



TC03925

Appeal number: TC/2011/07678

***TYPE OF TAX – PAYE – late submission of Employer’s Annual Return –
Whether there was reasonable excuse for late submission of return - No.***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THOMAS BRIGGS (BLACKBURN) LTD

Appellant

- and -

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

Respondents

TRIBUNAL: PRESIDING MEMBER

PETER R. SHEPPARD FCIS FCIB CTA AIT

The Tribunal determined the appeal on 12 August 2014 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 5 September 2011, and HMRC’s Statement of Case submitted on 10 November 2011 with enclosures. The Tribunal wrote to the Appellant on 21 November 2011 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

This considers an appeal against a penalty of £1,200 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2008 – 2009; and a penalty of £800 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2009 – 2010.

2. The Tribunal notes that the Appellant's Notice of appeal document states it is appeal against penalties totalling £1,600. However in the documents leading up to the Notice of Appeal and in their paper hearing submission HMRC have addressed penalties totalling £2,000 as detailed in paragraph 7 below. The Tribunal has therefore proceeded on the basis that the appellant intended to appeal against five penalties each of £400 totalling £2,000.

3. By a direction of the Tribunal dated 22 May 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. Unfortunately following the decision in Hok Ltd. this appeal was overlooked by HMRC and has only now been brought forward for consideration.

4. Preliminary Matter.

The decision appealed against was the conclusion of the review by HMRC dated 1 July 2011. This provides that an appeal to the tribunal must be made within 30 days of the letter. The Notice of Appeal is dated 5 September 2011 and is therefore outside the time limit. HMRC has stated that it does not object to the short delay. The Tribunal also has no objection so it has considered the appeal.

5. 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).

6. Case law

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

7. Facts

The appellant is an old established printing company incorporated in 1909 but whose history goes back to 1872.

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 2008-09 the appellant has failed to submit Forms P35 and P14 by 19 May 2009. On 28 September 2009 HMRC sent the appellant a first interim penalty notice for £400 for the period 20 May 2009 to 19 September 2009. On 25 January 2010 HMRC sent the appellant a second interim penalty notice for £400 for the period 20 September 2009 to 19 January 2010. On 24 May 2010 HMRC sent the appellant a third interim penalty notice for £400 for the period 20 January 2010 to 19 May 2010

In respect of the year 2009-2010 the appellant has failed to submit Forms P35 and P14 by 19 May 2010. On 27 September 2010 HMRC sent the appellant a first interim penalty notice for £400 for the period 20 May 2010 to 19 September 2010. On 24 January 2011 HMRC sent the appellant a second interim penalty notice for £400 for the period 20 September 2010 to 19 January 2011.

8. A letter dated 23 February 2011 was sent to the Appellant by HMRC. The Appellant responded on 7 March 2011 and this response was treated as formal appeal against the penalties. The letter offered no reasons for the late returns.

9. On 7 April 2011 HMRC replied saying they did not agree the appellant had a reasonable excuse and pointed out that the Employer Annual Returns for the tax years 2008/09 and 2009/10 had still not been received. They offered an independent review.

10. On 1 May 2011 the Appellant completed a form SA634 form Request for review of decision. The request included the following:

“The original P14s were sent to HMRC Accrington, Lancs, together with P35, for 2008/9 and 2009/2010. We have experienced difficulties in communicating with HMRC Accrington Office, as our files were transferred to HMRC Bolton Offices (3 in the town) and then to Hanley, Stoke-on-Trent. We have now prepared additional P14s for 2008/9 and 2009/10 and enclose them with this letter, no P14 has been completed for Mr. William John Mitchell for 2008/09 and 2009/10 as he received no remuneration or expenses whatsoever & do hope this will clear up this situation – we have enough problems keeping this business moving.”

11. On 31 May 2011 HMRC acknowledged receipt of the request for review and said if there was any other information that the appellant wanted to be considered it should be sent straightaway.

12. On 8 June 2011 the Appellant wrote to HMRC providing the following additional points:

“1. The Accrington Office of HMRC did not give any help some 18-20 months ago when visited to deliver the P35s for 2008/09 – the staff member dealing with it has left and only employees PAYE/NI queries were being dealt with.

2. Subsequent visits to other HMRC offices at HMRC Bury, HMRC Bolton stated eventually that our tax matters were to be dealt with by HMRC Hanley, (Stoke-on-Trent). Later Customer Operations Longbenton, N-on-Tyne wrote to us and new P35s were submitted to them.

3. Meanwhile we have been receiving demands from Debt Management offices in Colchester and Chesterfield, and finally from Swansea, South Wales.

4. The annual 2010/11 and 2009/10 returns have been sent in on time and 2011/12 Employers Payment book returns are up to date

5. We have already started repaying the PAYE NI arrears on a regular monthly basis.”

13. On 1 July 2011 HMRC advised that the result of the review was that the decision to reject the penalty appeal was upheld. The reply makes the following observations:

“I have been unable to trace the original P35s and P14s which you say were submitted.

.....Copies of the 08/09 & 09/10 P35s which you submitted were returned to you as there were no P14 forms received. As these forms were deemed to not be complete they were not treated as received.

I would advise that at today’s date both the P35 returns for 2008/09 & 2009/10 are still outstanding and have attracted penalties.

I would advise that 2009/10 was the first year you were required to file online. HMRC acknowledged this fact by allowing a concession, for 2009/10 only, to allow employers to file the P35 in paper format. The concession did not however give an extension to the statutory filing date of 19 May.”

14. Appellant’s submissions

On 5 September 2011 the appellant submitted a notice of appeal to the Tribunal. The grounds of appeal included the following:

“We had, for over 20 years, sent our annual P35s etc. to HMRC Accrington. The P35s etc. were taken by hand to Accrington and we saw Mrs Ann Carr, who refused to accept our returns as she stated only Personal Tax returns were dealt with there and advised us to go to HMRC Bolton. We attended Bolton three times during which our only communication was by internal telephone and finally advised to send our P35s to them. Since then we have had letters from at least six HMRC Offices (see attached) we now have two employees only one of whom is paid. The net result of all the work was a report from HMRC Londonderry of which you will be aware. Our PAYE/ NI returns for 2009/10 and 2010/11 have been submitted on time and we are dealing with the arrears on a monthly basis.”

15. HMRC’s submissions

HMRC say it is the responsibility of the Appellant, as an employer to ensure that the regulations are followed and Employer Annual Return forms delivered to HMRC by the legislative deadlines.

16. They say a complete Employer Annual Return needs to be correctly submitted and received by HMRC before it is deemed to be validly delivered and the Appellant’s filing obligation met.

17. HMRC records show that P35 forms for 2008-09 and 2009-10 were received along with a covering letter dated 21 September 2010, however as no P14s had been attached the Employer annual returns were deemed to be incomplete and as such were rejected as invalid on 11 January 2011 and returned to the Appellant for completion.

18. As at the date of the statement of case (10 November 2011) complete Employer’s annual returns for 2008/09 and 2009/10 have not been received from the appellant.

19. HMRC do not consider that any of the submissions of the appellant can constitute a reasonable excuse for the late submissions of the Employer’s annual returns forms P35 and P14.

20. HMRC say they have applied the penalties in accordance with Section 98A of the Taxes Management Act.

21. 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."

22. 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).

23. It appears to the Tribunal that the Appellant made genuine attempts to file its Employer's Annual Returns on time even to the extent of attempting to deliver forms by hand to various offices of HMRC. The appellant considers it received little assistance from HMRC. Unfortunately the details given by the Appellant do not include the dates of these visits which makes it difficult to understand the order of events.

It appears that the explanation of the lack of assistance from HMRC is because the offices visited no longer accepted Employer's annual returns as these were expected to be submitted online with effect from 2009/10.

24. When the returns were submitted they were incomplete and were returned to the appellant for resubmission with the missing P14s.

25. It is noted that the writer of the letters for the appellant is a chartered accountant. It should not have been too onerous a task for him to complete and submit the returns by post to HMRC.

26. In the Tribunal's opinion the Appellant has not established a reasonable excuse for the failure to submit the Employers Annual returns, forms P35 and P14 by the deadline for either of the years 2008/09 and 2009/10.

27. In respect of the year 2008/09 HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2009 to 19 May 2010 (£1,200)

28. In respect of the year 2009/10 HMRC has applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2010 to 19 January 2011 (£800)

29. As indicated in paragraph 18 above the First-tier Tribunal has no statutory power to discharge or adjust the penalties.

30. The appellant has not established a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) for either of the years 2008/09 and 2009/10. The penalties therefore remain and the appeal is dismissed.

31. 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: 14 August 2014