



**TC03169**

**Appeal number: TC/2012/04097**

*P35 and P14 return – Penalty for Late Return (Taxes Management Act 1970 s.98A) – Reasonable excuse – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BUCKLAND OMNIBUS COMPANY LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JENNIFER TRIGGER**

The Tribunal determined the appeal on 16 August 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 12 March 2012, letter dated 05.10.2011 to HMRC, letter dated 1 December 2011 to the Appellant, Request for review of decision with letter dated 16.12.2011 to HMRC, letter dated 12.1.2012 to the Appellant, letter dated 7 February 2012 to the Appellant, letter dated 28 February 2012 to HMRC, letter dated 5 March 2012 to Deeks & King and HMRC's Statement of Case submitted on 6 June 2013, employer notification to complete P35, notice of penalty determination, P35 Form, penalty details issued 6.10.2011, letter dated 5.10.2011 to HMRC and letter dated 1 December 2011 to the Appellant.

## DECISION

- 5 1. This appeal was against a penalty totalling £500 imposed pursuant to Section 98A(2) and (3) Taxes Management Act 1970 (“TMA”) in respect of the late filing of the Appellant’s P35 and P14 Employer’s Annual Return (“ the Return“) for the tax year 2010-2011.

### **The relevant legislation**

- 10 2. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003 and Paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 imposes on an employer the obligation to deliver to HMRC a P35 and a P14 return before the 20<sup>th</sup> day of May following the end of the tax year. Regulation 205 of the same regulations requires the mandatory use of electronic communication by an  
15 employer from 2009-2010 onwards. Paragraph (10) of the Income Tax (Pay As You Earn) Regulations 2003 provides that Section 98A of the TMA applies to paragraph 73(1) of that regulation.

3. Section 98A of the TMA provides so far as is relevant:

20 *“(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with this provision shall be liable –*

25 *(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 in the case of a failure to make a return –*

30 *(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.

35 Section 100B of the TMA provides for an appeal against the determination of that penalty.

40 Section 100B(2)(a) of the TMA provides, so far as is relevant, 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

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

5. Section 119(2) of the TMA provides for reasonable excuse:

10 *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*  
15 *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 without unreasonable delay after the excuse had ceased.*

20 **Facts**

6. The filing date for the Return was 19 May 2011. The Return was filed online on 31 October 2011. The Respondents (“HMRC”) sent the first interim late filing penalty notice on 26 September 2011 totalling £400. A final late filing penalty notice totalling £100 was issued on 6 October 2011.

25 **Submissions**

7. The case for the Appellant was set out in the Notice of Appeal dated 12 March 2012. The Appellant accepted that the Return had not been filed on 19 May 2011 but believed that the Return had been filed on 31 May 2011. It was the Appellant’s case that in those circumstances a penalty of £100 only for the period 19 May 2011 to 31  
30 May 2011 should be imposed.

8. The year 2011 was the first occasion on which the Appellant had attempted to file the Return online. Difficulties had been experienced and numerous calls had been made to HMRC’s on line Helpdesk. The Appellant was not aware that the Return had not been filed successfully until the first penalty notice was issued on 26 September  
35 2011.

9. The late submission of the Return was not a course of action adopted by the Appellant as a means of delaying payment of the PAYE and National Insurance liabilities. In the past the Appellant had been on time with both the payments and the filing of the paper returns. The Return had been filed late because an employee of the  
40 Appellant, responsible for filing the Return, was absent from work during the last week of May 2011 due to family ill health.

10. 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 the legislation. HMRC accepted that the Appellant may have accessed the online system on 31 May 2011. However the Return needed to be correctly submitted and received  
5 by HMRC before it could be deemed to be validly delivered. The Return was not successfully submitted until 3 October 2011. As the Appellant had filed online since 2009-2010 HMRC submitted that the Appellant had seen a successful submission and should not have assumed that the submission of the Return for 2010-2011 had been completed on 31 May 2011. No notification was sent to the Appellant by HMRC to  
10 confirm that the Return had been submitted on that date. In those circumstances the Appellant should have contacted HMRC for guidance on online submission and in particular messages issued to confirm successful receipt or rejection of returns. The online guidance confirmed that before an employer can assume that an annual return has been successfully filed it must receive an online message from HMRC confirming  
15 that "the EOY Return has been processed and passed full validation". No such acceptance message was issued to the Appellant at any time before the Return was actually filed on 3 October 2011.

11. In 2002 the Government first announced that small employers would be required to file online by 2010. A wealth of information had been published by HMRC to  
20 assist small employers. HMRC maintained that the Appellant had had adequate time to become acquainted with the employer's online filing procedures.

12. There was no statutory obligation of HMRC to issue penalty notices using a set timetable. The penalty notice was not a reminder and all employer late filing penalties were issued and processed in the same way. HMRC's website publicised the penalties  
25 imposed for late submission of annual returns and made it clear that if a return was outstanding for more than four months then HMRC would issue a penalty notice shortly after 19 September in any one year.

13. The amount of penalty was calculated using Section 98A (2)(a) TMA and the penalty had been correctly calculated relying on the number of employees for which  
30 P14s were submitted.

14. The fact that the Appellant had always made payments on time and filed paper returns on time was irrelevant. The penalty imposed was for the late filing of the Return for the specific year.

15. The fact that the person responsible for completing the Return was absent during  
35 the last week of May, was not accepted by HMRC as a reasonable excuse. The absence of the employee had not existed throughout the period of default and in any event the Appellant, as a prudent employer, should have had in place contingency plans so that it could meet its obligation to submit the Return on time.

### **Decision**

40 16. The Tribunal did not accept that the Appellant had a reasonable excuse for the late filing of the Return. The Appellant believed the Return had been filed on 31 May

2011 and that it had been filed late because the employee of the Appellant, responsible for filing the Return, was absent from work during the last week of May 2011. This did not in the opinion of the Tribunal amount to a reasonable excuse. The onus was on the Appellant to ensure that the Return was correctly filed on time. The  
5 Appellant had a responsibility to ensure that alternative arrangements were in place so that the Return filing date could be met. Furthermore, the reasonable excuse claimed by the Appellant was not sustainable on the second ground, namely, that for a reasonable excuse to be acceptable it had to last throughout the period of default. This was not the case as the absence of the relevant employee was for one week only  
10 at the end of May 2011 and not throughout the period 20 May 2011 to 3 October 2011.

17. The fact that the Appellant found the process of filing the Return online onerous does not amount to a reasonable excuse. The requirement to file online was announced in the 2002 Budget by the Government. Extensive information had been  
15 published by HMRC to support an employer to file a return online. It appeared to the Tribunal that the Appellant had not adequately prepared for the mandatory requirement to submit a return online. This failure therefore could not amount to a reasonable excuse.

18. The Appellant had maintained that the issue of the first penalty notice on 26  
20 September 2011 was unfair. If the Appellant had been alerted at an earlier time then a decreased penalty would have been payable. The Tribunal considered the case of *The Commissioners for Her Majesty's Revenue & Customs v Hok Limited* [2012] UKUT 363 (TCC). This case held that a First-tier Tribunal had no jurisdiction to discharge a penalty on the grounds of unfairness. This case was binding on the Tribunal.

19. The failure by HMRC to send a prompt reminder, to minimise the accrual of a  
25 penalty, could not be regarded as unfair. HMRC had no legal responsibility to issue reminders nor to issue penalty notices using a set timetable. All employer late filing penalties were issued and processed in the same way. The point disputed, namely the timing of the penalty notice and whether that was relevant to the amount of the  
30 penalty, arose in every employer late filing penalty and all employers were treated the same.

20. In addition HMRC website stated that if the annual return remained outstanding for more than four months then HMRC would issue a penalty notice shortly after 19  
35 September in any one year. HMRC had acted in accordance with the information on the website and had treated the Appellant in the same way as any other employer. In all the circumstances the Tribunal could not reduce the penalty imposed.

21. The burden was on the Appellant to establish a reasonable excuse, on a balance of probabilities. The Tribunal found that the Appellant had not discharged that burden.

22. The Tribunal decided there were no special circumstances in which HMRC could  
40 have reduced the penalty imposed. The penalty was not unfair and had been correctly calculated and the Tribunal therefore did not interfere with it.

23. The Tribunal confirmed the penalties and dismissed the appeal.

24. 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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**JENNIFER TRIGGER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 19 December 2013**