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**TC04475**

**Appeal number: TC/2015/01910**

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*PAYE – late submission of Employer’s Annual Return Form P11D(b) – 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**

**BANRIAN CONSULTING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

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

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The Tribunal determined the appeal on 27 May 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 bearing the date 16 August 2015 but received by the Tribunal on 27 February 2015 with enclosures, and HMRC’s Statement of Case submitted on 24 March 2015 with enclosures. The Tribunal wrote to the Appellant on 26 March 2015 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. The Appellant replied on 10 April 2015 forwarding a number of documents in response which were considered by the Tribunal.

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## DECISION

### 1. Introduction

5 This considers an appeal against penalties totalling £400 imposed under Regulation 81 (2)(a) of the Social Security Regulations 2001 by the Respondents (HMRC) for the late filing by the Appellant of its Employer Annual Returns (form P11D(b)) for the tax year 2013-2014.

### 2. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 85.  
10 Social Security Regulations 2001 (SI 2001/1004) in particular Regulation 80 (1) 7 (1A); Regulation 81 (2) (a); 81(4); 81 (5) and 81 (9)

### 3. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)  
15 Rowland v HMRC [2006] STC (SCD) 536  
Anthony Wood trading as Propave v HMRC (2011 UK FTT 136 TC 001010)

### 4. Background

20 Where an employer provides expenses and benefits to directors, or to employees earning at a rate of £8,500 or more a year, the employer is required to make a return on Form P11D, to HMRC of those expenses and benefits not administered through the company's payroll system. The P11D must be filed before 7 July following the end of the tax year to which it relates in accordance with Regulation 85 of the Income Tax (PAYE) Regulations 2003.

25 In addition to the P11D the employer must also file a return on form P11D(b) where Class 1A National Insurance Contributions are payable, by 6 July following the end of the year to which the return relates, in accordance with Regulation 80(1) of the Social Security Regulations 2001.

30 Form P11D(b) is a dual purpose return. It is a declaration that all the P11Ds are correct and complete and it is also the return of Class 1A National Insurance Contributions due.

Where the Employer does not file their P11D (b) form on time they will be charged a penalty in accordance with Regulation 81(2) of the Social Security Regulations 2001. Fixed penalties of £100 per month (or part month) for each batch (or part batch) of 50  
35 earners for whom Class 1A National Insurance Contributions are payable are charged for the first 12 months a return is late. The total penalty must not exceed the total amount of Class 1A due for that year.

In accordance with Regulation 81(9) of the Social Security Regulations 2001 a  
40 penalty will not be chargeable if the employer has a reasonable excuse for filing their P11D(b) late.

## 5. Facts

The Appellant was required to file a form P11D(b) as Class 1A National Insurance Contributions were payable for the year 2013-2014. The filing date for the form was 6 July 2014.

- 5 The Appellant made a final Full Payment Summary for 2013-2014 on 7 April 2014 which confirmed that a form P11D(b) was due.

HMRC say they sent a reminder to all employers in June 2014 to remind them to send in completed forms P11D and P11D(b) by 6 July 2014 and to pay any Class 1A National Insurance contributions .

- 10 In August 2014 HMRC issued a P11D(b) interim penalty letter to all employers who had not filed their P11D(b); to advise the form had not been received and to avoid further penalties arising a completed form should be submitted before September 2014.

The Appellant failed to submit Form P11D(b) until 8 October 2014.

- 15 On 28 October 2014 HMRC sent the Appellant a late filing penalty notice for £400 for the period 7 July 2014 to 8 October 2014.

## 6. Appellant's submissions

In the Notice of Appeal and subsequent correspondence the Appellant makes and repeats the following points:

- 20 a) The Appellant considers that the penalty of £400 is disproportionate and unfair.
- b) The Appellant mistakenly believed that by filing online the need to file a form P11D(b) was negated.
- c) The Appellant states it did not receive the reminder of June 2014.
- 25 d) Some of the correspondence from HMRC was confusing. The interim penalty letter dated 27 August 2014 was received on 3 September 2014 and had no address for reply.
- 30 e) The Appellant says that had HMRC alerted them to the penalty of £100 at the end of the first month of default they would have been in a position both to take corrective action immediately and thereby to avoid triggering further penalties.
- f) Payment was made on time on 15 July 2015 so there has been no loss to the revenue.

- g) The Appellant says that its compliance record has been good and that this should be taken into account.
- h) The Appellant refers to recommendations in the report On Tax Penalties and to Chapter 3 of that report “Behavioural Penalties” as they Impact Taxation by John Whiting, Tax Director of the Office of Tax Simplification.
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7. In respect of 6 a) HMRC say the amount of the penalties have been calculated in accordance with legislation.
8. In respect of point 6 (b) HMRC say that the Appellant has been submitting forms P11D and P11D(b) since 2010 and should be familiar with submitting the forms.
- 10 9. In respect of point 6 (c) HMRC contend that the law does not require HMRC to issue reminders in respect of late Employer Annual Returns. Furthermore there is no statutory obligation upon HMRC to issue penalty reminder notices any closer to the filing deadline of 6 July.
- 15 10. HMRC observe that point the lack of address in the letter dated 27 August 2014 at point 6 (d) was after the due date is so does not establish a reasonable excuse for the late return.
11. In respect of points 6 (f) HMRC say that the fact that payment for National Insurance Contributions was made on time does not establish a reasonable excuse for the late submission of the Form P11D(b)
- 20 12. In respect of point 6 (g) HMRC say that payment of all tax and national insurance contributions on time is a duty of the employer and cannot provide a reasonable excuse for the failure.
13. HMRC say they issued a letter to the appellant on 23 September 2014. The P11D(b) was received on 8 October 2014. If the form had been received before 6 October 2014 the penalty would have been £100 less.
- 25 14. In respect of the quote by the appellant from the report by John Whiting of the Office of Tax Simplification the quote used by the Appellant does not apply to late filing penalties for which reasonable excuse applies.

#### 15. Tribunal’s Observations

30 The Tribunal’s has considered these submissions and comments as follows:

In respect of the Appellant’s submissions on the level of the penalty; whether the respondent’s failure to send a prompt reminder was unfair; and the respondent’s updated procedures 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  
35 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.”

- 5 The Tribunal considers that the Upper Tribunal’s decision in Hok Ltd overturned the decision referred to by the Appellant.

The level of the penalties has been laid down by parliament. 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 Regulation  
10 81 (9) Social Security Regulations 2001.

16. The Appellant acknowledges he had made a mistake which resulted in the return not being submitted by the due date. The Appellant offers no reasonable excuse for that failure. It follows that a first monthly penalty of £100 is due.

15 17. Had HMRC at that time promptly notified the Appellant of the penalty for that failure and had the Appellant responded promptly a second penalty of £100 would already have been due. Thus the Appellant’s arguments as to the delayed advice by HMRC of the first and subsequent monthly penalties can only apply to the third and fourth monthly penalties.

20 18. The Tribunal is bound by the decision of the Upper Tribunal in Hok Ltd. and cannot accept that HMRC’s delay in notifying the first three of the monthly penalties constitutes a reasonable excuse. The Appellant has offered no other reasonable excuse for the late submission of the return.

19. Unfortunately for the Appellant the legislation makes no provision for reduction of a penalty in the light of a past good record for filing on time.

25 20. HMRC are correct in stating that the section of the report by John Whiting of the Office of Tax Simplification which the Appellant quotes from Chapter 3 “Behavioural Penalties” does not apply to late filing penalties for which reasonable excuse applies.

30 21. Whilst HMRC’s communications with the Appellant may have lacked clarity they have applied the legislation correctly and calculated the amount of the penalties accurately for the period 7 July 2014 to 8 October 2014. The Appellant has not established a reasonable excuse for the late submission of the Employer’s Annual Return (Form P11D (b)). Therefore the appeal is dismissed.

35 22. 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: 12 June 2015**

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