TC02610

Appeal number: TC/2012/10382

INCOME TAX – PENALTY FOR LATE FILING OF END OF YEAR PAYE RETURN – ***Whether the Appellant filed the return on time – No – Did the Appellant have a reasonable excuse for default – Yes – Appeal allowed.***

FIRST-TIER TRIBUNAL
TAX CHAMBER

WAYNE WATKINS OIL BURNER SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

The Tribunal determined the appeal on 14 March 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 5 November 2012, HMRC's Statement of Case submitted on 20 December 2012 and the Appellant's reply to the statement of case dated 2 January 2013.

DECISION

1. The Appellant appeals against the imposition of a penalty in the sum of £100 for the late submission of the employer's annual return (P35 & P14) for the tax year ending 5 April 2012.

2. The Appellant was required to file on-line its end of year PAYE return for 2011/12 by 19 May 2012. HMRC received the return on 11 June 2012 which was 22 days late. Under sections 98A(2) and (3) of the Taxes Management Act 1970, the Appellant was liable to a fixed penalty of £100 for each month or part month that it was in default with its return. The Appellant, therefore, received a penalty of £100 for the period of its default

3. The Tribunal has limited jurisdiction in penalty appeals which reflects the purpose of the legislation of ensuring that employers file their returns on time. The Tribunal has no power to mitigate the penalty. The Tribunal can either confirm the penalty or quash it if satisfied that the Appellant has either filed the return on time or has a reasonable excuse for its failure. The onus is upon the Appellant to prove on a balance of probabilities the matters upon which it asserts to discharge the penalty.

4. The Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) re-affirmed the First Tier Tribunal's limited jurisdiction in respect of penalty appeals, and in particular emphasised that it had no statutory power to adjust a penalty on the grounds of fairness. At paragraph 35 the Upper Tribunal said:

> "It is important to bear in mind how the First-tier Tribunal came into being. It was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007, "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is derived wholly from statute. As Mr Vallat correctly submitted, 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. In particular, neither that provision nor any other gives the tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair or for any similar reason. Pausing there, 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".

5. Section 118(2) of the TMA 1970 gives protection from a penalty if the employer has a reasonable excuse for failing to file a return on time. The reasonable excuse must exist throughout the period of default. The TMA 1970 provides no statutory definition of reasonable excuse. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

6. The Tribunal makes the following findings of fact:

(1) On 3 May 2012 the Appellant's agent submitted a return on-line for which it received an e-mail from HMRC confirming that the submission reference 475/MA61096 had been successfully filed.

(2) Following receipt of the penalty notice the agent spoke with HMRC and discovered that the return filed on 3 May 2012 had been a test submission. The Appellant's agent immediately resubmitted the return successfully on 11 June 2012.

(3) HMRC's e-mail was generic for both test and live submissions, although it stated that *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.*

(4) The Appellant's agent held an honest belief that the return had been filed on time.

(5) The Appellant is responsible for the actions of its agent.

7. The Tribunal is satisfied that the Appellant's belief of the return being filed by the due date was based on reasonable grounds. The first return was submitted in good time before the deadline of the 19 May 2012. HMRC acknowledged receipt of the return. The Appellant was not put on notice of any defect in the first return. The Appellant acted promptly once it became aware of the error with the first return. On balance, the Tribunal considers the Appellant's actions were those of a prudent employer conscious of his responsibilities under the Taxes Acts. The Tribunal holds that the Appellant had a reasonable excuse for its default.

8. The Tribunal allows the Appeal and cancels the penalty in the sum of £100.

9. 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.

MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE

RELEASE DATE: 25 March 2013