre ("the Centre"), is appealing against two penalty notices imposed under section 98A(2) and (3) Taxes Management Act 1974 for the late filing of the employer's annual return (Forms P35 and P14) in respect of the income tax year ended 5 April 2011.
- 10 2. The first penalty notice was issued on 26 September 2011 in the amount of £400 and second penalty notice was issued on 17 October 2011 in the amount of £100.

### Legislation

3. Regulation 73 of the Income Tax (PAYE) Regulations 2003/2682 imposes an obligation on an employer to submit an annual return:
- 15 (1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue a return containing the following information.
- (2) The information is—
- (a) the tax year to which the return relates,
- 20 (b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and
- (c) the total net tax deducted in relation to those payments.
- 25 (3) The return must be supported by the following information in respect of each of the employees mentioned in paragraph (2)(b).
- (4) The supporting information is—
- (a) the employee's name,
- (b) the employee's address, if known,
- (c) either—
- 30 (i) the employee's national insurance number, or
- (ii) if that number is not known, the employee's date of birth, if known, and sex,
- (d) the employee's code,
- (e) the tax year to which the return relates,
- 35 (f) the total amount of the relevant payments made by the employer to the employee during that tax year, and
- (g) the total net tax deducted in relation to those payments.

(5)...

(6)...

(7) The return must include—

5 (a) a statement and declaration containing a list of all deductions working sheets which the employer was required to prepare or maintain at any time during that tax year; and

(b) a certificate showing—

10 (i) the total net tax deducted or the total net tax repaid in the case of each employee, and

(ii) the total net tax deducted or repaid in respect of all the employees,

during that tax year.

(8) The statement and declaration and the certificate must be—

15 (a) signed by the employer, or

(b) if the employer is a body corporate, signed either by the secretary or by a director.

(9) Paragraph (8) is subject to regulation 211(5) (authentication in approved manner if return sent electronically).

20 (10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).

4. It will be noted that the information specified in Regulation 73(2) is in effect the information contained in Form P35 and the information specified in Regulation 73(3) is that required in respect of each employee on Form P14. It will be further noted that an employer must therefore file Form P35 (which gives aggregate tax details for all employees) and a Form P14 in respect of each employee. A failure to submit any of this information by the due date (19 May) renders an employer liable to a penalty because Regulation 73(10) applies the penalty provisions of Section 98A Taxes Management Act 1970 (“TMA”), to which we now turn.

5. Section 98A TMA contains penalty provisions in respect of a failure to file an employer’s annual return as required by Regulation 73 as follows:

(1) [PAYE regulations ... may provide that this section shall apply in relation to any specified provision of the regulations.

35 (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and

40 (b)...

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and

5 (b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

6. Section 118(2) TMA provides for the “reasonable excuse” defence for the penalties specified in Section 98A TMA as follows:

10 (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the [tribunal] or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall  
15 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 delay after the excuse had ceased.

### **The facts**

20 7. The Centre is a charity which provides adult education classes for disabled people. The Centre provides training courses, support and information for physically impaired people and to help them develop their potential, whether by improving their skills or helping develop their self-confidence. The disabilities catered for including various forms of physical disability, including blindness, and also Downs syndrome.  
25 The Centre was originally part of Surrey County Council but became independent some years ago. 60% of the Centre's funding is provided by Surrey County Council and the remaining 40% is obtained through donations.

8. The Centre has three employees of whom one is full-time and the other two are part-time. In addition, there are a number of volunteers who are unpaid and who, Mr  
30 Dillon informed us, do not claim expenses.

9. Mr Dillon was at the times material to this appeal the Treasurer of the Centre. In this capacity he attempted to submit the employer's annual return (Forms P35 and P14) for the tax year ended 5 April 2011. It was common ground that the deadline for the filing of the employer's annual return was 19 May 2011. Mr Dillon, therefore,  
35 accessed HMRC's electronic Gateway by computer on 1 May 2011 in order to submit the return in plenty of time before the deadline.

10. Mr Dillon explained to us that in the previous tax year he had experienced considerable difficulty with this electronic filing. Although penalty notices had been issued, HMRC cancelled these notices, acknowledging the difficulties that many  
40 taxpayers experienced with the new online filing system.

11. On 1 May 2011 Mr Dillon, as we have said, went on-line and attempted to complete the employer's annual return. He explained to us that once the necessary information had been added to each form it was necessary to send them to HMRC. This was done, in Mr Dillon's words, by putting a "blob" in the necessary box and then clicking "send". He explained that the Centre had to submit four forms (presumably, one Form P 35 and three Forms P14 – i.e. one for each employee). He told us that as regards two forms the relevant "green box" indicated that the form had been "accepted". However, as regards the other two forms, he had to "wait for ages" for anything to happen and turned off his computer after about ten minutes before receiving the "accepted" notification.

12. In October 2011 Mr Dillon discovered, for the first time, that the forms had been rejected. This occurred when HMRC issued the first penalty notice dated 26 September 2011, which Mr Dillon said (and we accept) was received in October 2011. After logging out from his computer on 1 May 2011, Mr Dillon did not check whether all four of the forms he believed he had submitted had in fact been received or accepted by HMRC.

13. When he received the penalty notice in October 2011, Mr Dillon went back on-line on 12 October 2011 and checked the returns that he believed he had submitted on 1 May 2011. His evidence was that two of the forms had been sent to HMRC but he discovered two forms were still marked as outstanding. He also discovered that the forms submitted on 1 May 2011 indicated an underpayment which he immediately paid. HMRC's records show this as being received on 14 October 2011. He completed the two forms that were indicated to be outstanding. Mr Dillon told us that when he completed these two additional forms the date of submission of all four forms (including the two forms that were shown as having been successfully submitted on 1 May 2011) was changed on the computer to 12 October 2011.

14. HMRC's records showed that there were no relevant malfunctions or disruptions in its computer systems on 1 May 2011.

15. Mr Goulding said that HMRC would have sent an automated receipt e-mail if the returns had been correctly submitted. He told us that his understanding was that if the forms had been successfully submitted to HMRC the appellant would have received a message acknowledging the successful filing within a minute. Mr Goulding was not, however, personally familiar with the workings of the government Gateway or with the terms employed on the record of filings which were produced in evidence.

16. HMRC's computer records in relation to 1 May 2011 indicated that no successful filing had taken place although it was clear that the appellant had accessed the Gateway on that date, consistent with Mr Dillon's evidence.

17. On 12 October 2011, the date on which Mr Dillon discovered that the filings which he thought he had made on 1 May 2011 had not been completely successful, the Gateway computer records record that the appellant again accessed the Gateway. It also records that 16:59 "Document received (ASP)". The records then show the following entries:

"16:59 Authenticate TE document (success)  
16:59 Acknowledge delivery from DIS (ASP)  
17:00 Response from DIS (success)  
18:42 Client response"

5 18. Mr Goulding submitted that if Mr Dillon had successfully submitted the employer's annual return on 1 May 2011 he would have received the sort of responses indicated on the Gateway in respect of his successful filing on 12 October 2011.

10 19. The difficulty with this submission was that Mr Goulding was unable to explain the entries on the Gateway in relation to 12 October 2011 recorded above. For example, in relation to his submission that a successful filing would have been acknowledged within a minute, he was unable to confirm whether the entry at 17:00 hours or 18:42 hours was such an acknowledgement.

15 20. On balance, we conclude that Mr Dillon was correct when he said that on 1 May 2011 he did not receive a response for approximately ten minutes in respect of the two forms in respect of which the "green box" did not show up before he turned off his computer. We have no reason to doubt Mr Dillon's evidence on this point – he seemed to us an entirely honest and straightforward person.

21. As indicated above, Forms P35 and P14 were recorded on HMRC's records as being successfully filed on 12 October 2011.

## 20 **Submissions and Discussion**

22. We consider that Mr Dillon attempted to submit the Centre's Form P35 and P14 on 1 May 2011 but that he failed to do so.

25 23. As we have explained above the filings required to be made by Regulation 73 require that the P35 and a P14 for each employee must be filed by 19 May. Failure to submit *all* the required information results in a penalty under Section 98A.

30 24. On Mr Dillon's own evidence, on 1 May 2011, after waiting for 10 minutes, he turned off his computer before receiving confirmation that two of the forms had been received. Even if, which in this instance we doubt, the frustrations and delays sometimes experienced with on-line filings could be a reasonable excuse, Mr Dillon's failure to check before the deadline of 19 May 2011 or indeed before 12 October 2011 that all the forms had been received by HMRC seemed to us to be careless with the result that we do not consider that the appellant had a reasonable excuse within Section 118(2) TMA.

35 25. Mr Dillon protested against the fact that the notice of the penalties did not reach the appellant until October 2011, even though the penalty notice was dated 26 September 2011 and was received by the appellant too late to prevent the issue of a further £100 penalty notice on 17 October 2011.

26. The delay by HMRC and sending out penalty notices until four months' worth of penalties have been clocked up is a familiar source of complaint. The issue arose in *HMRC v Hok* [2012] UKUT 363 (TCC). The Upper Tribunal decided that this Tribunal has no jurisdiction to consider whether the penalty should be discharged because HMRC acted unlawfully (in a public law sense) by delaying notification of accumulating penalties to the taxpayer so that the taxpayer was not put on notice to rectify its failure. The Upper Tribunal did not make a finding that HMRC's practice was fair but rather held that the First-tier Tribunal in that case had no evidence to conclude that the practice was unfair. In any event, jurisdiction to hear public law issues of fairness rested solely with the High Court. At paragraph 60 the Upper Tribunal referred to the explanation proffered by HMRC's counsel why penalty notices were not sent out until September. This was because:

15                    "[HMRC's] systems are designed to check not only whether a return was due at all, but whether those returns which have been submitted are correct."

27. In this case, no explanation was proffered in relation to the four-month delay. We note that it is indicated in *Hok* that HMRC has since changed its practice and that earlier reminders are now sent out. With all due respect, we are unimpressed with the reason put forward to the Upper Tribunal in *Hok*. There is no obvious reason why the checks mentioned should take four months. We accept that there is no statutory duty on HMRC to notify a taxpayer as soon as they are in default under Regulation 73. However, it was manifestly the intention of Parliament in providing for monthly penalties that compliance should be encouraged and that the use of monthly penalties should promote compliance. This statutory purpose is frustrated if the taxpayer – particularly one such as the appellant in this case who believes it has already complied with its obligations – is allowed to continue in ignorance of its default. It may be that, in accordance with *Hok*, we do not have jurisdiction to consider whether HMRC acted unfairly in the administrative law sense, but we cannot refrain from concluding that the delay in notifying a taxpayer of its default where a system of monthly penalties was in place was frankly unsatisfactory.

28. Nonetheless, we are bound by the decision in *Hok* and whether or not HMRC's practice of delaying for four months in sending out penalty notices was fair is not a matter over which we have jurisdiction.

29. Mr Dillon also argued that the appellant was a small charity with very limited means assisting disabled people. The appellant, therefore, was less able to comply with the statutory return obligations than larger organisations. All that may be true, but in our view this does not absolve the appellant from its statutory duties.

30. Mr Dillon also suggested that he had been prevented from submitting the employer's annual return because of HMRC's computer system. We are satisfied from the evidence produced by HMRC that there was no malfunction and no planned or unplanned disruptions to their computer system on 1 May 2011. Accordingly, we consider that there was no evidence that HMRC's computer system prevented the appellant from filing its return.

31. Mr Dillon also submitted that he had sent the employer's annual return electronically and that the appellant should not be liable for a penalty if the return was not received by HMRC. In this case, however, we accept HMRC's evidence that the annual return was not received by HMRC on 1 May 2011. On Mr Dillon's own  
5 evidence he did not wait until he received confirmation that Form P35 and Forms P14 had been successfully sent to HMRC but turned off his computer prematurely. We do not, therefore, consider that Mr Dillon submitted the return on 1 May 2011. As we have noted earlier in this decision, Regulation 73 requires all the information specified therein, and not part of that information, to be submitted by 19 May. In this  
10 case that did not happen.

32. Moreover, although the provisions of Section 98A TMA refer to a taxpayer who "fails to make a return" in accordance with the provisions of the regulation, Regulation 73 requires that the employer "deliver" the return to HMRC. It is, therefore, arguable that even if Mr Dillon had sent the return electronically and it  
15 somehow disappeared into the ether, the statutory obligation would not be fulfilled unless the return was delivered. However, in the light of our conclusion that Mr Dillon had not fulfilled the statutory duty of sending the full return in the first place it is unnecessary to express a concluded view on this point.

33. At various points, Mr Dillon said that he was aware of other taxpayers who  
20 were in a similar position to that of the appellant but who had been "let off" the penalties. Whether or not that is correct it is a matter over which we have no jurisdiction.

34. We therefore conclude, for the reasons given above, that the total amount of penalties of £500 was properly chargeable and that the appellant had no reasonable  
25 excuse. We must, therefore, dismiss this appeal.

35. Finally, Section 102 TMA gives HMRC discretion to mitigate or entirely remit penalties. As we have said, we have no jurisdiction over the exercise of this discretion. In this case, however, the appellant is a small charity providing training and support for disabled (many of whom are severely disabled) members of the local  
30 community. Much of its work is carried out selflessly by unpaid volunteers. At considerable difficulty it raises 40% of its funds from non-central or local governmental sources. The penalties in this case would deplete the resources available for its admirable work. It is clear that Mr Dillon, although exasperated by the procedures for on-line filing, genuinely intended and attempted to comply with the appellant's statutory tax filing obligations, albeit unsuccessfully. The four-month  
35 delay in notifying the appellant of its default does not seem to be in accordance with the statutory purpose of providing for monthly penalties. It is not for us to instruct HMRC how to exercise its discretion under Section 102, but we wish to express our clear view that mitigation or remission of penalties in this case would be an instance  
40 in which humanity might fairly and deservedly temper the hard face of the law.

36. 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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**GUY BRANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 4 March 2014**