



**TC01678**

**Appeal number: TC/2011/05025**

*P35 return—Penalty for late return (Taxes Management Act 1970 s.98A)—Reasonable excuse—Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**RESOURCES FOR LEARNING PENSION FUND**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: J. BLEWITT (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 16 November 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 30 June 2011, HMRC's Statement of Case submitted on 17 August 2011 and the Appellant's Reply received on 8 September 2011.**

## DECISION

1. This is an appeal against a penalty totalling £800 imposed pursuant to Section 98 (2) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the Appellant’s P35 employer’s annual return (P35) for the tax year 2009/2010.

### **The relevant legislation**

2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 imposes on an employer the obligation to deliver to HMRC a P35 return before the 20th day of May following the end of a tax year. Paragraph (10) of that regulation provides that s.98A of the Taxes Management Act 1970 (the “TMA”) applies to paragraph (1) of that regulation.

3. Section 98A of the TMA relevantly provides as follows:

(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, ...*

(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, ...*

4. Section 100(1) of the TMA provides for HMRC to make a determination imposing a penalty under s.98A of the TMA in such amount as it considers correct or appropriate. Section 100B of the TMA provides for an appeal against the determination of that penalty. Section 100B(2)(a) provides that in the case of a penalty which is required to be of a particular amount, the Tribunal may:

(i) *if it appears ... that no penalty has been incurred, set the determination aside,*

(ii) *if the amount determined appears ... to be correct, confirm the determination, or*

(iii) *if the amount determined appears ... to be incorrect, increase or reduce it to the correct amount.*

5. Section 118(2) of the TMA provides for reasonable excuse:

5                    *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 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.*

### **Facts**

10        6.    The filing date for the end of year return was 19 May 2010. The return was filed online on 14 January 2011. The first interim penalty totalling £400 was issued on 24 September 2010. A subsequent interim penalty notice totalling £400 was issued on 19 January 2011.

### **Submissions**

15        7.    The case for the Appellant as set out in the Notice of Appeal dated 30 June 2011 is as follows: “honest attempt to file documents online was made on 12 April 2010 but omission of suffix “P” resulted in transmission failing. Further transmission resulted in message “submission already received for this employer” and assumption was made that the first submission had been successful (it transpired that the message  
20 related to the company holding the reference 072/R217 as opposed to the Appellant’s reference 072/R217P). No further communication was received by the Pension Fund Administrator until 14 December 2010 which prompted appeal to be lodged.”

25        8.    The Appellant’s reply to HMRC’s Statement of Case, undated but received by the Tribunals Service by 8 September 2011 confirms that the facts as set out in HMRC’s Statement of Case are not disputed. The grounds of appeal query the purpose and amount of the penalties bearing in mind that the employer was aware of the responsibility to file the return online and endeavoured to meet those responsibilities in an honest manner. There is no financial loss to HMRC as all required PAYE payments had been made by the due dates. The case of *Hok Limited v HMRC [2011] UKFTT 433 (TC)* is cited in support of the appeal.  
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35        9.    HMRC’s Statement of Case can be summarised as follows. The return was submitted late and the fixed penalties were correctly charged in accordance with legislation. The message “submission already received for this employer” was an error message which indicated that the submission had not been accepted. The Appellant should have contacted HMRC to clarify the issue rather than making an assumption that the return had been delivered. The email exhibited on behalf of the Appellant in respect of the submission containing the error of omitting the suffix “P” clearly indicated that the return was not accepted and the reference number should have alerted the agent to the fact that the incorrect reference had been used. The  
40 obligation to ensure that legal obligations of filing end of year returns lies with the Appellant and cannot be transferred to an agent. The Appellant was aware of its obligations and should seek redress from its agent if the fault rests with the latter.

## Decision

10. It is accepted that the Appellant had made an honest attempt to comply with its legal obligations in respect of the 2009/20100 P35 within the time limit set by statute.  
5 The Tribunal found as a fact that the responsibilities of a diligent taxpayer also extend to ensuring that the obligations are fulfilled. The Tribunal found as a fact that the email relating to the submission containing the error of omitting the suffix “P” clearly indicated that the return was not accepted. It is accepted that the assumption made by the Appellant thereafter was no doubt a genuine mistake, but the Tribunal noted that  
10 the incorrect reference number was set out twice within the email and therefore should have alerted a diligent taxpayer or agent to the fact that it was incorrect. The Tribunal found as a fact that ultimately the responsibility rested with the Appellant and there was no reasonable excuse.

11. The case of *Hok Limited v HMRC* is not binding on this Tribunal. It is accepted  
15 on behalf of the Appellant that the case is distinguishable on its facts. In considering the principles set out in the case, the Tribunal noted that the view taken in *HOK* was that HMRC had deliberately desisted from sending a penalty notice, which acts as a reminder. The Tribunal agreed that it is unfortunate that HMRC’s policy is not to  
20 issue first penalty notices until there is already a four month delay, but did not consider that this could provide the Appellant with a reasonable excuse for its delay in submitting the return; even if the Tribunal had taken such an approach, it is noted that the P35 was not submitted until 14 January 2011, over 3 months following the first interim penalty notice being issued. There is no statutory obligation on HMRC to  
25 remind taxpayers of their legal duties and it the Tribunal found as a fact that the penalty notice is not intended to be such. The Tribunal did not accept that the delay in notifying the Appellant of the penalty amounted to a reasonable excuse.

12. The legislation gives the Tribunal no power to mitigate the prescribed penalty simply as a result of the delay in its issue. There is power to quash a penalty as  
30 disproportionate if it is “not merely harsh but plainly unfair.” The penalty of £800 might be considered harsh, but on the facts of this case the Tribunal did not find that it was “plainly unfair” and therefore does not interfere with it on grounds of proportionality or common law fairness.

13. The Tribunal found as a fact that the issue as to whether the Appellant’s tax had  
35 been paid in full was a separate issue and did not provide the Appellant with a reasonable excuse for the late submission of the return.

14. The burden is on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal found that the Appellant has not discharged that burden.

15. The Tribunal confirms the penalties and dismisses the appeal.

16. This document contains full findings of fact and reasons for the decision. Any  
40 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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**TRIBUNAL JUDGE**  
**RELEASE DATE: 20 December 2011**

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