



TC02954

Appeal number: TC/2012/08615

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**

MICHELLE BROWN t/a HEAVENLY BEAUTY SALON Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
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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 Notices of Appeal dated 3 September 2012 with enclosures, and HMRC’s Statement of Case date 5 February 2013 with enclosures. The Tribunal wrote to the Appellant on 12 February 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. A reply dated 14 June 2013 was received from the appellant’s agent.

DECISION

1. Introduction

This considers an appeal against a penalty of £100 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2011 – 2012. By a direction of the Tribunal dated 26 October 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 2011-2012 the appellant failed to submit Forms P35 and P14 until 12 June 2012. On 18 June 2012 HMRC sent the appellant a late filing penalty notice for £100 for the period 20 May 2011 to 12 June 2012.

5. At 10.34 on 30 March 2012 the appellant's agent, Pennybridge Accounting Ltd., attempted to submit a number of annual returns on line including that of the appellant. These returns were all submitted just before the year end on 31 March 2012. In respect of the appellant's return an e-mail reply was sent on 30 March 2012 at 10.36. It is headed "Successful Receipt of Online Submission for reference" It states

"Thank you for sending the PAYE End of Year Submission online.

The submission for reference..... Was successfully received on 30-3-2012. If this was a test transmission, remember you still need to send your actual Employer Annual return using the live transmission in order for it to be processed."

6. The appellant's agent printed off a copy of the response to the submission which is headed "Heavenly Beauty Salon P14/P35 Internet Filing Summary." It then says "File created at 10.34 on 30/03/12. It then gives the various details which the appellant's agent thought had been submitted.

Appellant's submissions

The appellant's case is simply stated. The Appellant's agent insists the Employer's End of Year returns were submitted on 30 March 2012. The print out obtained by the agent and appearing to show successful submission nowhere indicates that this was an acknowledgement of a test submission. The appellant's agent therefore believed the online submission had been successful.

In a letter to HMRC dated 21 January 2013 the appellant's agent writing on behalf of eight appellants states "the charges on these cases are excessive"

6. On 21st August 2012 HMRC advised that the conclusion of their review was that HMRC did not consider the appellant had reasonable excuse for the late submission of the Employer's End of year return

7. On 3 September 2012 the appellant's representative submitted a notice of appeal to the Tribunal

8. HMRC's submissions

HMRC accept that the appellant made a genuine attempt to file on 30 March 2012 but say that the appellant's agent actually submitted its Employer's Annual Return for 2011-2012 online but late on 12 June 2012. Therefore the penalties totalling £100 were correctly issued.

HMRC state that they would expect Pennybridge Accounting Ltd in their professional capacity to be experienced and familiar with the procedure of filing on-line, including acceptance and rejection messages.

HMRC contend that to file a "test" transmission Pennybridge Accounting Ltd. would have had to actively access "test" mode on the system.

The e-mail message of 10.34 on 30 March 2012 included the statement "If this was a test transmission, **remember** you still need to send your actual Employer Annual return using the live transmission in order for it to be processed." This should have reminded Pennybridge Accounting Ltd. that they had selected "test" mode.

9. 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 a Live Employers annual return form P35 was sent to the appellant's agent on 30 March 2012. 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.

10. 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.”

11. 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).

12. The appellant’s agent has stated that it submitted a return online and early on 30 March 2012 and genuinely believed it had succeeded. There is a wealth of guidance on HMRC’s 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 and “test” submissions. Unfortunately the Appellant’s agent had overlooked that it had selected “test” mode and ignored the reminder in the e-mail from HMRC received shortly after submission. 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 2012 to 12 June 2012 (£100). As indicated in paragraph 14 above the First-tier Tribunal has no statutory power to discharge or adjust the penalty.

13. Unfortunately a genuine and simple error of this type 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.

14. 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: 11 October 2013