



TC004361

Appeal number: TC/2012/04992

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PAYE – late submission of Employer’s Annual Return – whether scale of penalty is reasonable , and whether penalty is unfair and should be reduced - Decision of Upper Tribunal in Hok Ltd applies. Whether reasonable excuse for late submission of return - No.

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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HAIR TO DYE FOR DARLING LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AII**

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The Tribunal determined the appeal on 1 APRIL 2015 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 3 December 2014 with enclosures, and HMRC’s Statement of Case submitted on 4 February 2015 with enclosures. The Tribunal wrote to the Appellant’s representative on 9 February 2015 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. No reply was received.

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DECISION

1. Introduction

5 This considers an appeal against a penalties totalling £900 levied by the respondents (HMRC) for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2011 – 2012.

2. Preliminary matter

10 HMRC refused to consider the appellant's appeal on the grounds that it was out of time. It is true that the appeal was late. However the reason it was late was because the appellant was totally unaware that the return had not been filed by its accountant who had received the penalty notices and not advised the director. The Tribunal considers that Mrs.C.Goodfellow of HMRC took an extremely harsh line in not accepting the appeal on the grounds that it was late. She failed to appreciate the
15 appellant's situation. It is clear that until a phone call from HMRC on 24 September 2014 the appellant's director had no knowledge that the return had not been submitted by its agent nor had he received the penalty notices. The appellant therefore had no reason to appeal earlier. The appellant therefore had reasonable excuse for the late appeal. The Tribunal has no hesitation in continuing to consider the appeal
20 notwithstanding it is late.

3. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

25 Taxes Management Act 1970 (TMA1970), in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

4. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

Rowland v HMRC [2006] STC (SCD) 536

30 Anthony Wood trading as Propave v HMRC (2011) UKFTT 136 TC 001010

5. Facts

35 Regulation 73(1) of Income Tax (PAYE) Regulations 2003 and Paragraph 22 of Schedule 4 of Social Security (Contributions) Regulations 2001 require an employer to deliver to HMRC a complete Employer Annual Return (Forms P35 and P14) before 20 May following the end of the tax year. In respect of the year 2011-2012 the appellant failed to submit Forms P35 and P14 until 25 January 2013. Where an

employer does not file their annual return on time they will be charged a penalty in accordance with Section 98A(2)(a) and (3) TMA 1970.

On 24 September 2012 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2012 to 19 September 2012. On 28 January 2013
5 HMRC sent the appellant a further late filing penalty notice for the period 20 September 2012 to 19 January 2013. On 15 March 2013 HMRC sent the appellant a final late penalty notice for £100 for the period 20 to 25 January 2013.

On 17 October 2014 the appellant's agents, Sheila Barnes Accountancy Services, appealed against the penalties on the grounds that all the penalty notices had been sent
10 to the appellant's previous accountant and the appellant was unaware that the Employer Annual Return for 2011-2012 had not been filed.

On 14 November 2014 HMRC replied. They refused to accept the appeal on the grounds that it had been sent late. However they did offer a review.

The appellant did not request a review but on 3 December 2014 the appellant's agent
15 sent a notice of Appeal to the Tribunal.

Appellant's submissions

6. In the Notice of Appeal dated 3 December 2014 the appellant's agent states

"The director of the company (Mr. Moreton) had no knowledge of the penalties until he received a telephone call from HMRC Debt Collection Intervention Office (Mrs
20 McStea) on 24 September 2014. The original penalty notices had been sent to.....which is the address of Beaumont Seymour who acted for the company when it was first formed. Mr. Moreton telephoned the Employer Helpline for copies of the penalty notices which were sent to him about three weeks later. It is possible that Beaumont Seymour passed the original letters to the company's former accountant
25 who was responsible for submitting PAYE returns, but this accountant had previously told Mr. Moreton that everything had been filed on time and that there were no issues with HMRC. When I met the former accountant to hand over paperwork he mentioned to me that there had been some penalty notices but that they were incorrect; he had dealt with them and had them cancelled."

30 The Notice of Appeal also includes ".....cost of these penalties would damage a small business which aspires to make a profit. It also describes the penalties as "stringent".

7. In her letter of 17 October 2014 referred to above the appellant's agent makes similar points and includes the following "Mr. Moreton feels that although the
35 previous accountant may have had some difficulties, by changing the company's registered address and by appointing a new agent/accountant he is making every effort to go forward on a solid basis with all deadlines being met properly.

Respondent's submissions

8. HMRC say that under Regulation 73 of the Income Tax (PAYE) regulations 2003 it is the employer's obligation to make end of year returns by the due date

9. HMRC state there is no obligation on them to issue reminders to employers to submit their returns.

5 10. HMRC say that on 15 June 2012 a director of the appellant telephoned them and requested that all correspondence be issued to the business address.

11. HMRC say that they do "not consider a dilatory agent as a reasonable excuse. It is the responsibility of the company to ensure all their tax obligations were met. If the company feels their accountant has failed in their professional capacity or not followed specific instructions then the company should seek redress directly from the accountant."

12. HMRC say the late filing penalties have been charged in accordance with legislation and that the appellant has no reasonable excuse for the late return.

13. Tribunal's observations

15 The level of the penalty and whether HMRC's failure to send a prompt reminder was unfair are all covered in the decision of the Upper Tribunal in the case of Hok Ltd. That decision also considers whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states "...the statutory provision relevant here, namely TMA s 20 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.....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."

25 The level of the penalties has been laid down by parliament and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by the Taxes 30 Management Act 1970 Section 118(2).

14. It is clear that the late return was due to an error of omission by the appellant's former agent. In respect of reasonable excuse the Tribunal has had regard to the decision of Judge Adrian Shipwright in Rowland v HMRC [2006] STC (SCD) 536. In that case the appellant established that she had reasonable excuse for her failure to pay the tax due in full on time because she had relied on advice from experts. That case 35 involved complex tax issues connected with film partnerships. This case involves less complex issues. The Tribunal might have been prepared to follow the Rowland decision but have decided not to do so because in this case there is no evidence to suggest that the appellant had any communication with the agent in respect of 40 submission of the return. The appellant offers no explanation in respect of the director's telephone call to HMRC of 15 June 2012 requesting all future

correspondence be sent to the business address. They also offer no explanation of why after that date they were not aware of all three of the penalty notices which were sent to the business address. The Tribunal could understand that one notice might have gone astray in the post but not all three.

5 .16. The Tribunal does not consider that this constitutes a reasonable excuse. The Tribunal agrees with HMRC that it is the responsibility of the company to ensure all their tax obligations are met. If the company feels their former accountant has failed in his/her professional capacity or not followed specific instructions then the company should seek redress directly from the accountant.

10 17. HMRC have applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2012 to 19 September 2012 (£400); 20 September 2012 to 19 January 2013 (£400); and 20 to 25 January 2013 (£100), total £900. The appellant has established no reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) for 2011-2012 therefore the
15 appeal is dismissed.

18. 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
20 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.

25 **PETER R. SHEPPARD**
TRIBUNAL JUDGE

RELEASE DATE: 23 APRIL 2015

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