



TC02927

Appeal number: TC/2012/04912

TYPE OF TAX – 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.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FOUNTAYNE INTERNATIONAL SUPPLIES LIMITED Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD
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The Tribunal determined the appeal on 22 August 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 17 April 2012 with enclosures, and HMRC’s Statement of Case submitted on 25 June 2013 with enclosures. The Tribunal wrote to the Appellant on 26 June 2013 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 to the Tribunal against a penalty of £400 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2010 – 2011. By a direction of the Tribunal dated 30 April 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper Tribunal (Tax & Chancery Chamber) in the matter of Hok Ltd. That decision was released on 23 October 2012. The Appellant's agent also appealed to HMRC in
10 respect of a further penalty of £100 levied by HMRC for the continued failure.

2. Legislation

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

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

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

3. Case law

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

4. Facts

20 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
25 20 May following the end of the tax year. In respect of the year 2010-2011 the appellant failed to submit Forms P35 and P14 until 2 October 2011. On 26 September 2011 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2011 to 19 September 2011. On 5 October 2011 HMRC sent the appellant a final late filing penalty notice for £100 for the period 20 September 2011 to 2 October 2011. No appeal against this further penalty has been received by the Tribunal although as noted above the appellant's agent appealed against it to HMRC.

30 The statement of case provided by HMRC notes the appeal against the £400 penalty dated 17 April 2012 and the letter to HMRC dated 6 October 2011 appealing against the penalty of £100. The narrative of the statement of case covers all details concerning both the £400 and £100 penalty.

35 In the Notice of Appeal and correspondence provided the appellant acknowledges that the return was late because of a pure oversight and that a fine is appropriate. However its appeal is against the scale of the penalty. The penalty for a late return is £100 per 50 employees for each month or part month that the return is outstanding.

5. The appellant considers a penalty of £100 is appropriate but argues that because HMRC did not advise the oversight for 4 months it is faced with a much higher penalty than it would have if HMRC had levied the initial £100 penalty promptly. The appellant asks the Tribunal to reduce the level of it to £100.

5 6. The appellant offers no excuse for the late return other than it being a pure oversight by an appellant who previously has an impeccable record and notes that all PAYE tax due has been paid on time.

7. The level of the penalty; and whether the HMRC's failure to send a prompt reminder was unfair; are 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."

8. 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 the Taxes Management Act 1970 Section 118(2) and in this respect the appellant has acknowledged its oversight and not given any excuse for it.

9. HMRC have applied the legislation correctly and calculated the amount of the penalty accurately for the period 20 May 2011 to 19 September 2011 (£400). The Tribunal also notes that the penalty for the period 20 September to 2 October (£100) was also applied and calculated accurately. The appellant has offered no reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is dismissed.

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.

PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 30 September 2013