



TC01899

Appeal number: TC/2011/07768

Income tax – penalty for not filing P35 – taxpayer sold business before the filing date – whether legally responsible for filing the P35 – evidence incomplete – whether reasonable belief that the return had been filed constituted a reasonable excuse – yes – appeal allowed and penalty set aside.

**FIRST-TIER TRIBUNAL
TAX**

KEVIN JOHN BELLCHAMBERS

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 27 February 2012 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 16 September 2011 and HMRC's Statement of Case submitted on 11 November 2011.

DECISION

1. This was Mr Bellchambers' appeal against penalties totalling £800 which were charged for allegedly not submitting the 2009-10 end of year return of payments due under Pay As You Earn ("P35") business by the due date. A further £300 of penalties have been accrued but had not yet been charged.

2. **The appeal was allowed.**

3. **Mr Bellchambers does not have to pay any of the penalties.**

The issues in the case

4. There are three issues:

(1) whether Mr Bellchambers was legally required to complete the 2009-10 P35.

(2) If he was so required, whether he did in fact complete it by the due date;

(3) If he did not so complete it, whether he had a reasonable excuse for not completing it.

The facts

5. Mr Bellchambers ran a small hairdressing business called Headstart for 23 years. He had never been late with his tax payments or other filing responsibilities.

6. The business employed one employee.

7. On 21 December 2009, Mr Bellchambers transferred his business to new owners. I discuss below whether he completed a P35 on this date.

8. On or around 24 January 2010, HMRC issued an online filing notification for the 2009-10 return. They sent this Notice to Headstart at the address they had on file, addressed to Mr Bellchambers. It was not forwarded to him.

9. On 27 September 2010, HMRC issued a penalty calculated at £100 per month, because they had no record of receiving the 2009-10 P35. The penalty covered the four months from 20 May 2010 to 19 September 2010 and was therefore £400. This Notice was not forwarded to Mr Bellchambers.

10. On 24 January 2010, HMRC issued a second penalty, for the four month period from 20 September 2010 to 19 January 2011. This was for a further £400. It was not forwarded to Mr Bellchambers.

11. At some point shortly before 28 March 2012, HMRC made contact directly with Mr Bellchambers and advised him of the £800 penalty.

12. On 28 March 2011, Mr Bellchambers wrote to HMRC enclosing the P35 and P14 for the 2009-10 tax year. The tax and NICs totalled £2218.96, all of which had been paid on time.

13. Mr Bellchambers' letter to HMRC said:

5 "Please find enclosed end of year P35 and P14 for Headstart hairdresser year end 2009/10 paye ref [].

10 I am deeply distressed that I have just received your letter stating that I owe HM Customs eight hundred pounds, due to you not receiving my end of year returns. I sent in my online documents fifteen months ago and this is the first correspondence I have had telling me that you did not receive them.

 This may be due to your office sending letters to Headstart instead of to my home address. I am quite a novice to the computer but I genuinely thought they had been sent correctly and wish to apologise sincerely if you did not receive them."

15 14. Mr Bellchambers also informed HMRC that in a telephone conversation with the HMRC helpline, he was told that the new owners of Headstart are using the same PAYE reference as he used when he was running the business.

15. HMRC treated Mr Bellchambers' letter as an appeal against the penalty.

20 16. On 7 July 2011, HMRC rejected his appeal. The rejection letter appears to be in standard format, and says that

 "The law does not say what a reasonable excuse is. HMRC's view is that a reasonable excuse will only apply when an exceptional event beyond your control has prevented you from sending in your return in on time. Each case is considered on its own facts."

25 17. The next paragraph is headed "why I do not think you have a reasonable excuse" and reads:

 "We have written to every employer to tell them how online filing affects them and when they must file online. We have also publicise online filing widely and our staff have been contacting employers to remind them."

30 18. On 28 July 2011 Mr Bellchambers wrote to request a review of this decision. He said:

35 "I am genuinely sorry for sending my returns P35 on line and making an error as you state you did not receive them. You were sending letters for fifteen months to the wrong address for me. If I had known of my mistake I would have corrected it at once....

 I really am very distressed with this issue as I am unemployed and unable to pay this amount. I have been totally stressed since this was brought to my attention and have made dozens of telephone calls to try and speak to someone in person who could help, all to no avail.

You have now received my returns and all is as it should be, please please could you see that I genuinely have not done a bad thing, it really really has been an error. Also please understand I have not ignored this situation. You were sending letters to the wrong address for me for fifteen months.”

5 19. On 29 July 2011, HMRC replied Mr Bellchambers, inviting him to send any further information which might be relevant to the review.

20. On 2 August 2011, Mr Bellchambers wrote to HMRC. He said:

10 “please may I inform you that I have at last found some information on my computer that may show I sent my end of year forms in on the 21.12 2009 at 9.36am.

15 The reason I sent them in early is because this is when my business ceased. I am a novice on the computer but have always managed to send my end of year returns on time. I was a very small business with one employee and can assure you I would have had no reason not to send you the information you require. If it cannot be found by HMRC I am very sorry and very stressed...

I have made numerous telephone calls trying to sort this problem but all to no avail as no one seems to be able to help me. If I could speak to someone I am sure I could explain the situation and hopefully ease my mind as this has been a constant worry since March.”

20 21. By letter dated 16 August 2011, the HMRC review officer refused Mr Bellchambers’ appeal. He sets out Mr Bellchambers’ grounds of appeal, and then his reasons for rejecting these grounds. I have put the reasons in italics:

25 (1) You have information on your computer suggesting that End of Year forms were sent in on 21 December 2009, these were sent in early because your business had ceased. *If you had attempted to file your return on line you would have received an acceptance or rejection message, usually within one minute of filing. If you file before the end of the tax year because you cease being an employer HMRC will let you know straight away if the return has been accepted or rejected.*

30 (2) You were inexperienced in using the computer. *Lack of experience in using the computer cannot be taken into consideration. Our website contains comprehensive advice and will give instant messages of any errors.*

(3) Your end of year returns for previous years were submitted on time. *Each year has to be looked at in isolation.*

35 (4) Correspondence from HMRC was sent to the wrong address. *The responsibility lies with you to keep us informed of any changes of address.*

22. On 13 September 2011 Mr Bellchambers wrote to the Review Officer as follows:

40 “Please could you call me on [number]. I did reply to your letter of 16 August but as yet have had no reply. I am desperately asking for some compassion from HMRC as I have tried to explain that correspondence regarding my late returns was going to the wrong address, maybe if I had received it before 15

months my charge would have been half the amount that it is. I have not changed my address for 16 years so I don't understand why HMRC failed to contact me sooner.

5 As explained this is a GENUINE error and not avoidance of any description. Please is there any way that I can pay the £400 which would have been the first penalty payment...Please any help at all would be so much appreciated as I have been unemployed for over 12 months and the stress of this debt is taking its toll."

10 23. On 21 September, the Review Officer replied, saying that "a customer is only entitled to have their decision reviewed once and I have considered all the points you have presented. The next stage would be to proceed with taking your case to an independent tribunal."

24. On 23 September 2011, Mr Bellchambers appealed to the Tribunal. His appeal grounds say:

15 "By law it seems that HMRC decision is correct and I do understand this. But feel that as this was a genuine error and no tax was actually due, that maybe there could have been some compassion or understanding of my position.

20 It took HMRC nearly 15 months to contact me at my correct address where I have lived for sixteen years, had they sent this information to my correct address maybe my late payment would have been half the amount.

I have been unemployed for over a year and feel distressed that partly due to HMRC's correspondence or lack of it and partly due to my error, I now have a large debt that I cannot find funds for."

25 25. Under the heading "say below what you think the decision should have been", Mr Bellchambers has written "Desperately hoping for maybe this Bill to have been halved."

The parties' submissions

26. Mr Bellchambers' submissions are set out in the above extracts from his correspondence with HMRC and his appeal to the Tribunal.

30 27. In relation to the address issue, HMRC say it is "the Appellant's responsibility to keep HMRC informed of any change of address" and that they sent the correspondence to "the address held on record."

35 28. They accept that Mr Bellchambers "may have attempted to file the 2009-10 P35 on 22 December 2010" but say he has not provided any evidence that he received either an acceptance or rejection message when he tried to file online.

29. They submit that "while the mistake may have been an honest one this does not amount to a reasonable excuse", which they interpret as follows:

5 “Reasonable excuse is not defined in the legislation and there are no supporting case law authorities. The term must be given its normal everyday meaning. HMRC take this to mean that it is an unexpected or unusual event, either unforeseeable or beyond a person’s control, which prevents him/her complying with an obligation when he otherwise could have done. A combination of unexpected and foreseeable [sic] events may when viewed together be a reasonable excuse.

10 It is necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard to their responsibilities under the taxes acts.”

15 30. They say that Mr Bellchambers had no reasonable excuse, and conclude their submissions to the Tribunal by saying that “completion and delivery of the Employer’s Annual return was entirely within the control of the Appellant and nothing exceptional prevented the Appellant from doing so by the filing date.”

The law

31. Regulation 73 of the Income Tax (PAYE) Regulations requires that “an employer must deliver” a P35 before 20 May following the end of a tax year.

20 32. Regulation 102 is headed “Succession to a business” and reads, so far as relevant to this Decision, as follows:

(1) This regulation applies if there is a change in an employee's employer while the employee remains in employment in the same business.

25 (2) – (3)

(4) The new employer is, in relation to any matter arising after the change, liable to do anything which the former employer would have been liable to do under these Regulations if the change had not taken place.

30 (5) Paragraph (4) is subject to paragraphs (6) and (7) and regulation 104 (succession to a business: trade disputes).

(6) The new employer is not liable for the payment of any tax which was deductible from relevant payments made to the employee—

35 (a) before the change took place, unless those payments were made by the new employer, or

(b) by the former employer after the change took place.

(7) ...

40 (8) The former employer must give the new employer any particulars which the new employer needs in order to comply with this regulation.

(9) ...

33. Taxes Management Act 1970 (“TMA”) s 98A sets out the liability to fixed penalties for non-compliance with the P35 filing requirement. In so far as relevant to this Decision, it reads as follows:

5 (1) PAYE regulations...may provide that this section shall apply in relation to any specified provision of the regulations.

(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

10 (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed,

(b) ...

15 (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100.”

34. The taxpayer’s right of appeal against the penalty and the Tribunal’s powers are at TMA s 100B.

20 35. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2), which states that:

25 “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 had ceased.”

The first issue: liability

36. Mr Bellchambers sold his business in December 2010, before the end of the 2009-10 tax year.

30 37. If his single employee remained employed by those who purchased Headway from Mr Bellchambers, then responsibility for filing the 2009-10 P35 rests with the purchasers, and not with Mr Bellchambers.

35 38. This is clear from Reg 10 of the PAYE Regulations, quoted above, which applies “if there is a change in an employee’s employer while the employee remains in employment in the same business.” Where this is the case, “the new employer is, in relation to any matter arising after the change, liable to do anything which the former employer would have been liable to do under these Regulations if the change had not taken place.”

39. The Tribunal has not been informed by either party whether Mr Bellchambers' single employee remained employed, but HMRC told Mr Bellchambers that the same PAYE reference was being used by Headway. This is an indicator that the same employee remained with the business.

5 40. Although the Tribunal does not have sufficient information to decide this point, it is a simple matter of fact. It would have been very easy for HMRC to establish whether or not the employee remained with the business after December 2010, and so whether it was Mr Bellchambers, or the new business owners, who had the legal liability for the 2009-10 P35.

10 41. Because of the lack of evidence, I have gone on to consider the second point.

The second issue: whether the P35 was filed

42. Mr Bellchambers clearly believed he had successfully filed the P35. He has an exact time and date when he completed the return.

15 43. I find Mr Bellchamber to be a highly credible witness and have no doubt that he did do his best to file the return on 21 December 2010, well before the due date for the 2009-10 return, despite the fact that HMRC have no record of the return.

44. I also take into account the fact that HMRC issued a Notice to file the P35 in January 2010, and from this I infer that they had not received the return which Mr Bellchamber believed he had filed.

20 45. On the balance of probabilities, I find that the return was not in fact filed on 21 December 2010.

The third issue: reasonable excuse

46. Mr Bellchambers has put forward a number of possible reasonable excuse defences, and I consider each in turn.

25 *The postal issue*

47. It is not in dispute that the Notice to File the P35 and the penalty Notices were addressed to the shop premises. They were not forwarded to Mr Bellchambers and he was thus unable to respond to the first penalty Notice when it arrived in September.

30 48. HMRC say that it was Mr Bellchambers' responsibility to tell them about a change of address. Mr Bellchambers had not in fact *changed* his address – he says that HMRC had been aware of his home address for many years, and this is not disputed.

49. What neither party has told the Tribunal is whether or not Mr Bellchambers told HMRC in December (or soon thereafter) that the business had been sold, and whether he asked that any residual business correspondence be sent to his home address.

50. Again, all the facts are not before the Tribunal. However, it is clear that *if* there was a failure to inform HMRC of the sale of the business, this was not deliberate on Mr Bellchambers' part. Any failure was wholly accidental.

5 51. On the basis of the evidence before the Tribunal it is, however, not possible to conclude that this is sufficient to constitute a reasonable excuse.

Reasonable belief

52. Mr Bellchambers clearly believed that he had submitted the company's P35 on 21 December 2010 at 9.36am. HMRC say that he has not provided evidence of either an acceptance or rejection message when he filed online.

10 53. However, the absence of these messages does not, of itself, mean that Mr Bellchambers did not try to file electronically: it is clear from the many Tribunal decisions on this subject that some filing attempts generate neither an acceptance nor a rejection message – see for example *Wayne Seddon v R&C Commrs* [2011] UKFTT 784(TC) and *Pontyberem Rugby Football Club v R&C Commrs* [2011] UKFTT
15 511(TC).

54. I take into account Mr Bellchambers' lack of experience with computers, and his impeccable history of filing on time over a 23 year period, and I find that his belief that the return had been filed online was reasonable.

20 55. That a genuine, honest and reasonable belief provides a defence in common law has long been accepted, see *Reg v Tolson* (1889) 23 QBD 168, 181; this principle was more recently expanded to include a genuine but mistaken belief by the House of Lords in *R (ex p B) v Director of Public Prosecutions* [2000] UKHL 13.

25 56. In the recent case of *R v Unah* [2011] EWCA Crim 1837, while noting the caveat in that case that “it is only with caution that one should seek to draw analogies with other statutory contexts where the concept of reasonable excuse is employed”, the Court of Appeal found that a genuine and reasonable belief was sufficient to amount to a reasonable excuse.

30 57. Whether there is a reasonable excuse is “a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v R&C Commrs* [2006] STC (SCD) 536).

58. On the evidence provided, and in the light of all the circumstances of this case, I find that Mr Bellchambers' reasonable belief that he filed the return in December 2010 is sufficient to provide him with a reasonable excuse.

35 59. I further find that once he was informed that the P35 had not been received he filed without delay, and so meets the test in TMA s 118(2).

Decision

60. I find that, if Mr Bellchambers was in fact the person legally required to complete the 2009-10 P35 – which is far from clear – that he had a reasonable excuse for the late filing.

5 61. I thus accept his appeal and set aside the penalties.

62. 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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Anne Redston

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TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 19 March 2012

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