



**TC02972**

**Appeal number: TC/2013/01046**

***TYPE OF TAX – PAYE – late submission of Employer’s Annual Return –  
Whether reasonable excuse for late submission of return - No.***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**IAN BARLOW BUILDERS**

**Appellant**

**- and -**

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

**TRIBUNAL: PRESIDING MEMBER  
PETER R. SHEPPARD FCIS FCIB CTA  
AII**

**The Tribunal determined the appeal on 13 September 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 Notice of Appeal dated 1 February 2013, and HMRC’s Statement of Case submitted on 25 March 2013 with enclosures. The Tribunal wrote to the Appellant on 8 July 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. No reply was received.**

## DECISION

### 1. Introduction

5 This considers an appeal against a penalty of £600 levied by the respondents for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the tax year 2008 – 2009.

### 2. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.  
10 Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.  
Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

### 3. Case law

15 HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

### 4. Facts

Regulation 73(1) of Income Tax (PAYE) Regulations 2003 and Paragraph 22 of Schedule 4 of Social Security (Contributions) Regulations 2001 require an employer to deliver to HMRC a complete Employer Annual Return (Forms P35 and P14) before  
20 20 May following the end of the tax year. In respect of the year 2008-09 the appellant failed to submit Forms P35 and P14 until 30 October 2009. On 28 September 2009 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2009 to 19 September 2009. On 4 November 2009 HMRC sent the appellant a final late filing penalty notice for £200 for the period 20 September 2009 to 30  
25 October 2009.

5. The Notice of Appeal and subsequent correspondence were received from the appellant's agent, Drabble & Co., Chartered Accountants

Most of the comments made concern the fact that the appeal was out of time because the original penalty notices were not received by either the appellant or its agent. The  
30 appellant only became aware of the penalties 2 years later when the bailiffs called to collect the amount due. In their statement of case HMRC say they "accept the appellant's submission to the Tribunal and therefore the lateness is not an issue in this instance."

In respect of the main issue in the Grounds for appeal Drabble & Co., state

35 "The P35s for 2008/09 was issued by HMRC on 13/10/09 and submitted on 30/10/09"

A copy of a form P35 issued by HMRC, East Kilbride on 13 October 2009 was in the bundle of papers before the Tribunal

6. HMRC state that their records show that a P35 was issued to the appellant on 5 January 2009 and was due for submission by 19 May 2009 at the latest. They say that no return was submitted until 30 October 2009. They make no comment about the fact that the form appeared to have been issued by their East Kilbride office on 13 October 2009. They say that the penalties have been charged in accordance with the legislation and the amount of the penalties has been calculated accurately.

7. HMRC contend that there is no obligation upon HMRC to issue reminders in respect of late Employer Annual Returns or to notify the appellant that a P35 had not been received prior to the issue of penalty notices.

8. HMRC say their records show that correspondence was sent to addresses on their records at the time and there is no record of any mail returned undelivered.

9. HMRC say that the filing of an Employers Annual return by the due date is a responsibility of the employer.

10. The Tribunal's has considered these submissions and comments as follows:

15 The level of the penalty; whether the respondent's failure to send a prompt reminder was unfair; and the respondent's updated procedures are all covered in the decision of the Upper Tribunal in the case of Hok Ltd. That decision also considers whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states "...the statutory provision relevant here, namely TMA s 100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. ...it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair."

25 The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by the Taxes Management Act 1970 Section 118(2). The excuses advanced by the appellant is that the Form P35 was not sent by HMRC until 13 October 2009. HMRC say that a form was sent on 5 January 2009 for completion by 19 May 2009.

35 It is the appellant's responsibility to submit returns on time. The appellant had been responsible for the filing of the Employers Annual Return since 2005-2006 so should be aware of the annual deadline of 19 May and his obligation to send a return by that date. The Tribunal notes that shortly after the issue of the first penalty notice on 28 September 2009 a P35 form was issued by HMRC, East Kilbride on 13 October 2009. This suggests that as a response to the penalty notice (which it is claimed was not received by either the appellant or its agent) a form had been requested from HMRC.

40 11. HMRC have applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2009 to 19 September 2009 (£400) and 20 September 2009 to 30 October 2009 (£200). The appellant has not established a

reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is dismissed.

12. 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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**PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 15 October 2013**