



TC01846

Appeal number: TC/2011/06311

Income Tax - penalties for late payment of PAYE and NIC - Schedule 56 Finance Act 2009 - twelve late payments in 2010/11 - penalties levied at 4% where more than ten late payment failures - Appellant unaware that some payments made late and some paid late by only a few days – Appellant unaware of progressive nature of penalty regime – whether reasonable excuse – no – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX**

**CV STAFF SERVICES 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 4th Floor City Exchange 11 Albion Street Leeds LS1 5ES on 21 October 2011

For the Appellant : Ms Virginia Skarbaliene, Director of the Appellant Company

For the Respondents : Ms Joanna Bartup, Officer of HM Revenue and Customs

DECISION

The Appeal

- 5 1. Having orally given my Decision at the conclusion of the hearing to dismiss this appeal, the following are full written findings of fact and reasons for the Decision.
2. CV Staff Services Limited ('the Appellant') appeals penalties totalling £4,861.15 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
15 were 11 other late payment failures and that accordingly under the Regulations a 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 under Schedule 56 Finance Act 2009, and in particular the
20 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, although it paid PAYE and NIC late for each of the 12 months in 2010-11, two payments were only 2 days late and eight payments were less than 7 days late. The other two late payments were 13 and 15 days late.
5. The evidence before the Tribunal comprised a bundle prepared by HMRC, which
25 included a summary of payments due and made by the Appellant in 1010-11 (their default history); a copy of relevant extracts from issues of HMRC's Employer Bulletin, together with HMRC Guidance on PAYE/National Insurance Payments and Deadlines; the Appellant's notice of appeal and oral evidence by Ms Skarbaliene as Director on behalf of the Appellant company.
- 30 Relevant Legislation
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
35 Security (Contributions) Regulations 2001 impose the same requirements on an 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.
- 40 7. Regulation 6 of Schedule 56 Finance Act 2009 states :-

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)

5 6(3) the first default during the tax year does not count as a default and therefore does not incur a penalty

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.

15 8. The Appellants 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 21 May 2010, but paid on 27 May 2010. Because this was a first default it did not count as a default and
20 therefore the Appellants did not incur a penalty. Each of the payments made by the Appellants for months 2–10 were paid between 2 and 15 days late. Two were 2 days late, six were between 3 and 6 days late, two were 8 days late and the other two were 13 and 15 days late.

HMRC's contentions

25 9. Ms Bartup 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
30 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
35 regional publications. Ms Bartup 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 Appellants to ensure that its payments were made on time.

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

Appellant's contentions

11. Ms Skarbaliene, on behalf of the Appellant company, reiterated the grounds of appeal contained in its appeal to the Tribunal, being that they were unaware of the introduction of the new penalty regime and in particular the progressive nature of penalties imposed for defaults as the number of defaults increased throughout the year. Ms Skarbaliene said that, had the Appellant company been on time with payments instead of being between 2-6 days late in respect of eight of its payments, the penalty percentage would have been only 1% and, to that extent, the penalties were unfair and particularly 'painful' to a small company. Since they had become aware of the new penalty regime, payments of PAYE and NIC from May 2011 had been paid in full and on time. Ms Skarbaliene also said that the retrospective nature of the penalties was unfair and that the Appellant company should have been made aware of penalties as and when they arose, as opposed to being applied at the end of the year by reference to the number of defaults. Ms Skarbaliene maintained that in any event at least two of the Appellant company's payments, in her view, had in fact been paid on time.

Decision

12. The Tribunal accepts that HMRC has correctly applied the legislation in this case. Penalties have been correctly charged in respect of months 2-12 and the Appellant has not provided a reasonable excuse that would allow liability for the penalties to be reconsidered. The Tribunal accepts that payments in some instances were made only a matter of days late but that is something which the Tribunal is not entitled to consider unless there is a reasonable excuse for the late payment. Accordingly the Tribunal determines that the Appellant has paid PAYE and NIC late in respect of months 2-12 (month 1 was paid late but does not incur a penalty) and that accordingly penalties are payable on those months at 4% of the total amount of those defaults pursuant to paragraph 6(6) of Schedule 56 Finance Act 2009.

13. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 22 February 2012