



TC02649

Appeal number: TC/2012/10184

**INCOME TAX – PENALTY FOR LATE FILING OF END OF
YEAR PAYE RETURN – *Whether the Appellant filed the return on
time – No – Did the Appellant have a reasonable excuse for default
– No – Appeal dismissed.***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DHILLON HAULAGE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

The Tribunal determined the appeal on 28 February 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 8 November 2012, HMRC's Statement of Case submitted on 7 December 2012, and the Appellant's reply to the statement of case dated 2 January 2013.

DECISION

1. The Appellant appeals against the imposition of a penalty in the sum of £100 for the late submission of the employer's annual return (P35 & P14) for the tax year ending 5 April 2012.

2. The Appellant was required to file on-line its end of year PAYE return for 2011/12 by 19 May 2012. HMRC received the return on 11 June 2012 which was 22 days late. Under sections 98A(2) and (3) of the Taxes Management Act 1970, the Appellant was liable to a fixed penalty of £100 for each month or part month that it was in default with its return. The Appellant, therefore, received a penalty of £100 for the period of its default

3. The Tribunal has limited jurisdiction in penalty appeals which reflects the purpose of the legislation of ensuring that employers file their returns on time. The Tribunal has no power to mitigate the penalty. The Tribunal can either confirm the penalty or quash it if satisfied that the Appellant has either filed the return on time or has a reasonable excuse for its failure. The onus is upon the Appellant to prove on a balance of probabilities the matters upon which it asserts to discharge the penalty.

4. The Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) re-affirmed the First Tier Tribunal's limited jurisdiction in respect of penalty appeals, and in particular emphasised that it had no statutory power to adjust a penalty on the grounds of fairness. At paragraph 35 the Upper Tribunal said:

"It is important to bear in mind how the First-tier Tribunal came into being. It was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007, "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is derived wholly from statute. As Mr Vallat correctly submitted, 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. In particular, neither that provision nor any other gives the tribunal discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair or for any similar reason. Pausing there, 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".

5. Section 118(2) of the TMA 1970 gives protection from a penalty if the employer has a reasonable excuse for failing to file a return on time. The reasonable excuse must exist throughout the period of default. The TMA 1970 provides no statutory definition of reasonable excuse. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

6. The Tribunal makes the following findings of fact:

(1) The Appellant has been filing on-line annual employer's returns since the end of 2007.

5 (2) On 25 April 2012 the Appellant's agent submitted a return on-line for which it received an e-mail from HMRC confirming that the submission reference 653/KZ98932 had been successfully filed.

(3) Following receipt of the penalty notice the agent spoke with HMRC and discovered that the return filed on 25 April 2012 had been a test submission. The Appellant's agent immediately resubmitted the return successfully on 11 June 2012.

10 (4) HMRC's e-mail acknowledging receipt of return was generic for both test and live submissions, although it stated that *if this was a test transmission, remember you still need to send your actual Employer annual return using the live transmission in order for it to be processed.*

15 (5) On 29 April 2012 HMRC issued the Appellant with a reminder to file the annual return by 19 May 2012. This reminder was sent to all employers who had not yet filed their annual return for the year ending 5 April 2012. The Appellant asserted that it did not receive the reminder. If it had, the Appellant would have resent the submission.

(6) The Appellant did not file the annual return by the due date.

20 (7) The Appellant's agent held an honest belief that the return had been filed on time.

(8) The Appellant is responsible for the actions of its agent.

25 7. The Tribunal is satisfied that the Appellant held a genuine belief that it had submitted its annual return on 25 April 2012 which was in good time before the deadline of 19 May 2012. The Tribunal considers that HMRC's acknowledgement of receipt of that return did not in itself put the Appellant on notice that the return was defective, despite its warning that if the return was a test submission it would be necessary to send an actual return by the due date

30 8. The issue in this Appeal was whether the Appellant received HMRC's reminder of 29 April 2012. The Appellant contended in its reply of 2 January 2013 that it did not receive the reminder but has offered no explanation for its non-receipt or given an indication of the enquiries it has made about potential reasons for the non receipt. The Appellant was first made aware of the relevance of the reminder notice in HMRC's review letter of 12 October 2012. In those circumstances the Tribunal finds that the
35 Appellant has not established on the balance of probabilities the non-receipt of the reminder issued on 29 April 2012.

40 9. The Tribunal is of the view that a prudent employer conscious of its responsibilities under the Taxes Acts would have been alerted by the reminder and taken some action to check the status of the online return submitted on 25 April 2012, particularly having been previously warned about test submissions in the acknowledgement. The Tribunal holds that the Appellant's actions were not those of prudent employer, and, therefore, did not have a reasonable excuse for its default.

10. The Tribunal dismisses the Appeal and confirms the penalty in the sum of £100.

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.

MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE

RELEASE DATE: 17 April 2013