



TC02709

Appeal number: TC/2012/5522

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**

M and L STEVENS LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE

The Tribunal determined the appeal on 14 March 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 9 May 2012, HMRC's Statement of Case submitted on 29 January 2013 and the Appellant's reply to the statement of case dated 13 February 2013.

DECISION

1. The Appellant appeals against the imposition of a penalty in the sum of £1,000 for the late submission of the employer's annual return (P35 & P14) for the tax year ending 5 April 2010.

2. The Appellant was required to file on-line its end of year PAYE return for 2009/10 by 19 May 2010. HMRC received the return on 18 April 2011 which was eleven 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 £1,000 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

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 his responsibilities under the Taxes Acts.

7. The Appellant argued initially that the quantum of the penalty was unfair, particularly as it was months before HMRC made it aware of the non filing of the return. The Appellant relied on the FT Tribunal decision in *Hok Limited* which has subsequently been reversed by the Upper Tribunal. The Appellant's reason for the late filing was due to a computer failure at its accountants. Also Mr Stevens, the Appellant's director, telephoned the accountant's office on more than one occasion and was unfortunately told by a junior assistant that the return had been submitted.

8. The Tribunal is restricted to considering whether the Appellant had a reasonable excuse, the threshold for which is high. The Appellant cannot avoid liability by blaming its accountants. The Appellant is responsible for the actions of its agent. The Tribunal is not satisfied that the Appellant had effective controls in place to ensure that the accountants were doing their job. The reference to telephone conversations with a junior member of staff was vague and no details were given when precisely the conversations took place. Also HMRC put the Appellant on notice in September 2010 that penalties had been imposed, and yet it took another seven months before the return was filed. The Appellant adduced no evidence of the steps that it took after receipt of the penalty notice in September 2010. Similarly the mention of computer failure was equally vague. The Appellant supplied no details of the computer breakdown and when it took place.

9. The obligation is upon the Appellant to set out the circumstances to substantiate a reasonable excuse. The Appellant has failed to do this. The Tribunal finds that the Appellant did not have a reasonable excuse for failing to complete the return on time. The Tribunal dismisses the Appeal and confirms the penalty of £1,000.

10. 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: 17th May 2013