



**TC02929**

**Appeal number: TC/2012/05004**

***TYPE OF TAX – PAYE – late submission of Employer’s Annual Return – whether scale of penalty is reasonable - Decision of Upper Tribunal in Hok Ltd applies. Whether reasonable excuse for late submission of return - No.***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SIMON TUBB PAINTER AND DECORATOR LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: PRESIDING MEMBER  
PETER R. SHEPPARD FCIS FCIB CTA  
AIIT**

**The Tribunal determined the appeal on 22 August 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 a letter dated 11 October 2011 a copy of which was received by the Tribunal on 19 April 2012 and taken by the Tribunal as a Notice of Appeal, and HMRC’s Statement of Case submitted on 21 June 2013 with enclosures. The Tribunal wrote to the Appellant on 26 June 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. On 25<sup>th</sup> July 2013 the Tribunal received a reply from the Appellant which it also considered.**

## DECISION

### 1. Introduction

Simon Tubb Painter and Decorator Limited are a small painting and decorating business which the Tribunal notes is a member of The Guild of Master Craftsmen. The managing director is Simon Tubb. This considers an appeal against a penalty initially of £400 but later reduced to £100 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 18 April 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 2010-2011. The appellant failed to submit Forms P35 and P14 until 19 January 2012. On 26 September 2011 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2011 to 19 September 2011.

5. The penalty for a late return is £100 per 50 employees for each month or part month that the return is outstanding. However in some cases mitigation can be considered by HMRC. This is limited to the greater of the total duty (Tax and NIC) shown on the return and £100. As the total liability to duty of the appellant was nil on 20 March 2012 HMRC wrote to the Appellant and mitigated the penalty to the minimum of £100.

6. In the correspondence provided Simon Tubb makes many points but a large number of these are criticisms of the legislation, government policy, and politicians. Other points criticise the government and HMRC for the way they have failed to collect sufficient tax from large corporates as compared to their treatment of small businesses and the self-employed. All of these points have no direct relevance to the

matter appealed so the Tribunal has no need to consider them. The Tribunal has extracted from the correspondence the following relevant points.

The penalties are too heavy.

HMRC waited 4 months to advise the penalty of £400 had they issued a more timely reminder the penalty would have been £100.

I am not confident about dealing on line and using computers.....I am 50 and there was no real computer training given to my generation at school.

My agent failed to remind me that the annual return was due.

The appellant points to 30 years of faithfully sending returns on time

7. The level of the penalty and whether or not 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."

8. As HMRC have mitigated the penalty to £100 the second point falls away.

9. Whilst the Tribunal has some sympathy with the appellant's view on the use of computers HMRC point out that the government announced in 2002 that small employers would be required to file on line by 2010. HMRC have issued a number of guides to assist small businesses, and have written directly to them in November 2008, 2009 and 2010. HMRC submit that the appellant has had ample time to familiarise itself with the system. The Tribunal observes that it would seem that the appellant or his agent successfully submitted the 2009-2010 return on-line.

10. In respect of the agent failing to remind the appellant that his return was due it is the Appellant's legal obligation to ensure that returns are filed on time. The failure of a third party to remind the appellant does not remove that obligation nor is it a reasonable excuse for the failure to submit the return.

11. In respect of 30 years of faithfully sending returns on time. Whilst this is to be commended it is also what is expected. The legislation covering the penalties (Taxes Management Act 1970 Section 98A(2) and (3) ) makes no allowance for a history of good compliance.

12. HMRC has applied the legislation correctly and accurately calculated the amount of the penalty for the period 20 May 2011 to 19 September 2011 at £400. On 20 March 2012 they mitigated this to £100. The appellant has not established a reasonable excuse, as contemplated by the Taxes Management Act 1970 Section 118(2), for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is dismissed and the penalty of £100 is confirmed.

13. 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: 30 September 2013**