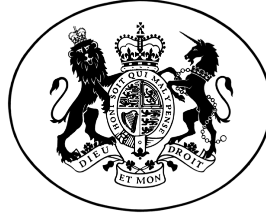

TC03835

Appeal number: TC/2013/05639

INCOME TAX – late filing penalties – employer's return – reasonable excuse – reliance on third party agent – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROX PRODUCTIONS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD J MANUELL

The Tribunal determined the appeal on 22 November 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 15 May 2012, HMRC's Statement of Case submitted on 7 December 2013 (with enclosures) and the Appellant's Reply dated 14 January 2013. The appeal had been stayed to await the Upper Tribunal's decision in *Hok* [2012] UKUT 363 (TCC).

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DECISION

1. This determination has been prepared following the Appellant's request for full findings following the promulgation of the standard short form determination usual in default paper appeals. In reality having heard no live evidence from either side there is little which the Tribunal can usefully add, nevertheless a full decision is required to enable a Notice of Appeal to be considered. Unfortunately although a request for full reasons was made by the appellant as long ago as 30 December 2013, due to administrative error the request was not notified to the judiciary until 15 July 2014. The delay is regrettable.

2. The Tribunal decided that the Appellant had shown no reasonable excuse for the late filing of its Employer's Annual Return (P35 and P14) for the year 2010-2011 which was due by 19 May 2011 (electronic). The return was not received until 21 October 2011. The Appellant incurred a penalty of £600.

3. A detailed summary of the relevant legislation with full extracts was provided to the Appellant by HMRC with the Statement of Case dated 7 December 2012 served on the Appellant and copied to the Tribunal. There was no dispute about the law and it will not assist the Appellant if the Tribunal were to set out the relevant legislation again in detail here.

4. The key section is 93(8) of the Taxes Management Act 1970 (as amended) ("TMA"):

> On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the [First-tier Tribunal] may –
> (a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or
> (b) if it does not so appear to them, confirm the determination.

5. It should be noted (a) that there is no statutory definition of "reasonable excuse" in the TMA: see, e.g., section 118(2) where the same term is used, again undefined, and (b) that as the penalties applicable for failure to deliver a return are fixed in amount, the Tribunal's powers are restricted by TMA section 100(2)(a).

6. The Appellant contended in summary that it had relied on its previous accountant who had claimed to the Appellant's director that he had submitted the return in time and would deal with the penalty notified on 26 September 2011 of £400. In the absence of a response from the former accountant, the Appellant's director contacted HMRC and spoke to Mr Morgetroyd on 3 November 2011 who informed the Appellant's director that there was no penalty on the system as the P35 was sent in on time. That was, however, subsequently contradicted by a penalty letter

for £600. In its Reply the Appellant reiterated that it had relied on its former accountant and had instructed a new accountant when it became apparent that the P35 had not been filed. Had the Appellant been notified sooner the penalty would have been lower. The Appellant had not intended to default in its filing obligations.

7. HMRC produced evidence to show that the Appellant's Employer Annual Return was not filed until 21 October 2011. The Appellant had not registered as a new employer for the tax year commencing 6 April 2010 until 1 August 2011, which meant that the P35 return for 2010-2011 was overdue by that date. The content of the telephone call to Mr Morgetroyd is disputed in that HMRC have no record of the call. HMRC maintain that in any event Mr Morgetroyd did not have access to the correct information.

8. As both parties have consented to the Tribunal dealing with this appeal on the papers, doubtless for sensible commercial reasons, the Tribunal must work from the necessarily limited evidence before it. Unfortunately the Appellant produced no evidence to show that it had any solid foundation for believing that the return had been filed on or before the due date by its previous accountants, such as to put them off guard. Such evidence might (for example) have consisted of notes of telephone calls, one or more letters or emails or a fee note for services rendered. It was for the Appellant's director(s) to supervise their agents and to ensure that the company's statutory registration and filing deadlines were met.

9. The Appellant produced a note of its director's conversation with Mr Morgetroyd on 3 November 2011 which stated that the penalty had been removed as the P35 had been filed in April [2011]. Again HMRC's records as produced to the Tribunal show that Mr Morgetroyd's comments as understood by the Appellant's director were based on a mistake of fact, as there had been no April 2011 filing.

10. The Tribunal finds from the evidence produced that the Appellant was under a misapprehension about its obligations as an employer, although to the Appellant's credit action was taken once the Appellant realised that it was in default and had not filed its P35 return. Nevertheless, the Appellant was unable to show that it had met its filing obligations until 21 October 2011, the date recorded by HMRC as the successful electronic submission. HMRC were not in any way responsible for the Appellant's misapprehension. The conversation with Mr Morgetroyd on 3 November 2011 was to that extent irrelevant, as the belated filing had occurred on 21 October 2011 and was an established fact bound to lead to a penalty notice which duly followed.

11. The Tribunal finds that the explanation provided, reliance on a third party who failed to perform, was not shown to be a reasonable excuse. The Appellant may well have recourse against its unreliable agent by way of remedy. The Upper Tribunal in *Hok* [2012] UKUT 363 (TCC) found that there was no duty on HMRC to issue reminders about penalties.

12. The wider proportionality issue behind the level of penalties was decided in favour of HMRC by the Upper Tribunal in *Total Technology (Engineering) Ltd v*

Revenue and Customs Commissioners [2012] UKUT 418 (TCC). In short, the harsh penalties are statutory, i.e., imposed by parliament for a permissible purpose and no greater than is needed to secure compliance with filing and payment obligations. The Tribunal while recognising the Appellant's difficulties has no power to reduce penalties of this type in the absence of evidence supporting a reasonable excuse. The appeal is dismissed.

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 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD J MANUELL
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2014