



**TC02951**

**Appeal number: TC/2012/04824**

*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 - Yes.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL BIRCH T/A THE WOODMAN INN**

**Appellant**

**- and -**

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

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**Respondents**

**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 11 April 2012 with enclosures, and HMRC’s Statement of Case submitted on 21 June 2013 with enclosures. The Tribunal wrote to the Appellant on 1 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.**

## DECISION

### 1. Introduction

5 This considers an appeal against a penalties totalling £500 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 25 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  
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 October 2011. 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. On 14 October HMRC sent a final late filing penalty notice for the period 20 September 2011 to 7 October 2011

### Appellant's submissions

5. It is clear from the appellant's letter dated 10 October 2011 that the appellant  
30 accepts that the Employers Annual return was not submitted until 7 October 2011 but considers he has reasonable excuse for the late submission.

6. In that letter he also states

35 "The annual return .....was completed in May 2011 and 'transmitted' via the PAYE Tools programme which has replaced the cd Rom versions of previous years. The transmission failed and after numerous attempts over the ensuing days it proved impossible to connect with your server.

1)The intended transmission took place at 16.23 on 16 May 2011 (still recorded on PAYE Tools).

2)I have spoken to the online help team on 3 occasions but they have been unable to solve the issue (these calls will presumably be held on your call log).

5 3)There was no outstanding payments due

4)The P14/P35 information has now been forwarded by input of information onto the website and receipt has ben confirmed.

The information was sent last week thanks to Stephen who works in your office and was extremely helpful in identifying the alternative method of sending the returns I have to say the online specialists spoken to earlier in the year were less helpful.....”

7. On 3 February 2012 the appellant requested a review of HMRC’s decision He makes the following points

“I believe there is a reasonable excuse based on

15 1)The submission was attempted before the deadline (as recorded) and further attempts were made via the Basic PAYE tools but the problem persisted throughout and still does. I also engaged the services of local IT specialists (on the advice of your helpdesk) but they could not resolve the issue.

20 2)No alternative method of submission was advised or indicated until my call in early October to the helpdesk when Stephen explained it could be done ( albeit with re-entry of data via the online HMRC site(which is still the method I have to use ) I immediately used this method to submit the return (7th October).

25 3)If your other advisers had given this information in May the submission would have been on time – there was no reason or benefit in not making the submission as no payments were due and all previous payments / reports had been sent on time via the Employer CD Rom

4)With refrence to the above and the details provided in my appeal letter dated 10 October I consider that there is a reasonable excuse ( your software not working) and it continued throughout the whole period (as it still exists).

8. In the Notice of Appeal the appellant repeats some of the above points and also makes the following additional points:

35 “ 1) The submission .....was successfully entered but when transmitted a failure message was received stating time and date of transmission, the reason “Host server not connecting” and a request to try again. Numerous attempts were made with the same outcome which suggests there is a fault with the HMRC software (Basic PAYE Tools) or the main server (Host Server).

2) Previous years' submissions had been successfully made by the CD-Rom method but this was no longer available (even though the data was contained on this system) as HMRC had changed to Basic PAYE Tools from April 2011.

3) Quarterly submissions had been made during the 2010-11 tax year.....

5 4) It is stated that no further attempts were made (citing the online log ons) but this is incorrect as frequent attempts were made during attempts to rectify the problem via the Basic PAYE Tools method, which does not register on line.

10 5) It was not until my October call to the helpdesk that an operative actually provided the solution (re input of data onto online system and transmit this way). Had this information been given in May the submission would have been made on time. This should have been the HMRC helpdesk's initial concern rather than trying to resolve the IT glitch.

### **Respondents submissions**

15 9. HMRC in their review accept that the appellant accessed the online system on 16 May and on 23 May and that further log on attempts were made on 3 August, 13 September and 6 October prior to submission of the return on 7 October 2011

10. HMRC say that the person submitting the return should have been familiar with the acceptance and rejection messages that follow from submission of returns and should have taken screen prints to evidence the difficulties he encountered.

20 11. HMRC consider that the appellant did not make sufficient effort to ensure a successful submission of their return.

12. HMRC submit that there is plenty of guidance online to assist the appellant. There was no known server problems in the period up to 19 May 2011

25 13. They say that the appellant failed to operate the PAYE scheme correctly and it is the Appellant's responsibility to ensure the regulations are followed and returns submitted on time.

### **14. Tribunal's observations**

30 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).

35 15. 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) and 20 September 2011 to 7 October 2011 (£100). The Tribunal considers that appellant tried to submit the return on time but encountered unexpected transmission

difficulties. He telephoned the Helpline on more than one occasion but they were unable to assist with the problem and advised the appellant to get help from IT specialists which he did. They too were unable to assist. The appellant was fully aware throughout that he had not submitted the return and made frequent attempts to do so, some of which were recorded by HMRC and others not. Ultimately on 6 October he telephoned HMRC helpline again and this time got advice which he immediately implemented and successfully submitted the return. The tribunal considers that the appellant's actions were those of a person who was genuinely trying to submit a return but experiencing unexpected and unforeseen transmission difficulties. There was no financial benefit for him to submit the return late. The transmission problem still exists. In the tribunal's view the appellant has established a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) for 2010-2011 for the whole of the period to 7 October 2011, therefore the appeal is allowed.

16. 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: 7 October 2013**