



TC03204

Appeal number: TC/2012/03724

PAYE – late submission of Employer’s Annual Return – whether penalty notice issued properly – no evidence produced, 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**

PEEBLES BAPTIST CHURCH

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER:
PETER R SHEPPARD FCIS FCIB CTA AIT
MS EILEEN SUMPTER WS**

**Sitting in public at George House, 126 George Street, Edinburgh on
7 November 2013**

Douglas McCall and Elizabeth Keiro for the Appellant

Linda McGuigan, Officer of HMRC, for the Respondents

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DECISION

Introduction

1. This considers an appeal against a penalty of £400 levied by the respondents for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the tax year 2010–2011.

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).

Case law

HMRC v Hok Ltd [2012] UKUT 363 (TCC)
HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC)
Rennie Smith & Co [2013] UKFTT 505 (TC), TC02894
Life Property Management Limited (The Ironworks) [2013] UKFTT 303 (TC), TC02708.

Facts

2. 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 20 February 2012. HMRC say that on 26 September 2011 they sent the appellant a late filing penalty notice for £400 for the four month period 20 May 2011 to 19 September 2011. On 29 February 2012 the appellant lodged an appeal against this penalty.

Appellants submissions

3. The Tribunal was addressed by Mr Douglas McCall who had lodged the appeal.

4. Mr McCall said that he is not a member of Peebles Baptist Church, but his wife is, and he has attended the church with her for many years. He said that PBC is a small Baptist church normally attended by around 35 to 45 worshippers. Besides the weekly church service the church is active in supporting local community projects.

5. Mr McCall introduced Elizabeth (Liz) Keiro who is a member of the PBC leadership team of four people, and acts as Treasurer. She has been a member of PBC for more years than she cared to remember. She said that the church has about 20 members and currently employs one person - its minister. Liz Keiro said she had been a social worker and had little in the way of financial experience. She had taken

on the role of Treasurer in the absence of anyone else. She had submitted the annual return on time in previous years.

6. Mr McCall said that PBC would not wish to do anything which was not legitimate. He confirmed that it was not part of the church ethos to act illegally.

5 7. He said that in 2006 it had become necessary to appoint a new pastor and on
4 April 2006 a newly qualified man was appointed. He said that whether through
inexperience or a personality clash the new man had created considerable unrest in
PBC. He had tried to introduce different religious teaching and created problems with
PBC's administrative practices. The administrative problems had created stress for
10 the Treasurer in particular.

8. Mr McCall explained that in the Baptist Church in Scotland each fellowship is responsible for its own financial affairs including raising money to achieve that. Whilst the intention is that each church is self-supporting the Baptist Union of Scotland can help by making grants.

15 9. The difficulties continued and matters came to a head when a bereavement was
handled badly and the leadership team felt they had to step in. There was division in
the church over how to treat the minister. The minister resigned with immediate
effect on 4 April 2010. Nevertheless it was agreed that PBC would pay the minister
his salary for the following three months and allow him to live in the manse for six
20 months. During this six month period the minister continued to influence a small
group of followers who in turn continued to cause division in the church. Both
Mr McCall and Liz Keiro described this as an extremely stressful and traumatic
period in the history of the church. The leadership team in particular were all very
stressed having to deal with many upset members as well as deal with their own
25 personal difficulties. In addition one of the leadership team was undergoing
treatment for cancer. Liz Keiro's own family were affected. The PAYE for the
additional three months had been paid, and the minister finally left in October 2010
and Peebles Baptist church began to return to normality. It was as a result of this
difficult and traumatic situation that Liz Keiro overlooked the need to send in the end
30 of year return. She was only reminded of this when she received a telephone call
from HMRC on 19 September 2011. She attempted to rectify this immediately.
When she received the penalty notice dated 26 September she noted it was for the
period ending on 19th September and assumed that the penalty period ended on that
date because it was the day she had submitted the return. In fact she now realises that
35 she had pressed the update button rather than the submit button.

10. The Tribunal found the statements made by both Mr McCall and Liz Keiro entirely credible.

11. On 10 October 2011 Liz Keiro wrote to HMRC appealing against the penalty. She mentions most of the points set out above.

12. On 7 December 2011 HMRC replied to this appeal by saying that they do not consider that the explanations given for the late return constitute a reasonable excuse. They offered a review.

5 13. In a letter dated 20 December 2011 on behalf of PBC, Liz Keiro requested a review by HMRC. She makes many of the points listed above but the letter also includes the following:

10 “The events which took place in our church were unique in our history, let alone the time I have been church Treasurer.....We have only had one ‘employee’ at a time. In Christian circles this is regarded as a ‘calling’ rather than a job. Sadly in the case of Peebles Baptist church and our pastor Rev. A....., things went grotesquely wrong and ‘were completely beyond our control’. A very lengthy drawn out period ensued where the church leadership team of four people, one of whom is me, as Treasurer attempted to remedy the situation. This was a gruelling experience where all four people suffered major trauma and very serious illness. This involved the two people in my household, so the effect in my home, within which I deal with – as a volunteer with no financial training – all of the church’s financial transactions was multiplied. There were points where I could barely function, suffering from sleep deprivation, deep anxiety and severe stress. In a small congregation there was no one else available to take over the reins.”

20 Liz Keiro also wrote “.....I had no idea of my omission till Sept 2011 when I received a phone call from HMRC, at which point I *immediately rectified the error.*”

25 14. It was from the letter from HMRC dated 7 February 2012 giving the result of the review that Liz Keiro learned that the return still had not been submitted so she submitted it on 20 February 2012. HMRC remained of the opinion that no reasonable excuse had been established.

15. In the Notice of Appeal dated 29 February 2012 Mr McCall makes similar points to the above.

HMRC’s submissions

30 16. HMRC said that they had no previous knowledge that Liz Keiro had attempted to submit the return prior to 20 February 2012. Therefore they had not produced a log in history. They say that the penalties have been charged in accordance with the legislation and the amount of the penalties has been calculated accurately.

17. HMRC contend that they are under no obligation to issue reminders in respect of late Employer Annual Returns.

35 18. HMRC say that payment of all tax and national insurance contributions on time is a duty of the employer and the lack of a reminder cannot provide a reasonable excuse for the failure.

19. HMRC consider that PBC has not established a reasonable excuse for the late return.

Tribunal's observations

20. The Tribunal has considered these submissions and comments as follows:

5 In the acknowledgement of the Notice of Appeal the Tribunal recommends to parties that they bring along any relevant documents they may have to support the submissions they are proposing to make. Unfortunately neither party to the appeal took heed of this recommendation and so the appeal was characterised by a dearth of evidence in support of what was submitted verbally. This has made the determination of this case more difficult for the Tribunal.

10 21. HMRC submitted that they had issued a penalty notice to the appellant on 26 September 2011. No copy of this notice was produced to the Tribunal. In the absence of this the Tribunal asked for a specimen of the notice but this was not available either. What HMRC did produce was their own internal computer generated record headed Employer P35 Penalty History which recorded that a penalty notice for £400 had been issued on 26 September 2011. They also produced a computer
15 generated form headed "Penalty Details" which recorded similar information and that the penalty was for the period from 20 May 2011 to 19 September 2011. It also recorded that a reasonable excuse type appeal had been received on 17 October 2011. The appellant did accept that they had received a penalty notice for £400 for the period ended 19 September 2011. The written Skeleton Argument provided by
20 HMRC contained a paragraph headed "Calculation and amount of penalty". This is set out above and contains the information "Default period - 19 May 2011 to 20 February 2012" and "Amount - £400". According to The Taxes Management Act 1970 Section 98A the penalty for failure to make a return in the circumstances of where the number of employees is less than 50 is £100 per month for each month (or
25 part of a month) during which the failure continues. Therefore it occurred to the Tribunal that the penalties in this case should total £900 being for the nine month period 20 May 2011 to 19 February 2012. The failure having been put right on 20 February 2012.

30 22. This possibility of an additional £500 of penalties clearly came as a complete shock to those representing PBC. They said they had received no notification from HMRC of the possibility of such additional penalties and understandably had come prepared to address the Tribunal only on the £400 penalty they had appealed against.

35 23. However the Tribunal notes that in their conclusion of review letter dated 7 February 2012 HMRC mention that the penalty rate is £100 per month and "further penalties are still accruing and payable".

40 24. The Tribunal asked Linda McGuigan why the further penalties have not been levied and whether it was HMRC's intention to levy the further penalties of £500 for the period 20 September 2011 to 19 February 2012. Mrs McGuigan replied that she had received no instructions on the matter. She said that she presumed that because the £400 penalty had been appealed by PBC before 20 February 2012 it had probably been decided not to levy the further penalty pending the result of this hearing.

25. The Tribunal is aware of the document “Your Charter” published by HMRC. At Point 9 of this document HMRC undertake to “Do all we can to keep the cost of dealing with us as low as possible.” It occurs to the Tribunal that by not notifying the appellant of the potential for a further penalty they have created the possibility of two
5 appeal hearings where only one would have been necessary. In this way if HMRC now issue a penalty notice for the further £500 they will have potentially doubled the costs for the appellant. Thus this section of the charter has not been adhered to.

26. PBC submitted that they had reasonable excuse for the failure to submit the annual return. The failure had been caused by the trauma and stress caused by the
10 dismissing of a minister who had caused division and distress in the church. The stress had caused ill health and as a result although PAYE payments had been made on time the annual return due by 19 May 2011 had been overlooked. Attempts to put this right had also failed for the same reasons. The Tribunal does not doubt the statements of Mr McCall or Mrs Keiro both of whom were credible witnesses.
15 However it has to be observed that no medical evidence was produced to support their contentions.

27. The level of the penalty and whether the respondent’s failure to send a prompt reminder was unfair; are both 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
20 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 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
25 *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair”.

28. 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
30 Management Act 1970 Section 118(2).

29. The Tribunal accepts that the actions of the new minister were unexpected and unforeseen. His actions created division within the church which the leadership had to address. They had to spend considerable time assisting members who were distressed or confused by the teaching of new doctrines and by new administrative
35 practices whilst having to deal with the same difficulties they were having personally. This created a period of trauma and stress amongst the congregation and leadership and resulted in ill health.

30. The Tribunal accepts that this period of maximum trauma and stress lasted until the minister left the church house in October 2010, but its after effects continued.
40 Liz Keiro in her stressed state thought that all had now been done in respect of dealing with HMRC and the resignation of the minister. In fact she had overlooked the need to submit the annual return. She received no reminder until she received a telephone call from HMRC on 19 September 2011 and, as she thought, immediately submitted

the return that day. On 26 September 2011 she received the penalty notice for the four month period ending 19 September 2011. Understandably she assumed that her submission of the annual return late on 19 September had been successful and had triggered the issue of the penalty notice. In fact it was an unfortunate coincidence of timing that on 19 September HMRC decided to issue many taxpayers with late return penalty notices. It was not until 7 February 2012 that she learned that her attempted submission had been unsuccessful whereupon now being in a calmer state of mind she immediately put the matter right and in doing so realised that in her previously distressed state of mind she had been following a procedure on the computer of pressing the update button which she thought meant she had submitted the return but in fact only updated the information. There was a separate submit button which she had overlooked.

31. Bearing in mind all of these circumstances the Tribunal has decided that the appellant had reasonable excuse for their failure to submit the annual return on time and that that excuse lasted until 7 February 2012 when Liz Keiro received a letter from HMRC from which she realised that her previous attempt to file the return had not been successful. Having realised the problem she corrected it within a few days.

32. The appellant has established a reasonable excuse for the late submission of the Employer's Annual Return (forms P35 and P14). Therefore the appeal is allowed.

33. 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: 9 January 2014