



TC02708

Appeal number: TC/2012/9882

**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**

**LIFE PROPERTY MANAGEMENT LIMITED Appellant
(THE IRONWORKS)**

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

The Tribunal determined the appeal on 20 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 26 October 2012 and HMRC’s Statement of Case submitted on 6 December 2012. The Appellant did not make a reply to the statement of case.

DECISION

1. The Appellant appeals against the imposition of a penalty in the sum of £1,200 for the late submission of the employer's annual return (P35) for the tax year ending 5 April 2011.

2. The Appellant was required to file on-line its end of year PAYE return for 2010/11 by 19 May 2011. HMRC received the return on 25 June 2012 which was 13 months 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 £1,200 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. 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

5 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.

10 7. The Appellant asserted that it relied on its previous accountants to carry out the payroll function and manage its PAYE compliance duties. At the year end the accountants confirmed to the Appellant verbally that they had carried out the payroll and PAYE compliance function for ten companies in common ownership. It transpired subsequently that the accountants had not filed the end of year PAYE return for three of those companies, which included the Appellant's return. The Appellant argued that it had no reason to doubt the filing of the return because it was under the mistaken impression that the return had been sent to HMRC.

15 8. The Appellant has the responsibility of ensuring that returns were filed by the due date. The Appellant entrusted its accountants with the task of filing the return, and was ultimately accountable for the actions of its agent. In the Tribunal's view, a prudent employer exercising reasonable foresight and due diligence with proper regard to its responsibilities under the Taxes Acts would have had systems in place to ensure that the agent carried out its responsibilities. A verbal confirmation that the return had been filed on time did not meet the standards expected of prudent employers. The Tribunal considers that a prudent employer would make regular checks on progress, and at the very least receive confirmation in writing that the return had been filed on time.

25 9. HMRC issued the Appellant with late filing penalty notices On 26 September 2011, 30 January 2012 and 28 May 2012. The Appellant has not supplied a satisfactory explanation as to why it was not put on notice of the failure to file the return on time earlier than June 2012 when the return was finally submitted

30 10. 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. The Tribunal dismisses the Appeal and confirms the penalty in the sum of £1,200.

35 11. 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.

5

**MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE**

RELEASE DATE: 17 May 2013