

[2012] UKFTT 60 (TC)



TC01757

Appeal number TC/20116316

Income tax- PAYE penalties for late payment Sch 56 FA 2009 – reasonable excuse- special circumstances.

FIRST-TIER TRIBUNAL

TAX

TRIO OFFSET LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: CHARLES HELLIER
SHEILA CHEESMAN**

Sitting in public in Sutton on 1 December 2011

Thomas Philby, director of the Appellant, for the Appellant

Mrs Gardiner for the Respondents

© CROWN COPYRIGHT 2012

DECISION

1. The appellant appeals against penalties totalling £6354.42 assessed under schedule 56 Finance Act 2009 for the late payment of PAYE and NI during 2010/11.
- 5 2. Mr. Philby did not dispute that the company had been late in making payment each month in that year. But we note that:
 - (1) for three months it was only one day late,
 - (2) for one month it was only two days late and
 - (3) the three months it was only three days late.
- 10 3. In other months it was 6, 8, 10 and 19 days late. The 19 day delay was in respect of the payment due on 19 December 2010.
- 15 4. Mr. Philby told us, and we accept, that the company had faced particularly difficult trading conditions in 2010/11. Its turnover had declined by about 30% from about £3 million to about £2 million, and its customers had delayed payment. In response to these difficulties the company: had sought and been refused an overdraft facility by its bank; in September 2010 had dismissed about a quarter of its employees - these were long established staff – and had paid redundancy payments of some £100,000 in the autumn of 2010; and had tried to extend the credit it took from its suppliers. Mr. Philby and his fellow director had recently injected further funds into
20 the company secured on their homes to keep it trading.
- 25 5. Mr. Philby told us that in January 2011 one customer had gone into creditors voluntary administration owing some £68,000. Mrs Gardner told us that the accounts for the year to 31 December 2010 showed bad debts of £56,187. We suspect that the difference between the two figures may have been occasioned by the recognition in the accounts the VAT bad debt relief and that the accounts for 2010 would have recognised as a post balance-sheet event the insolvency of the debtor in 2011. This loss was of about the same order as the company's profits in previous periods although it was only about 2.7% of the turnover of the company: the company operated on a small net margin.
- 30 6. HMRC's officers had telephoned and spoken to either Mr. Philby or the company's bookkeeper. Telephone calls had been made in December 2009, May, November and January 2010. It is likely that the HMRC officers gave warnings that penalties could be payable if payments were not made on time.
- 35 7. Mr. Philby says that they had thought that after the telephone calls, having discussed their difficulties with the officers, late payment was being allowed by HMRC. The telephone attendance notes before us indicated that the officers gave no express indication of such an assurance. It seems to us likely that HMRC's officers noted the difficulties and expressed understanding but gave no express comfort that HMRC would permit or allow late payment.

8. In May 2010 HMRC say they sent a warning letter to the company advising you to the possibility of penalties. Mr. Philby said it was not received. We make no finding on this issue.

The Law

5 9. Schedule 56 paragraph 1 provides that "A penalty is payable by a person "P" where P fails to pay" an amount under the PAYE regulations on time. Paragraph 6 of that schedule set out the calculation of the penalty:

10 (1) "P is liable to a penalty under this paragraph of an amount determined by reference to the number of defaults in relation to the same tax year that he has made during the tax year.

(2) P makes a default in relation to a tax when he fails to pay an amount of that tax in full on or before the date on which it becomes due and payable.

(3) But the first failure during the tax year to pay an amount tax does not count as a default in relation to that tax during that tax year.

15 (4) If P makes 1, 2 or 3 defaults during the tax year, he is liable to penalty of 1% of the total amount of those defaults.

(5) If P makes 4, 5 or 6 defaults during the tax year, he is liable to penalty of 2% of the total amount of those defaults.

20 (6) If P makes 7, 8 or 9 defaults during the tax year the tax year, he is liable to penalty of 3% of the total amount of those defaults.

(7) If P makes 10 or more defaults during the tax year, he is liable to penalty of 4% of the total amount of those defaults."

10. Paragraph 9 of schedule 56 provides that HMRC may reduce the amount of the penalty because of "special circumstances".

25 11. Paragraph 11 of schedule 56 provides that where P is liable for a penalty HMRC must assess and notified the penalty. It has no discretion in this respect.

30 12. Paragraph 16 provides that if a person has a reasonable excuse for a failure, a liability to a penalty in respect of that failure does not arise. Subparagraph (2) provides that "an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control".

35 13. A right of appeal to the tribunal is given. The tribunal may make its own determination as to whether or not there is a reasonable excuse for a default. It may also apply the special circumstances provisions of paragraph 9, but it may only interfere with HMRC's decision in relation to special circumstances if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was "flawed". That means that it was flawed when considered in the light of the principles applicable in proceedings the judicial review (see paragraph 15(4)).

Discussion

(a) construing the legislation.

5 14. Mr. Philby says that a fine of £6,354 for making payments between one day and two weeks late was unjust and excessive. In the circumstances the company had paid as quickly as it could. It would be much fairer simply to charge interest on the unpaid amounts.

10 15. The problem for us with this argument is that we are a statutory tribunal given the duty of applying legislation enacted by Parliament. Parliament has enacted legislation which provides for penalties at fixed percentages. It does not provide for an interest charge. It is not for us to question the fairness of that legislation unless there is other legislation which conflicts with it or otherwise requires a special approach to it. The only legislation in that category is the Human Rights Act 1998 which requires regard to be had to the Human rights Convention in construing domestic legislation. That
15 Convention permits a state to take away a person's property by levying a fine or penalty if it does so in a way which goes no further than is necessary in achieving a legitimate aim. The penalties in Sch 56 are clearly imposed with the legitimate aim of securing prompt payment of tax, and those assessed on the company are not so unfair that it can be said that they go further than is necessary to achieve that aim. We
20 therefore cannot interfere with the application of the plain words of Sch 56 on this ground.

(b) applying Sch 56

16. There is no dispute that the payments were made late or that the arithmetical calculation of the penalties was wrong.

25 17. We note that paragraph 6 refers to "defaults during the tax year". In relation to the payment due for the 12th month of the tax year the due date was 19 April 2011; that was after the end of the tax year. Thus whilst the default was in respect of the tax year it was not "during the tax year". As a result no penalty may be assessed in relation to this default in relation to 2010/11. Neither may any penalty be assessed in respect of
30 this default in 2011/12 since it would have been the first default in that year. We therefore allow the appeal in relation to that default.

18. That leaves the defaults in relation to the other 11 months. The first is not be taken as default (see paragraph 6(3)). That leaves 10 defaults for us to consider

Reasonable excuse

35 19. Did the appellant have any reasonable excuse for any of these defaults? The thrust of Mr. Philby's argument was that the delays had been caused by an insufficiency of funds. As a result of paragraph 6(2)(a) that is not a reasonable excuse unless it is due to events outside the appellant's control.

20. The decline in the company's business was however in our view an event beyond its control. The question is thus whether it was a cause or excuse for these defaults, and whether it and other difficulties provided a reasonable excuse for them.

5 21. But Mr. Philby did not go so far as to say that it was impossible for the company to have paid all these amounts on time. Indeed not only does the company's statement in its grounds of appeal say that it put in place procedures in order to ensure that payments would in future be made in time, but the evidence for payments made in 2011/12 indicates that after the company discovered the severity of the penalty regime it made sure it did pay on time. In other words it seems likely that the company could
10 have made most of the 2009/10 payments on time. As a result it seems likely to us that, at least for those payments which were 1 to 8 days late, the company could reasonably have been expected to have made arrangements to make payment on time. Thus it cannot be said that it has a reasonable excuse for the delays.

15 22. Two payments were made much later: the payment due on 19 July 2010 which was made 10 days late, and that due on 19 December 2010, which was made 19 days late. We therefore considered whether any of the facts related to us by Mr. Philby indicated that these payments could not have been made earlier and whether, as a result it could be said that the defaults were due to events outside the company's control. The two particular facts related by Mr. Philby were the redundancy payments
20 and the big bad debt.

23. The bad debt was due from a company which had gone into creditors' voluntary liquidation in February 2011 but it seemed likely to us that that debt would otherwise have been received by the company in December 2010. The insolvency was an event beyond the company's control. The redundancy payments had to be made and were
25 made as a result of the decline in the company's activity which was beyond its control.

24. As a result it seemed likely that the cash flow shortage in December 2010 could properly be said to have been attributable to events beyond the taxpayer's control. The delay of 19 days suggests that there was no way in which the taxpayer company could have made payment on time for that month, and therefore that these events caused,
30 and were an excuse for, the delay in respect of that payment. It seems to us that they were a reasonable excuse because the company could not with reasonable diligence and foresight have avoided the problems which caused its inability to pay. We therefore find that in respect of that payment there was a reasonable excuse.

25. However, there were no facts which would enable us to reach the same conclusion in relation to the default in relation to the payments due on 19 July 2010.
35

26. We therefore conclude that only for the payment due on 19 December did the company have a reasonable excuse for its default. In relation to the other payments there was no reasonable excuse.

Special circumstances

40 27. The penalty had not been reduced under paragraph 9. Mrs Gardner told us that HMRC's officers considered whether there were special circumstances which

warranted a reduction in the penalties under paragraph 9 at the time of the assessment of the penalties. We accept that evidence. There was nothing before us as we suggested that HMRC's officers had failed to consider relevant circumstances, considered irrelevant matters, or wrongly apply the law in relation to their decision not to apply paragraph 9. In the context therefore it cannot be said that the decision was flawed. As a result we cannot replace the decision with one of our own and may not reduce the penalties further.

Conclusion

28. We have allowed in the appeal in respect of the payment due on 19 April. We have found that the company had a reasonable excuse for the payment due on 19 December. Therefore the company is to be treated as if it made 9 rather than 10 defaults in the tax year. The rate of penalty is therefore 3% rather than 4%. It is to be applied to the defaults for months 2 to 7 and 9 to 11 only. To that extent we allow the appeal.

Rights of Appeal

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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 17/01/2012