



TC03177

Appeal number: TC/2012/02109

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**

SCEPTRE ASSOCIATES LIMITED

Appellant

- and -

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

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

The Tribunal determined the appeal on 23 December 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 20 January 2012 with enclosures, and HMRC’s Statement of Case submitted on 24 April 2013 with enclosures. The Tribunal wrote to the Appellant on 20 May 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

This considers an appeal against a penalty of £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 10 February 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 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.

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)

Rowland v HMRC [2006] STC (SCD) 536

AnthonyWood trading as Propaye v HMRC [2011] UK FTT 136 TC 001010

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 appellant failed to submit Forms P35 and P14 until 3 October 2011. On 26 September 2011 HMRC sent the appellant a first late filing penalty notice for £400 for the period 20 May 2011 to 19 September 2011. On 6 October 2011 HMRC sent the appellant a second late filing penalty notice for £100 for the period 20 September 2011 to 3 October 2011.

5. Appellant's submissions

On 3 October 2011 the appellant's agent, who is variously referred to in the papers as GC Accountants; GC Consultancy Ltd. and Georgiades Charalambou & Co LLP, wrote to HMRC. The letter explains "according to our software, the P35 was submitted on 21 April 2011 by internet. However, due to a computer error the form did not go through online."

On 11 November 2011 HMRC replied saying that they did not consider that the reasons given for the late submission of the return constituted a reasonable excuse. They offered a review.

On 11 November 2011 the appellant's agent replied to HMRC repeating the points made in the earlier letter but also saying:

“Please note that we filed the annual returns of 200 clients this year without any problem and our internal control and schedules show that the return was filed on 21 April 2011.

Finally, and especially as all liabilities were paid on time, we do not understand why you have refused to abide by your own guidance on reasonable excuse i.e. “HMRC does not want to penalise customers who would have filed on time but were prevented from so by events beyond their control. For this reason a reasonable excuse claim received without details of the IT message will still be considered.”

In view of the circumstances and the fact that technical errors with HMRC online filing are beyond our control, could you please waive thepenalty.”

HMRC wrote to the appellant on 21 December 2011 advising that the result of the review was that the decision to levy the penalty was correct and that the reasons given by the appellant's agent for the late submission of the Employer's annual Return were not considered sufficient to establish a reasonable excuse.

The Notice of Appeal dated 20 January 2012 submitted by the appellant's agent contained comments very similar to those mentioned above.

6. HMRC's submissions

HMRC say that the appellant submitted its Employer's Annual Return for 2010-2011 online on 3 October 2011. HMRC say that where an employer fails to make an Employer Annual Return on time Section 98A (2) and (3) of the Taxes Management Act 1970 provides for a penalty of £100 for each month (or part month) during which the failure continues for each batch (or part batch) of 50 employees. Therefore the penalty of £500 is correct and fixed in legislation.

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

HMRC say that GC Consultancy Ltd. have not submitted any evidence to show the successful submission of the returns for the appellant on 21 April 2011. They say GC Consultancy Ltd should be familiar with the process as by their own admission they successfully submitted returns for over 200 clients. In addition they should be familiar with the online acceptance/rejection messages which would have alerted them to any submission problems.

HMRC say there is no evidence of any computer or software or technical online errors within HMRC and would contend that as GC Consultancy Ltd successfully submitted

eight other End of year returns on 21 April 2011 computer failure in this case, cannot be accepted as a reasonable excuse.

7. Tribunal's observations

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."

8. 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).

9. The appellant has produced no evidence to show that it attempted to submit the appellant's annual return form on 21 April 2011. HMRC say that there is no evidence of any online computer problems on 21st April and point out that the appellant's agent successfully submitted eight other Employer's annual return forms that day. The employer's agent has considerable experience in submitting Employer's annual return forms and would be expected to understand any rejection notices. It is a simple matter to check whether a return has been accepted and it appears that the appellant's agent neglected to make such a check although it had from 21 April 2011 to 19 May 2011 to do so..

10. HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2011 to 3 October 2011 (£500).

11. Unfortunately a simple error whilst attempting to file a return does not establish a 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 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: 23 December 2013