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**TC04365**

**Appeal number: TC/2014/06316**

10 *PAYE – late submission of Employer’s Annual Returns for 2008-2009 and 2009-2010. Whether reasonable excuse for late submission of returns – No in respect of 2008-2009 return, Yes in respect of 2009-2010 return.*

15 **FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PERFECT PERMIT LIMITED  
T/as LOFTHOUSE HILL GOLF CLUB**

**Appellant**

**- and -**

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

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

25 **The Tribunal determined the appeal on 8 April 2015 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 20 October 2014, and HMRC’s Statement of Case submitted on 27 January 2015 with enclosures. The Tribunal wrote to the Appellant’s**  
30 **representative on 29 January 2015 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 penalties totalling £1,400 levied by the respondents (HMRC) for the late filing by the appellant of its Employer Annual Returns (forms P35 and P14) for the years 2008-2009 (£1,200) and 2009-2010 (£200).

### 2. **Preliminary matter**

10 In a letter dated 6 October 2014 HMRC refused to consider the appellant's appeal on the grounds that it was out of time. They say the penalty notices were issued on 28 September 2009, 25 January 2010, 24 May 2010, and 08 July 2010. On 5 August 2010 the appellant's agent wrote to HMRC suggesting a payment plan which included two of penalties each for £400 and PAYE outstanding for 2009-10 (see below). It  
15 appears that HMRC did not reply. In fact the appellant states that it was not until a letter dated 15 May 2013 that he became aware of the penalties. Whilst it is true that the appeal was late it would appear that the appellant had had no reason to appeal earlier. In the Notice of Appeal dated 20 October 2014 the appellant states. "The original appeal was returned after the time limit as some documentation was not  
20 included".

In the circumstances and in order to be fair to the appellant the Tribunal has decided to consider the appeal notwithstanding it is late.

### 3. **Legislation**

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

25 Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

Taxes Management Act 1970 (TMA1970), in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

### 4. **Case law**

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

Rowland v HMRC [2006] STC (SCD) 536

Anthony Wood trading as Propave v HMRC (2011) UKFTT 136 TC 001010

## 5. Facts

5 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 years 2008-2009, and 2009-2010 in each case the appellant failed to submit Forms P35 and P14 until 5 July 2010. Where an employer does not file their annual return on time they will be charged a penalty in accordance with Section 98A(2)(a) and (3) TMA 1970.

10 6. In respect of the tax year 2008-2009 the Employer Annual return was due to be filed by 19 May 2009. On 28 September 2009 HMRC sent the appellant a late filing penalty notice for £400 for the period 20 May 2009 to 19 September 2009. On 25 January 2010 HMRC sent the appellant a further late filing penalty notice for the period 20 September 2009 to 19 January 2010. On 25 May 2010 HMRC sent the  
15 appellant a final late penalty notice for £100 for the period 20 January 2010 to 19 May 2010.

7. In respect of the tax year 2009-2010 the Employer Annual return was due to be filed by 19 May 2010. On 8 July 2010 HMRC sent the appellant a final late filing penalty notice for £200 for the period 20 May 2010 to 5 July 2010.

20 8. On 22 May 2013 the Appellant's agent, Simon Cross, chartered accountant, wrote to HMRC appealing against the penalties.

25 "The reasons for the appeal are; that the client agreed a settlement in respect of those years which at the time included all interest and penalties; he has not received any correspondence in respect of this matter until received a letter dated 15 May 2013 demanding £1,000 therefore was unaware of these penalties."

9. On 28 August 2013 Simon Cross again wrote to HMRC. His letter states:

"Thank you for your letter of 15 August. I await a response from the correct department concerning the appeal against the penalties.

30 I note your records show an underpayment of £822.22 for 2012-2013. This was the first indication that the client had underpaid. I contacted your office to be told there was no underpayment for that year though there seems to be an under and over payment for some earlier years and I have requested details to investigate this further. I am frustrated by the incorrect information being supplied to me and my client and the inability of any one person to deal completely with the issues of penalties and late  
35 payments.

I will consider what action to take once I have received full responses from all concerned to resolve this matter."

10. On 8 August 2014 Simon Cross wrote again to HMRC enclosing a copy of the letter of appeal and saying

“My client has not had a reply to this until being contacted, on his holiday, on 8 August.”

5 11. On 6 October 2014 HMRC replied. They refused to accept the appeal on the grounds that it had been sent late. However they did offer a review.

In their letter they say “Our records show that your 2008/09 P35 Annual Return was not received until 09 July 2010 and that your 2009/10 P35 Annual Return was not received until 10 May 2011.”

10 12. The appellant did not request a review but on 20 October 2014 the appellant sent a notice of Appeal to the Tribunal.

13. On 24 November 2014 Simon Cross wrote to HMRC enclosing a copy of a letter dated 14 November 2014 from Jon Crossley of Burrow and Crowe Limited to the Appellant. That letter contains the following:

15 “To summarise this documentation we did not appeal the fine in 2009 as we had no grounds for appeal. However, as set out in my letter to Debt Management we set up a time to pay agreement which rolled up the arrears of £7,255.49 and the fine we were aware of at the time, £800.

20 Assuming the time to pay agreement was completed, then £800 of the fines have already been paid.

In terms of appealing the additional 2009 fines there is a recent case *Hok v HMRC* which your adviser may wish to review.

25 In respect of the 2010 form P35 this was submitted on 5<sup>th</sup> July 2010, not the 10<sup>th</sup> May 2011 as stated in the letter from HMRC dated 6<sup>th</sup> October 2014, and I have enclosed confirmation of this from the HMRC website for your attention.”

The Tribunal notes that the dates of receipt of returns stated in HMRC’s letter of 6 October 2014 are both inconsistent with the dates quoted in HMRC’s Statement of Case which states that both returns were received on 5 July 2010.

### **Appellant’s submissions**

30 14. In the Notice of Appeal dated 20 October 2014 the appellant states:

35 “The first indication that penalties had been raised for the two years was upon receipt of a letter on 15/5/2013. Upon receipt an appeal was made to the address on that letter. No reply was received for 2 months until a letter received on 4 July 2013. The company has not relocated during the period and had not received the earlier notices of penalty from HMRC.

The late PAYE returns were subject to an arrangement / settlement and as such it was expected this settlement incorporated any late filing penalties. These to be then raised later is unreasonable.”

5 15. On 5 August 2010 the appellants then recently appointed agent (Jon Crossley) wrote to HMRC Debt Management. Included in the letter is the following:

“In reference to your letter dated 22<sup>nd</sup> July 2010, we have attempted to contact you by telephone. Despite our best attempts to submit form 64-8, the first copy sent 5<sup>th</sup> March 2010, a second copy sent 5<sup>th</sup> July 2010 (see attached letter and copy) we are still not logged on as agents and therefore able to speak to HMRC staff on behalf of our client.

10 We commenced acting for our client on the 5<sup>th</sup> March 2010 and have during this process uncovered the fact that the forms P35 and various other regulatory submissions have not been submitted by the previous agent (Ms Jacque Shelmit). This has caused our client significant problems in terms of fines/penalties and unknown outstanding amounts on PAYE.

15 We have managed to bring our client up to date on PAYE (submitting forms P35 for 2009 and 2010) and they are up to date with current PAYE liabilities. We would therefore request to enter into an agreement to pay the arrears on the outstanding fines of £800 and the PAYE due on the 2010 P35 amounting to £7,255.49.

20 Our client is in the process of a court case in which he has won the judgement, although there are protracted negotiations ongoing as to the final settlement. Obviously the legal fees associated with this and the large payments already made to bring him up to date with HMRC have damaged his cash flow somewhat.

Based on this I would be grateful if you could accept a monthly payment plan starting at £500 per month with a view to reviewing the position after 6 months.....

25 If you are in agreement with this payment plan I would be grateful if you would confirm so in writing.”

### **Respondent’s submissions**

16. HMRC say that under Regulation 73 of the Income Tax (PAYE) regulations 2003 it is the employer’s obligation to make end of year returns by the due date

30 17. HMRC say that on 19 August 2010 they “agreed a short term Time to Pay arrangement at £500 per month for 6 months with a review to receive payment in full after 6 months.”

35 18. They say only 9 Payments of £500 were made so that “Only £4.500 of the original debt of £7,255.49 was paid and the £800 late payment penalties for 2008-2009 remain unpaid. One 2008-2009 late filing penalty of £400 was paid on 1 July 2010.”

19. HMRC say that Time to pay arrangements do not suspend fixed filing penalties under Section 98A of TMA 1970 for the tax years 2008-2009 and 2009-2010. Time to pay arrangements only affect late payment penalties from the tax years 2010-2011 onwards and there is strict criteria concerning these Types of Time to pay arrangements.”

The Tribunal notes that one of the conditions is that the employer approaches HMRC before the date they become liable for the late payment penalty.

20. HMRC say the late filing penalties have been charged in accordance with legislation and that the appellant has no reasonable excuse for the late return.

## 21. Tribunal's observations

The level of the penalty is 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 and unless the default surcharge has not been issued in accordance with legislation or has been calculated inaccurately the Tribunal has no power to discharge or adjust it. 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. In considering whether or not the appellant had reasonable excuse for the late returns the Tribunal has firstly considered carefully the chronology of events.

24. In respect of the return for the period 2008-2009 which was due by 19 May 2009 the return was not submitted until 5 July 2010. It was therefore over a year late and in accordance with the legislation penalties totalling £1,200 are potentially due.

The appellant's agent Jon Crossley is to be commended on bringing the appellant's affairs up to date as far as he could. On 6 August 2010 he wrote to HMRC suggesting a payment plan which it seems HMRC did not respond to despite being asked to confirm their agreement in writing.

The Tribunal notes that the appellant's agent Jon Crossley said “we did not appeal the 2009 fine as we had no grounds for appeal.” The Tribunal agrees and considers that the failure of the appellant's previous agent to submit the Employer Annual Returns (forms P35 and P14) for the year 2008-2009 on time does not constitute a reasonable excuse. The Tribunal agrees with HMRC that it is the responsibility of the company to ensure all their tax obligations are met. If the company feels their former agent has

failed in her professional capacity or not followed specific instructions then the company should seek redress directly from the agent.

5 The agent's letter and HMRC's lack of response to it both occurred after the penalties were due and therefore cannot be regarded as establishing a reasonable excuse for the late submission of the returns.

10 It might be said that had HMRC registered the agent more promptly after the application on 5 March 2010 then the agent would have submitted the return earlier than he did. However the agent would have had to have been registered and submitted the return before 20 April 2010 for there to be any reduction in the penalty. The Tribunal notes the Easter holiday occurred between 5 March and 19 April 2010 and considers a response from HMRC and a reply by the agent possible but unlikely.

25. In respect of the return for the period 2009-2010 which was due by 19 May 2010 the return was not submitted until 5 July 2010. It was therefore 47 days late and in accordance with the legislation penalties totalling £200 are potentially due.

15 In respect of the 2009/2010 return the Tribunal accepts that the appellant's agent had genuine and continuing difficulties in registering with HMRC as an agent. He started the process on 5 March 2010 and still had not been logged on as agent by 5 August 2010. The Tribunal notes that HMRC's statement of case makes no submissions in this respect. In the Tribunal's view had the requests for registration as an agent been  
20 acted on reasonably promptly by HMRC it is highly likely that the appellant's return for 2009/10 would have been submitted on time by the agent, that is by 19 May 2010. The return for 2009-2010 was over 6 weeks late. In the Tribunal's view the unexplained delay by HMRC in registering the agent provides reasonable excuse for the late submission of the Employer Annual Return (forms P35 and P14) for the year  
25 2009-2010.

30 26. Secondly the Tribunal considered whether the penalty notices were correctly served. This has proved a difficult task. HMRC has not provided a copy of any of the notices but merely an internal document which is a schedule of the penalties that have been issued. This is hardly evidence that the penalties were correctly served. The appellant has not provided a copy of any of the notices and states he was unaware of them until a letter dated 15 May 2013.

35 The agents Jon Crossley and later Simon Cross were not registered with HMRC at the time the penalties were issued. It is clear that Jon Crossley had difficulty getting registered about the time of the last penalty. At the time of his letter of 5 August 2010 he was unaware of the last two penalties. The Tribunal therefore considers it entirely possible that all of the penalty notices were sent to the previous agent who failed to bring these to the attention of the appellant and in the absence of evidence to the contrary were served properly.

40 27. HMRC have applied the legislation correctly and calculated the amount of the penalties accurately for the periods 20 May 2009 to 19 September 2009 (£400); 20 September 2009 to 19 January 2010 (£400); 20 January 2010 to 19 May 2010; and 20

May 2010 to 5 July 2010 (£200), total £1,400. The appellant has established no reasonable excuse for the late submission of the Employer's Annual Returns (Forms P35 and P14) for 2008-2009, but has established a reasonable excuse for the late submission of the Employer's Annual Returns (Forms P35 and P14) for 2009-2010. Therefore the appeal in respect of the £1,200 penalty for late submission of the 2008-2009 return is dismissed, whereas the appeal in respect of the £200 penalty for late submission of the 2009-2010 return is allowed.

28. 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.

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**PETER R. SHEPPARD**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 23 APRIL 2015**

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