



TC01686

Appeal number: TC/2011/05768

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

FIRST-TIER TRIBUNAL

TAX

HCM ELECTRICAL LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: J. BLEWITT (JUDGE)
M. HANDS (MEMBER)**

Sitting in public at Nottingham on 29 November 2011

Mr Dickinson (Director) and Mr Cooper (Managing Director) for the Appellant

Ms Walker, 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 £9,955.15.

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 Dickinson and Mr Cooper confirmed that they 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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(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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(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.*

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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 7 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 £9,955.15.

20 11. The Appellant appealed to HMRC by letter dated 20 June 2011. The Appellant relied on lack of funds due to events outside of its control in that a major customer reneged on payment, ultimately paying the Appellant far less than had been agreed. If the reduced amount had not been accepted by the Appellant, the Company would have collapsed, causing the loss of 50 jobs. The Appellant had done all that it
25 reasonable could to secure payment.

12. By letter to the Appellant dated 29 June 2011 HMRC rejected the appeal on the basis that contact had only been made with HMRC each month after the due date for payment and arrangements for payments were not kept.

30 13. By Notice of Appeal dated 27 July 2011 the Appellant appealed to the Tribunals Service. The grounds relied upon reiterated those set out in the Appellant's appeal letter to HMRC dated 20 June 2011. The Appellant accepted that contact with HMRC was not always prior to the due date but stated that their position had been reiterated several times. A query was raised in respect of the penalty charge of 4%; the Appellant submitted that 10 payments were late and consequently 3% should have
35 been the rate levied.

Submissions

14. HMRC clarified that the rate had been charged at 4% as 12 payments had been made late and the number of defaults fell within Paragraph 6 (7) of Schedule 56 FA 2009. This was accepted by the Appellant.

5 15. The fact that payments were made late was not disputed by the Appellant. It was submitted that as a result of the loss of approximately £500,000 from a major international customer, the Appellant Company had suffered cash flow difficulties beyond their control and which almost caused the collapse of the Company. The Appellant submitted that a £250,000 profit became a loss in the same amount as a result and that the cash flow difficulties had continued throughout the period with
10 which this appeal is concerned.

16. The Appellant Company was unable to obtain finance from a bank in order to assist in making payments on time and the Company had worked through the difficulties and it had taken approximately 2 years to reach the point whereby it could meet its tax obligations in a timely manner.

15 17. In addition, Mr Cooper explained that the Company's losses had been exacerbated by seeking legal advice in order to pursue the monies owed to the Appellant by its customer and the materials purchased in order to complete the work for the company that later reneged on payment. The Appellant was left with a VAT debt in the region of £200,000 which it had been paying throughout the relevant
20 period.

18. Mr Cooper accepted that contact had been made with HMRC after the due date had passed, but submitted that it had been the same ongoing difficulties which had caused the late payments yet HMRC had treated the explanation as a separate issue each month. Mr Cooper stated that he had spoken to a different representative each
25 time he telephoned HMRC and that he had to repeat same information on each occasion. Mr Cooper explained that the difficulties suffered by the Company were not short term problems yet HMRC had expected a swift resolution.

19. Miss Walker 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
30 that the Appellant had been sent a warning letter advising of the potential consequences of late payment.

20. The Tribunal was referred to extracts from HMRC's records of telephone contact with the Appellant and the advice that had been offered such as liquidating assets.

21. HMRC submitted that insufficiency of funds cannot amount to a reasonable
35 excuse unless attributable to events outside of the Appellant's control; HMRC had not been informed until April 2009 that the Company was suffering such problems and the issue was not reiterated by the Appellant until it appealed against the penalty.

22. HMRC had incorrectly failed to charge month 6 as a penalty due to a system error; fairly and properly in our view, HMRC agreed that the penalty would remain as
40 initially notified and that month 6 would not be added to the penalty.

Decision

23. The Tribunal found as a fact that the PAYE payments throughout 2010/2011 were paid late.

5 24. The Tribunal accepted the evidence of Mr Cooper in respect of the circumstances that existed during the relevant time and the explanation given as to the cause of the cash flow difficulties.

10 25. The Tribunal found as a fact that the loss of a significant amount of income, which was entirely unforeseeable and beyond the control of the Appellant, taken together with the exacerbated effect of the loss arising from materials purchased amounts to a reasonable excuse on the particular facts of this case.

15 26. The Tribunal found as a fact that the reasonable excuse lasted throughout the period of default; given the severity of the cash flow problems we accepted that there would inevitably be a long term impact on the Appellant and the reasonable excuse has only recently ceased.

27. The Tribunal found as a fact that there had been a misunderstanding on HMRC's part as to the nature and severity of the Appellant's cash flow difficulties, which contributed to the lack of an earlier resolution through timely payment arrangements.

20 28. On balance, the Tribunal accepted that there was on the specific facts of this case a reasonable excuse for the late payments made throughout 2010/2011.

29. The appeal is allowed and penalties set aside.

25 30. 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: 20 December 2011

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