



**TC02950**

**Appeal number: TC/2012/04898**

*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**

**DUFFIN TRANSPORT**

**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 29 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 24 June 2013 with enclosures. The Tribunal wrote to the Appellant on 25 July 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. The appellant’s agent replied by letter dated 23 July 2013 and the Tribunal also read that..**

## DECISION

### 1. Introduction

5 This considers an appeal against a penalty of £500 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 27 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  
10 October 2012.

### 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 6 October 2011. On 26 September  
25 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 14 October 2011 HMRC sent the  
appellant a final late filing penalty notice for £100 for the period 20 September 2011  
to 6 October 2011.

### Appellant's submissions

30 5. In the Notice of Appeal and correspondence provided the appellant's agent  
Stevenson and Wilson, chartered accountants advise that on 21 December 2010 the  
business known as Duffin Transport ceased and was transferred into the limited  
company Duffin Distribution Limited. The employees were all issued with Forms P45  
at that date and all PAYE tax and national insurance was paid. An administrative  
35 oversight resulted in the non-filing of the Employer Annual return at 5 April 2011 as  
Duffin Transport assumed that their PAYE tax affairs had been dealt with the Return  
was not considered at the year end as the PAYE reference was not live. The Employer  
annual Return for Duffin Distribution was filed.

6. They also submit that the penalties seem disproportionate as all tax and insurance was paid on time.

They submit that the first penalty notice was not issued by HMRC until 26 September 2011 by which time the penalties had built up to £400 and a second penalty of £100 had already accrued. They submit that the penalty notices could have been issued sooner.

They also draw attention to the First-tier Tribunal decision in Hok Limited.

### **HMRC submissions**

7. HMRC submit that the appellant's agent states that the late return was due to an administrative oversight. They say that guidelines on the HMRC web-site provide clear guidelines for employer regarding "PAYE if your business closes or changes". The "PAYE if your business closes" guidance reminds employers that they have to complete end of year PAYE forms using information up to the date on which the business closes and must send their Employers Annual return for the year.

8. HMRC say that there is no statutory obligation on HMRC to issue penalty notices any closer to the filing deadline of 19 May.

9. In respect of the decision of the First tier Tribunal in the case of Hok Ltd , HMRC submit that this was appealed and the Upper Tribunal overturned the decision.

10. HMRC consider that the appellant has offered no reasonable excuse for the late return.

### **11. The Tribunal's observations**

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 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."

12. 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).

13. The appellant's agent has said that the late filing was due to an administrative oversight . The tribunal understands that when a business is transferred there are many administrative matters to attend to and it is very easy to overlook something especially if there is no payment to be made. That is what happened in this case.  
5 HMRC provide guidelines on the web-site to assist in such situations and there website specifically includes the reminder to submit an Employer's Annual return in these situations.

14. 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) and 20  
10 September to 6 October 2011 (£100). The Tribunal finds that the appellant has not established that it had a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) for 2010-2011. Therefore the appeal is dismissed.

15. 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)"  
20 which accompanies and forms part of this decision notice.

25 **PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 7 October 2013**