# TC01881

**Appeal number: TC/2011/06001**

*Income tax – employer's annual return for 2009-10 – penalty for delayed submission – no attempt made to submit the return until penalty notice received in September 2010 – return then delivered promptly – simple oversight – £500 penalty imposed, of which appellant paid £100 without dispute – no reasonable excuse – whether penalty disproportionate – on the evidence supplied, no – penalty clearly harsh, but not "plainly unfair" – whether appeal should be allowed on basis of principle set out in HOK Limited v HMRC – held no – appeal dismissed – directions given to enable any appeal to wait on the outcome of the appeal to the Upper Tribunal in HOK Limited v HMRC*

**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

**NATASHA BAILEY** **Appellant**

**-and-**

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

**TRIBUNAL**: **JUDGE KEVIN POOLE**

The Tribunal originally determined the appeal on 29 November 2011 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 1 August 2011 (with enclosures), HMRC's Statement of Case submitted on 12 September 2011 (with enclosures) and the Appellant's Reply received on 22 September 2011.

DECISION

## The facts

1. There was no disagreement about the facts of the case, which I find as follows.

2. The appellant was required to deliver an employer's annual return (forms P35/P14) in respect of the year 2009-10 no later than 19 May 2010.

3. An electronic reminder of the need to file the return was sent by HMRC on 10 January 2010.

4. The annual return not having been received, HMRC issued a penalty notice dated 27 September 2010 imposing a £400 penalty in respect of the delay up to 19 September 2010 in delivering the return. This prompted the delivery of the return, which was filed online on 11 October 2010.

5. The return included 2 forms P14 (i.e. there were two employees covered by it) and the total amount of PAYE and NICs paid by the appellant to HMRC for the whole year was £14,664.92, none of which was shown as outstanding on the return.

6. On 20 October 2010 HMRC issued a final penalty notice for £100 in respect of the period of delay from 20 September 2010 up to the date of filing the return.

7. £100 of the penalty was paid without argument. The balance of £400 remains outstanding.

## The grounds of appeal

8. The appellant's agent appeals on behalf of the appellant in relation to the outstanding £400, stating that the return would have been delivered earlier if they had been aware it had not been submitted. They acted quickly after the September penalty notice was received. They paid a £100 penalty without argument but submitted the remaining penalty should not be charged.

9. The appellant has submitted that £100 was enough to pay in fines as HMRC had waited four months to tell them that the return was outstanding.

10. The appellant has submitted an application for permission to appeal since the issue of the original summary decision in this appeal. Whilst that application is premature (such an application may only be made once full written findings of fact and reasons have been applied for), I consider it appropriate also to respond to the expanded argument raised by the appellant in her application.

## Consideration and decision

11. Whilst the appellant has not actually argued that she has a reasonable excuse for the delay in filing the return, for the avoidance of doubt I confirm I am unable to

find that failure to deliver the return by reason of a simple oversight can amount to a reasonable excuse.

12. The appellant, by arguing that "£100 is enough" for this particular default, is implicitly raising the allegation that a £500 penalty is disproportionate and therefore unenforceable.

13. I have considered the possible application of the principle set out in *Enersys Holdings UK Limited v HMRC* [2010] UKFTT 20 (TC) in this regard. On the assumption that the principle in that case can apply to penalties of this type, I have reached the conclusion that whilst it could undoubtedly be said that a penalty of £500 is "harsh", I do not consider that it could be said to be "plainly unfair" on the basis of the evidence before me as to the circumstances of this case. In this context, I bear in mind specifically that the appellant has, during the year in question, accounted for over £14,000 of income tax and NICs and there is no allegation that any attempt was made on her behalf to file the return earlier than 11 October 2010.

14. In her application for permission to appeal, the appellant also cites the First-tier Tribunal case of *HMD Response International v HMRC* [2011] UKFTT 472 (TC). A similar (but more relevant) case is *HOK Limited v HMRC* [2011] UKFTT 433 (TC), in which the Tribunal made the following statement, echoing the earlier statements of the same Judge in *HMD*, but this time on the basis that (unlike in *HMD*) the principle being expressed was determinative of the appeal:

> "15. It has long been part of the common law of this country that organs of the State must act fairly and in good conscience with its citizens. In our judgement there is nothing fair or reasonable in setting a computer system so that it does not generate a penalty notice until four months have gone by from the date of default, thereby ensuring that a penalty of not less than £500 will be due. We are in no doubt that the computer system could easily be set to generate a single £100 penalty notice immediately after the 19 May in each year. That is the course that a fair organ of the State, acting in good conscience towards the citizens of the State, would adopt.
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> 16. As, in our judgement, HMRC has neither acted fairly nor in good conscience, in the manner described above, we do not consider that any penalty is recoverable over and above the £100 penalty for the first month unless HMRC proves (the onus being upon it) that even if such a penalty notice, which would have acted as a reminder, had been issued, the default would nonetheless have continued. It has proved no such thing."

15. Decisions of the First-tier Tribunal are not binding on other panels of the First-tier Tribunal. The *HOK* case therefore has no binding force. If it were good law, then this appeal would succeed. I do not however agree that it is good law. I understand that HMRC have obtained permission to appeal against the decision. If and when that appeal is heard and the Upper Tribunal issues a decision, that decision will be binding on this Tribunal.

16. In the circumstances, I therefore dismiss the appeal but I consider it is appropriate that matters should be so arranged that if the Upper Tribunal in *HOK* dismisses HMRC's appeal in that case, the appellant in this case should be able (if necessary) to consider an appeal against my decision in the light of the Upper Tribunal's decision in *HOK*.

**Directions**

17. In addition to dismissing the appeal, I therefore direct that the appellant's time for applying for permission to appeal against this decision shall be extended so as to expire 90 days after the release of the Upper Tribunal's decision in *HOK*. For the avoidance of doubt, this means that the last date on which a valid application for permission to appeal against this decision may be received at the Tribunal shall be the 90th day after the date of release of the Upper Tribunal decision in *HOK*. Clearly HMRC should take no steps in relation to the enforcement of the outstanding £400 penalty until matters have been finally resolved, as matters remain "under appeal".

18. If HMRC's appeal in the *HOK* case is withdrawn before the issue of a decision by the Upper Tribunal, then HMRC are directed to notify the appellant (or her representative) of that fact and the appellant shall have a period of 56 days from the date upon which HMRC send such notification to the appellant (or her representative) to deliver her application for permission to appeal to the Tribunal.

19. Either party may apply to the Tribunal for further directions.

20. 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.

**KEVIN POOLE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 March 2012**