



**TC03010**

**Appeal number: TC/2012/05286**

*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**

**STUART ANDREW**

**Appellant**

**- and -**

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

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

**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 27 April 2012, and HMRC’s Statement of Case submitted on 24 June 2013 with enclosures. The Tribunal wrote to the Appellant on 26 June 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 £400 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)

### 4. Facts

20 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 2010-2011 the  
appellant has failed to submit Forms P35 and P14. On 26 September 2011 HMRC  
25 sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May  
2011 to 19 September 2011

The appellant had personally employed a handyman gardener for a few years. This  
arrangement ceased in August 2010. He advised HMRC that he no longer had an  
employee and thought his responsibilities had ended at that time. He realises that he  
30 was mistaken and that he should have sent in a Form P35 by 19 May 2011. However  
its appeal is against the scale of the penalty. The penalty for a late return is £100 per  
50 employees for each month or part month that the return is outstanding.

5. The appellant considers argues that because HMRC did not advise him of his  
oversight for 4 months he is faced with a penalty of £300 more than he would have  
35 been if HMRC had levied the initial £100 penalty promptly. The appellant considers  
the penalty does not represent a true reflection of the mistake he made. On 3 October  
2011 the appellant's agent, Baker Tilly, wrote to request the penalty be reduced to nil.

6. The appellant offers no excuse for the late return other than he thought his responsibilities had ended.

7. HMRC submit that as the appellant had filed Employer annual returns in previous years it is not clear why he assumed one was not required for 2010-2011. HMRC Website gives clear guidance as to what has to be done when a PAYE business closes down. A reminder was issued to the appellant on 13 February 2011

8. The level of the penalty and whether HMRC's failure to send a prompt advice 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."

9. 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). In this respect the appellant thought his responsibilities had ended when he notified HMRC that he no longer had an employee. He accepts he made a mistake in not realising he still had to submit a form P35 for the year 2010-2011.

10. The respondents have applied the legislation correctly and calculated the amount of the penalties accurately for the period 20 May 2011 to 19 September 2011 (total £400). The appellant has established no reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14). Therefore the appeal is dismissed.

11. 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: 24 October 2013**