



**TC02934**

**Appeal number: TC/2012/04956**

*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 - Yes.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAGLESS HOLDINGS LIMITED**

**Appellant**

**- and -**

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

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

**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 16 April 2012 with enclosures, and HMRC’s Statement of Case submitted on 21 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 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.

### 10 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 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 20 February 2012. On 26  
25 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.

5. HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2011 to 19 September 2011 (£400).

30 6. Having established that the penalties have been applied correctly and calculated accurately 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).

7. In the Notice of Appeal the appellant states

35 “On the 12 May I calculated the Tax and NI outstanding for our Payroll. I then signed up to and entered the details on to the HMRC website as HMRC are no longer accepting paper submissions. The information entered on the website could not be transmitted as we did not have an activation code at that time. However a cheque was sent to HMRC paying up the outstanding Tax and NI, along with a paper copy of the P35 and associated tax forms and we duly sat back and waited for the activation code.

The activation code did not arrive so we tried again to obtain one on 12 August 2011. In each case we received direction by telephone from HMRC to make sure we had done everything correctly. Still an activation code did not arrive. We had several attempts at sorting out the problem between September and December 2011. During  
5 which time I have been insulted by one HMRC representative. For the most part we have found HMRC representatives unhelpful on these occasions. Finally we received the activation code on the third attempt, in February. We should not be penalised for the shortcoming of HMRC.”

8. In their “Conclusion of Review” letter dated 29 March 2012 HMRC say that the  
10 appellant “made a total of three separate registrations – on 12 May 2011, 12 August 2011 and 15 February 2012. Activation codes would have been issued to your business address on all three occasions. However, for whatever reason, you did not activate the first two codes within the 28 day limit, so those registrations were cancelled. There does not appear to have been a problem with receipt of the codes to  
15 the business address as the address HMRC holds for you has been the same since 24 May 2010 and the third code obviously arrived as it was activated on 20 February 2012-the day on which the return was submitted. A return can only be filed once. The fact that you were able to file on 20 February 2012 indicates that a previous attempt was not successful.”

9. In considering this exchange the Tribunal observes that HMRC confirm that the  
20 appellant did try on 3 occasions to submit the return online. HMRC say Activation codes would have been issued on each occasion. The Tribunal notes there it has not been provided with any evidence to back up whether the codes were or were not sent and it is therefore more accurate to say Activation codes should have been issued.  
25 HMRC then say “for whatever reason you did not activate the first two codes.” The codes are sent by post so one reason could well have been that the appellants are being truthful and did not receive them even though they were correctly addressed.

10. On 15 and 28 February 2012 the appellant wrote to HMRC to the effect that as  
30 he was concerned that the process had not been completed he had sent a paper return together with a cheque for payment of £57,630.78 on 14 May 2011. The cheque had been debited to the appellant’s account on 18 May 2011 and HMRC accept that they posted it to the appellant’s account on 16 May 2011. However they have no trace of the paper return which they say would not have been valid as they required online returns and the appellant was aware of this.

11. The HMRC guidance says “Give yourself at least a week. Going through the  
35 online registration process only takes a matter of minutes. But before you can start using the service you’ll need to wait for an Activation PIN that HMRC will send you by post.....This will arrive within seven days of your registration.”

12. On 12<sup>th</sup> May 2011 the appellant tried to submit its form online within reasonable  
40 time allowing seven days for the activation code to be forwarded to it by post. This was not received making it impossible for the return to be submitted on time. The Appellant tried again in August with the same result. The appellant may be criticised for taking 3 months to try again but the Tribunal observes that it took even longer

(over 4 months) for HMRC to send the late filing penalty notice to the appellant by which time the penalty had increased from £100 to £400. In the absence of the activation code the appellant definitely sent the tax due and claims to have also sent a paper return although this would not have been considered invalid by HMRC. Thus  
5 the appellant made genuine efforts to submit its return by the due date but was unexpectedly prevented from doing so by the lack of an activation code. The tribunal considers that the appellant has therefore established a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is allowed.

10 13. 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  
15 "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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**PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 02 October 2013**