



TC02932

Appeal number: TC/2012/05616

TYPE OF TAX – PAYE – late submission of Employer’s Annual Return – whether scale of penalty is reasonable, and whether penalty is unfair and should be reduced - Decision of Upper Tribunal in Hok Ltd applies. Whether there was reasonable excuse for late submission of return - No.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BEAUXFIELD LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
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The Tribunal determined the appeal on 3 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 11 May 2012 with enclosures, and HMRC’s Statement of Case submitted on 28 June 2013 with enclosures. The Tribunal wrote to the Appellant on 9 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.

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DECISION

1. Introduction

This considers an appeal against a penalty of £500 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2010 – 2011. By a direction of the Tribunal dated 22 May 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper Tribunal (Tax & Chancery Chamber) in the matter of Hok Ltd. That decision was released on 23 October 2012.

2. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

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

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 May following the end of the tax year. In respect of the year 2010-2011 the appellant failed to submit Forms P35 and P14 until 4 October 2011. On 26 September 2011 HMRC sent the appellant a late filing penalty notice for £400 for the period 20 May 2011 to 19 September 2011. On 7 October 2011 HMRC sent the appellant a final late filing penalty notice for £100 for the period 20 September 2011 to 7 October 2011.

5. Appellant's submissions

The appellant's agent J. Darbyshire, chartered accountant initially appealed against the decision to HMRC on 10 October 2011. He writes

Return figures were prepared on 29 April together with a leavers P45 (1) – the company only has one employee.

Copies of these returns were taken at that time and it was assumed (obviously incorrectly) that a submission had taken place

This is not a case of ignoring the requirement to file but rather, as a once a year user, a failure to fully grasp the operation of the online filing system.

| The level of the fine, in this instance, is wholly excessive and is based on the principle of punishment for employers who disregard the filing requirements which is not the case here.

On this basis I would respectfully request that the penalty be cancelled.

6. On 15 December HMRC replied saying they did not agree the appellant had a reasonable excuse and offered a review.

7. On 7 March 2012 the appellant's agent wrote to HMRC requesting them to review their decision. He apologised for the late submission and made further submissions including

I processed the P35 information on 29 April 2011, well before the deadline date followed at the same time by the detail for a P45. I took copies of both and thought both forms were being filed together whereas only the P45 was filed. I enclose a copy of the P35 to confirm the date.

It was only receipt of the penalty notice in September 2011 that made me aware that no P35 filing had taken place. After checking with the Helpline to confirm the position I immediately corrected the mistake.

Had the penalty notice been sent in June I could have corrected the mistake and thereby mitigate the fine.

I would respectfully ask that you dismiss the penalty on the grounds that it is wholly excessive for this type of error."

8. On 18 April HMRC advised that the result of the review was that the decision to reject the appeal was correct.

9. On 11 May 2012 the appellant's representative submitted a notice of appeal to the Tribunal and made very similar comments' He also observes

"These longstanding late filing penalties were appropriate in the days of manual submissions where the taxpayer was fully aware that he had or had not filed. This is not the case here."

10. **HMRC's submissions**

HMRC accept that the appellant made a genuine attempt to file on 29 April 2011 but say that the appellant actually submitted its Employer's Annual Return for 2010-2011 online but late on 7 October 2012. Therefore the penalties totalling £500 were correctly issued.

11. They say that the failure to submit a return on time cannot be attributed to any delay in issuing penalty notices and therefore cannot be considered a reasonable excuse for the late return.

12. HMRC point out that it is the employer's responsibility to ensure that the return is submitted on time. It is not HMRC's responsibility to issue reminders although one was sent in February 2011.

13. HMRC point out that there is a wealth of guidance on their website about submission and completion of forms online. This includes details of the acceptance and rejection messages that might be received following attempts to submit returns. They submit that no acceptance message for the Employers annual return form P35 was sent to the appellant's agent on 29 April 2011. This should have alerted the Appellant's agent to the problem. They say the fact

that a mistake was made when submitting the return cannot be considered a reasonable excuse.

14. Tribunal's observations

The level of the penalty and whether HMRC's failure to send a prompt reminder was unfair 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."

15. 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).

16. The appellant's agent has stated that it made a genuine attempt to file a return online on 29 April 2011 and genuinely believed it had succeeded. Unfortunately it omitted to check for the message that the P35 submission had been accepted. In such circumstances it is understandable that the appellant's agent considers the penalty to be harsh. Nevertheless HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2011 to 19 September 2011 (£400) and 20 September 2011 to 7 October 2011 (£100). As indicated in paragraph 14 above the First-tier Tribunal has no statutory power to discharge or adjust the penalty.

17. Unfortunately a genuine and simple error of omission does not establish a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). The appeal is therefore dismissed.

18. 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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 2 October 2013