



**TC02937**

**Appeal number: TC/2012/05615**

*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 reasonable excuse for late submission of return - No.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LEWIS GROUNDWORKS 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 3 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 Notice of Appeal dated 9 May 2012 with enclosures, and HMRC’s Statement of Case submitted on 1 July 2013 with enclosures. The Tribunal wrote to the Appellant on 4 July 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. No reply was received.

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## DECISION

### 1. Introduction

5 This considers an appeal against a penalty of £300 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 31 May 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  
10 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.

15 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

20 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 7 August 2011. On 10 August  
25 2011 HMRC sent the appellant a late filing penalty notice for £300 for the period 20  
May 2011 to 7 August 2011.

### 5. Appellant's submissions

The appellant's agent J.K.Tarry Accounting Services wrote to HMRC on 29 January  
2012. The letter explains that the failure to submit was due to an error by the person  
30 responsible at the time who failed to recognize that computer problems had prevented  
full submission to HMRC.

Attached to the Notice of Appeal was a letter to HMRC dated 10 May 2012 from the  
appellant's agent. The letter offers no reasonable excuse for the late return but  
requests that the penalty be reduced to £100 on the grounds that a fine of £300 is  
35 draconian. It says that there is no reason whatever why HMRC could not have issued  
a penalty notice for £100 immediately after 19 May default instead of issuing a  
penalty for a higher amount months later.

5 It notes that on 19 March 2012 HMRC announced that in future significant improvements would be made to the P35 Employers end of year return 2011/12 process. The appellant's agent submits this is in recognition of its failings to date. It says HMRC have agreed to ensure more timely reminders ahead of the 19 May filing date.

## 6. HMRC's submissions

HMRC say that the appellant submitted its Employer's Annual Return for 2010-2011 online on 7 August 2011. Therefore the penalty of £300 is correct and fixed in legislation.

10 They say that the failure to submit a return on time cannot be attributed to any delay in issuing penalties and therefore cannot be considered a reasonable excuse for the late return.

HMRC point out that it is the employer's responsibility to ensure that the return is submitted on time

15 HMRC point out that there is a wealth of guidance on their website about submission and completion of forms. They say the fact that a mistake was made when submitting the return cannot be considered a reasonable excuse

## 7. Tribunal's observations

20 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  
25 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."

30 8. The Upper Tribunal's decision in Hok Ltd also covers whether the change in practice by HMRC demonstrates that their previous practice was unfair. In Paragraphs 60 and 61 of the decision can be found the following passage:-

"60.....we cannot make a positive finding that the earlier practice was fair.

35 61. By the same token we do not make any finding that the earlier practice was unfair. We agree with the view expressed by Ms Redston in *Royal Institute of Navigation* that an improvement in practice does not carry with it any necessary implication that before the improvement the practice was unfair;....."

9. 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).

10. The appellant's admitted error whilst attempting to submit a return on time is most unfortunate. In these circumstances it is understandable that the appellant finds  
5 HMRC's actions harsh. HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2011 to 7 August 2011 (£300). As indicated in paragraph 7 above the Tribunal has no statutory power to adjust the penalty.

11. Unfortunately a simple error whilst attempting to file a return does not establish a  
10 reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). The appeal is therefore dismissed.

12. 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  
15 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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**PETER R. SHEPPARD**

**TRIBUNAL PRESIDING MEMBER**  
**RELEASE DATE: 3 October 2013**

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