



TC01835

Appeal number: TC/2011/06536

Penalties for late payment of PAYE and NIC – Schedule 56 Finance Act 2009 - eleven late payments – penalties levied at 4% where more than ten late payment failures – Appellant unaware of progressive nature of penalty regime and disputed number of late payments

FIRST-TIER TRIBUNAL

TAX

**R A and J C ATKINSON LTD
t/a MINSTER CLEANING SERVICES**

Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

Sitting in public at Alexandra House Manchester on 25 October 2011

For the Appellant Mr R Atkinson

For the Respondents Mrs K Douglas, Officer of HM Revenue and Customs

DECISION

1. Having orally given my Decision at the conclusion of the hearing to partly allow this appeal, the following are full written findings of fact and reasons for the Decision.
- 5 2. R A and J C Atkinson Limited t/a Minster Cleaning Services (the Appellant) appeal penalties totalling £3,040.56 charged by HMRC under Schedule 56 Finance Act 2009 for the late payment of PAYE and National Insurance Contributions during the tax year 2010-11.
- 10 3. HMRC say that the PAYE and NIC for each of the 12 months in 2010-11 were not paid on time. The relevant Regulations provide that an employer is liable to a penalty of an amount determined by reference to the number of defaults made during the tax year. Under the Regulations the first default during the tax year does not count as a default and therefore does not incur a penalty. In this case, HMRC say that there were 11 other late payment failures and that accordingly under the Regulations a
15 penalty of 4% was charged on the total amount of the default.
4. The Appellant's grounds of appeal are that they were unaware of the introduction of the penalty regime, and in particular the progressive nature of the penalties imposed for defaults as the number of defaults increased throughout the year. The Appellant also appeals on the basis that the penalties have been applied, in their view,
20 retrospectively, whereas had they been applied as and when defaults occurred the total penalties would have been significantly less. The Appellant also appeals on the basis that, in respect of one of the penalties they had agreed a Time to Pay Arrangement with HMRC, and that two other monthly payments had actually been paid on time.
5. The evidence before the Tribunal included the Appellant's notice of appeal to the
25 Tribunal; copy HMRC recorded transcripts of telephone and other communications between HMRC and the Appellant during the tax year; a copy of relevant extracts from HMRC Employer Bulletin relating to the introduction of late payment penalties and oral evidence by Mr Roy Atkinson.

Relevant Legislation

- 30 6. Regulation 69 Income Tax (PAYE) Regulations 2003 states that tax which an employer is required to deduct under Regulation 68(2) must be paid either within 17 days after the end of the tax period where paid electronically, or within 14 days after the end of the tax period in any other case. Regulation 67 and Schedule 4 to the Social Security (Contributions) Regulations 2001 imposes the same requirements on an
35 employer for the purpose of paying earnings related National Insurance Contributions. The month end is the 5th of each month and therefore electronic payments are due by the 22nd of each month and the penalty date is the 23rd. Manual payments are due on the 19th of each month and therefore the penalty date is the 20th.
7. Regulation 6 of Schedule 56 Finance Act 2009 states : -
- 40 6(1) .. an employer is liable to a penalty of an amount determined by reference to the number of defaults made during the tax year

6(2) a default occurs if the employer fails to pay an amount of tax in full on or before the due date, that is the 19th or 22nd of the month (depending on the method of payment)

6(3) the first default during the tax year does not count as a default and therefore does not incur a penalty

5 Paragraphs 6(4) to (7) sets out the progressive nature of the penalty regime from 0% to 4% as the amount of defaults increase throughout the year

10 Paragraph 16 says that if there is a reasonable excuse for the failure to pay on time then there will be no penalty, but under paragraph 16(2) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the employer's control, and if there was a reasonable excuse for the failure that excuse is deemed to have continued if the failure is remedied without unreasonable delay once the excuse has ceased.

8. The Appellant's payments for PAYE and NIC were late for each of the 12 consecutive tax months ending 5 April 2011. Because there were 10 or more late payment failures under Schedule 56 Finance Act 2009 paragraph 6(7) the rate of penalty in respect of the total amount of defaults was 4%. The Appellant's payment for the first month of the tax year end 5 April 2011 was due on 19 May 2010, but paid on 19 June 2010. Because this was a first default it did not count as a default and therefore the Appellant did not incur a penalty. Each of the payments made by the Appellant for months 2 – 10 were paid at least one month late, and on most occasions two months late. HMRC say that the Appellant's payment in respect of month 11 was paid on 22 March 2011 and the payment made in month 12 was paid on 21 April 2011. The Appellant disputes this and says that each of those payments was made on the 19th of the month.

HMRC's contentions

25 9. Mrs Douglas on behalf of HMRC submitted that the Appellant did not have a reasonable excuse for the late payments. She said that penalties for late payments had featured regularly in the Employer Bulletin which is published on the internet and provides information for employers regarding any changes in legislation and penalty charges. Much of the publicity she said, relating to the new late payment penalty regime for PAYE, was advertised extensively before and after they came into effect. An employer pack featuring a CD-ROM was mailed to employers in February 2010, flyers mailed to contractors and published on the HMRC website as well as being distributed at face to face events organised by HMRC. Late payment penalties were published in guidance and employer helpbooks and detailed in national trade and regional publications. Miss Douglas says that there is a requirement for employers to keep up to date with changes in policy and legislation that may affect them, and that it was incumbent on the Appellant to ensure that its payments were made on time.

40 10. Mrs Douglas also said that a warning letter was issued to the Appellant on the occasion of its first default in May 2010. The Appellant disputes having received the warning letter but Mrs Douglas said there was no reported problems with HMRC's automated outputs on that day and the letter was not returned to HMRC as undelivered.

11. HMRC's copy transcribed record of communications with the Appellant show that HMRC had a number of telephone calls with the Appellant during the tax year and contact was made during months 1, 5, 6, 9 and 12 and that on each of these occasions the Appellant was advised of the penalties. Again, the Appellant disputes this, saying that whilst they may have been aware that penalties would be incurred, they were not aware of the progressive nature of those penalties. Mrs Douglas therefore says HMRC refutes that the Appellant was not aware of the penalty position during the tax year 2010-11.

12. Mrs Douglas acknowledged that a Time to Pay Arrangement had been put in place for month 10, but explained that this was made on 9 March 2011 and therefore after the due date of payment, being 22 February 2011. A Time to Pay Arrangement had to be agreed before a due date otherwise a late payment still counted as a default. Paragraph 10 of Schedule 56 Finance Act 2009 allows HMRC to suspend a penalty provided payments are made as agreed and the amounts included in the Time to Pay Arrangement were not already overdue.

13. Mrs Douglas said that the Appellant's payments for months 11 and 12 were both paid late, having been received by HMRC on 22 March 2011 and 21 April 2011, both having fallen due for payment on the 19th of those months.

Appellant's contentions

14. Mr Atkinson in his submissions reiterated the Appellant company's grounds of appeal. He said that in respect of periods 1 – 9, not being an internet user, he was unaware of the late payment penalties until it was mentioned to him by HMRC at the end of March 2011. He denied having received any warning letters but accepted that he had had a number of conversations with HMRC regarding his inability to pay PAYE as and when it fell due. Mr Atkinson said that the retrospective and progressive nature of penalties was unfair, and felt that when the instalment arrangement was made in respect of period 10 some mention should have been made of penalties which would be applied at the end of the year. Mr Atkinson maintained that payments in respect of periods 11 and 12 were made by 18 March and that payments appeared to be taking more than two weeks to clear through his bank, but that in any event was a problem of HMRC's making, not his. He said that cheques had been sent to HMRC before the 19 March and before 19 April. He accepted that payments in respect of months 1 – 9 had been paid late.

Decision

15. The Tribunal accepts that HMRC has correctly applied the legislation in this case. Penalties have been correctly charged in respect of months 1 – 10 and the Appellant has not provided a reasonable excuse that would allow liability to the penalties to be reconsidered. The Tribunal accepts that payments were made on time in respect of months 11 and 12. Accordingly the Tribunal determines that the Appellant has paid PAYE late in respect of months 1 – 10 and therefore penalties are payable on months 2 – 10 of 3% of the total amount of those defaults pursuant to paragraph 6(6) of Schedule 56 Finance Act 2009.

15. 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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MICHAEL S CONNELL

TRIBUNAL JUDGE
RELEASE DATE: 17 February 2012

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