



**TC02936**

**Appeal number: TC/2012/05623**

*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**

**WINSTER HOMES 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 9 May 2012 with enclosures, and HMRC’s Statement of Case submitted on 2 July 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

5 This considers an appeal against a penalty of £182 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 31 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.

## 10 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).

## 15 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  
20 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 19 April 2012. 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. As a concession to small employers HMRC allows fixed penalties to be mitigated to the amount of the duties on  
25 the return (ie total tax and NIC) if these are less than the penalty, down to a minimum of £100. As the duties for the appellant totalled £182 the penalty was mitigated to that amount on 14 June 2012.

## 5. Appellant's submissions

The appellant initially appealed against the decision to HMRC on 20 October 2011. In that  
30 letter Chris Jones Director for the appellant states "The end of year return was filed online on 28 July. I accept this was after the deadline for which I sincerely apologise. However, it was a genuine and regrettable oversight. I do not recall receiving a reminder which we have had in the past and would have prevented the late filing." They argued that the return although late was submitted on 28 July 2011 and therefore the penalty should not be £400. HMRC replied  
35 on 12 January 2012 and rejected the appeal.

6. On 8 February 2012 the appellant wrote to HMRC requesting them to review their decision. They made further submissions including "to delay a penalty notice until 26 September 2011 when a £400 fine has accrued is penalising small businesses." They criticised HMRC for not sending reminders. They repeated their assertion that the return was

submitted on 28 July 2011. On 12 April 2012 HMRC notified the appellant that the result of their review was that the decision was upheld.

7. On 9 May 2012 the appellant contacted HMRC and made the following comments

5 “Upon receipt of HMRC’s letter on 19 April I was concerned to read that you believed a P35 had not yet been filed for the relevant period. I immediately logged onto your online system and eventually found the section relating to last year’s filing. It stated that the P35 had been updated or amended on 28 July 2011 but did not say it had been submitted as I believed. I immediately went through the submission process again and at the end got confirmation it was filed.....

10 Attached is a copy of the printout of the P35 submission which you will see was printed on 28 July. Also attached is a copy email from yourselves which was printed on 19 April but you will see is dated 28 July which states that my submission was successful. It now appears that relates to the expenses and benefits only and not the P35 as I had understood it. It was my belief that both documents had been successfully lodged that day.

15 I trust you will understand from the attached that I was not avoiding filing the documents but instead I honestly believed they had been filed. As such , I trust that no penalties will be imposed beyond 28 July.”

#### 8. **HMRC’s submissions**

20 HMRC say that the appellant submitted its Employer’s Annual Return for 2010-2011 online but late on 19 April 2012. Therefore the penalty of £400 was correctly issued and calculated but has been mitigated to £182

9. 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.

25 10. 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.

30 11. 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 was sent to the appellant on 28 July 2011. They say the fact that a mistake was made when submitting the return cannot be considered a reasonable excuse.

#### 12. **Tribunal’s observations**

35 The appellant concludes his letter of 9 May 2012 by stating “As such I trust that no penalties will be imposed beyond 28 July.” A penalty of £400 was initially levied by HMRC on 26 September 2011. However HMRC mitigated the penalty to £182 as explained in paragraph 4. above. Had HMRC being considering a submission date of 28 July 2011 the initial penalty would have been £300 and this would also have been mitigated to £182. Thus in effect no  
40 penalties have been imposed beyond 28 July 2011 and the Tribunal therefore wonders why the appellant has continued with this appeal.

13. 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  
5 "...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."

14. 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).

15. The appellant has stated that it was a genuine and regrettable oversight that the return was submitted after the deadline. The appellant gives no reason for the oversight except he does not recall receiving a reminder from HMRC although one was sent in February 2011. 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). On 14 June 2012 HMRC mitigated the penalty to £182. That being the case and as indicated in paragraph 7 above the Tribunal  
20 has no statutory power to discharge or adjust the penalty.

16. A genuine and regrettable oversight 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.

17. This document contains full findings of fact and reasons for the decision. Any party  
25 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: 3 October 2013**

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