



TC01620

Appeal number: TC/2011/06568

Penalty – late payment of PAYE payments – FA 2009, Sch 56 - – reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

P. A. DUNWELL TRANSPORT LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: J. BLEWITT (JUDGE)

Sitting in public at Leeds on 28 November 2011

Mr Dunwell for the Appellant

Miss Bartup, of HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This case concerns an appeal against a penalty for late payment of PAYE payments. The penalty under appeal amounts to £8,448.60, the initial penalty figure of £8,492.44 having been revised by HMRC.

2. The Tribunal had in advance the Appellant's Notice of Appeal, including a schedule from HMRC showing that they considered the Appellant had been late with all its PAYE payments for 2010-11. HMRC produced a helpful bundle of papers, including extracts from their call logs, copy correspondence, relevant legislation and copies of HMRC notices. Mr Dunwell confirmed that he had a copy of the bundle and did not dispute the contents; it was accepted by the Appellant that the payments had been late.

The legislation

3. The legislation in question is relatively new; the provisions came out of a review of HMRC's powers and the penalties available to them. Historically there was no penalty for late paid PAYE.

4. The legislation is contained in Finance Act 2009, Schedule 56. The relevant paragraphs which provide for the structure of the penalty for PAYE are as follows:

Penalty for failure to pay tax

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.

(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.

(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).

1	<i>Income tax or capital gains tax</i>	<i>Amount payable under section 59B(3) or (4) of TMA 1970</i>	<i>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</i>
2	<i>Income tax</i>	<i>Amount payable under PAYE regulations . . .</i>	<i>The date determined by or under PAYE regulations as the date by which the amount must be paid</i>

Amount of penalty: PAYE and CIS amounts

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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) *But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).*

[6

10 (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 sub-paragraphs (2) and (3)), and*

15 (b) *the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).*

(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—*

20 (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);*

(c) *a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);*

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (SR 2000 No 121).

5 (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.

10 (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.

15 (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.

(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;

20 (b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.

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5. HMRC is given no discretion over levying a penalty, given the use of the word ‘must’ in paragraph 11:

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.

6. The legislation does allow discretion to HMRC, but only in ‘special circumstances’ (Paragraph 9):

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

5 *(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.*

7. On appeal, the Tribunal’s powers are laid down in paragraph 15:

10 *(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.*

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

15 *(b) substitute for HMRC's decision another decision that HMRC had power to make.*

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

20 *(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.*

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

25 *(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).*

8. The Tribunal can, therefore, only rely upon the “special circumstances” set down in paragraph 9 if it thinks that HMRC’s decision in that respect was flawed. In applying Judicial Review principles, the Tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, whether
30 they took into account some irrelevant matter or disregarded something to which they should have given weight and whether HMRC have erred on a point of law.

9. Paragraph 16 provides for the defence of reasonable excuse, although it should be noted that there are specific exclusions contained within the provision:

If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

5 *(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.]*

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

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

10 *(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*

(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.

15 **The penalty notice**

10. A standard warning letter was sent to the Appellant on 28 May 2010 which informed the Appellant that it had not paid a PAYE payment for 2010/2011 on time and that it may be liable to a penalty if it paid late more than once in a tax year. On 1 June 2011 a penalty notice was issued; the penalty was charged at 4% of the Appellant's late paid PAYE (excluding the first default) which resulted in a penalty of £8,492.44 which was later amended by HMRC to £8,448.60.

11. The Appellant appealed to HMRC by letter dated 8 June 2011 in which it was accepted that the payments were made later. The letter explained that major customers tend to pay at the beginning of each month and payments are made to fit the Company's cash flow; to pay earlier would put the Company out of business.

12. By letter to the Appellant dated 14 June 2011, HMRC did not accept that a reasonable excuse existed and confirmed the penalty.

13. A review was requested by the Appellant on 22 June 2011, following which HMRC upheld the decision to impose the penalty by letter dated 29 June 2011.

30 **Submissions**

14. Mr Dunwell, Managing Director of the Appellant Company, accepted that the payments had been late. He explained that in 2008, at the start of the recession, the Company was forced to find £500,000 to pay its bank. Although the Company managed to make the payment without causing unemployment, it was forced to re-finance its vehicles which caused cash flow difficulties. These difficulties were exacerbated by payment terms being reduced.

15. Mr Dunwell stated that the Company often received a telephone call from HMRC after the payment due date, usually on or about 21st of the month, however when he returned the call, the HMRC staff were arrogant and blunt or did not return his calls.

5 16. Mr Dunwell accepted that payments should have been made on or by 19th of the month, but that the Company now pays a great deal closer to the due date at a cost to the Company. The Appellant has rearranged the purchase of diesel at extra cost and a vehicle has been sold. The imposition of a penalty would lead to at least one other vehicle being sold.

10 17. Mr Dunwell accepted that he was aware of HMRC's time to pay arrangements and that he had only informed HMRC that payment would be made late after the due date, rather than seeking to agree a payment plan prior to the due date.

15 18. Miss Bartup took the Tribunal through the relevant legislation and the publicity for the new penalty regime found on HMRC's website and in bulletins. It was argued that the Appellant had been sent a warning letter advising of the potential consequences of late payment.

19. The Tribunal was referred to extracts from HMRC's records of telephone contact with the Appellant in which warnings were given about penalties which could be imposed for late payment.

20 20. Miss Bartup submitted that HMRC had considered Mr Dunwell's case and considered that the events which had led to the late PAYE payments had not been outside of the Company's control.

25 21. It was submitted on behalf of HMRC that the difficulties experienced by the Appellant were not beyond the normal hazards of business in the current economic climate and that there were no grounds cited which, under the legislation, allowed HMRC to reduce or set aside the penalty.

Decision

22. The Tribunal found as a fact that the PAYE payments throughout 2010/2011 were paid late. The schedule produced by HMRC showed payments made between 7 and 18 days late, which was not disputed by the Appellant.

30 23. The Tribunal found as a fact that the Appellant was aware of the due date for making payment and, from the warning letter dated 28 May 2010 and telephone calls with HMRC, the potential consequences of making late payments.

35 24. The legislation is clear; except in the case of special circumstances, the statute gives no discretion and the rate of the penalty is set by the number of PAYE late payments in the tax year. The 4% penalty rate was correctly charged in this case, there having been 11 late payments.

25. The amount of the penalty is, therefore, only affected by the Appellant showing that a reasonable excuse existed. The Tribunal found Mr Dunwell to be a genuine and

credible witness and was sympathetic to the difficulties experienced by the Company. The Tribunal accepted that this was not a case in which the Appellant had by any means, attempted to avoid making payment to HMRC and that efforts were made by the Appellant to make payment as and when it could.

5 26. The legislation specifically excludes cash flow difficulties as a reasonable excuse unless attributable to events outside of the Appellant's control. The Tribunal found as a fact that there was no specific or unforeseeable incident outside of the Appellant's control which had caused such difficulties. The problems suffered by the Appellant Company arose from the economic climate in which many businesses struggle to
10 operate. The cash flow difficulties had continued for some time yet the Appellant, knowing of his inability to make payments by the due date, did not seek to arrange a payment plan with HMRC despite being aware of the consequences of late payments.

15 27. The Tribunal considered the limited discretion held by HMRC to make a "special reduction" and found as a fact that this issue had been considered in its review process. The conclusion reached was that there were no special circumstances. The Tribunal found as a fact that this decision was not flawed on judicial review principles. The Tribunal found that inability to pay cannot constitute a reasonable excuse or special circumstances.

28. The appeal is dismissed and penalty confirmed.

20 29. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 5 December 2011

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