



TC02668

Appeal number: TC/2012/05981

INCOME TAX – Penalties for late file of employer’s return – no reasonable excuse – no jurisdiction to deal with allegations of perceived unfairness – Appeal dismissed – penalty of £800 confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS GILLIAN LANE

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

The Tribunal determined the appeal on 9 January 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 22 April 2012 with enclosures, HMRC’s Statement of Case submitted on 2 October 2012 and the Appellant’s Reply dated 2 November 2012 (with enclosures)

DECISION

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The Appeal

1. The Appellant appeals against the imposition of a penalty in the sum of £800 for the late submission of the employer's annual return (P35 and P14s) for the tax year ending 5 April 2011.

10 2. The Appellant was required to file on-line an end of year PAYE return for 2010/11 by 19 May 2011. HMRC received the return on 21 March 2012 which was ten months late. Under sections 98A(2) and (3) of the Taxes Management Act (TMA)1970, the Appellant was liable to a fixed penalty of £100 for each month or part month that she was in default with her return. The penalty of £800 related to the
15 Appellant's default for the period 20 May 2011 to 19 January 2012.

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
20 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
25 of fairness. At paragraph 35 the Upper Tribunal said:

30 "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
35 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
40 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. Other Acts of Parliament dealing with penalties for

failure to make tax returns or payments on time specify that insufficiency of funds and or reliance on third parties do not constitute a reasonable excuse (see section 71(1) of the VAT Act 1994 and paragraph 23(2) schedule 55 Finance Act 2009). The limitations on the scope of reasonable excuse imposed by other Acts of Parliament dealing are persuasive when construing reasonable excuse within the context of TMA 1970

6. 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 Tax Acts.

7. The Appeal was submitted by Ms Barnes, the Appellant's agent, who was responsible for filing the return. Ms Barnes explained that she was kept busy over the six week period from the end of the tax year to the filing date of 19 May 2011 because of acting for some 20 clients with approximately 200 employees. Ms Barnes was not set up as an agent to file on-line the Appellant's return. In those circumstances Ms Barnes used the file only facility offered by HMRC but her attempt to file was rejected because unbeknown to her she had used the wrong reference (the collection one rather than the PAYE reference). On 17 May 2011 Ms Barnes e mailed the helpdesk of HMRC online services explaining the difficulties. The helpdesk responded to the e mail within an hour advising Ms Barnes to make contact by telephone as the helpdesk required further information. According to Ms Barnes she attempted to contact the helpdesk but could not get through. Unfortunately Ms Barnes inadvertently failed to follow through with a further telephone call due to work pressures. As she had not heard anything further from HMRC, Ms Barnes assumed that the return may have been filed after all. Ms Barnes was, therefore, surprised to receive a late filing penalty notice on 8 February 2012 for £800.

8. Ms Barnes complained that HMRC's conduct of delaying the issue of a penalty notice for eight months without notification or prior warning was an act of conspicuous unfairness. Ms Barnes considered that HMRC failed to provide her with the necessary support and that there were constant problems with HMRC's IT systems.

9. The Appellant has the responsibility of ensuring that returns are filed by the due date. The Appellant entrusted Ms Barnes with the task of filing the return, and is ultimately accountable for the actions of her agent. Ms Barnes made an honest mistake in completing the wrong reference on the return, and then inadvertently failed to follow up HMRC's request to seek advice from its helpdesk. Honest mistakes, however, are not sufficient to constitute a reasonable excuse. Ms Barnes' actions in relation to the late filing of the return were not those of a prudent employer exercising reasonable foresight and due diligence with proper regard to an employer's responsibilities under the Taxes Acts. A prudent employer would have taken steps to ensure that she was conversant with the requirements of the file only service, and persisted with her efforts to enlist the help of HMRC. In this respect Ms Barnes' mistakes did not arise as a result of purported shortcomings in the services provided by HMRC. The Tribunal, therefore, finds that the Appellant did not have a reasonable

excuse for failing to file the employer's annual return (P35 and P14s) for the tax year ending 5 April 2011 on time.

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10. Ms Barnes allegation that HMRC acted with conspicuous unfairness by not issuing a reminder is a matter outwith the Tribunal's jurisdiction. The Upper Tribunal in *Hok Ltd* confirmed that this Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair. The facts of *Hok Ltd* were principally concerned with HMRC's practice of not issuing reminders.

11. The Tribunal is satisfied that the late filing penalty has been charged in accordance with the legislation. The Tribunal, therefore, dismisses the Appeal and confirms the penalty in the sum of £800.

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.

**MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE**

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RELEASE DATE: 22 February 2013