



TC01623

Appeal number: TC/2011/05794

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

FIRST-TIER TRIBUNAL

TAX

**STELLA CROWSON
T/A MACKENZIES SMOKED PRODUCTS**

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

Mrs Crowson, assisted by Mr Crowson 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 £2,661.31.

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 also produced a helpful bundle of papers, including extracts from their call logs, copy correspondence, relevant legislation and copies of HMRC notices. Mrs Crowson confirmed that she had a copy of the bundle.

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).

<i>1</i>	<i>Income tax or</i>	<i>Amount payable</i>	<i>The date falling 30</i>
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	<i>capital gains tax</i>	<i>under section 59B(3) or (4) of TMA 1970</i>	<i>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).

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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

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

15 (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;

20 (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);

25 (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.*

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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.*

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(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.*

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(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.*

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(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)).*

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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.

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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 8 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 £2,661.31.

20 11. The Appellant appealed to HMRC by letter dated 24 June 2011. In a letter to the Appellant dated 1 July 2011, HMRC did not accept that the appeal on the basis that there were no valid grounds advanced.

25 12. By Notice of Appeal dated 26 July 2011 the Appellant appealed to the Tribunals Service. The grounds relied upon were excessive interest charges and victimisation. The rural business is suffering; it is accepted that PAYE payments were made late, but PAYE was paid in preference to other creditors. The problem was rectified at the first available opportunity; month 1 was received into HMRC's account 3 days late and month 2 was received into HMRC's account 8 days late. The Appellant queried the length of time taken by HMRC to process the payments once received.

30 13. The Appellant explained that other companies who are months in arrears have not received a penalty and as a result Mrs Crowson feels victimised. The imposition of the fine may be the last straw for the Company.

Submissions

35 14. Mrs Crowson exhibited the Company cash book at the hearing which showed the date of payments made. It was accepted that a number of payments had been made late, but in respect of the following months, Mrs Crowson had recorded the date on

which the cheque had been sent by first class post to HMRC as predating the due date for payment:

- (a) Due date 19 June 2010: cheque posted 14 June 2010: received by HMRC 22 June 2010;
- 5 (b) Due date 19 July 2010: cheque posted 18 July 2010: received by HMRC 28 July 2010;
- (c) Due date 19 August 2010: cheque posted 16 August 2010: received by HMRC 1 September 2010;
- 10 (d) Due date 19 September 2010: cheque posted 15 September 2010: received by HMRC 25 September 2010;

15. Mrs Crowson queried why HMRC had not received the payments until so long after the due date.

15 16. Mrs Crowson reiterated the grounds relied upon as set out in the Notice of Appeal and explained that her accountant had informed her that a number of other local companies were further in arrears than the Appellant yet had not been penalised.

17. 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.

20 18. Miss Bartup explained that the length of time taken to process payments did not have any bearing on the date they were marked as received as the latter was allocated to the payment when processed.

25 19. Miss Bartup stated that the Appellant had been picked manually on a risk assessment basis due to the number of months over which payments had been made late; however HMRC had not intended to victimise the Appellant and the process of selection was ongoing in relation to other companies.

20. The amount of the penalty was charged in accordance with legislation; the rate is progressive on the basis of the number of late payments made and the number of days does not affect the rate.

30 **Decision**

21. 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 5 and 34 days late.

35 22. 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. 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.

23. 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.

5 24. The amount of the penalty is, therefore, only affected by the Appellant showing that a reasonable excuse existed.

25. The Tribunal accepted as accurate the evidence given by Mrs Crowson as to the dates that payments were posted to HMRC. The Tribunal found as a fact that for the months set out at paragraph 14 above, the payments had been made prior to the due date and by first class post. In such circumstances, the Tribunal found as a fact that sufficient time had been allowed for the payments to reach HMRC prior to the due date and that the Appellant had a reasonable expectation that such would be the case.

26. The Tribunal found as a fact that there is a reasonable excuse for the defaults during the months June 2010, July 2010, August 2010 and September 2010; namely postal delays over which the Appellant had no control.

27. No grounds amounting to reasonable excuse were advanced by the Appellant for the remaining months and the Tribunal therefore finds that no reasonable excuse existed for the months May 2010 and October 2010 to April 2011.

28. The appeal is allowed in respect of June 2010, July 2010, August 2010 and September 2010 and dismissed for the remaining months. HMRC is directed to amend the penalty in accordance with the Tribunal's findings.

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 "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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