



**TC03418**

**Appeal number: TC/2012/05058**

*INCOME TAX – penalties for late filing of employer’s annual return under Regulation 73 PAYE Regulations – section 98A(2) and (3) Taxes Management Act 1970 - whether paper return submitted – appellant did not have access to internet – whether a paper return a valid return for Regulation 73 – Regulation 205 requiring electronic returns- no – relationship with Regulation 210 PAYE Regulations in relation to penalties for failure to file annual return electronically – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MIKE HAYNES LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE GUY BRANNAN  
                     MR MOHAMMED FAROOQ**

**Sitting in public at Cambridge on 27 February 2014**

**The Appellant did not appear and was not represented**

**David Wilson for the Respondents**

## DECISION

### Introduction

5 1. This is an appeal against four £100 monthly penalties charged under section 98A(2) and (3) Taxes Management Act 1970 ("TMA") for the failure of the appellant to submit its employers annual return pursuant to Regulation 73 of the Income Tax (PAYE) Regulations 2003 ("the PAYE Regulations").

10 2. The appellant did not appear at the hearing. On 24 January 2014 Mr Mike Haynes, the director of the appellant, applied for an adjournment of the hearing. He said he was not available to attend on 27 February 2014. He was in full-time employment and could not take a day off at short notice. This application was considered by Judge Jonathan Cannan on 27 January 2014. Judge Cannan refused the application stating:

15 "The Appellant was asked to provide details of availability but in his e-mail dated 18 November 2003 he did not do so because he was "unable to plan my diary as far ahead as February 2014." Further, he does not say why he is an able to attend on 27 February 2014."

20 3. The appellant wrote a letter to the tribunal on 17 February 2014 stating that he would not be able to attend the hearing and the contents of which he asked should be taken into account at the hearing, which we have of course done.

25 4. In the light of the above and being satisfied that the appellant had been duly notified of the hearing, we concluded that it was in the interests of justice that the hearing should proceed in the absence of the appellant under Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

### Statutory Provisions

5. Regulation 73 of the Income Tax (PAYE) Regulations 2003/2682 imposes an obligation on an employer to submit an annual return:

30 (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,  
35 (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.

- (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,
  - 5 (b) the employee's address, if known,
  - (c) either—
    - (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,
  - 10 (d) the employee's code,
  - (e) the tax year to which the return relates,
  - (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.
- 15 (5)...
- (6)...
- (7) The return must include—
  - (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
  - 20 (b) a certificate showing—
    - (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,
    - 25 during that tax year.
  - (8) The statement and declaration and the certificate must be—
    - (a) signed by the employer, or
    - (b) if the employer is a body corporate, signed either by the secretary or by a director.
    - 30
  - (9) Paragraph (8) is subject to regulation 211(5) (authentication in approved manner if return sent electronically).
  - (10) Section 98A of TMA (special penalties in case of certain returns) applies to paragraph (1).
- 35 6. 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
  - 40 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.

7. 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:

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

(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—

10 (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

(b)...

15 (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

20 (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.

8. It will be seen therefore that section 98A TMA provides for a fixed penalty at £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees. Section 118(2) TMA provides for the “reasonable excuse” defence for the penalties specified in Section 98A TMA as follows:

25 (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 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.

35 9. Regulation 205 made it mandatory to file the employer’s annual return electronically:

*Mandatory use of electronic communication for delivering relevant annual returns*

40 205. An employer (as to which see regulation 206) must deliver a relevant annual return by an approved method of electronic communications to HMRC.

*General provisions relating to this Chapter*

5 205B.–(1) The Commissioners for Her Majesty’s Revenue and Customs may make a general or specific direction requiring an employer or a specified employer to deliver any relevant annual return or specified information by a particular approved method of electronic communications.

(3) ...

(4) ...

10 (5) References in this Chapter to information and to the delivery of information must be construed in accordance with section 135(8) of the Finance Act 2002 (mandatory e-filing).

10. Regulation 206A provided that :

15 “(1) In this Chapter “relevant annual return” means the return and accompanying information required by regulation 73 (annual return of relevant payments liable to deduction of tax (Forms P35 and P14).”

11. Regulation 210 provided for a penalty for failing to deliver relevant annual returns in accordance with Regulation 205A:

(A1) An employer who fails to deliver specified information or any part of it in accordance with regulation 205 is liable to a penalty.

20 (1) ...

(2) Where paragraph (A1) applies the penalty must be determined in accordance with regulation 210A.

25 12. Regulation 210A sets out penalties for the tax year ending 5 April 2010. The penalties for the year ending 5 April 2011 are set out in Regulation 210AA. In both cases the penalty for failure to comply with Regulation 205 is £100 for an employer with five or fewer employees.

**The facts**

13. In the absence of the appellant, we have set out at greater length than usual extracts from correspondence and from documents which were produced in evidence.

30 14. It is common ground that the appellant was required to make a return under Regulation 73 of the PAYE Regulations by 19 May 2011. It is also common ground that the appellant submitted its annual return electronically on 6 December 2011.

35 15. HMRC issued penalty notices on 26 September 2011 in the amount of £400 in respect of four monthly £100 penalties charged in respect of each month in the period 20 May 2011 to 19 September 2011 under section 98A(2) and (3) TMA. The penalties were issued in respect of the failure to submit an employer’s annual return on 19 May 2011 and for the following months up to the issue of the penalty notices on 26 September 2011.

16. However, Mr Haynes, the director of the appellant company, maintains that he submitted the appellant's annual return in paper form to HMRC's Nottingham office following a written request to provide an end of year return. Mr Haynes, in a letter dated 7 December 2011 to HMRC, acknowledges that there was no fault with HMRC's website but rather that he did not have Internet access at the time – hence his letter to HMRC's Nottingham office, which he said was “following [HMRC’s] written request to provide an end of year return.” Mr Wilson drew our attention to the fact that according to HMRC’s computer records it appears that HMRC sent a computer-generated reminder letter to the appellant in respect of its Form P35 on 13 February 2011.

17. Mr Haynes asked HMRC for a review of the penalty decision in a document entitled "request for review of decision" dated 27 January 2012 (received by HMRC on 8 February 2012). Mr Haynes stated that he did not accept HMRC's decision because:

- (1) He did send his return in on time.
- (2) He did not receive any correspondence from HMRC to inform him that his return was not acceptable.
- (3) The earliest point at which he knew there was a problem was upon receipt of the penalty notice. At no time prior to this did HMRC inform him that there was a problem with his return.
- (4) He was not aware there was a problem and as such no reason for there being an excuse existed.
- (5) HMRC found it acceptable to waive tax owed by large multinational companies – why was he different?

18. A letter from HMRC dated 14 February 2012 informed Mr Haynes that the original decision to impose a penalty was being upheld. HMRC stated:

"You have advised that you had submitted your return on time, but my records show that you did not actually submit the P 35 return until 6 December 2011. I enclose a printout showing the date of receipt of your return. My on-line services have confirmed that you logged into the system twice in the last 18 months. The first session was on 30 September 2011 when you attempted to submit a starter/leaver form. The second was on 6 December 2011 when you submitted your End of Year return form.

Please note that the penalty notices are not reminders. The law does not require HMRC to issued [sic] reminders to employers of the late submission of returns. Furthermore there is no statutory obligation upon HMRC to issue the first penalty notices any closer to the filing deadline of 19 May. Generally the first interim penalties are issued to employers where the return has not been received four months after the due date – as happened in your case. HMRC's view is that following both the employer's responsibility to file their return on time. [Sic]

5 The HMRC on-line system has been set up to ensure that as soon as  
HMRC receives your return on-line, it will be checked against the  
HMRC Quality Standard. You get a message – usually within a  
minute, letting you know whether HMRC has accepted or rejected your  
return. As you did not submit your return before 19 May, the fact that  
you did not receive this message should have alerted you to the fact  
that the submission had not been done. In addition, whenever you  
submit an on-line return the status of your on-line forms should change  
from "Update" to "Submitted". I therefore cannot accept your view that  
10 you were not aware that the return had not been submitted.

I have noted your comments with regards to the tax waived by HMRC  
for large multinational companies but would point out that each case is  
treated on its own merit.

15 In the light of the above I have to rule that you have not offered a  
reasonable excuse so the decision to reject the penalty appeal on 12  
January 2012 was correct."

19. It will be noted that HMRC's review letter appears to ignore or proceed in  
ignorance of Mr Haynes's letter of 7 December 2011, although it is fair to note that  
that letter simply referred to a "letter" to HMRC's Nottingham office without making  
20 it clear that Mr Haynes was claiming that he had sent his annual return in paper form  
to HMRC's Nottingham office. Supporting HMRC's review letter was an internal  
HMRC e-mail from the reviewing officer enquiring what attempts the appellant had  
made to submit their 2010/11 employer's annual return on-line, the response to which  
was reflected in HMRC's review letter.

25 20. In a letter dated 24 April 2012 to the tribunal, Mr Haynes states:

"I initially submitted a paper return to HMRC in Nottingham. This was  
in time, although the appeals hearing [we take this to be a reference to  
HMRC's internal review process] have failed to acknowledge that I  
made this return. The reason for making a paper return was that I did  
not have access to the Internet at the time and was an able to make a  
return on-line – this being HMRC's preferred format. HMRC have  
acknowledged that I did not access their on-line system but appear to  
be using this as evidence against me when in fact it is proof that I was  
unable to access their system and therefore make a return on-line."  
30

35 21. This appeal was stayed until the decision of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC). After the decision of the Upper Tribunal, Mr Haynes  
wrote to the tribunal on 24 February 2013. He stated:

"You will be aware from correspondence on your files that my  
previous arguments have been that the HOK case did not apply.  
40 HMRC imposed fines for late filing penalties against HOK Ltd as they  
failed to submit an annual return. In my case I actually *did* submit a  
return.

I can advise, therefore, that I require my case to be heard at the First-  
tier Tribunal, and that evidence previously provided by myself be taken  
into account. It should be noted that this is not a case relating to  
penalties imposed for late filing of returns but the penalties for not  
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submitting a return due to HMRC. It should also be noted that return *was* made, but as HMRC Nottingham lost my file there is no record of my return ever being received. I was unaware of this until I received the fine notice."

5 22. We shall now set out relevant extracts from Mr Haynes's letter of 17 February 2014 which he has asked to be taken into consideration in his absence at the hearing. The letter states:

10 "My case is based on the fact that the case put forward by HMRC is based on incorrect information. In this point I would refer you to the letter issued by Mrs M Patterson on 14 March 2012 and covered in pages 6 to 8 of the bundle put forward by HMRC in their defence.

You will note the reasons given for rejecting my appeal. I will deal with each of these in turn:

15 1. HMRC stated that I did not submit a return in the required format. As previously stated, I did submit a return on time, this being a paper-based submission to HMRC's Nottingham office following correspondence received from HMRC Nottingham. I submitted a second (on-line) return on 6 December 2012 [we assume that this is a reference to 6 December 2011] following a second request from  
20 HMRC as they had lost my first return.

25 2. HMRC stated that they were unable to consider that the reasons outlined for the late filing of the return as being a reasonable excuse. On this point I would refer you to the information above. At no time have I made any excuses not submitting a return as indeed I did actually submit a return. There were, therefore, no excuses required or given.

30 It can be noted from the above that I did submit a return on time, although this was paper-based due to me not having access to the Internet. At no time have HMRC acknowledged that I submitted a paper return and continue to treat me unequally due to me not having the facility to complete an on-line return. In making the submission of returns on-line mandatory, HMRC did not take account of the fact that to submit an on-line application you actually have to be able to do this. I submitted a paper-based return in advance of the deadline and did not  
35 receive any further reminders and correspondence to advise me that my method of submission was not acceptable."

40 23. As HMRC's review letter of 14 March 2012 states, HMRC's computer records show that the appellant accessed HMRC's on-line services on 30 September 2011 and 6 December 2011. There was no record of the appellant accessing the on-line system in May 2011.

45 24. HMRC, however, have produced no evidence to the effect that they did not receive the paper annual return which Mr Haynes says he sent to HMRC's Nottingham office prior to the 19 May 2011 filing deadline. Mr Wilson, for HMRC (who did not prepare the trial bundle) accepted that he did not know whether HMRC had searched their files for the return which Mr Haynes said he submitted. Nonetheless he was aware that, where a taxpayer was required by statute to submit an



electronic return, if the taxpayer submitted a paper return HMRC would usually reject the return and send it back to the taxpayer requesting that an electronic return be submitted. There was no record of the return being returned to Mr Haynes in this case.

5 25. The appellant had filed the previous year's employer's annual return on-line on 30 April 2010.

### Discussion

26. Section 98A(2) and (3) TMA and Regulation 210 of the PAYE Regulations provide penalties which deal with the failure by an employer to submit an employer's annual return (Forms P35 and P14).

10 27. But these two sets of penalty provisions deal with different issues. Regulation 73 of the PAYE Regulations requires an employer to deliver a return. Failure to deliver a return renders the taxpayer liable to penalties under Section 98A(2) and (3) TMA. The penalty provided for in Regulation 210 penalises the failure to submit a return in accordance with Regulation 205 i.e. the failure to submit a return in the  
15 approved electronic form. In other words, Regulation 210 is penalising a failure to follow the "method" of delivering a return specified in Regulation 205.

28. Regulation 205 states that an employer "must deliver" its annual return "by an approved method of electronic communications to HMRC." Does this mean that a paper return was not a valid return for the purposes of Regulation 73? If so, then the  
20 fact that Mr Haynes had submitted a paper return on or before 19 May 2011 would not assist him. He would not have submitted a valid return for the purpose of Regulation 73 and the penalties in Section 98A TMA would apply.

29. The difficulty in this analysis is that, if it is correct, it makes the penalty provisions of Regulation 210 redundant. If a submission did not comply with  
25 Regulation 205 with the result that no valid return was delivered, the penalties in Section 98A would be engaged and there would be nothing to which the Regulation 210 penalties could apply. This was one of the arguments which appealed to this tribunal) in *Waring Investments Ltd v Revenue & Customs* [2011] UKFTT 387 (TC):

30 "11. We note that the requirements of regulation 73 and those of regulation 210 are separate. The first requires delivery of a return. The second requires the submission of "a" return online. It seems to us that if a taxpayer submitted a paper return on time he would have complied with regulation 73 even if he did not comply with regulation 210. Regulation 205B may have the effect of requiring that a return is  
35 delivered online but does not require that the delivery of a paper return does not comply with regulation 73. Regulation 210 simply provides for a penalty if "a" return is not delivered online. Clearly compliance with regulation 210 would ensure compliance with regulation 73, but the reverse is not the case.

40 12. This conclusion is also indicated by the penalty provision of section 210(A1). If failure to deliver a return online on time gave rise

to a penalty under section 98A there would seem to be little need for the additional penalty provisions which follow section 210(1)."

30. Nonetheless, with respect, the words of Regulation 205 are emphatic and mandatory. It seems to us that, notwithstanding the possible redundancy of the penalty provisions in Regulation 210, a paper return is not a valid return for the purposes of Regulation 73. Accordingly, the penalty provisions in Section 98A are engaged where an employer who is obliged to file electronically instead submits a paper return, unless there is a reasonable excuse for the failure. Although this tribunal expressed a contrary view in *Waring Investments* we note that the view which we have adopted is consistent with the decisions of the tribunal in *Chi International Ltd v Revenue & Customs* [2011] UKFTT 730 (TC) and *JN Dimensions Ltd & Anor v Revenue & Customs* [2011] UKFTT 653 (TC)

31. It follows, therefore, that even if Mr Haynes, as he claims, submitted a paper return to HMRC's Nottingham office prior to 19 May 2011 that would not be a valid return for the purposes of Regulation 73.

32. Mr Haynes complains of the failure of HMRC to warn the appellant that penalties were accruing until penalties of £400 had accrued. It is clear from the *Hok* that this tribunal has no judicial review powers (unless expressly conferred by statute) to determine whether HMRC acted unfairly. HMRC is under no statutory duty to notify an employer that it has failed to deliver its annual return by the deadline or at all. We understand that HMRC have now changed their practice and do send out warnings. This change in practice is to be welcomed. Nonetheless, the failure by HMRC to warn the appellant of its failure to file its annual return cannot form the basis for a challenge to the imposition of a penalty. For good measure, we do not consider that the failure by HMRC to issue warnings to the appellant can constitute a reasonable excuse for the appellant's failure to submit a valid return.

33. Furthermore, we do not consider that the appellant has satisfied us that it had a reasonable excuse for its failure to file electronically. Mr Haynes states that he did not have access to the internet but does not say why or for how long. He clearly had access to the internet the year before in 2010 when he submitted the appellant's employers annual return on-line on 30 April 2010 for the previous year and on 30 September 2011 when, according to HMRC's records, he accessed the appellant's account with HMRC. The onus of proof in respect of reasonable excuse lies upon the appellant and he has not in our view discharged it in this case.

34. For completeness, in case we are wrong about our interpretation of Regulation 73, we should address the question whether Mr Haynes did submit a paper annual return prior to 19 May 2011. In this respect, the onus of proof lies upon HMRC to show that a penalty is chargeable. As we have said, it is for the taxpayer to show, if relevant, that there was a reasonable excuse for the failure, for the purposes of Section 98A(2) and (3) TMA, within section 118 (2) TMA.

35. Had we decided, contrary to our conclusion expressed above, that a paper return was a valid return for the purposes of Regulation 73, we would not have been satisfied that HMRC had discharged this burden of proof. HMRC have shown that the

appellant did not file on-line until 6 December 2011 but that is not in dispute. We see no reason to doubt Mr Haynes's repeated assertion that he did file a paper return before 19 May 2011. There is no suggestion in the papers before us that he is not telling the truth. No evidence has been produced to contradict this assertion that the appellant filed a paper return before 19 May 2011. Of course, we accept that it is not necessary or indeed feasible for HMRC prove such a negative. However, we would expect HMRC to have put forward some evidence to show that enquiries had been made (e.g. in their Nottingham office) but had produced no evidence of any return having been made. Mr Wilson candidly admitted that he was not sure that such enquiries had been made. Indeed it is evident from the papers that HMRC's internal enquiries focused on whether and when the appellant had filed electronically. We have taken into account the fact that HMRC's usual practice is to return a paper return in cases where an electronic one was required but this point, in so far as it is in HMRC's favour, is undermined by the uncertainty over whether HMRC searched through the files in its Nottingham office.

36. For these reasons, we consider that this appeal must be dismissed and the penalties confirmed.

### **Decision**

37. This appeal is dismissed and the penalties are confirmed.

38. 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.

**GUY BRANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 21 March 2014**