



TC03600

Appeal number: TC/2014/00509

INCOME TAX - PAYE - penalty for late submission of Employer's annual return – whether there was a “reasonable excuse” – no – whether penalty disproportionate – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NICK EASON LTD

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 22 April 2014 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 10 January 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2014.

DECISION

Introduction

1. This is an appeal against penalties of £1,200 imposed for the late filing of the Employer's Annual return for the tax year 2010-11. The penalties were imposed in accordance with s98A(2) and (3) Taxes Management Act 1970.
2. Mr Nick Eason appeals on behalf of the appellant company. ("the company")

The issues

3. Mr Eason appeals on the following grounds:
 - (1) there was a reasonable excuse for the late filing of the return and
 - (2) the penalty is disproportionate.
4. These grounds of appeal are opposed by HMRC

Extension of time

5. These penalties were imposed on 26 September 2011, 30 January 2012 and 28 May 2012. Appeals against the penalties were due to be lodged within 30 days. Mr Eason appealed on 19 December 2013. Accordingly the appeal is out of time.
6. Mr Eason has not provided a reason for the lengthy delay in lodging his appeal. However he maintains that this is a substantial penalty which will have a profound affect upon his business.
7. This Tribunal has the power to extend the time limit for lodging an appeal in accordance with Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber Rules) 2009 ("the Rules"). When considering whether to permit an extension of time the Tribunal is required to apply the overriding objective Rule 2(1) "to deal with cases fairly and justly".
8. I accept that Mr Eason has not put forward an explanation for the lengthy delay in lodging his appeal. However I take into account that this is a substantial penalty for the company which may affect its ability to continue trading. I do not find that HMRC have been prejudiced by the delay.
9. For these reasons I am satisfied that it is in the interests of justice to permit the extension of time for appealing against these penalties.

The Law

Obligation to file the return

10. An employer has an obligation to file an Employer's Annual Return before 20
5 May following the end of the tax year. Regulation 73(1) of the Income Tax (Pay As You Earn) Regulations 2003.

Imposition of penalties

11. If the return is not filed a penalty is payable in the sum of £100 per month for a firm with 50 employees or less s98A(2)&(3) Taxes Management Act 1970. ("TMA")
- 10 12. The Tribunal may set aside the penalty "if it appears ..that no penalty has been incurred" s100B(2) TMA.

Reasonable excuse

13. A penalty may be set aside if the taxpayer can establish a "reasonable excuse" for the late filing of the return throughout the default period s118(2) TMA.
- 15 14. In the case of *Rowland v HMRC [2006] STC (SCD) 536* it was decided that a "reasonable excuse" was "a matter to be considered in the light of all the circumstances of the particular case"

Proportionality

15. In the case of *The commissioners for Her Majesty's Revenue and Customs v Hok Limited [2012] UKUT 363 (TCC)* the Upper Tribunal considered the procedures adopted by HMRC for issuing penalties imposed under s98A(2)&(3) TMA. It was decided that HMRC had acted lawfully in allowing penalties to accumulate for four months before issuing the first penalty notice.
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16. The case also established that this Tribunal has no power to discharge penalties on the grounds of fairness. At paragraph [58] of the judgement: Mr Justice Warren held:
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"in purporting to discharge the penalties on the grounds that their imposition was unfair the Tribunal was acting in excess of its jurisdiction".

The agreed facts

17. The company was required to file an Employer's annual return for the year 2010-11. The return was due to be filed on or before 19 May 2011
18. The company had only one employee during the year 2010-11. This employee left the company on 30 September 2010. Mr Eason wrote to HMRC on 17 December

2010 informing them of the departure of his employee and mentioning that he had overpaid the tax and national insurance. He also issued a P45 for the employee.

19. On 12 February 2011 HMRC sent the company an electronic reminder to file the return for the tax year 2010-11. The return was not filed by the due date.

5 20. On 26 September 2011 a first interim penalty of £400 was issued for the default period 20 May to 19 September 2011. The return remained outstanding.

21. On 30 January 2012 a second interim penalty of £400 was issued for the default period 20 September 2011 to 19 January 2012.

10 22. On 28 May 2012 a final late filing penalty of £400 was issued for the default period 20 January 2012 to 10 May 2012.

23. The return was filed online on 10 May 2012.

The arguments

Reasonable excuse

15 24. Mr Eason submits that he reported to HMRC on 17 December 2010 and paid the tax and national insurance due. He submitted a P45 for the employee and did not realise that he was also required to file a P35 annual return at the end of the tax year. He does not state whether or not he received the filing reminder in February 2011 and does not provide an explanation for his failure to respond to the penalty notices served on 26 September 2011 and 30 January 2012.

20 25. HMRC submit that Mr Eason has been registered to file Employer's annual returns since 2005 and would have been aware of the process. In the event that he was uncertain as to his filing obligations he could have made enquiries of HMRC via e-mail or the helpline but there is no evidence that he did so.

Proportionality and fairness

25 26. Mr Eason submits that the penalty is disproportionate in the circumstances because:

- (1) his wife has recently had a baby;
- (2) the penalty will cause severe financial hardship to the company which may be forced to cease trading and
- 30 (3) he has insufficient funds to pay the penalty.

27. HMRC submit that the penalty has been correctly imposed in accordance with the legislation and this Tribunal has no power to cancel or reduce the penalty on the grounds of proportionality or fairness. In support of their case they refer to the decision in the case of *Hok Limited (above)*.

Reasons for decision

Reasonable excuse for the initial default

28. I accept that Mr Eason genuinely believed that he was not required to file a return for the year 2010-11. However I do not find that this belief was reasonable in the circumstances because:

- (1) he has been filing returns since 2005 and would have been aware of the need to file annual returns;
- (2) he was issued with a filing reminder in February 2011 and
- (3) if in doubt he could have contacted HMRC for advice regarding his filing obligations but he failed to do so.

29. For these reasons I find that there was no reasonable excuse for the initial failure to file the return on 19 May 2011.

Reasonable excuse for the continuing default

30. Mr Eason has not provided any explanation for the continuing failure to submit the return after the issue of the first and second interim penalty notices on 26 September 2011 and 20 January 2012.

31. For these reasons I do not find that there is a reasonable excuse for the continuing failure to submit the return after 26 September 2011.

Proportionality

32. The penalties were calculated correctly in accordance with the regulations taking into account the lengthy period of the default and the number of employees. The case of *Hok limited* has established that such penalties are lawful and proportionate.

33. I accept that this is a substantial penalty which may affect the continuing viability of the company. However this Tribunal is limited to considering the statutory grounds of appeal namely the lawfulness of the penalty and the question of reasonable excuse. The Tribunal has no additional jurisdiction to discharge the penalty on the grounds of fairness, *Hok limited (above)*.

34. For these reasons there are no grounds upon which the Tribunal can set aside the penalties on the grounds of proportionality or fairness.

Decision

35. There was no reasonable excuse for the failure to submit the Employer's Annual return for the tax year 2010-11.

36. The penalty imposed was lawful and proportionate.

37. The appeal against the late filing penalties of £1,200, is dismissed.

Right of appeal

38. 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
5 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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**JOANNA LYONS
TRIBUNAL JUDGE**

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RELEASE DATE: 15 May 2014