



**TC03049**

**Appeal number: TC/2012/04825**

*TYPE OF TAX – PAYE – late submission of Employer’s Annual Return – whether scale of penalty is reasonable , and whether penalty should be waived - Decision of Upper Tribunal in Hok Ltd applies. Whether marriage breakdown, financial hardship and possible computer software failure constitute a reasonable excuse for late submission of return - No.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE SQUARE ORANGE CAFÉ BAR LIMITED                      Appellant**

**- and -**

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

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

**The Tribunal determined the appeal on 20 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 28 March 2012 with enclosures, and HMRC’s Statement of Case submitted on 18 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.**

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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 Return (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 (Pay As You Earn) Regulations 2003, in particular Regulations 73 and  
205.

15 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)

### 20 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  
25 appellant failed to submit Forms P35 and P14 until 20 July 2011. On 25 July 2011  
HMRC sent the appellant a late filing penalty notice for £300 for the period 20 May  
2011 to 20 July 2011.

5. The appellant considers that a genuine mistake was made and requests that the  
Tribunal waive the penalty.

30 6. The appellant gives the following excuses for the late return

- i) The person responsible for submitting the return was experiencing  
marriage difficulties at the time the return was due.
- ii) The appellant was experiencing financial hardship at the time.
- 35 iii) The data was input on the system using QuickBooks in May 2011 but  
before the deadline of 19 May. This system had been used successfully by

5 the appellant in previous years. On this occasion it did not arrive with  
HMRC. There may have been an HMRC website glitch or an  
administration error on the part of HMRC. It was only later that it was  
discovered that this attempt had failed. In a letter dated 12 March 2012 the  
appellant states “I cannot be sure if this was a software error or a human  
error on my part as my marriage was in the process of breaking down at  
that point and it is possible that I made an error in completion of the  
submission.” HMRC state that they have no record of the appellant  
logging into the HMRC on line system until 20 July 2011 when the P35  
was submitted. HMRC also have no record of the appellant advising any  
difficulty in submitting the return prior to 19 May 2011. HMRC accept  
that the appellant has a good record of filing in the past and all payments  
are up to date. However they observe that an experienced filer should be  
aware that on receipt of a successful submission to HMRC an online  
message of confirmation is issued, and also if an e-mail address is  
provided, an e-mail message.

20 The tribunal notes that HMRC have available on line a guide entitled  
“Filing your Employer Annual Return (P35 and P14s)”. One paragraph is  
headed “Acceptance and Rejection messages when you file online”. This  
gives details of the various messages that could be received including  
notification if an application has been accepted or rejected. It appears that  
the appellant received neither of these and therefore should have realised  
there was a problem.

25 7. The decision of the Upper Tribunal in the case of Hok Ltd. considers whether the  
jurisdiction of the First-tier Tribunal includes the ability to discharge or reduce 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.  
30 ..... 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.”

35 8. The level of the penalties has been laid down by parliament. HMRC has applied the  
legislation correctly and calculated the amount of the penalty for £300 accurately for  
the period 20 May 2011 to 20 July 2011. 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).

40 9. The Tribunal has considered the three excuses submitted by the appellant.  
Taxpayers have a reasonable length of time from the end of their tax year until 19  
May to submit their Employer’s Annual Return. The papers reviewed contained no  
explanation of why the marriage difficulties of one person constituted a reasonable  
excuse for the appellant’s failure to submit the return for the whole of that period.

10. The business was experiencing financial hardship. In their statement of case the respondents accept that the appellant's PAYE payments were all up to date. The penalty has been levied for failure to submit Forms P35 and P14 on line by the due date. It is therefore difficult to understand how financial hardship of the appellant could constitute a reasonable excuse for the late filing by the appellant of its Employer Annual Return (forms P35 and P14) for the year 2010 – 2011.

11. In respect of the submission error it seems likely that the appellant made an error when attempting to submit its return on line before the May 19 deadline and for some reason failed to connect to the HMRC online system. The lack of any confirmation or rejection should have alerted the appellant ( who HMRC state "has a good record of filing in the past" ) to the possibility of a problem and the need to make further enquiries.

12. The appellant has established no reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) for the year 2010-2011.

13. Therefore for all the above reasons 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.

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

**RELEASE DATE: 12<sup>th</sup> September 2013**