



**TC01685**

**Appeal number: TC/2011/03310**

*PAYE and NIC – annual employer’s return (P35/P14) for 2009-10 – Appellants ceased to trade in May 2009 – did not submit employer’s year end return, not realising one was required – only realised when received first penalty for £400 – wrote to HMRC asking for paper P35 if one still needed to be filed – no reply from HMRC – when HMRC sought to collect penalties, Appellant contacted HMRC to be told return should be filed – held no reasonable excuse for period of delay up to receipt of first penalty notice, but reasonable excuse thereafter – penalty therefore reduced from £800 to £500, which was “harsh but not plainly unfair” – appeal allowed in part*

**FIRST-TIER TRIBUNAL**

**TAX**

**DENNIS BURROWS (INSURANCE BROKERS)**

**Appellants**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE AND CUSTOMS (Income tax and NICs)**

**Respondents**

**TRIBUNAL: KEVIN POOLE (TRIBUNAL JUDGE)**

The Tribunal determined the appeal on 26 August 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 dated 21 April 2011, HMRC’s Statement of Case submitted on 23 May 2011 and the Appellant’s Reply dated 6 June 2011.

## DECISION

### Introduction

1. This is an appeal against a fixed penalty of £800 imposed in respect of the  
5 Appellants' late filing of their employer's annual return (form P35/P14) for the year  
ended 5 April 2010.

2. I gave a summary decision dated 26 August 2011 (which was released to the  
parties on 15 September 2011). The Appellants wrote to the Tribunal on 4 October  
2011 stating that they wished to "challenge" my decision. They followed this up with  
10 an email on 25 October 2011. The Tribunal replied to them on 4 November 2011  
stating that it could not accept a "challenge" and pointing out the Appellant's right to  
apply for permission to appeal as set out in the notes sent with the decision. Those  
notes clearly set out that the first step in any appeal is to apply, within 28 days of the  
release of a summary decision, for full facts and reasons. The Appellants then  
15 contacted the Tribunal again by email, on 8 November 2011, stating that they wished  
to appeal against the decision.

3. Strictly speaking, the Appellants have not yet applied for full written reasons  
for the decision as they are required to do as the first step in an appeal, and they are  
now out of time for doing so. Nonetheless, in the interests of justice I have decided to  
20 issue full written reasons and the Appellants now have a limited time to follow the  
correct procedure to apply for permission to appeal. The last paragraph of this  
decision and the accompanying notes provide details, which the Appellants should  
read carefully and comply with.

### The facts

25 4. The Appellants carried on business as insurance brokers. The partnership  
ceased to trade on 31 May 2009, its business being taken over by a limited company.

5. The Appellants had made their monthly PAYE and NIC payments up to that  
time and when their employees were transferred to the new company, they completed  
their in-year leaver summaries and submitted P45's for all their employees to HMRC.  
30 All PAYE and NIC was paid up to date.

6. The Appellants, having completed these formalities, notified HMRC that they  
had ceased to employ anyone. They then believed that they had complied with all  
outstanding obligations under the PAYE system.

7. Unfortunately, however, they were still under an obligation to file an  
35 employer's annual return (in Form P35 with associated Forms P14) in respect of the  
tax year ended 5 April 2010. The deadline for this return was 19 May 2010. As there  
is no dispute on this issue, I do not feel it necessary to set out the relevant legislation  
in full in this decision.

8. Being unaware of the obligation to carry out this filing, the Appellants heard  
40 and thought nothing further of the matter until they received a penalty notice dated 27

September 2010 from HMRC, imposing a penalty of £400 in respect of the delay in delivering the return up to 19 September.

5 9. The Appellants wrote to HMRC promptly upon receipt of this notice, on 4 October 2010. They explained the position and said that if HMRC still required a form P35, “would you kindly send us one”.

10. HMRC did not reply to that letter. The next thing the Appellants heard was a letter dated 30 December 2010 from HMRC’s debt management unit, chasing up the penalty.

10 11. The Appellants telephoned HMRC to check the position. They were told they should complete the missing return online, which they duly did without material delay. The return was finally completed on 26 January 2011.

12. In the meantime, HMRC had issued a further penalty notice dated 24 January 2011 for £400 in respect of the further delay.

15 13. In the circumstances, I cannot accept that the Appellants’ ignorance of their obligation to file the return can give rise to a reasonable excuse for their failure to do so. I do however consider that the Appellants have a reasonable excuse for their failure to file the return while they were waiting for a reply to their letter dated 4 October 2010. I find that reasonable excuse continued right up to the date on which they eventually filed the return on 26 January 2011.

20 14. Under section 118(2) Taxes Management Act 1970 (“TMA”):

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”

15. Accordingly, the Appellants are deemed not to have failed to file the return from 4 October 2010 to 26 January 2011. It follows that, for the purposes of calculating the penalty payable, the period of default runs from 20 May to 4 October 2010, a period of more than four but less than five months.

30 16. The penalties in this case are charged under section 98A TMA, which provides that “any person who fails to make a return... shall be liable to a penalty or penalties in the relevant monthly amount for each month (or part of a month) during which the failure continues...” and also provides that in the case of an employer whose return should include 50 or less employees, “the relevant amount” is £100.

35 17. Accordingly I find that the Appellants failed to file their return for a period of four whole months and a part of a month. This makes them liable to a penalty of £500.

18. Whilst considering the penalty to be harsh, I do not consider it to be “plainly unfair” in the circumstances of the case. This is not a situation where the Appellants genuinely and honestly believed they had filed the return; it is a situation in which they did not appreciate that a return was required. They effectively plead ignorance of the law as a defence. They are (or rather were) a normal commercial business with experience in the PAYE field. I acknowledge that there was no tax liability associated with the return, all liabilities had been settled earlier. Nonetheless, the PAYE regulations require a return and TMA lays down penalties to be applied if the return is not submitted. Whilst I find that the Tribunal has power to strike down a penalty which it considers to be “not merely harsh but plainly unfair”, that is a power to be exercised sparingly and with due regard for the scale of penalties which Parliament has seen fit to lay down.

19. Since my original summary decision was issued, the Appellants have referred, in “challenging” that earlier decision, to the case of *HMD Response International v HMRC* [2011] UK FTT 472. I think it is appropriate to give my specific comments on that submission, even though it was made after my decision was given. Decisions of the First-tier Tribunal have no binding force, and I note that the case was decided on the basis that the Judge found the return to have been submitted on time. None of the other comments made by the Judge were relevant to that decision, and I do not find myself wholly in agreement with them in any event.

20. 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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**KEVIN POOLE**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 20 December 2011**