



**TC01837**

**Appeal number TC/2011/05043**

*Penalties for late payment of PAYE and NIC – schedule 56 Finance Act 2009 – twelve late payments - penalties levied at 4% for more than ten late payment failures– Appellant unaware of progressive nature of penalty regime – cash flow and administrative problems – reasonable excuse – no – appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX**

**AQUILA PROCESSING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)  
ANN CHRISTIAN (MEMBER)**

**Sitting in public at 4<sup>th</sup> Floor City Exchange 11 Albion Street Leeds LS1 5ES on 07  
October 2011**

**For the Appellant : Mr Gordon Bell, Company Financial Controller**

**For the Respondents : Mr Tony Burke, Officer of HM Revenue and Customs**

## DECISION

### The appeal

- 5 1. Having already given our decision to dismiss this appeal at the conclusion of the hearing, the following are full written findings of fact and reasons for the decision.
2. Aquila Processing Limited (“the Appellant”) appeals penalties totalling £1,282.26 charged by HMRC under Schedule 56 Finance Act 2009 for the late payment of PAYE and National Insurance Contributions (NIC) during the tax year 2010-11.
- 10 3. The Appellant company’s PAYE and NIC for each of the 12 months in 2010-11 were not paid on time. In some months payments were made on account but of an insufficient amount to discharge the amount due. 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  
15 during the tax year does not count as a default and therefore does not incur a penalty. In this case, because there were 12 late payments, a penalty of 4% was charged on the total amount of the default.
4. The Appellant accepts that each of the 12 monthly PAYE and NIC payments payable in 2010-11 were paid late. The Appellant’s grounds of appeal are that they  
20 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. The Appellant also appeals on the basis that it was suffering administrative and cash flow problems, saying that some months were overpaid and some underpaid due to weekly wages being posted to a wrong period on  
25 its account system but that everything balanced out eventually and the correct amount had been paid for the year ending 05 April 2011. The Appellant submits that in some months, payments were late only by a matter of days or weeks, and were always eventually paid in full. The Appellant argues that, in view of this, the amount of penalty of £10,282.26 is excessive and disproportionate.
- 30 5. The evidence before the Tribunal included the Appellant’s notice of appeal to the Tribunal; a copy of HMRC’s recorded transcripts of communications between the Appellant and HMRC during the tax year; HMRC’s schedule of the Appellant’s default ‘history’; a copy of relevant extracts from HMRC’s Employer Bulletin relating to the introduction of late payment penalties and oral evidence by Mr Bell on  
35 behalf of the Appellant company.

### Relevant Legislation

6. Regulation 69(1) 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 when paid electronically or within 14 days after  
40 the end of the tax period in any other case. Regulation 67 and Schedule 4 to the Social Security (Contributions) Regulations 2001 impose the same requirements on an employer for the purpose of paying earnings-related NIC. The month end is the 5<sup>th</sup> of

each month and therefore electronic payments are due by the 22<sup>nd</sup> of each month and the penalty date is the 23<sup>rd</sup>. Manual payments are due on the 19<sup>th</sup> of each month and therefore the penalty date is the 20<sup>th</sup>.

7. Paragraph 6 of Schedule 56 Finance Act 2009 states :

5 “6(1) ... an employer is liable to a penalty of an amount determined by reference to the number of defaults made during the year.

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

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

Paragraphs (3)-(7) set out the progressive nature of the penalty regime from 0% to 4% as the number of defaults increase throughout the year.

15 Paragraph (16) provides 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 due to events outside the employer’s control.

8. Because there were 10 or more late payment failures, the rate of penalty in respect of the total amount of defaults was 4%. The first late payment did not count as a default and therefore the Appellant did not incur a penalty. However, HMRC issued a warning letter. The Appellant does not dispute that it received the warning letter. Most of the payments made by the Appellant were several weeks late and, on one occasion, several months late.

#### HMRC’s contentions

25 9. Mr Burke on behalf of HMRC submitted that the Appellant did not have a reasonable excuse for the late payments. He said that penalties 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, he said, related to the new late payment regime for PAYE and was  
30 advertised extensively before and after the regulations came into effect. An employer pack featuring a CD ROM was emailed to employers in February 2010. Flyers were mailed to contractors and published on the HMRC website as well as being distributed at various events attended by employers and organised by HMRC. Late payment penalties were published in guidance and employer help books and detailed  
35 in national trade and regional publications. Mr Burke 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. Mr Burke said that the Appellant does not dispute that it received a warning letter or a copy of the employer bulletin and openly conceded that problems had really stemmed from internal administrative difficulties and cash flow problems.

Appellant's contentions

11. Mr Bell in his submissions reiterated the Appellant company's grounds of appeal as stated in the notice of appeal to the Tribunal. He said that the company had been totally unaware of the new late penalty regime but felt that the retrospective, progressive and total amount of penalties imposed was unfair given the nature of the defaults, and that in some instances payments were only made days late. Mr Bell said that, had notification of the penalties been given at as early stage, the management of the company would have been put on notice and resolved its internal administrative problems, which would therefore have enabled it to ensure that, at least for the latter part of the tax year, payments would have been made on time.

Decision

12. The Tribunal accepts that HMRC has correctly applied the legislation in this case and therefore correctly charges penalties in respect of months 2-12. The Appellant has not provided a reasonable excuse that would allow the penalties to be reconsidered. Accordingly, because the Appellant has made 10 or more defaults during the tax year, the Appellant is liable to a penalty of 4% of the total amount of those defaults in accordance with paragraph 6(7) of Schedule 56 Finance Act 2009.

13. For the above reasons we dismiss the appeal.

14. 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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