



TC03390

Appeal number: TC/2011/09933

PAYE – late payment penalty – reasonable excuse – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LAMBTON CLOTHING COMPANY LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JENNIFER BLEWITT

Sitting in public at Bradford on 27 February 2014

Mr E. Lambert for the Appellant

Ms J. Bartup, officer of HM Revenue and Customs, for the Respondents

DECISION

5 1. By Notice of Appeal dated 16 November 2011 Mr Lambert appealed against a penalty in the sum of £6,403.95 incurred as a result of making PAYE payments late.

2. The Grounds of Appeal can be summarised as follows:

- The Appellant does not agree that HMRC systems are incapable of sending out an interest invoice on a monthly basis;
- 10 • The penalty is a cynical attempt by HMRC to raise additional tax by accumulating interest without informing customers what their liability is;
- The warnings given by HMRC regarding late payment penalties are insufficient given that they are contained within 100s of pages of complicated edicts produced by HMRC;
- 15 • It is accepted that payments were made late due to cash flow problems within the Appellant Company which had to deal with £240,000 of bad debt;
- If the Appellant had known how inflexible HMRC was being with small businesses it would have tried to arrange an agreement for late payments to be made.

20 3. In oral evidence to the Tribunal Mr Lambert reiterated the Grounds of Appeal set out above and expanded upon them. He explained that, having read the authorities and documents relied upon by HMRC, it was clear that HMRC had failed to take into account the economic state of the country and its effect on small businesses. The judgments relied upon showed no compassion to small businesses in such unprecedented times.

25 4. Mr Lambert contended that HMRC's guidance states that if payments are made late a taxpayer "may" incur a penalty, which denotes an element of discretion on the part of HMRC which was not applied in this case.

30 5. It was submitted by Mr Lambert that the introduction of the legislation was a desperate act of a Government facing bankruptcy and the Appellant is being penalised as a result. The Appellant was forced to act as a banker to its customers during the relevant period as banks refused to lend money and had the Appellant been aware of the penalty accruing, it would have contacted the bank to arrange assistance.

35 6. Mr Lambert submitted that the imposition of a penalty by HMRC is unfair and improper. All payments were made within a few days of the due date. In November/December 2010 the Appellant suffered a loss in excess of £200,000 as a result of one of its customers ceasing to trade. The customer represented 60% of the Appellant's business and the loss was considerable. The customer had been struggling since April 2010 and the Appellant had attempted to help it through the year until it

became apparent in December 2010 that the Appellant would be unable to recoup the debt owed.

7. On behalf of HMRC Ms Bartup submitted that the Appellant does not have a reasonable excuse for the late payments made. She relied on the legislation at paragraph 16 of Schedule 56 Finance Act 2009 which specifically excludes insufficiency of funds as a reasonable excuse unless attributable to events outside the Appellant's control. Ms Bartup submitted that the general economic state of the country is insufficient to amount to a reasonable excuse, which requires an element of the unexpected or unforeseeable rather than events which arise in the usual course of business.

8. Ms Bartup contended that the bad debt suffered by the Appellant was relatively low when compared with the Appellant's annual turnover at the relevant time which was stated by Mr Lambert to be in the region of £3,500,000.

9. As to the issue of fairness, Ms Bartup referred me to the judgment of *HMRC v Hok* [2012] UKUT 363 (TCC) in which it was made clear that this Tribunal has no jurisdiction to consider the issue of fairness where the penalty was charged in accordance with the legislation.

Decision

10. I was satisfied and found as a fact that all of the PAYE payments in the period with which I am concerned were made late.

11. Mr Lambert raised a number of issues and I shall address each in turn. As regards the fact that no monthly invoice was sent to the Appellant warning of the penalty accruing, I agree with and adopt the words of Judge Berner in *HMRC v Dina Foods Ltd* [2011] UKFTT 709 (TC) ("Dina Foods"):

25 *"The scheme of the PAYE legislation requires taxpayers to pay over PAYE on time. The legislation does not require HMRC to issue warnings to individual employers, though it would be expected that a responsible tax authority would issue general material about the new system. This HMRC did; in our view, the absence of specific warnings to **Dina Foods Ltd** about the consequences of failing to pay on time does*
30 *not constitute a reasonable excuse for any of the late payments.*

34. *With respect to Mr Kaye's argument on the lack of any warning from HMRC that the penalty was building up, the comparison he drew with the VAT Default Surcharge system may be apt, but only in the sense that both seek to encourage a taxpayer to pay on time and penalise him if he does not. However, the comparison only goes so far.*
35 *Parliament decided on a different system for PAYE, possibly because of the monthly schedule that usually applies to PAYE payments. But even though there is no provision for a formal warning, Schedule 56 does exclude the first default from the penalty regime.*

38. *In this context we have a number of observations to make concerning the scheme*

of Schedule 56 as a whole, as it applies to PAYE and NICs payments. The penalty regime is based on the number of defaults over a complete tax year. There is no separate penalty for each individual default; the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained. A taxpayer who continues to pay late, so increasing both the amount of tax (and NICs) on which the penalty may be levied and the rate of the penalty, may well complain that his behaviour (and thus the amount of his liability) would have been different had a penalty been levied in respect of a default early in the tax year or at least a warning issued. But on the scheme of penalties that has been laid down, the total would not then have been capable of being ascertained, so the penalty could not at that earlier time have been assessed.

39. We do not therefore consider that any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is of itself capable of amounting either to a reasonable excuse or special circumstances.”

12. Furthermore, I do not accept Mr Lambert’s submission that the warnings given by HMRC were insufficient, again noting the comments by Judge Berner in *Dina Foods*:

“27. ...HMRC publicised the late payment penalties for PAYE and NICs extensively both before and after they came into effect. An employer pack including a CD-ROM was mailed to all employers in February 2010, flyers were mailed to employers and factsheets were distributed at face to face events (such as “Employer Talk” and published on the HMRC website. Late payment penalties also featured in issues of *Employer Bulletin*, on the PAYE pages of the website (and on a podcast), on *Businesslink* and in published guidance and employer help books. There was also communication with accountants and other tax agents, and publication in local and national media.”

I do not accept that the Appellant’s lack of awareness of the penalty regime constitutes a reasonable excuse. In my view, any reasonable employer seeking to fulfil his or her statutory obligations to make timely payments would have read at least some of the information published and sent to employers by HMRC. That Mr Lambert failed to do so, does not constitute a reasonable excuse.

13. The fact that payments were made, in the main, within 1 week of the due date does not, in my view, constitute a reasonable excuse. The legislation is clear and the statute gives no discretion; the rate of the penalty is set by the number of late payments made in a tax year irrespective of whether those late payments are 4 or 40 days late.

14. Whilst I am sympathetic to the situation in which the Appellant now finds itself due to the economic climate, I am satisfied that the general economic state of the country does not constitute a reasonable excuse for its failure to make payments on time.

15. I considered the information given by Mr Lambert regarding bad debts carefully and I accept that the loss would have no doubt had an impact on the business. That said, I do not accept that it amounts to a reasonable excuse for the following reasons: on Mr Lambert's own evidence the Appellant was aware of the fact that its customer
5 was in financial difficulty from approximately April 2010 yet it chose to continue to trade with the customer and assist it through a difficult period. In or around December 2010 the customer ceased trading and the Appellant could not recoup the debt. Throughout this period, from April to December 2010, the Appellant traded with the customer whilst being aware of the difficulties. At no time did the Appellant contact
10 HMRC to explain that the customer had ceased trading or seek to make a formal arrangement for making payments late despite the fact that it must have been increasingly obvious to the Appellant either that the debt was increasing or that time was passing without the customer being able to pay its debt to the Appellant. I also noted that payments had been made late in the previous year (2009/10) and I rejected
15 the argument that the bad debt was the reason for the Appellant's late payment as I was satisfied that late payments were habitual. Taken together with the Appellant's failure to take steps to contact HMRC and agree a time to pay arrangement, I do not accept that there was a reasonable excuse.

16. As regards the issue of unfairness, I am bound by the Upper Tier decision in
20 *Hok*, which states:

"36. ...it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair..."

Consequently, I do not have jurisdiction to interfere with the penalty on the basis of unfairness.

25 17. The appeal is dismissed.

18. 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
30 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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**JENNIFER BLEWITT
TRIBUNAL JUDGE**

RELEASE DATE: 6 March 2014

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