



**TC02930**

**Appeal number: TC/2012/04906**

*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**

**AMPER CLEARFLOW LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: PRESIDING MEMBER PETER R. SHEPPARD  
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**The Tribunal determined the appeal on 22 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 8 March 2012 with enclosures, and HMRC’s Statement of Case submitted on 21 June 2013 with enclosures. The Tribunal wrote to the Appellant on 1 July 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. No reply was received.**

## DECISION

### 5 1. Introduction

This considers an appeal against a penalty of £500 levied by the respondents for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the tax year 2010 – 2011. By a direction of the Tribunal dated 30 April 2012 the appeal was stood over until 60 days after the issue of its decision by the Upper  
10 Tribunal (Tax & Chancery Chamber) in the matter of Hok Ltd. That decision was released on 23 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  
15 22.  
Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100;  
Section 100B; and Section 118 (2).

### 3. Case law

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

### 4. 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  
25 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 5 October 2011. On 26 September 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 10 October 2011 HMRC sent the appellant a final late filing penalty notice for £100 for the period 20 September 2011  
30 to 5 October 2011.

5. In the Notice of Appeal and subsequent correspondence the appellant makes the following points:

- a) Mr. Amper who is the only employee of the appellant notes that his total duties, tax and NIC, for 2010/11 was £2,038.77 and submits that a penalty of  
35 £500 is disproportionate. It would amount to nearly one months wages.
- b) In the letter of 5 October 2011 Mr. Amper states “I have not received any reminders up until your letter of the 26<sup>th</sup> September”.
- c) Mr. Amper logged into the HMRC on 5<sup>th</sup> and 6<sup>th</sup> April 2011 in order to complete the appellant’s return. In completing an on-line return there is a

prompt "Do you wish to file your return?" to this Mr. Amper answered "yes". He therefore believed his return had been filed with HMRC. In fact it had been filed on his own computer and had not been submitted to HMRC. As the return had not been submitted no acknowledgement was sent by HMRC.

5 Mr. Amper notes the loose use of the words "file" and "submit" by HMRC. He points to a letter dated 24 February 2012 from HMRC to the appellant. This letter is the conclusion of the review by HMRC. In the first bullet point on page 3 can be found the following words "I cannot therefore accept that as a small business you have not been supported with regard to your requirement to

10 file online. In addition I note from your records that you have filed successfully online in previous years." In addition the Tribunal notes on Page 2 of the same letter "The onus is on the employer to ensure they file a correct return by the due date."

15 d) In the Notice of Appeal Mr. Amper writes "HMRC are making a penalty of £500 for my mistakenly thinking I had made a return when in fact I had not due to a misreading of their system."

e) In a letter dated 5 October 2011 to HMRC Mr. Amper states " I can only believe that during my attempt to submit the return I let the programme run through to the end which then stored it and I didn't realise I had not submitted

20 it to yourselves."

f) In a request for a review (by HMRC) of the decision, form SA634 dated 11 January 2012 Mr. Amper writes "I do not feel the inspector has taken enough regard of my argument and has disregarded my excuse of not being completely proficient at the use of computer online filing when I thought I had

25 filed the copy but it only filed on my computer and was not sent to you by electronic return."

g) I have consistently paid the owed tax and NI on time.

6. HMRC acknowledge that their records confirm that Mr. Amper logged into the site on 5 & 6 April 2011 but also show that no return was submitted until 5 October

30 2011. They say that the penalties have been charged in accordance with the legislation and the amount of the penalties has been calculated accurately.

7. In respect of 5 a) HMRC say the amount of the penalties have been calculated in accordance with legislation.

8. In respect of point 5 b) HMRC contend that the law does not require HMRC to issue reminders in respect of late Employer Annual Returns. Furthermore there is no

35 statutory obligation upon HMRC to issue penalty notices any closer to the filing deadline of 19 May.

9. In respect of point 5.c) HMRC say a file facility is provided to enable an employer to partially complete a return and save it, allowing the employer to revisit the Return at a later date in order to complete or amend it and then submit it. They point out that

40 the HMRC website provides detailed guidance on how to file online and what to

5 expect when a submission is made to HMRC. It includes details of the message that will be received if the return is successful and the messages that will be received if the return is rejected. It also states “If you do not receive either an acceptance or rejection response please contact HMRC’s Online services Helpdesk. HMRC also state in the statement of case “HMRC contend that to “file” an employer Annual return or to “submit” an Employer annual Return means the same thing, as the Return is either filed with HMRC or submitted to HMRC-that is the reason that HMRC’s review letter alternates between the two terms.”

10 10. HMRC consider that points 5. d) and e) do not establish a reasonable excuse for the late return.

15 11. In respect of point 5 f) HMRC say that filing through the Online Returns and Forms- PAYE service is a straightforward process and has been designed for small employers. Extensive information is available on the HMRC website a dedicated Employers Helpline and the HMRC Online services Helpdesk were all available to the appellant. They note that the appellant successfully submitted its return for 2009-2010 online.

12. In respect of point 5 g) HMRC say that payment of all tax and national insurance contributions on time is a duty of the employer and cannot provide a reasonable excuse for the failure.

20 13. The Tribunal’s has considered these submissions and comments as follows:

25 In respect of the appellants submissions at paragraph 5. a) and b) above the level of the penalty; whether the respondent’s failure to send a prompt reminder was unfair; and the respondent’s updated procedures 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.”

35 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). The excuses advanced by the appellant are listed above at points 5 c) to f)

40 In respect of 5. c) The alternating use of the words file and submit may have been confusing but clear guidance is given as to what messages should be received for successful and unsuccessful submissions of the returns. The fact that no messages were received should have alerted the appellant to the possibility that there was a potential problem and should have led him to make further enquiries.

In respect of point 5. d) and e) the appellant acknowledges he had made mistakes which resulted in the return being completed but not submitted.

5 In respect of point 5. f) Whilst the Tribunal has some sympathy with the appellant it is aware that in 2002 the government announced that it was proposing to introduce an  
10 online filing system from 2010. The appellant therefore had ample warning that it would need to familiarise itself with the online filing system. The appellant successfully submitted its return for 2009-2010 online. There is ample assistance available to an Employer in the form of detailed guidance on line, and the HMRC Employers Helpline and HMRC Online forms –PAYE service which provides a demonstration of how to use the system.

14. In respect of point 5.g) unfortunately for the appellant the legislation makes no provision for reduction of a penalty in the light of a past good record for filing on time.

15 15. The respondents have 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 September 2011 to 5 October 2011 (£100). The appellant has not established a reasonable excuse for the late submission of the Employer’s Annual Return (Forms P35 and P14). Therefore the appeal is dismissed.

20 16. 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)”  
25 which accompanies and forms part of this decision notice.

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

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**RELEASE DATE: 30 September 2013**