



[2014] UKFTT 099 (TC)

TC03239

Appeal number: TC/2011/04865

Income tax – penalty for late payment of PAYE – whether reasonable excuse – held, no – appeal dismissed and penalty confirmed

FIRST-TIER

TAX CHAMBER

J R PAYNE HAULAGE LTD

Appellant

-and

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

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

JUDGE PETER KEMPSTER

TERENCE BAYLISS

Sitting in public at Birmingham on 4 December 2012

In the absence of the Appellant

**David Wilson of HM Revenue and Customs Appeals and Reviews Unit, for the
Respondents**

DECISION

1. The appeal has been adjourned on two previous occasions in 2012 due to Mrs Payne's illness. On this occasion J R Payne Haulage Limited ("the company") did not request an adjournment of her hearing. The tribunal was satisfied that the company had received over 14 days notification of the hearing to their last known address. Further they were sent a letter notifying them that if they did not attend the hearing the appeal may be heard in their absence. Under these circumstances the tribunal was satisfied it was in the interests of justice to proceed in their absence (Rules 2 and 33 of the Tribunal Procedure Rules considered).
2. This was the appeal by the company against a penalty of £1,965.89 for the late payment of monthly Pay As You Earn ("PAYE") and Class 1 employees' National Insurance Contributions ("NICs") for the tax year 2010/11 for months 3-11. A penalty was issued on 10 June 2011 under schedule 56 Finance Act 2009.
3. It is not in dispute that the PAYE and NICs were paid late. The payment due date was the 19th of the month. Between 19 July 2010 and 19 March 2011 there were eight late payments.
4. The issue in the case was whether the company had a reasonable excuse for the late payments.
5. The Tribunal gave its decision orally at the end of the hearing. We decided that the company did not have a reasonable excuse. We dismissed the appeal and confirmed the penalty.
6. We issued a summary decision which was a summary of our reasons for dismissing the appeal. However, after receiving the summary decision, Ms Payne asked for full written findings of fact and reasons for the decision (a "full decision"), as she is entitled to do. This is that full decision.

The legislation

7. Penalties for late payment of monthly PAYE came into effect from 6 April 2010. The relevant legislation is at Finance Act 2009, Schedule 56 ("Schedule 56"). The structure of the regime is as follows:
 - (1) if payments of PAYE and employees' NIC are late for one month in a tax year, there is no penalty;
 - (2) if two to four months' payments are late, the penalty is 1% of the total PAYE and NICs for the tax year;
 - (3) if five to seven months' payments are late, the penalty rises to 2%;
 - (4) if eight to ten months' payments are late, the penalty rises further to 3%;
 - (5) if eleven or twelve months' payments are late, the penalty is 4%.
8. However, following the case of *Agar v R&C Commrs* [2011] UKFTT 773 (TC) ("Agar"), HMRC have accepted that the legislation does not allow a penalty to be charged for a Month 12 late payment.
9. The provisions of Schedule 56, so far as relevant to this decision, are set out in the Appendix.

10. The Social Security Contributions Regulations 2001 (SI 2001/1004), Regulation 67A state that Schedule 56 applies to Class 1 employee NICs.

The evidence

11. We heard submissions from Mr Wilson.
- 5 12. HMRC provided a bundle which included the correspondence between the parties together with the following documents:
- (1) A statement of case
 - (2) A schedule of late payments between 5 May 2010 and 5 March 2011 including the total amount of the penalties charged
 - 10 (3) Template example of the PAYE late payment penalty warning, and the penalty notice for late PAYE payment
 - (4) Copies of computer printouts headed “Action History” for 2010-11.
 - (5) Calculation schedules of the company’s 2010-11 PAYE and NICs by tax month showing the number of days the payments had been made late.
 - 15 (6) A table of the PAYE due date and payments for 2007-2008, 2008-2009, 2009-2010, 2010-2011, and 2011-2012.
 - (7) These included notes of telephone calls between HMRC and the company
 - 20 (8) Extracts from HMRC’s online guidance and from their Employer Bulletin relating to the payment of PAYE.

The issues

13. In considering whether there is a reasonable excuse the tribunal has to consider whether the company exercised reasonable foresight and due diligence in their tax affairs and had a proper regard for their tax obligations (see *Stephen Mutch v HMRC* [2009] UKFTT 288 (TC)). Although the tribunal is not bound by this decision nevertheless, as it is a decision of the former president of the Tax Tribunal, it is persuasive and the tribunal finds it a helpful analysis of the factors to consider when looking at the issue of reasonable excuse.
- 25
- 30
14. Insufficiency of funds cannot amount to a reasonable excuse unless attributable to factors outside the taxpayer’s control for example unforeseen or unexpected events.

Summary of the company’s arguments

15. The reasons given by the company for paying late are:
- 35 a) Rising fuel prices;
 - b) Cash flow problems;
 - c) Being given a week's additional grace to make payments by the Worcester HMRC office;
 - 40 d) HMRC taking 10 days to present and cash cheques and had the company known this they could have sourced a better means of payment i.e. by taking out a short-term loan or discussing a change to the monthly payroll;
 - e) If they had known they could pay by credit card they would have done so;
 - f) The penalty is unfair.

Discussion

16. We accept Mr Wilson's submissions that the dates used by HMRC to calculate late payments are the dates the cheques are received and not the dates that they are cashed. In any case in a phone call to HMRC on 3 August 2011 Mrs Payne stated she could not be sure whether the dates she held were the dates the cheques were received or the dates the cheques were cashed. Further based on her own paying in book she has paid her PAYE late.
17. Insufficiency of funds does not constitute a reasonable excuse unless the situation was outside the company's control. There is no evidence of any attempt by the company to resolve any difficulties caused due to rising fuel prices and/or late payments from customers despite the problems starting at least nine months prior to the period we are looking at. In our view nine months is a sufficient amount of time to put in place a strategy to deal with these issues.
18. Details of how to pay the PAYE, when to pay, and the penalties if not paid by the due date are published in the employer's bulletin dated September 2009, and the employer's pack sent on February 2010. There are also factsheets published on HMRC's website dealing with these issues. Further HMRC sent a penalty warning letter on 28 May 2010 and Mrs Payne was warned about the penalties over the phone on 2 September 2010. In our view a reasonable taxpayer would at least have read the literature issued by HMRC.
19. Further if the company had any problems paying their PAYE they could have contacted HMRC before the due date or made attempts to find other sources of funding for example from their bank. Other than stating that the banks are not interested in helping small businesses the company has not explained why they were unable to get an overdraft from their bank, what attempts were made, and when these attempts were made. The company has not given the tribunal any details of why their customers have been paying late, when this started, what attempts the company have made to sort out this problem, and how this has affected the business. No documentary evidence has been provided of any agreement made with HMRC's Worcester office to pay the PAYE after the due date.
20. For the above reasons the tribunal therefore finds there was no reasonable excuse.
21. *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) makes it clear that this tribunal does not have jurisdiction to supervise the conduct of HMRC and thus has no power to determine whether the imposition of the penalty was unfair. This decision is binding on this tribunal.

Conclusion and appeal rights

22. As a result of the foregoing, we find that the company does not have a reasonable excuse. We dismiss the appeal and confirm the penalty of £1,965.89
23. 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.
24. 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.

5

PAULENE GANDHI

**PETER KEMPSTER
TRIBUNAL JUDGES**

10

RELEASE DATE: 14 January 2014

FINANCE ACT 2009, SCHEDULE 56 PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

Penalty for failure to pay tax

5 1 (1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.

(2) Paragraphs 3 to 8 set out—

- (a) the circumstances in which a penalty is payable, and
- (b) subject to paragraph 9, the amount of the penalty.

10 (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.

15 (4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

2 – 4

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE Regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid
3-24		

Amount of penalty: PAYE and CIS amounts

5 (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.

(2) ...

25 6 (1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—

- (a) the number of defaults that P has made during the tax year (see subparagraphs (2) and (3)), and

- (b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).
- 5 (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—
- (a) a payment under PAYE regulations;
- (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004)...
- 10 (3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.
- (4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.
- 15 (5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total of those defaults.
- (6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of the tax comprised in the total of those defaults.
- (7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.
- 20 (8) For the purposes of this paragraph—
- (a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;
- (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is
- 25 remedied before the end of the tax year.

7-10

Assessment

- 11 (1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—
- 30 (a) assess the penalty,
- (b) notify P, and
- (c) state in the notice the period in respect of which the penalty is assessed.
- (2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is
- 35 issued.
- (3) An assessment of a penalty under any paragraph of this Schedule—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),

(b) may be enforced as if it were an assessment to tax, and 5 (c) may be combined with an assessment to tax.

(4)-(5) 12-15

Reasonable excuse

5 16 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

- 10 (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- 15 (c) Where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.