



TC01650

Appeal number: TC/2011/05756

Employer sold business in March 2010 - Penalty for not submitting P35 for 2009-10 – whether former employer liable for the penalty – PAYE regulations applied – penalty discharged and appeal allowed

FIRST-TIER TRIBUNAL

TAX

JILL HARMSWORTH

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 22 November 2011 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 received on 1 July 2011 and HMRC's Statement of Case submitted on 31 August 2011.

DECISION

1. This was Mrs Jill Harmsworth's appeal against penalties totalling £1,600 for not submitting the 2009-10 end of year return of payments due under Pay As You Earn ("P35") business by the due date.
2. The appeal was allowed and the penalties discharged.

The issues

3. It was not in dispute that Mrs Harmsworth had not filed a 2009-10 P35 by the due date of 19 May 2010. The issues in the case are:
 - (1) whether Mrs Harmsworth was the person liable to submit the 2009-10 P35, and if so
 - (2) whether she had a reasonable excuse for not filing the return by the due date.

The law

4. Regulation 73 of the Income Tax (PAYE) Regulations¹ ("the Regulations") requires that "an employer must deliver" a P35 before 20 May following the end of a tax year.
5. 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.
 - (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.
 - (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—
 - (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) ...

¹ All references in this Decision to Regulations are to these Regulations

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

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(9) In paragraph (1), "business" includes any trade, concern or undertaking.

6. 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:

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(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—

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(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) ...

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(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, and

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(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

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

8. The taxpayer can appeal a penalty on the grounds of reasonable excuse. The relevant provisions are set out at TMA s 118(2).

30 **The evidence**

9. The Tribunal was provided with the correspondence between the parties, Mrs Harmsworth's Notice of Appeal, and HMRC's Statement of Case.

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10. HMRC also provided several pages of guidance entitled "PAYE if your business closes down," two screenprints showing the issuance of the penalty Notice, and a screenprint headed "Amend Employer Segmentation" stating that in 2009-10 Mrs Harmsworth's business had 90 employees.

The facts

11. From the evidence provided, I find the following facts.

12. Mrs Harmsworth is 75 years old. She was widowed in June 2008, and in October 2009 she went into hospital for an operation, followed by a second operation in May 2010. During the second operation there were complications and she was subsequently in a wheelchair for three months.
- 5 13. Until 13 March 2010 Mrs Harmsworth was the proprietor of a business entitled “40+ Recruitment”, which in the tax year 2009-10 had around 90 employees.
14. On 13 March 2010 she sold the business to a Mr Weakley.
15. All the computer records and other information were handed over to Mr Weakley at the time the business was transferred.
- 10 16. On 27 September 2010, HMRC issued a penalty, calculated at £200 per month (because the business had more than 50 employees), because Mrs Harmsworth had not filed the 2009-10 P35. The penalty covered the four months from 20 May 2010 to 19 September 2010 and was therefore £800.
- 15 17. 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 £800.
18. On 3 February 2011, Mrs Harmsworth appealed the penalty.
19. HMRC say that at 31 August 2011, the date they sent their Statement of Case to the Tribunal, the EoY return is still outstanding. As a result they say Mrs Harmsworth has accrued further penalties at a rate of £200 per month.
- 20 20. The period from 20 January 2010 to 31 August 2011 is six full months and one part month. Further penalties of £1,400 had thus accrued up to 31 August 2010 (the date of the Statement of Case), making a total of £3,000. Penalties continue to accrue at £200 a month.

Mrs Harmsworth’s submissions

- 25 21. Mrs Harmsworth’s letter of appeal dated 3 February 2011 opens by saying that she has received HMRC’s “letter of 24 January addressed to my previous accommodation.”
22. Her letter states that Mr Weakley “who took over all my computer records would I am sure have completed the end of year return.”
- 30 23. The second penalty Notice covers the period 20 September 2010 to 19 January 2011. Mrs Harmsworth says:
- 35 “I see you are asking for 20 September 2010 to 19 January 2011 but I was most careful to ensure that the payroll clerk completed the necessary form and paid the money owing at the end of the relevant month so I am at a loss to understand why that period is still missing.”

24. Mrs Harmsworth had difficulties with her accountant around the time she sold her business, and in her Notice of Appeal says that:

5 “if I had been able to get to work in Bicester and had a reliable accountant the problem would not have arisen. I had paid regularly for many years and had paid promptly – why should I not have paid the final payment?”

25. She concludes her Notice of Appeal by saying:

10 “I am not against the missing last payment when it has been confirmed on 19 May 2011 so I hope you will look on my plea for the penalty with sympathy – there was no idea that the last payment had not been made until 19 May 2011.”

HMRC’s submissions

15 26. HMRC say that the letter they receive from Mrs Harmsworth dated 3 February 2011 “was the first notification to HMRC that the business had been sold, 11 months after the event.”

27. They also say that “regardless of the fact that a company has closed down it is still responsible for submitting the End of Year return on time.”

28. Mrs Harmsworth employed personnel during 2009-10 and so a P35 and P14 was due by 19 May 2010.

20 29. It is Mrs Harmsworth’s responsibility as employer to file the P35 and she cannot transfer this to another person.

30. The guidance which they provided to the Tribunal in support of their submissions says, under the heading “what to do if your business and its payroll changes hands”:

“If you take over another business and its payroll

25 If you take over another employer’s business, then you also take on the responsibility for its employees and its payroll. You must take all of the following actions that apply to you [four items listed]...you must also include your new employees in your Employer Annual Return (P35 and P14s)...The previous employer will not need to give forms P45 to the employees.

If your business and its payroll is taken over

35 If your business and its employees are taken over by another employer, you must inform HMRC of the change. You also need to make sure that you work out, record and deduct the correct PAYE tax and NICs for the period up until your business changes hands. You do not need to give forms P45 to your employees....

40 It’s also important to make sure you let all the relevant parts of HMRC know that your business has been taken over. This will ensure you won’t underpay or overpay any tax and will prevent HMRC from sending you demands or bulls that you aren’t liable for.”

31. They say that Mrs Harmsworth has no reasonable excuse for not submitting the return by the due date.

Discussion and decision

5 32. There is no dispute that Mrs Harmsworth sold her business in March 2010, before the end of the 2009-10 tax year.

33. Regulation 102(4) states that “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.”

10 34. HMRC’s guidance correctly reflects the Regulations, putting responsibility for the P35 on the successor to the business.

35. The obligation to complete and submit the 2009-10 P35 rested with Mr Weakley, not with Mrs Harmsworth.

36. The Tribunal has no information as to whether the 2009-10 P35 was, in fact, submitted by Mr Weakley, but that is not relevant to this appeal.

15 37. HMRC clearly advise that proprietors should inform them when they sell their business, so as to prevent “HMRC from sending you demands or bills that you aren’t liable for”.

20 38. Mrs Harmsworth did not inform HMRC, a failure which appears to have been caused by her ill-health and difficulties with her accountant at the time. There was then a further delay, perhaps because it appears that she moved house: there is no indication in the papers before the Tribunal that she ever received the first penalty Notice, and the second was “addressed to [her] previous accommodation.”

25 39. There is, however, no penalty for a failure to inform HMRC that a business has been sold. The penalties under appeal are for not submitting the P35, and these penalties cannot be charged on Mrs Harmsworth, as she was not “the employer” when the P35 was due to be filed.

40. Mrs Harmsworth’s appeal is allowed, and the penalties discharged.

30 41. For completeness, I note that Mrs Harmsworth’s submissions deal in part with a “missing last payment”. The Notice for September 2010 to January 2011 is not a request for a missing payment, and in any event, Mrs Harmsworth had sold the business in March 2010, long before this period.

42. It is not clear whether there is, in fact, a missing payment for 2009-10, or whether Mrs Harmsworth has simply misunderstood the documents being sent to her by HMRC. In any event, this issue is not before the Tribunal.

35 43. 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

5 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.

Anne Redston

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**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 12 DECEMBER 2011**

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