



**TC01478**

**Appeal number: TC/2010/03647**

*PAYE – employer’s annual return (P35/P14) – late filing – communication error with accountants – clerical error – assumption that obligation to file return suspended pending appeal against penalty – reasonable excuse – proportionality – HMRC policy of issuing first penalty only after four months’ delay had already accrued – Enersys Holdings UK Limited v HMRC considered – held, on the facts no reasonable excuse and penalty harsh but not “plainly unfair” – appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**HALL SAFETY & ENVIRONMENTAL LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE AND CUSTOMS (income tax)**

**Respondents**

**TRIBUNAL: KEVIN POOLE (TRIBUNAL JUDGE)  
HELEN MYERSCOUGH ACA**

**Sitting in public in Norwich on 22 July 2011**

**Jason Hall, director for the Appellant**

**Philip Osborne, Higher Officer of HMRC for the Respondents**

## DECISION

### Introduction

1. This appeal concerns a fixed penalty in respect of the late delivery of the  
5 Appellant's employer's annual return for the year ended 5 April 2010.

2. The amount of the penalty which was initially the subject of the appeal was £400, but the total penalties charged were £800 and it was agreed at the hearing (see below) that this appeal could be treated as covering the entire penalty.

### The facts

10 3. The Appellant was at all material times effectively a "one man company", of which its director Mr Hall was the sole employee.

4. Mr Hall works full time in other employment and provides consultancy services on a part time basis through the Appellant. He spends much of his time working away from home. He also has a young family.

15 5. The Appellant was at the relevant time a newly incorporated business. Its first employer's annual return was required to be made in respect of the year ended 5 April 2010.

20 6. As a result of what Mr Hall variously described as "a minor communication error with my accountant" and "a clerical error", he omitted to arrange for the filing of the relevant return by the due date of 19 May 2010. The first time the omission came to his attention was when he received a penalty notice dated 27 September 2010, notifying him of the imposition of a penalty of £400 for the delay up to 19 September 2010 in the filing of the return.

25 7. Mr Hall met with his accountant, who wrote a letter to HMRC on the Appellant's behalf dated 21 October 2010, appealing against the imposition of the penalty "on the grounds that there were no wages paid in the fiscal year to 5.4.10". In passing, we observe that if this had in fact been the case, HMRC have confirmed they would have mitigated the late filing penalty down to £100.

30 8. On 24 January 2011, no return having yet been filed, HMRC sent a further penalty notice, notifying the Appellant of the imposition of a further penalty of £400 in respect of the continuing default in filing the return.

9. The return was finally submitted on 7 February 2011, and it showed a liability of £3,107.30 (combined PAYE and NIC) due in respect of earnings paid to Mr Hall during the year in question.

35 10. When asked at the hearing why the return had not been filed immediately following the receipt of the first penalty notice, Mr Hall said he had assumed his accountant would deal with it. He was too busy dealing with his two jobs and young family to police his accountant's activities and simply relied on him to do what was

necessary. He also complained that communication with HMRC was very difficult if not impossible – he had been written to by at least six different HMRC offices and none of them seemed to be actually in overall control of the case; and whenever he tried to contact HMRC by telephone he was invariably unable to get through or was left on hold for 20 or 30 minutes at a time (unless he was calling the payment line, in which case it was answered almost immediately).

## Discussion

11. Mr Hall’s main complaint was that HMRC should have notified the Appellant of its default as soon as it occurred, giving him the opportunity to remedy it straight away. He would have accepted an initial £100 penalty without objection. He felt HMRC had purposely allowed the penalty to build up to £400 before issuing the penalty determination in order to increase the size of the penalty charged.

12. Although this appeal was initially made only in respect of the first £400 penalty, both parties agreed at the hearing that it should be treated as covering the second £400 penalty as well.

13. Whilst we agree it is unfortunate that HMRC’s policy is not to issue first penalty notices until there is already a four month delay, we do not consider this can afford a reasonable excuse to the Appellant for its delay in delivering the return.

14. We have no power to mitigate the penalty simply as a result of the delay in its issue.

15. We do have power (following the case of *Energys Holdings UK Limited v Revenue & Customs Commissioners* [2010] SFTD 387) to strike down a penalty as disproportionate if it is “not merely harsh but plainly unfair”, and in appropriate circumstances there is no doubt that HMRC’s policy of issuing a first penalty at a time when the minimum penalty payable has already built up to £500 will weigh heavily against them in a Tribunal’s assessment of what is “plainly unfair”.

16. Mr Hall accepted that the return had been filed late, and the only reason given for this (once the oversight had come to his attention as a result of the issue of the first penalty notice) was the delay resulting from his communication with his accountants, possibly compounded by an assumption that whilst the appeal process was in train the obligation to file the return was in some way suspended. We cannot accept that there is a reasonable excuse either for the initial delay or for the subsequent further delay in these circumstances.

17. We took Mr Hall’s main argument to be effectively a submission that the penalty was disproportionate to the default. We acknowledge that the penalty was undoubtedly harsh, but in the circumstances viewed as a whole we are unable to agree that it was “plainly unfair” and therefore cannot interfere with it on proportionality grounds.

18. The appeal must therefore fail and the penalties are confirmed.

19. 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.



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**KEVIN POOLE**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 28 SEPTEMBER 2011**