



TC01621

Appeal number: TC/2011/06015

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

FIRST-TIER TRIBUNAL

TAX

NORTHERN BULK 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 Thornton for the Appellant

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

© CROWN COPYRIGHT 2011

DECISION

Introduction

1. This case concerns an appeal against a penalty for late payment of PAYE payments. The penalty under appeal amounts to £1,726.98.

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 Thornton 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

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

(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

(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—

(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.*

(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.*

10 (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.*

(8) *For the purposes of this paragraph—*

15 (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 remedied before the end of the tax year.*

20 (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.*

25 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—

(a) *assess the penalty,*

(b) *notify P, and*

30 (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*

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

5

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

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

10

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

(a) *affirm HMRC's decision, or*

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

15

(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*

(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.*

20

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

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

25

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 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.

30

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*

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

5 (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,*

(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*

10 (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.*

The penalty notice

15 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 21 June 2011 a penalty notice was issued; the penalty was charged at 3% of the Appellant's late paid PAYE (excluding the first default) which resulted in a penalty of £1,726.98.

20 11. The Appellant appealed to HMRC by letter dated 18 July 2011 in which it was accepted that the payments were made later. The letter explained that the Company's terms of payment were changed from 30 to 90 days which seriously impacted on its cash flow.

25 12. By letter to the Appellant dated 27 July 2011, HMRC did not accept that a reasonable excuse existed and confirmed the penalty.

13. By Notice of Appeal dated 3 August 2011 the Appellant appealed to the Tribunals Service. The grounds relied upon were the alteration to the Appellant's payment terms and visits to the Appellant Company by an HMRC representative who did not raise the issue of penalties.

30 Submissions

14. Mr Thornton submitted at the hearing that it was unreasonable for HMRC to have delayed notification of the penalty until the penalty notice was received on 26 June 2011.

35 15. Mr Thornton explained that the Appellant Company has only one customer, TNT, who changed its payment terms over the relevant period which caused the Appellant

Company to experience severe cash flow difficulties which took a significant period of time to resolve. TNT have now reinstated the original payment terms.

16. Mr Thornton submitted that during the period with which this appeal is concerned, the Appellant Company was visited by an HMRC representative on at least three occasions. The late payments were discussed with the representative and Mr Thornton had understood that there was no objection to the payments being made late and that this information was passed back to the relevant HMRC department by the representative.

17. The Appellant's cash flow difficulties were further exacerbated in December 2010 when Newtown Vehicle Rentals, from whom the Company leased their vehicles, went into administration and the Appellant was forced to raise the finance to purchase the vehicles; the only other option being to close the Company.

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 attempted telephone contact with the Appellant where there had been no response; Mr Thornton clarified that the number shown on the records was the Appellant's fax number as opposed to its telephone number and therefore the Appellant had been unaware of any attempts by HMRC to make contact. This, properly in the Tribunal's view, was not disputed by Miss Bartup.

20. It was accepted on behalf of HMRC that there were no records of visits by HMRC to the Appellant Company, but that this could not be disputed.

21. The Tribunal found that Miss Bartup took a fair and proper approach to this case in accepting that the grounds of appeal which had been expanded upon at the hearing were not previously known by HMRC.

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 6 and 75 days late, which was not disputed by the Appellant.

23. The scheme of the PAYE legislation requires taxpayers to pay PAYE on time. There is no statutory requirement on HMRC to issue warnings to individual employers. The system for penalty notification arises as a result of the monthly schedule that usually applies to PAYE payments. The Tribunal found as a fact that the delay in notification of the penalty due does not constitute a reasonable excuse for any of the late payments.

24. The Tribunal accepted the evidence of Mr Thornton in respect of the circumstances existing during the relevant time. The Tribunal found as a fact that Mr

5 Thornton had been in contact with an HMRC representative with whom there had been discussions about late payments arising from the Company's cash flow difficulties. As a result of these discussions, the Tribunal found as a fact that Mr Thornton believed that HMRC had agreed that the Appellant could make late payments. The Tribunal found as a fact that Mr Thornton had acted in reasonable reliance on this agreement between himself and the HMRC representative and that this amounted to a reasonable excuse.

10 25. The Tribunal also accepted Mr Thornton's explanation as to the cause of the cash flow difficulties. Had the Appellant had a number of clients, then perhaps the Tribunal may have taken a different view; however, on the basis the Appellant had only one customer, the Tribunal found as a fact that the unexpected and unforeseeable change by TNT to the payment terms was an event beyond the Appellant's control. The Tribunal accepted that such an event would not be resolved quickly and that a great deal of negotiation was required from Mr Thornton to resolve the matter. The Tribunal found as a fact that the reasonable excuse continued throughout the period with which this appeal is concerned.

20 26. The Tribunal found as a fact that the decline of the Appellant's vehicle supplier was also an unforeseeable event beyond the control of the Appellant and which further exacerbated the cash flow difficulties suffered by the Company. The Tribunal found that this constituted a reasonable excuse.

27. The appeal is allowed and penalties set aside.

25 28. 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.

30

TRIBUNAL JUDGE
RELEASE DATE: 5 December 2011

35