



TC02948

Appeal number: TC/2012/05023

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**

REGEN LIMITED

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
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The Tribunal determined the appeal on 27 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 the Notice of Appeal dated 19 April 2012 with enclosures, 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. No reply was received.

DECISION

1. Introduction

5 This considers an appeal against a penalty of £400 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 2 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 13 October 2011. On 26
25 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.

In the Notice of Appeal and correspondence provided the appellant acknowledges that
the return was late because of an oversight and that a fine is appropriate. However its
appeal is against the scale of the penalty. The penalty for a late return is £100 per 50
30 employees for each month or part month that the return is outstanding.

5. The appellant considers a penalty of £100 is appropriate but argues that because
HMRC did not advise the oversight for 4 months it is faced with a penalty of £300
more than it would have been if HMRC had levied the initial £100 penalty promptly.
The appellant considers the penalty is disproportionate and asks the Tribunal to
35 reduce the level of it to £100. On 3 February 2012 Smailes Goldie Chartered
Accountants wrote to HMRC as agent of the appellant. They complained that by
waiting until September 2012 before notifying the penalties that had been
accumulating “HMRC has neither acted fairly or in good conscience.” They accepted

that a penalty of £100 was due for the first month and lodged a cheque for this sum with HMRC. In respect of the following months they say no penalty is due “unless HMRC proves (the onus being upon it) that even if such penalty notice, which would have acted as a reminder, had been issued, the default would nevertheless have continued. It has proved no such thing.

6. On 19 April 2012 on behalf of their client Smailes Goldie sent a notice of appeal to the Tribunal repeating the above and they also advised that they understood that HMRC have started to issue penalty notices within one month of the filing deadline. This would suggest that the previous policy of waiting until September, by which the penalty was £400 was unfair on those employers who had historically met all filing deadlines and in a single instance had missed a deadline.

7. HMRC submit that the the Upper Tier Tribunal decision in Hok Ltd applies and therefore the First-tier Tribunal has no power to adjust the penalty

8. They consider that the appellant offers no excuse for the late return other than it being an oversight by their agent. HMRC submit that reliance on an agent does not relieve an employer of their legal obligation to ensure their Annual return is filed on time. The obligation cannot be transferred to another party.

9. 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 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.”

10. The Upper Tribunal in Hok Ltd also made some brief comments at paragraphs 59 to 61 about the changes of practice made by HMRC as mentioned at paragraph 6. above. The Tribunal notes the following sentences:-

11. “60.....For those reasons we do not think it necessary or desirable to explore the matter further, and we cannot make a positive finding that the earlier practice was fair.

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;....”

12. The level of the penalties has been laid down by parliament and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it. 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). It is clear that the late return was due to an oversight by the appellant's agent. The Tribunal considers that reliance on an agent does not relieve an employer of their legal obligation to ensure their Annual return is filed on time.

13. The respondents have applied the legislation correctly and calculated the amount of the penalties accurately for the period 20 May 2011 to 19 September 2011 (£400). The appellant has established no reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) Therefore the appeal is dismissed.

14. 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.

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PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 7 October 2013

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