



**TC01645**

**Appeal number TC/2011/04707**

*Income tax- late filing of P35s - reasonable excuse-no- penalty manifestly excessive- appeal allowed in part*

**FIRST-TIER TRIBUNAL**

**TAX**

**CAFE VIEW**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Barbara J King (Tribunal Judge)**

**Sitting in public at North Shields on 27 October 2011**

**Mr R Macdonald for the Appellant**

**Mrs R Oliver for the Respondents**

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## DECISION

1. The Appellant appeals against the imposition of penalties in the total sum of £2,400 for its failure to submit an employer's annual return for the tax year ending 5 April 2009, which was required to be filed by 19 May 2009 and for the failure to submit an employer's annual return for the tax year ending 5 April 2010, which was required to be filed by 19 May 2010.
2. Mr MacDonald gave oral evidence at the hearing and both parties have produced further submissions following a direction given by me on the day of the hearing
3. Mr and Mrs MacDonald started trading as partners in Cafe View in Scarborough in 2007. Mr MacDonald was a retired schoolteacher and he intended not to work in the cafe itself but he would do the various aspects of book-keeping for the business. Mr and Mrs MacDonald lived at an address in Scarborough, at that time, and they gave their home address to the Respondents as the address to which they wished to receive correspondence concerning the business.
4. Mr MacDonald attended various courses in book keeping and he submitted all P14s to the Revenue. On 30 June 2008 he was able to file the end of year P35 for the year ended 5 April 2008 using software from an 'Employer's CD ROM.'
5. Mr MacDonald then employed an accountant to assist him with the filing of various tax documents concerning the business and the personal tax returns for both Mr and Mrs MacDonald. Mr MacDonald believed that the accountant would complete all tax forms for the year ended 5 April 2009.
6. I am not satisfied from the letters and copy emails produced to me that Mr MacDonald had instructed his accountant to do the P35s. The first mention by his accountant of the '08/09 payroll return' is in the email of 12 April 2011 and the accountants do not suggest that they had ever tried to file this back in 2009. It appears that there has been a misunderstanding between Mr MacDonald and his accountant but I do not find that this amounts to a reasonable excuse for the late filing of the P35 for the year ended 5 April 2009.
7. The accountants appear to have been instructed to do accounts in connection with the sale of the business in November 2009 but again they do not appear to have been instructed to file P35s for the tax year ended 5 April 2010. The email dated 12 April 2011 from the accountants suggests that the earliest any attempt was made by them to file the P35 for the year ended 5 April 2010 was 12 April 2011.
8. I do not find that there is a reasonable excuse for the late filing of the P35 for the year ended 5 April 2010.
9. Mr and Mrs MacDonald sold the business on 6 November 2009. The Respondents confirm that all PAYE and NIC remittances were paid by the Appellants during 2008-09 and 2009-10. The returns once filed show that the tax and National Insurance contributions due have exceeded the amounts already paid in both tax years. The Revenue submit that, even in a case such as this where no tax or National

Insurance is outstanding, it is important that National Insurance contribution records are kept up to date as otherwise someone might be denied a benefit to which they might be entitled. The Revenue have not, however, produced any evidence to show that such a result has ensued in this case.

5 10. I do consider that the penalties of £1200 for each year are manifestly excessive for the nature of the failures concerned in this case. I am satisfied that Mr and Mrs MacDonald mistakenly believed that they had instructed the accountant to do all their returns and that they believed he had dealt with them. They did not receive  
10 notification that they had failed to send in their end of year returns until April 2011. Had they done so earlier I find that there is no evidence that they would not have dealt with the filing of the returns immediately.

11. The Revenue now submits that had the partnership, when it registered as an employer, given the address of the business premises then the first notice informing them of a failure to submit a P35 (sent out on 8 October 2009) would have reached  
15 the Appellants before they sold the business on 6 November 2009. There is no evidence to suggest that employers are obliged to use the business address. The Revenue, having accepted a private address as the address for correspondence in the first place, I consider that it was reasonable for Mr and Mrs MacDonald to expect that, when they moved they could expect the Revenue to accept the new private  
20 address as the address for the business as well as for their personal tax affairs.

12. The Respondents acknowledge that they received notification on 23 March 2009 from Mr and Mrs MacDonald stating that they had moved address from Scarborough to Whitby. The Respondents only updated this change of address on the computer system which dealt with Self Assessment of partnerships and individuals. It did not  
25 update the computer system which deals with Employers. Details of how the change of address was notified to the Respondents, and whether it contained sufficient details to put the Revenue on notice that Mr and Mrs MacDonald had changed both their private address and their address for correspondence for the business was not produced to the Tribunal. In the absence of this information, I am satisfied that it was  
30 reasonable for Mr and Mrs MacDonald to assume that they had notified the Revenue for all tax matters in which they were involved.

13. The Revenue submits that the Tribunal has no power to mitigate the penalties under section 102 Taxes Management Act 1970. I have considered the case of Hok Ltd TC 01286 and I agree that in section 98A(2)(a) Taxes Management Act 1970 the  
35 words “shall be liable to a penalty or penalties of...£X...” can mean that the fine can be up to that amount if the fairness of the case justifies it. I adopt the reasoning in TC 01286 as to why this is the case.

14. In this appeal I find that the Appellants are liable to pay a penalty of £100 for the failure relating to the tax year ending on 5 April 2009 and a further £100 for the  
40 failure in respect of the tax year ended on 5 April 2010.

15. The Appeal is allowed in part.

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

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**Barbara J King**

**TRIBUNAL JUDGE**

**RELEASE DATE: 9 December 2011**

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