



**TC02988**

**Appeal number: TC/2012/05263**

***TYPE OF TAX – PAYE – late submission of Employer’s Annual Return –  
Whether reasonable excuse for late submission of return - Yes.***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PROVIDENCE HEALTH CONSULTANTS LIMITED      Appellant**

**- and -**

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

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

**The Tribunal determined the appeal on 28 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 24 April 2012 with enclosures, and HMRC’s Statement of Case submitted on 21 June 2013 with enclosures. Copies of other relevant documents provided were also considered. The Tribunal wrote to the Appellant on 2 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

### 1. Introduction

5 This considers an appeal against a penalty of £500 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the year 2010 – 2011. By a direction of the Tribunal dated 14 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  
10 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 22.

15 Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

### 3. Case law

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

Stephen Rich v HMRC [2011] UKFTT 533 (TC) TC03180

20 Rowland v HMRC [2006] UKSPC 00548

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

5. In the Notice of Appeal and correspondence provided the appellant acknowledges that the return was late but claims it has reasonable excuse for the failure.

35 6. The level of the penalties has been laid down by parliament. 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 30 September 2011 (£100).

7. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) as contemplated by the Taxes Management Act 1970 Section 118(2).

8. On 13 October 2011 the appellant's agent, Ingham & Co wrote to HMRC appealing against the penalty issued on 26 September 2011. Their letter included the following. "The company was incorporated on 18 January 2010 and Dr. Jumogolima Idoniboye was appointed the company's first director. She had remained the company's sole director from incorporation to the date of the letter. She in turn appointed Mr. Abolaji Gbesan, who advised his qualifications as FCCA ACA, as agent and instructed him to deal with all taxation affairs of the company including filing all company tax returns and establishing the PAYE scheme ("the Scheme").

15 The director first became aware that there may be a problem when the company tax return was rejected. It was rejected because the incumbent accountant attempted to file the Accounts and company tax return in paper format.

The director then appointed this firm as Accountants and Tax Advisers for the company. Whilst completing our work, we discovered that the previous agent had never advised HMRC of the Scheme. We immediately brought this to the attention of the company director, who instructed us to establish the Scheme on behalf of the company. We established the scheme on 19 September 2011 and subsequently submitted the return on 30 September 2011. The company's agent Mr. Gbesan purported to be a member of the Institute of Chartered Accountants in England and Wales ("ICAEW"). We identified a number of fundamental errors in the company tax return and computation and were sufficiently concerned to make enquiries at the ICAEW to establish whether Mr. Gbesan was actually a member. He was not in fact a member. The company had taken significant confidence from the fact that the accountant was a member of the ICAEW and relied on this. We must emphasise that the errors were corrected prior to the submission of the company tax return.

The standard of service provided by the former agent was significantly below that expected of a Chartered Accountant. Our client has reasonably relied on the agent being a Chartered accountant and had a clear expectation that his work would have been of a sufficient standard to ensure that the Scheme was established at the correct time and the Return was prepared and submitted on time."

9. The appellant's agent drew attention to the decision of the First-tier Tribunal decision in the case of Stephen Rich. It submits that the case is relevant to the appellant's case. HMRC merely say that this was a decision made at First-tier Tribunal and any decision made at First-tier Tribunal does not set a precedent. Each case is taken on its merits. This Tribunal considers that, whilst this may be true, when a taxpayer points to a decision of the First-tier Tribunal HMRC should take that seriously and not merely dismiss it as not setting a precedent. Decisions of the First-

tier Tribunal may not set a precedent but they give informed guidance from experienced tax practitioners which may help to determine what the outcome of a set of facts should be. They should not be dismissed lightly as appears to have happened in HMRC's review in this case. In fact the case of Stephen Rich is relevant to this case. The following is an extract from that decision:

5           “26. I now have to consider whether this amounts to a reasonable excuse. This is not defined in the legislation but “is a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

10           27. Although reliance on a third party is specifically precluded from being a reasonable excuse for VAT purposes by s 71 Value Added Tax Act 1994, there is no similar provision in relation to income tax. As this legislation came into effect many years after the VAT provisions had been in force it would have been open to the draftsman to adopt a similar restriction to the definition of “reasonable excuse” for  
15 income tax purposes. However as he did not do so I conclude that, in the absence of a specific provision to the contrary, reliance on a third party can amount to a reasonable excuse in cases such as this.

28. I find support for my view from the decision of the Special Commissioner (Adrian Shipwright) in *Rowland* where he said at [22 – 26]:

20           “The issue arises as to whether reliance on a third-party is prevented from being a reasonable excuse. For VAT purposes there is specific provision that where “reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied on is a reasonable  
25 excuse.” There is also specific provision that insufficiency of funds is not a reasonable excuse (see section 71 VATA). The legislation that I am concerned with in this case was passed after the VAT legislation but only contains a provision that insufficiency of funds is not a reasonable excuse. There is no equivalent provision that reliance on a  
30 third party is not a reasonable excuse for direct tax purposes.

          Whilst in the VAT context it was thought necessary to exclude reliance on a third party as presumably otherwise it could be a reasonable excuse in the direct tax context it is, at most only an indication that  
35 reliance on a third party can be a reasonable excuse. However, I consider it a very telling indication especially as it is a limited exclusion for VAT (see *Enterprise Safety Coaches* notwithstanding *GB Capital Ltd*).

          The *Thorne* case and *Enterprise Safety Coaches* are clear authority that reliance on a third party can be a reasonable excuse.

40           I conclude that in the direct tax context reliance on a third party can be a reasonable excuse.

          The issue then becomes, did Mrs Rowland have an effective reasonable excuse? Having found that it was reasonable from Mrs Rowland to rely on her then accountants and that it was this reliance that led to the  
45 underpayment, I consider that this was an excuse for making the



excuse ceased on or around the end of August 2011 when the appellant realised that its tax return had been rejected.

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

5 “.....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.”

10 The Tribunal finds that Ingham & Co notified HMRC of their agency on 31 August 2011 and by 19 September 2011 they had discovered the omission so established the Scheme and on 30 September 2011 had submitted the return for the appellant.

It is clear to the Tribunal that there was no unreasonable delay after the excuse ceased. Therefore the appeal is allowed.

15 14. 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)”  
20 which accompanies and forms part of this decision notice.

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

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**RELEASE DATE: 24 October 2013**