TC04837

Appeal number: TC/2015/05406

PAYE – late submission of Employer's Annual Return – whether the level of the penalty is reasonable - Decision of Upper Tribunal in Hok Ltd applies. Whether there was reasonable excuse for late submission of return - No.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANGELA TAYLOR T/as DRAYCOTT DELI **Appellant**

- and -

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

TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA AIIT

The Tribunal determined the appeal on 11 January 2016 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 9 September 2015 with enclosures, and HMRC's Statement of Case dated 20 October 2015 with enclosures. The Tribunal wrote to the Appellant's Agent on 26 October 2015 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

This considers an appeal dated 9 September 2015 against penalties totalling £1,001 levied by the Respondents (HMRC) for the late filing by the appellant of its Employer Annual Returns (form P35) and for the years 2012 – 2013 and 2013 -2014.

2. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 80.

Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

Taxes Management Act 1970, in particular Sections 98A(2) and 118

3. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

4. Facts

The Appellant Mrs. Angela Taylor is the proprietor of a sandwich shop known as Draycott Deli. She employs her daughter and a number of other part-timers.

During a PAYE inspection it was determined that all employees of the Appellant earn below the taxable threshold. However it was noted that one employee was receiving income from two pensions, and because of this PAYE would have been due. That employee has now resigned and as the remaining staff all earn under the lower earnings level and only have one job no PAYE scheme is now required.

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 before 20 May following the end of the tax year. In respect of the years 2012-2013 and 2013-2014 the Appellant failed to submit Form P35. On 21 May 2015 HMRC sent the appellant a late filing penalty notice for failure to submit end of year tax returns for the periods 2012/2013 and 2013/2014 in the sums of £501 and £500 respectively, total £1,001. A Regulation 80 determination of tax due for the periods is not disputed. The tax due for 2011-2012 was £501.22 and the tax due for 2013-2014 was £663.20.

5. Appellant's submissions

In the Notice of Appeal dated 9 September 2015 the Appellant states "I accepted that I made an error in not setting up a PAYE scheme as one of my employees was in receipt of pensions. I was aware that no scheme was needed if my employees earned under the lower earnings limit and only had one job as my accountant had told me this. It was nothing more than an oversight that I missed the fact that one of my employees received pensions.

I have co-operated fully with HMRC and have never disputed the tax owed. Unfortunately HMRC have been totally inflexible over the penalty and have given no consideration to the devastating effect of such a financial burden…."

A letter dated 7 July 2015 from the Appellant's accountant to HMRC includes the following:

Firstly there is no dispute over the amount of the tax owed…….

Secondly I wish to address the size of the penalty that you are insisting upon……..I wish the subject of the penalty to be referred to another HMRC Officer, preferably one in a more senior position. The reason for my appeal is the size of the penalty. My client runs a sandwich shop and after paying all bills makes a very modest profit, most likely less than the minimum wage when you look at the hours she works. She employs her daughter and a number of other part-timers. I had spoken to her about the PAYE rules and she was confident that none of the staff had any other income. Unfortunately one member of staff was in receipt of pensions, making her a taxpayer…….In no way can you justify such draconian penalties for what is basically an oversight, which has now been corrected……"

6. **HMRC's submissions**

As requested by the Appellant's agent HMRC reviewed the matter and in a letter dated 12 August 2015 they confirmed the penalties.

They submit that the appellant had not submitted Employer's Annual Returns for 2012-2013 or 2013-2014. Therefore in accordance with Taxes Management Act 1970 Section 98A(2) the penalties totalling £1,001 were correctly issued. They say that the penalty is fixed at £100 for every month the return is outstanding with a maximum of the tax due. Thus in the year 2012-2013 the penalty is limited to £501. In 2013-2014 the penalty is £500 being five months at £100.

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

8. HMRC say that it has been stated that at the time of the HMRC visit as far as the appellant was aware none of the employees had any other earnings.

9. HMRC point out that "guidance is available on the HMRC website regarding the actions that an employer should take when they take someone on and when an employer should submit a form P35. There is also guidance available by contacting the employer's helpline."

10. **Tribunal's observations**

On 20 October 2015 HMRC sent their statement of case by e-mail to the Tribunal and copied the Appellant.

11. The Tribunal wrote to the Appellant's agent on 26 October 2015 stating:

"The respondent has filed its statement of case with the tribunal and should also have sent a copy to you.

You are entitled (if you wish) to submit a reply to the Tribunal…….If there are any further relevant documents that you wish the Tribunal to consider, you must send them with

your Reply (also copying them to the respondent) within the 30 day deadline. After the expiry of the 30 days (or upon earlier receipt of any Reply from you) the Tribunal will consider your appeal on the basis of the papers received from both parties.

You may request an oral hearing at any time before the appeal is determined."

No reply enclosing further papers was received from the Appellant or the Appellant's agent and neither was a request for an oral hearing.

12. Thus the Tribunal's was faced with a dearth of evidence in support of the contentions made by the Appellant in its Notice of Appeal and by the Appellant's agent in their letters to HMRC dated 16 June 2015 and 7 July 2015.

The Appellant's agent states that the penalty "represents 70% of the tax due and 20% of my client's income from the business."

The penalty is in fact two penalties for two separate tax years. It is not stated how the 70% figure or the 20% figure have been calculated. It is clear that the tax discovered to be unpaid for two years in respect of the one employee totalled £1,164.42 (see paragraph 4 above). A penalty of £1,001 clearly exceeds 70% of this sum. Significantly the Tribunal has been unable to understand how the 20% figure has been calculated. No accounts or calculations have been submitted to allow the Tribunal to confirm this figure.

On the other hand HMRC explain the level of the penalties for the periods they have calculated but do not include in the papers a copy of the penalty notice issued.

13. The onus lies with the Appellant to prove its case. The Appellant accepts that the failure to realise that one of its employees was in receipt of two pensions was an oversight. It offers no reasonable excuse for that oversight. The Appellant's main contention is in respect of the level of the penalties which it considers "are completely out of proportion to the offence committed" and "draconian". The Tribunal notes that whilst it is the level of the penalties that is of concern there is no dispute that a penalty is due and no contention that HMRC have calculated the penalty inaccurately.

14. The subject of the level of penalties is 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."

15. 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 the failure as contemplated by the Taxes Management Act 1970 Section 118(2).

16. The Tribunal accepts that the appellant has, as it has stated, made an administrative oversight with the result that the Employer's annual returns for 2012-2013 and 2013-2014 were not submitted. The Tribunal has a deal of sympathy with the Appellant but the

Appellant has failed to provide supporting evidence for its contentions in respect of the level of the penalty. It has also failed to provide any reasonable excuse for its oversight. The Appellant has not challenged the accuracy of the calculation of the amount of the penalties. The Appellant decided not to request an oral hearing.

17. In these circumstances on the papers before it the Tribunal has no alternative but to dismiss the appeal and confirm the penalties totalling £1,001.

18. 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 JUDGE

RELEASE DATE: 15 JANUARY 2016