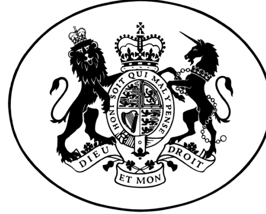


# TC02989

**Appeal number: TC/2013/01526**

*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**

**TRM ELECTRONICS LIMITED** **Appellant**

**- and -**

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

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

**The Tribunal determined the appeal on 4 October 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 e-mailed to the Tribunal on 28 February 2013, and HMRC's Statement of Case submitted on 16 April 2013 with enclosures. The Tribunal wrote to the Appellant on 25 April 2013 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. A reply dated 10 May 2013 was received and considered by the Tribunal.**

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## DECISION

1. **Introduction**

This considers an appeal against a penalty of £100 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2011 – 2012.

**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, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

2. **Case law**

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

3. **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 2011-2012 the appellant failed to submit Forms P35 and P14 until 14 June 2012. On 19 June 2012 HMRC sent the appellant a late filing penalty notice for £100 for the period 20 May 2012 to 14 June 2012.

4. The appellant has made lengthy submissions.

These included the following:

"On 22 April 2012 we received the resignation without notice of a programmer …….who worked for us for 3 years. Sadly we discovered he had destroyed files on his computer , taken up front wages, had sabotaged code and been negligent. This had resulted in my working late almost every night, the loss of 1,000,000 pounds of new work. We are a small company and this is a devastating blow.

The fact is that TRM now has 3 members of staff and all are very overloaded. On top of this an apprentice left, another member of staff absconded without notice, we later discovered he had been arrested and his trial is next month. Dealing with the absconder alone is a major liability alone."

5. The appellants who are expert computer programmers submit that if the taxpayer and HMRC have properly tested their software to check it works properly there should be no need to send a test transmission.

6. The appellant makes a number of submissions about the receipt issued by HMRC for what they allege was a test submission. The appellant says that if a receipt is issued it must be because HMRC received the submission and therefore have the return. If HMRC have received something regarded as a test then the receipt should clearly indicate this. They say they the receipt did not make clear it was for a test submission and therefore they accepted it in good faith as confirming they had discharged their liability to submit the annual return. They say the receipt is either false, misleading, or non specific. However no copy of the receipt is submitted in evidence.

7. The appellant offers no other excuse for the late return other than it is considered that the return had been submitted successfully on 20 April 2012 and had received a receipt for it.

8. The appellant submits that HMRC have produced no evidence of the Appellant's submission of its return in either test or live mode neither have they produced evidence of their acknowledgements.

9. HMRC submit the appellant has been an employer since 26 September 1994, they have been filing their returns online successfully for a number of years and therefore should be familiar with the process.

10. HMRC submit that although the e-mail sent for a successful submission is the same whether it is a test or live submission the appellant would have also received a message stating

"Software – 9001: this submission would have been successfully processed if sent under non test conditions."

HMRC contend that this message should have alerted to the appellant that they had filed their return in test mode and would still need to file their return in live mode.

11. HMRC say that although the appellant assumed their process was successful this was not the case and HMRC cannot accept this as a reasonable excuse.

12. HMRC make no comments about the staff difficulties mentioned by the appellant.

13. HMRC provide a summary of a search which shows that On 20 April 2012 the appellant submitted a return in test mode and then on 14 June 2012 submitted a return in live mode. What is also evident is that in previous years the appellant had always used live mode and had never used test mode.

14. **The Tribunals Observations**

The level of the penalty and whether it 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."

15. 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).

16. The problem for the Tribunal is that as the appellant submits there is no evidence in the form of the return that was submitted on 20 April 2012 and HMRC's response to it. In their statement of case HMRC outline in detail the procedures, they say what should happen, what responses should be received. They provide copies of the guidance they give. What they fail to do is provide evidence of what actually did happen. The appellant asserts that it submitted the return on 20 April 2012 and got a receipt from HMRC but again no evidence in the form of a copy of the submission and receipt is provided by the appellant. HMRC say that the appellant is only able to make a live submission of an annual return once so the fact that the appellant made a successful submission on 14 June 2012 is evidence that the submission on 20 April 2012 was in test mode. No evidence in the form of the return submitted on 14 June 2012 or HMRC's acknowledgement of it was provided to the Tribunal.

17. The tribunal concludes that both parties accept that a submission was made on 20 April 2012 whether it be in test or live mode. This date is well in advance of the deadline of 19 May 2012. In the absence of good evidence the Tribunal finds that on the balance of probabilities the appellant submitted the return in test mode. However because of the lack of evidence the Tribunal is unable to make any finding as to the format of the receipt received by the appellant.

18. It is apparent that only two days after the test submission of the return was made on 20 April 2012 the company suffered the start of a series of staff difficulties. The first event was the resignation of a programmer on 22 April 2012. The programmer had destroyed files on his computer, taken up front wages, sabotaged code and been negligent. Putting the ensuant problems right clearly caused an overload of work on the remaining employees. All of this put a great deal of pressure on the appellant's staff and time which might have been spent on checking more carefully the acknowledgement and supporting electronic responses for the Annual return and whether the Annual return had been submitted properly had to be spent on attending to other matters.

19. The tribunal considers that there is inconclusive evidence concerning the nature of the receipt received by the appellant. The appellant suffered unforeseen staffing difficulties which severely disrupted the business of the appellant who as a consequence unexpectedly had to attend to the considerable problems created. The

Tribunal accepts that these establish that the appellant had reasonable excuse for the failure to submit its annual return in live mode.

20. The Tribunal notes that Section 118 (2) of the Taxes Management Act 1970 includes the following:

"………and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse ceased."

It is clear to the Tribunal that as the Annual return was submitted on 14 June 2012 there was no unreasonable delay after the excuse ceased therefore the Tribunal finds that the excuse continued throughout the failure period.

21. Paragraph 9 of Schedule 56 of the Finance Act 2009 (Special Reduction) provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances. On the information supplied to the Tribunal in this case it would appear that HMRC did not consider whether there were any special circumstances which would allow them to reduce the penalty.

22. HMRC have applied the legislation correctly and calculated the amount of the penalties accurately as £100 for the period 20 May 2012 to 14 June 2012. However the appellant has established a reasonable excuse for the late payment of the tax due. Therefore the appeal is allowed.

23. 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: 25 October 2013**