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**TC004363**

**Appeal number: TC/2012/06094**

10 *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.*

15 **FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ST. NICOLAS CHURCH & COMMUNITY CENTRE LIMITED**      **Appellant**

**- and -**

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

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

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**The Tribunal determined the appeal on 8 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 8 November 2014 with enclosures, and HMRC’s Statement of Case submitted on 19 December 2014 with enclosures. The Tribunal wrote to the Appellant’s representative on 23 December 2014 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. An email reply dated 13 January 2015 was received and was considered by the Tribunal.**

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## DECISION

### 1. Introduction

This considers an appeal against a penalties totalling £600 levied by the respondents (HMRC) for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2012 – 2013.

### 2. Preliminary matter

HMRC refused to consider the appellant's appeal on the grounds that it was out of time. HMRC say that the appeal notices were sent out on 23 September 2013 and 31 October 2013 but there is no copy of either of these documents in the bundle. The appeal was made. It is probable that the appeal was late. However the reason it was late was because of the changes in management of the appellant. The first Manager was forced to resign through ill health and the second manager was accused of incompetence. The Treasurer appointed in May 2014 was totally unaware that the return had been filed late by its then manager. On enquiry he was initially advised the balance was zero so he did not know there was anything to appeal. The appellant therefore had reasonable excuse for the late appeal. The Tribunal has decided to continue to consider the appeal 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.

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

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

### 5. Facts

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 2012-2013 the appellant failed to submit Forms P35 and P14 until 28 October 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 23 September 2013 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2013 to 19 September 2013. On 31 October 2013 HMRC sent the appellant a final late penalty notice for £200 for the period 20 September 2013 to 28 October 2013.

On 17 October 2014 the appellant's Treasurer, Peter Rogers, wrote a letter to HMRC. The letter contains comments about a penalty of £400 for the late submission of the 2010-2011 return but this seems to have been resolved with a zero balance showing on 5 December 2011. The letter also covers a fine for £750 for late submission of the year end accounts. The following extracts from the letter appear to relate to the £600 penalty which is the subject of this appeal

“When first established, the centre was managed by Mr. Paul Longhurst who unfortunately had to resign through ill health in January 2014 following a long period of illness and a deteriorating condition. He was succeeded by Mrs A O'Reilly in March 2014, she subsequently resigned at the beginning of August 2014 although she never returned to work thereafter. This left me, elected as Treasurer in May 2014 to try and sort out the financial situation.

The letter includes a paragraph which is included in the Notice of Appeal and is set out in paragraph 6 below.

On 27 October 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 8 November 2014 the appellant sent a Notice of Appeal to the Tribunal.

### **Appellant's submissions**

6. In the Notice of Appeal dated 8 November 2014 the appellant's Treasurer states:

“When I took over as Treasurer I was unable to log on to the Government Gateway as the password had disappeared along with the previous manager so I applied for a new password. I received this with a letter dated 13 August 2014 and straight away logged on to the PAYE system to see that there was a balance outstanding of £600. I immediately phoned the Employer's Helpline and spoke to one of your agents who told me that this was an error on the part of HMRC and that the balance outstanding was in fact zero. This call was made on 18 August 2014 at approximately 15:00 and I spoke to Marie who gave me her key number as 44 should there be further problem. I presume you record calls and so will be able to confirm what Marie told me.”

The Notice of Appeal also included:

“The response to my appeal appears to be based solely on the fact that my appeal was late. I explained the reason for this was due to my recent appointment as Treasurer and only discovering the fine when able to logon to the Government Gateway. This fact seems to have been ignored.

My main argument about being told by Marie about a zero balance also seems to have been ignored.

As far as I am concerned Marie who I refer to in Section 6 is a representative of HMRC and having told me on 18 August that the £600 was an error on the part of HMRC and that the balance outstanding was zero, HMRC should stand by that statement even though it was only a verbal one.”

7. In their email dated 13 January 2015 the appellant’s Treasurer states

I have now received HMRC’s somewhat verbose Statement of Case comprising 23 sheets of A4. It is good to see that HMRC admit I was told on 18 August 2014 that the balance of the account was zero

During my many years in Senior Management in the Telecoms industry, I delegated responsibility to my managers. If one of them made a mistake with a decision in a customer discussion, I would stand by that decision, although wrong, as their word should be acceptable to a customer.

It’s my belief that in this case, morally, HMRC should abide by the phrase “dictum meum pactum” (my word is my bond) and abide by the decision given to me by their employee that the balance of the account was zero which they have now accepted I was told.

#### **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 say they sent an electronic reminder to the appellant on 28 April 2013.

10. HMRC state that although Mr. Longhurst resigned in January 2014, the 2012-2013 P35 had already been submitted on 28 October 2013 and so the resignation was after the late submission.

11. HMRC say that the fact that Mr. Rogers took over as treasurer in May 2014 and was unable to view the employer record online until August 2014 has no bearing on the late submission of the 2012-2013 P35 which was received by HMRC on 28 October 2013.

12. HMRC say “Unfortunately Mr. Rogers was advised incorrectly during the telephone conversation of 18 August 2014 that the balance outstanding was £nil and HMRC apologise for this error. HMRC have been unable to obtain a transcript of this conversation. Although this was an error on the part of HMRC this has no relevance to the late submission of the form P35 for 2012-2013.”

13. 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.

#### **14. Tribunal’s observations**

In the Tribunal’s view the submissions of the parties fail to focus on the main issue which is whether the appellant had reasonable excuse for the late return. The appellant concentrates on the incorrect advice given to them in a telephone conversation dated 18 August 2014 and HMRC concentrated on the appeal being late. Both events occurred after the late submission of the return.

15. It appears to the Tribunal that the only possible statement that could explain the late return is found in the appellants letter to HMRC dated 6 October 2014 “the centre was managed by Mr. Paul Longhurst who unfortunately had to resign through ill health in January 2014 following a long period of illness and a deteriorating condition.” There is no submission from the appellant that the manager’s ill health gave them reasonable excuse for the late submission of the return in 2013. It is disappointing to note that there is no evidence to suggest that when receiving this letter HMRC enquired as to whether the manager’s ill health had affected the appellant’s ability to submit the return on time.

16. The level of the penalty is 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 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.”

17. 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 Management Act 1970 Section 118(2).

18. Whilst it is very disappointing that HMRC are not prepared to follow the motto “My word is my bond” adopted by many businesses including the Stock Exchange they are correct to say that the error happened after the return had been submitted late and cannot be regarded as a reasonable excuse for its lateness.

Other than the possibility of the ill health of the manager there is no explanation as to why the return was submitted over 5 months late.

19. The Tribunal does not consider that a reasonable excuse for the late return has been established. The Tribunal agrees with HMRC that it is the responsibility of the company to ensure all their tax obligations are met.

HMRC have applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2013 to 19 September 2013 (£400); 20 September 2013 to 28 October 2013 (£200) total £600. The appellant has established no reasonable excuse for the late submission of the Employer’s Annual Return (Forms P35 and P14) for 2012-2013 therefore the appeal is dismissed.

20. 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.

**PETER R. SHEPPARD  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 APRIL 2015**