



**TC02949**

**Appeal number: TC/2012/05051**

*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**

**STUART EDWARDS LANDSCAPES 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 29 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 16 April 2012 with enclosures, and HMRC’s Statement of Case submitted on 20 June 2013 with enclosures. The Tribunal wrote to the Appellant on 25 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 9 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 2 March 2012. On 26 September  
25 2011 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month  
period 20 May 2011 to 19 September 2011.

### Appellant's submissions

5. In the Notice of Appeal and correspondence provided the appellant's agent  
Folkes Worton LLP submits that attempts were made to submit the P35 online on 16  
30 May 2011 but an error was encountered at that time. A telephone call was placed with  
HMRC as no specific error was being listed and the return was being submitted under  
the correct PAYE number. They say they were advised that they would be contacted  
however no call was received so they assumed HMRC had resolved the problem.  
They say that this establishes a reasonable excuse and the penalty should be reduced  
35 to £100.

### HMRC submissions

6. HMRC submit that it is acknowledged that the appellant's agent knew that the return had not been submitted and they say they made a telephone call about it. HMRC have no record of that telephone call.

5 7. HMRC say that the appellant's agent should not have assumed that no contact from HMRC meant the problem had been resolved. A simple check would have revealed that the return was still outstanding. They also point out that the appellant's agent successfully submitted a number of annual return forms for other clients on 16 May 2011 so they were familiar with the process. In the circumstances they consider a penalty is due. They submit The Upper Tier Tribunal decision in Hok Ltd applies and therefore the First-tier Tribunal has no power to adjust the penalty.  
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8. HMRC consider that the appellant has offered no other excuse for the late return.

### 9. **The Tribunal's observations**

15 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  
20 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."

25 10. 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).

30 11. It is clear that the appellant's agent knew that the attempt to file the return on 16 May had not been successful. They say they telephoned HMRC about this and had been told they would be contacted. It may well be that at 20 May there was reasonable excuse for the return not being submitted but the subsequent lack of action by the appellant or its agent demonstrates the reasonable excuse did not exist  
35 throughout the failure period. The agents were expecting to be contacted but this did not happen. In such circumstances when this did not happen within a few days a prudent man would have telephoned to check on progress.

40 12. HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2011 to 19 September 2011 (£400). The Tribunal finds that the appellant has not established a reasonable excuse that existed

throughout the failure period for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is dismissed.

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.

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**PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

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**RELEASE DATE: 7 October 2013**