



TC03134

Appeal number: TC/2013/03066

*Income Tax – late payment penalty – whether reasonable excuse – no –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAMSON WEST

Appellant

- and -

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

**TRIBUNAL: JUDGE DR K KHAN
MR CHRISTOPHER JENKINS**

Sitting in Bedford Square, London on 24 September 2013.

Mr Michael Samson, Partner, for the Appellant.

**Gloria Orimoloye, Presenting Officer, assisted by Sarah Bentley, and Alison
Smith, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

Introduction

1. This appeal is concerned with a penalty of £3,832.36 for the late payment of PAYE for months 2 to 11 for the tax years 2011-2012.
- 5 2. The question for the Tribunal is whether there is a reasonable excuse for the late payment of PAYE that precludes the liability from arising.

Legislation

3. Legislation Schedule 56 Finance Act 2009 allows a penalty to be charged when an employer fails to pay to HMRC its monthly PAYE/NIC payment by the due date.
- 10 4. Paragraph 6(2) specifies that a default occurs if the employer fails to pay an amount of tax in full on or before the due date i.e. 19 or 22 of the month depending on the method of payment.
5. Paragraph 16 provides that if there is a reasonable excuse for the failure to pay on time then there will be no penalty but specifies that insufficiency of funds or reliance on a third party are not reasonable excuses.
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Background facts

6. The Appellant is a firm of chartered accountants and the PAYE relates to amounts deducted from employees' salaries and wages.
7. The payment records indicate that the Appellant had paid late multiple times in the year 2011-2012 but for the previous year 2010-2011 had paid on time except for two monthly payments. In the year 2009-2010 there were several late payments throughout the year.
8. The Appellant indicated that they were well aware of the dates their tax liability was due and always intended to pay on time but did not have the resources to pay on the due date. There were reliant on fees paid by clients and there was a large bad debt of £30,000 relating to unpaid client fees from 2011 which had created financial difficulties for the firm.
9. The Appellant did not apply for time to pay arrangements as they always expected the PAYE due to be paid on time and funds to be available to do so.
- 30 10. On 24 January 2013, HMRC indicated that there was no reasonable excuse for late payment. They said that the PAYE late payment penalties were intended to encourage employers to pay by the due date. When the Appellant realised that they were in financial difficulties and before the PAYE was due they should have contacted HMRC. If this had been done then arrangements could have been made which would have avoided the penalty and allowed payments to be made late.
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11. On 20 February 2013 the Appellant requested an independent review of HMRC's decision which upheld the original decision. Given that the Appellant had considerable experience in negotiating time to pay arrangements on behalf of their clients and had been overdrawn throughout the year they should have known that they would have difficulties paying their PAYE liability.

12. The Appellant acted as payroll agents for over 50 companies and negotiated several time to pay arrangements. It was felt that a diligent taxpayer in the Appellant's position would have made arrangements to have paid their tax liabilities late. This was not done and for this reason the review upheld HMRC's decision on penalties. It was felt that the Appellants did not have a reasonable excuse.

The Evidence

13. The Tribunal was provided with a ring binder containing the correspondence and other documentation which passed between the parties. They were also provided with a separate binder of legislation and authorities.

Appellant's Submissions

14. The Appellant appeal on the following grounds:

(1) In 2011 they suffered a bad debt of £29,000. It was explained that the client company had previously paid substantial fees and there was no reason to believe that the outstanding fees would not have been paid. The debtor company was resident overseas and it was not possible to have a court action in a foreign jurisdiction without incurring substantial fees to recover the debt. A statement of the outstanding fees shows that the amounts were owed between May 2010 and June 2011 with the main amounts due in the year 2010.

(2) Given the poor state of the economy the firm experienced payment problems resulted in cash flow difficulties for the Appellant which meant that they were unable to pay their liabilities on time including PAYE.

(3) The company's overdraft facility which had been fully used in 2011 was not available to be increased and this caused further cash flow difficulties for the Appellant.

Respondents' submissions

(1) There was no reasonable excuse based on the cash flow difficulties of the Appellant.

(2) The bulk of the bad debt arose in the previous tax year so it was not an unforeseen or unexpected event. There was no bad debt during the January 2011 to April 2011 period which would have caused financial difficulties for the firm.

- (3) The debt for the period May 2011 to June 2011 totalled approximately £4,000 and this should not have impacted on the ability of the taxpayer to make payments by the due date.
- (4) Most businesses experience cash flow difficulties which is part of the normal cycle of business. In any event the lack of money of itself is not a reasonable excuse for failure to make payments on time.
- (5) The timing of the issue of the penalties was in accordance with the legislation and was not unfair. The penalty itself was not disproportionate.

Discussion and Conclusion

- (1) It is expected that employers will pay the tax liability. PAYE is the money the employer deducts from the employees on behalf of HMRC and it is not therefore theirs to use for other purposes in the interim period between deduction and payment.
- (2) The PAYE deducted from employees' salaries and wages belongs to HMRC and should not have been used as short term finance.
- (3) It is understandable that the company had a bad debt but this arose in the previous year and did not impact on the company's ability to pay their tax liability for the 2011-2012 periods.
- (4) Schedule 56, paragraph 16(2)(a) states that an insufficiency of funds is not a reasonable excuse unless attributable to events outside of the taxpayer's control. The Appellant has a long history of non-compliance. Whilst there were only two late payments in 2010-2011, the tax year prior and the period between 2005 and 2010 showed significant late payments. This would appear to show that there is an ongoing problem with timely payment and would show a pattern of payments by the taxpayer which were late.
- (5) The Appellant has acknowledged that they should have requested payment deferral or time to pay but choose not to use this facility. In the Tribunal's view that was a poor decision which resulted in penalties being levied on the taxpayer. The Appellant would have been aware of the implications of late payments having been issued with default warning letters and being familiar with the late penalty regime.
- (6) In their letter of 20 February 2013, the Appellant acknowledged that "as a firm of chartered accountants they had studied the capricious manner in which the PAYE penalty regime operates". This suggests that they were familiar with the PAYE penalty regime and legislation.
- (7) The structure of the penalty regime is such that a percentage is to be charged which increases according to the number of late payments received. It is not until the end of the year that the full picture is known which is why HMRC wait until the year end to review payments and to establish penalties. The taxpayers

5 have been issued with a warning which states that HMRC “may” issue penalties. The reason this wording is used is so HMRC are able to see if there were months when there was a reasonable excuse and to see what percentage rate should be used in calculating the final penalty, if at all. For this reason, it is not unfair for HMRC to wait to impose the penalty.

10 (8) The Appellant has questioned the proportionality of the payments. This is not a matter in which the Tribunal ordinarily has jurisdiction. Suffice it to say that the penalties are issued in accordance with the law which was considered by Parliament and the penalty rate increases with the number of defaults, as stated in the legislation.

(9) HMRC considered whether a special reduction should be given on the evidence. They did not consider there to be any special circumstances which would allow the penalty to be reduced.

15 (10) The Appellant is appealing on grounds of cash flow, lack of a yearly warning and proportionality. The Tribunal does not believe that any of these provides a reasonable excuse.

(11) The Appellant may discuss with HMRC arrangements to pay the penalty by instalments if they are so agreeable.

15. In the circumstances, the appeal the dismissed.

20 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **DR K KHAN**
TRIBUNAL JUDGE

RELEASE DATE: 11 December 2013