



**TC02710**

**Appeal number: TC/2012/6513**

**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**

**ANDREW WHEELER T/A TRAINAGAIN  
(HOSPITALITY CALLS 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 28 May 2012, HMRC’s Statement of Case submitted on 25 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 £500 for the late submission of the employer's annual return (P35 & P14) 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 3 October 2011 which was four and half 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 HE was in default with its return. The Appellant, therefore, received a penalty of £500 for the period of his 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 his responsibilities under the Taxes Acts.

6. The Appellant pointed out that this was the first year that he had completed the returns himself. The Appellant had tried to sort out the problems with the return once he realised he was late. In June 2011 the Appellant telephoned HMRC to ask what he needed to do. As a result of that call he made a return on unprinted stationary to HMRC on 30 June 2011. On 18 July 2011 HMRC advised the Appellant that his return on unprinted stationary could not be processed and suggested that he use the online facility. On 26 July 2011 the Appellant received the activation code for the online facility. On 3 August 2011 the Appellant completed the return online but inadvertently failed to submit the return. The Appellant discovered the error when he received the penalty notice on 26 September 2011.

7. The Appellant argued that a fine of £500 was excessive. The Appellant did his best to resolve the situation and considered that he should not be penalised for the delays caused by HMRC in responding to his correspondence. On 13 December 2011 the Appellant spoke to a Mr Firth at HMRC who stated that the Appellant should only pay a penalty of £100 for being late by one month. The Appellant believed this to be a fair compromise and requested that the penalty be reduced to £100.

8. As explained in the preceding paragraphs the Tribunal's powers are limited. The Tribunal has no authority to mitigate the penalty. The purported agreement with Mr Firth has no bearing on this Appeal and did not relate to the reasons why the Appellant failed to submit his return on time. The Tribunal is aware that the Appellant has instigated HMRC's complaints procedures in respect of the agreement with Mr Firth which HMRC accept took place. The complaints route is the proper mechanism for dealing with matters of poor service over which the Tribunal has no jurisdiction.

9. The Tribunal is restricted to considering whether the Appellant had a reasonable excuse, the threshold for which is high. The Tribunal is satisfied from the Appellant's explanation that he was not properly prepared for taking on the responsibility of completing end of year returns. The Appellant cannot abdicate his responsibility to HMRC. As a result of his poor preparation the Appellant was in a state of catch up and responding to problems. These were not the actions of a prudent employer exercising reasonable foresight and due diligence having proper regard of his responsibilities under the Taxes Acts. A prudent employer would have taken steps to be fully aware of the requirements for completing end of year returns in good time before the deadline of 19 May 2011 and as a result would have been in a position to anticipate difficulties with completion of the return.

10. 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 £500.

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.

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**MICHAEL TILDESLEY OBE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 17 May 2013**