



TC02976

Appeal number: TC/2012/03415

INCOME TAX – EMPLOYERS ANNUAL RETURN – penalty for late filing – Regulation 73(1) The Income Tax (PAYE) Regulations 2003 and Para 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001 – reasonable excuse – unfairness/proportionality - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR R HOWARD t/a THE ALBION INN

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER G. NOEL BARRETT LLB.
ALAN SPIER**

**Sitting in public at Alexandra House The Parsonage Manchester
on 4th September 2013**

Mr G P Snape Accountant for the Appellant

M/s H Roberts of HM Revenue and Customs, for the Respondents

DECISION

Introduction

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1. This is an appeal against penalties for late filing of the Appellant's P35 and P14's Employer's Annual Return for the tax year 2009-10.
2. The Appellant traded as Licensee from the Albion Inn.
- 10 3. Employers are required to submit their Employer's Annual Return to HMRC no later than 19 May (the "due date"), following the tax year end.
4. Interim penalties are charged where a return remains outstanding after the due date.
- 15 5. Penalties are charged at £100 per month for all or part of a month from the due date of the Return until the date it is received.
6. HMRC sent a paper notification to the Appellant on 17th January 2010, requiring him to file an Employer's Annual Return.
7. A late filing penalty notice was sent to the Appellant on 27th September 2010 and a further late filing penalty notice was sent on 24th January 2011.
- 20 8. Late filing penalties in the total sum of sum of £635 have been imposed on the Appellant.
9. The Appellant's return was not in fact filed until 27th April 2011
10. The Appellant acknowledges that he filed his return late but appeals on the grounds that he has a reasonable excuse; and that the penalty charged is
- 25 disproportionate.

The Law

11. 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 impose a statutory obligation on an employer to deliver an Employer's Annual Return before 20 May following the end of a tax year.
12. The Employer's Annual Return consists of a P14 for each employee, together with a P35 which is the Employer's composite return. The P14's and the P35 have to

contain the requisite information set out in Regulation 73(2), and the details submitted within the forms have to correspond with one another.

13. With regard to the imposition of penalties section 98A TMA 1970 (2) and (3) states;

5 (2) “...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....”

10 (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.....”

15 14. Section 118(2) of TMA 1970 states;

20 “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”

25 15. Regulation 205-205B of the Income Tax (PAYE) Regulations 2003 provides that an employer must use electronic communications to deliver the Employer’s Annual return on-line from the 2009-10 tax year onwards.

16. The Government first announced in 2002 that small employers would be required to file on-line by 2010.

30 ***The Evidence and our Findings of Fact***

17. We were able to read and refer to the document bundle provided by HMRC. We also heard oral evidence from Mr Howard his accountant Mr Snape and from M/s Roberts for HMRC.

18. It was accepted by the parties and we accept that the Appellant filed his return late.

19. There was no dispute between the parties over the relevant legislation.

20. HMRC submitted that the fact that Mr Howard had ceased to trade did not negate his obligation to submit the P35 and P14's – something which she underlined the Appellant accepted in his appeal application form and which we accepted.

21. M/s Roberts explained that there was no statutory definition of reasonable excuse and then helpfully provided HMRC's definition. HMRC, she confirmed, considered a reasonable excuse to be an unexpected or unusual event that is either unforeseeable or beyond the employers control, and which prevents the employer from complying with their obligation. A series of unexpected and foreseeable events she submitted may, when viewed together, amount to a reasonable excuse. HMRC's view is that the actions of the employer should be considered from the perspective of a prudent person exercising reasonable forethought and due diligence having proper regard for their responsibilities in the Tax Acts. We found this explanation helpful and accepted it.

22. HMRC submitted that although the Appellant had arranged for the Brewery to deal with his payroll, that their failure was not a reasonable excuse, unless the Appellant took reasonable care to avoid the failure. The Brewery's failure was the Appellants failure unless the Appellant has taken reasonable care to check that the Brewery did file his return for him on time. Again we accepted, as did the Appellant that ultimately he was responsible for ensuring that his return was filed on time.

23. HMRC further submitted, following *HMRC v Hok Limited [2012] UKUT 363 (TCC)*, that the Tribunal does not have the jurisdiction to discharge or adjust a fixed penalty on the grounds of unfairness or proportionality.

24. Mr Snape explained that had previously assisted the Appellant with his personal tax returns but that he had not had anything to do with the payroll since 2007-08 when he discovered that Hydes were still filing a paper return and advised Hydes in future to file on-line to enable them to recover the financial incentives then available to the Appellant for filing on line. Mr Snape had arranged the necessary passwords and identification for the Appellant and had then sent all these details to Lynne Wall at Hydes Brewery.

25. Mr Snape also explained on the Appellant's behalf that the Appellant had been a Tenant of Hydes Brewery, to whom he sold back his tenanted business when he retired on 10th August 2009, having previously as required given 6 months' notice of his intentions.

26. Because of his previous involvement with these matters he (Mr Snape), was now trying to assist the Appellant with this appeal.

27. In addition to paying his rent and other Tenants expenses, the Appellant also paid Hydes Brewery, (who ran around 26 Public Houses), a fee of £1 per employee per week to deal with his employers returns for him on his behalf.

28. The Appellant confirmed that he was quite friendly with and trusted Lynne Wall in the Brewery's accounting office with whom he dealt in respect of such matters. On the Appellants retirement he confirmed that he had been assured by Lynne that she would file the necessary return for him. He could not understand why she had not done as she said she would.

29. The Appellant also confirmed, (although this was not apparent from the document bundle, and so far as we are aware had not previously been raised with HMRC), that he had been forced to retire as a result of financial difficulties, which difficulties had in themselves arise in part as a result of the recession but to the greater part as a result of his failing health.

30. The Appellant, who described himself as a diligent person, had in the last six months before retiring, suffered from sleep apnoea and depression and had had a nervous breakdown. He had spent time in hospital. After retiring the Appellant had been diagnosed with leukaemia. His wife with whom he ran the business had suffered from heart failure and a heart attack at or about the time the Appellant retired and had since been diagnosed with cancer.

31. We found the Appellant to be a very genuine and truthful in the evidence he provided, which we accepted.

32. Finally Mr Snape explained that whilst he had tried to appeal on behalf of the Appellant against the late filing penalty notice which had been sent on 27th September 2010, that appeal was not accepted because the return was at that time still outstanding. It then took Mr Snape a considerable period of time to obtain new passwords and identification to enable him to file on line for the Appellant, which he was finally able to do on 27th April 2011.

Reasonable Excuse

33. Miss Roberts confirmed and we accepted that the burden of proving this appeal rests upon the Appellant.

34. We also accept HMRC's definition of what in fact amounts to a reasonable excuse and as to the diligence of the employer.

35. We accepted what the Appellant and Mr Snape said in their evidence as to why the Appellant may have a reasonable excuse.

36. We have weighed the evidence we have heard very carefully.

37. We find that there are in this case exceptional circumstances. We believe that the Appellant is a diligent man. He had been assured by Lynne Wall (who had previously filed his return for him) and who he had paid to file his return again, and whom he

knew and trusted, that she would file his return for him. Although he had no reason, therefore, even to check that Hyde's Brewery had filed the return, we believe that had his health allowed, he might well have done so.

5 38. The Appellant was at that time already suffering significantly with his health, as was his wife. These medical conditions continued for a considerable period and neither he nor his wife have recovered, even to this day.

39. As a result of these factors we find that Appellant has succeeded in establishing a reasonable excuse for the late filing of his return.

10 ***Proportionality***

40. In view of the Appellant having succeeded in establishing a reasonable excuse, there is no need for us to examine the second part of the Appellants appeal as to the penalties being unfair.

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Decision

41. In the circumstances we allow the appeal and dismiss the penalties of £635.

20 42. 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)"
25 which accompanies and forms part of this decision notice.

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**G NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

RELEASE DATE: 10 October 2013

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