



TC03708

Appeal number: TC/2014/01105

PAYE – employer’s annual return – penalty for late submission – whether reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DJ LAING HOMES LTD

Appellant

- and -

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

TRIBUNAL: JUDGE WDF COVERDALE

The Tribunal determined the appeal on 03.06.2014 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 24.02.2014 (with enclosures), HMRC’s Statement of Case submitted on 12.03.2014 (with enclosures) and the Appellant’s Reply dated 08.05.2014 (with enclosures).

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DECISION

1. The Tribunal has, admitted this late appeal because there has been ongoing
5 correspondence between the parties and the timescale of events is of the essence of
the appeal.

2. The Tribunal decided that the Late Filing Notices dated 30.01.2012 and
28.05.2012 in the total sum of £800 were properly issued.

3. The appeal is dismissed.

10 4. The Tribunal found that the filing date for the Appellant's Employer Annual
Return for the year 2010-2011 (forms P35 and P14) was 19.05.2011. Up to the date of
the preparation of the Tribunal bundle by HMRC (12.03.2014) no complete and
correct paper or online Return had been received by the Respondents.

15 5. The Tribunal further found that there was no reasonable excuse for the failure to
file the Employer Annual Return on time. A scrutiny of the timescales recited by both
the Appellants and the Respondents enables the Tribunal to make the following
findings of fact.

20 6. The Appellants did not attempt to file their Return electronically on 17.05.2011.
They have produced no evidence that they did so. If they had made a failed
submission they would have been able to produce a printout of the rejection message
but they have not done so. Their experience of online filing since 2007-2008 would
have enabled them to identify a failed submission. They have not provided a
'Correlation ID', which is an identity reference attached to each individual online
event, to show that there had been an attempt to submit the Return electronically.
25 Government Gateway records disclose that there was no activity at all on the
Appellants' account from 13.04.2011 to 12.12.2012.

30 7. The copy of Online Services P35 produced by the Appellants bears the date
17.05.2011 but, as clearly stated on the face of that document, it is "for your records
only" and does not constitute evidence that the Appellants attempted to make a
submission on that date.

35 8. A first interim penalty was issued by the Respondents on 26.09.2011 in the sum
of £400 but was subsequently cancelled. It appears that the Respondents gave the
Appellants the "benefit of the doubt" in respect of an alleged attempt at online filing.
The Respondents now take the view that the cancellation was incorrect but have not
sought to reinstate that penalty

9. The Respondents received a paper Return from the Appellants on 05.10.2011,
some four and a half months after the due date. There is no evidence before the
Tribunal as to the source of the forms. They were an incorrect version of the forms
and were returned to the Appellants on 21.12.2011.

10. A Penalty Notice in the sum of £400 was issued by the Respondents on 30.01.2012.

11. Some six weeks later, on 16.02.2012, the Appellants made a further submission of paper Returns but these were, again, returned by the Respondents on 27.02.2012 because they were incomplete.

12. On 28.05.2012 the Respondents issued a further Penalty Notice in the sum of £400.

13. Paper Returns were sent back to the Appellants because of perceived defects in the forms, not because of any requirement for Returns to be filed online.

14. The Appellant's representative has submitted copies of Decisions in two previous First-tier Tribunal cases and seeks to argue that this Tribunal should accept them as precedents. Those decisions have been studied. They do not affect the outcome of the present appeal firstly because they can be distinguished on the facts and secondly because previous First-tier Tribunal decisions are not binding on this Tribunal.

15. In so far as the Appellants may seek to argue that the penalty in this case is unfair the Tribunal refers to the Upper Tribunal decision in the case of *HMRC v Hok* [2012] UKUT 363 (TCC). Such an argument is unsustainable in this Tribunal: the Upper Tribunal made it clear that although the Tribunal can set aside a penalty which has not properly been imposed there is no statutory power to discharge or adjust a penalty because of a perception that it is unfair.

16. The Tribunal concludes that there was no reasonable excuse for the failure to file the Employer's Annual Return on time. The test applied by the Tribunal is whether the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the Return would become due on a particular date would not have avoided the default. The above chronology of events discloses that such foresight and diligence would have avoided the default. The continuing failure by the Appellants to file the Return is evidence of their lack of commitment to their responsibilities.

17. 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.

**WDF COVERDALE
TRIBUNAL JUDGE**

RELEASE DATE: 10 June 2014