



TC01924

Appeal number: TC/2011/06442

PAYE late payment penalty – Sch 56 FA 2009 – Penalty unfair – Special circumstances – Reasonable excuse – cash flow

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

XTREME BUSINESS SOLUTIONS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE SCOTT LLB, NP

**Sitting in public at Atholl House, 84 - 88 Guild Street, Aberdeen on Thursday
10 November 2011**

Mr Graeme Duncan (Managing Director) for the Appellant

Ms Joyce Ballingall for the Respondents

DECISION

1. On 12 July 2011 HMRC issued a decision to the appellant (the company) stating that penalties totalling £6,226.97 were due because a number of the PAYE payments due for the year 2010-11 were not paid on time. That decision was appealed on 18 August 2011. On 28 September 2011 that decision was reviewed and the penalty recalculated in the sum of £5,986.02. (The summary decision erroneously referred to the £6,226.97 and that accidental error is hereby corrected to £5,986.02 in terms of Rule 37 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

2. It was a matter of agreement between the parties that all but one of the payments for the tax year 2010-11 were late. Both parties agreed at the outset of the hearing that the actual calculation of the £5,986.02 was not in dispute.

3. The grounds of appeal specified in the Notice of Appeal were that there had been a lack of communication between HMRC and the company, a lack of clarity about penalties and no mention of penalties when discussing PAYE; the first penalty notice was received in early July 2011. Further the company had had cash flow problems. Mr Duncan confirmed that those remained his grounds of appeal and that the key point was that if he had been aware of the penalties sooner then more would have been done earlier to avoid the imposition of penalties.

4. Historically, there has been no penalty for late payment of PAYE as such. However, with effect from April 2010 sch 56 Finance Act 2009 introduced a new regime for penalties for late payment of PAYE by employers. In summary, it is a tax-geared penalty which is charged depending on the number of failures to pay tax on time, other than the first, in a tax year. Where there are 10 or more failures, other than the first, in a tax year then the penalty is 4% of the late paid PAYE (Paragraph 6 sch 56). Paragraph 11 states that HMRC "must" levy a penalty where a taxpayer is liable for a penalty under any paragraph of the schedule and therefore HMRC has no discretion. However, there is discretion to reduce the penalty in the special circumstances set out in Paragraph 9 the relevant portion of which reads as follows:-

"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....."

Paragraph 16 contains a defence of reasonable excuse, with some particular express exclusions:-

"16 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if....there is a reasonable excuse for the failure.

(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....

- (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."

Although the penalty regime came into effect from 6 April 2010 the first time that any penalties could actually be raised was after the end of the 2010-11 tax year because of the way that the legislation refers to the total number of defaults during the tax year.

5. HMRC argued that the introduction of the new penalty regime had been preceded by extensive publicity, including press coverage and a podcast. Further, the April 2010 Employer Bulletin Issue 35 at page 11 headed "Avoid late payment penalties" explained very clearly that if PAYE was not paid on time and in full then penalties would be exigible. In particular it states:- "We will charge the first penalties for late payment in this tax year from April from 2011 and will not routinely send out warning letters. This means that you might have a penalty even if you do not hear from us straight away." The August 2010 Employer Bulletin Issue 36 reinforced the message at page 18 as did the February 2011 Employer Bulletin Issue 37 at page 19. Copies of all of these were included in the bundle of papers provided to the Tribunal and Mr Duncan.

6. That bundle of papers also included extracts from HMRC's records of dealings with the company (the extract). That shows that there was telephone contact in May, August, September, and October 2010 and January, March and May 2011. Those were all referred to in the course of the Hearing and the accuracy was not challenged, as such, but Mr Duncan stated that he did not recollect the detail of a number of the conversations. He certainly had not understood the impact of the penalty regime until the telephone conversation in May 2011 (see paragraph 10 below).

7. Mr Duncan, for the company, was in telephone contact with HMRC on 26 May 2010 when, amongst other matters, he was advised of the outstanding CIS returns and about penalties. He said that he would call back by the following day and that he would appeal the penalties because the returns had been submitted, albeit they had been incorrect. (PAYE and CIS are treated together in sch 56.) His argument to the Tribunal was that since he had been advised about the CIS penalty regime early in the tax year (and indeed had also been advised about VAT penalties by HMRC), those dealing with PAYE should also have alerted him to the penalty regime at an early stage in the tax year.

8. The first payment which was late in the 2010-11 tax year was the payment of £19,060.45 which was due by 19 May 2010. On 28 May 2010, a Late payment penalty warning known as a Penalty Default Letter was issued to the company. As this was the first late payment in the tax year no penalty was applied.

9. The Penalty Default Letter is in standard form and that letter makes it explicit that the taxpayer may be liable to a penalty if PAYE is paid late more than once in a tax year. It also gives details of three websites where more information about penalties and payment can be found. Specifically it states:-

"Unable to pay

If you are unable to pay on time please contact us before the payment date. Contact our Business Payment Support Service and we may agree extra time to pay. Go to

www.hmrc.gov.uk/payinghmrc/problems/cantpay-business.htm for more information. We will not charge penalties for the periods covered by the time to pay agreement from the date you approached us - providing you stick to the agreed terms."

Mr Duncan had no recollection of seeing that letter but conceded that his book keeper may not have shown it to him.

10. On 27 August 2010, it is recorded that Mr Duncan said that he would check with his book keeper since he was unaware that the payment for month four was outstanding (it was due by 19 August 2010) or that there were any penalties on the record. The extract includes the entry WLAIP. Ms Ballingall explained that that was an abbreviation for "Warned legal action and late payment penalties" and it was also in the extract as WLAP in a number of subsequent telephone calls both with Mr Duncan and Ms McDonald. Mr Duncan said that he did not recall being warned by telephone in the course of the year about the scale of the penalties. He did say that the "education about in-year penalties" referred to in the conversation with Ms McDonald of the company following the late payment for month one of 2011-12 in May 2011 had been very good.

11. The Tribunal found Mr Duncan to be a clear witness and it was obvious that he had focussed his attention on the business in a difficult economic environment. He explained that the problem was that the company had grown in seven years from a one man company to employing 38 people and PAYE and other tax issues had been a learning curve. It was possible that, because of pressure of business, the detail in the Employers Bulletins had not been appreciated. He believed strongly that HMRC had a duty to individual employers to highlight for them the specific impact of their late payment of PAYE; general information was not of great assistance since there was so much of it. If he had realised the implications of the new penalty regime then more would have been done at an earlier date.

12. The Tribunal found as fact that all but one of the payments had been late. It does not matter that most were only a matter of days late since the legislation provides that once a payment is even one day late it counts as a late payment for the penalty regime. It was clear that there had been contact between the company and HMRC on a number of occasions during the tax year and that the late payments were discussed. It also seems that, on the balance of probabilities, the penalty regime was flagged up on a number of occasions. Given that Mr Duncan could not remember the conversations with himself and there was no evidence from Ms McDonald and or any other member of staff of the company who spoke with HMRC there can be no finding of fact in regard to the detail of what may have been said. While HMRC are under no statutory duty to issue warnings to individual employers they did in this case issue a clear warning in the form of the Penalty Default Letter. Although Mr Duncan may not have seen the Penalty Default Letter, the Tribunal accepts that it was issued to the company. The Tribunal finds as fact that, HMRC did publicise the new penalty regime very widely and that the company, like every other employer, would have received the Employer Bulletins which gave clear information about the penalty regime. There was explicit information made available to the company whereby they were, or should have been (had the information been read) alerted to the possibility of penalties and the method of calculation and thus the likely amounts of any penalties.

13. Mr Duncan argued that HMRC should have approached the PAYE penalties in the same way as they did for CIS and VAT and if that had been done then the

company would have done more to ensure that the penalties did not build in the way that they did. (As indicated in paragraph 7 above, it is clear that he was advised by HMRC that the company was exposed to penalties for CIS in May 2010 but HMRC was not obliged to issue any such warning.) The company was specifically warned about the PAYE penalties when the Penalty Default Letter was issued on 28 May 2010. Parliament has established quite different systems for VAT and PAYE.

14. The problem here is that the penalty is based on the number of defaults over a complete tax year, cannot be calculated until the end of the year and is effectively cumulative in that if there are continuing defaults then both the rate of the penalty and the amount of PAYE and NIC on which it is levied continue to rise. Accordingly, whilst Mr Duncan's argument that the company would have changed its pattern of behaviour in late payments and thus the amount of the liability if a clear warning of the amounts involved had been issued earlier is understandable, the fact is that only a general warning can be issued before the end of the tax year. The total cannot be ascertained until the number of defaults and the total of PAYE and NIC involved are known. The Tribunal does not accept Mr Duncan's argument that it is very unfair and unacceptable to receive a "Bill" in July 2011 relating back to the first default in May 2010. That "Bill" is, at least in part, a consequence of the calculation method established by Parliament.

15. Although it was argued that the penalty regime is harsh, the penalties are graduated, the first is ignored, the penalties are geared to the level of the tax, there are the defences set out in Paragraphs 9 and 16 of the schedule and there is a right of appeal. Accordingly, the Tribunal finds that the penalty scheme is not ineffective by reason of disproportionality because it falls within the "margin of appreciation" and therefore is not "devoid of reasonable foundation" and therefore no right in terms of the European Convention of Human Rights has been infringed. The Tribunal does not find any unfairness by HMRC in assessing the penalties in this case.

16. The Tribunal finds that the company's lack of awareness of the penalty regime cannot amount to a special circumstance or a reasonable excuse. A reasonable employer should have been aware of the statutory obligation to pay PAYE and NIC on time and, in the knowledge of those responsibilities, and given the wide publicity, to say nothing of the written material furnished to them, should have taken steps to ascertain what the new penalty regime might mean to them and to ensure that any defaults and therefore penalties were minimised. Further any perceived failure of HMRC to issue warnings in respect of continued late payment and or the imposition of penalties is not in itself capable of amounting to either special circumstances or a reasonable excuse.

17. HMRC had found that there were no special circumstances in this case and the Tribunal also concludes that there were none. (Ability, or perhaps more pertinently, inability to pay, cannot amount to special circumstances.)

18. In the Notice of Appeal, at the Hearing and in the extract there was mention of cash flow problems for the company. That was explored in some detail. The first issue is that Mr Duncan repeatedly stated that if the extent of the potential penalties had been understood then the problem would not have arisen. The payments were usually only a matter of days late. On the balance of probabilities, therefore it would seem that the payments could have been made on time since it would have been a matter of management of cash flow.

19. Insufficiency of funds cannot be a reasonable excuse unless attributable to events outwith the company's control. Mr Duncan explained that the cash flow problem related to work worth £400,000 done for a new building for a University where stage payments were made up until the end of April and May 2010. At that juncture there was about £20,000 or £25,000 outstanding and £25,000 was paid in June or July. They had to do remedial work worth approximately £65,000 for an insurance claim and that work was done in May 2010 but only paid by insurers in January 2011. The company's terms of business were normally payment within 30 to 60 days. The Tribunal is very well aware that insurance settlements can take a very long time to be processed and paid; that is an inherent risk for any business dealing with an insurance claim and is therefore predictable and for a prudent business would form part of cash flow forecasting, as it may have done here. Certainly payment by insurers was outwith the company's control but Mr Duncan confirmed that the bank had been helpful and the company had an overdraft facility of £130,000 which had been fully utilised during the tax year. Undoubtedly, the company was stretched as far as cash flow was concerned but, in the Tribunal's view, the outstanding PAYE and NIC, which was generally of the order of an average of approximately £13,000 per month, could not reasonably be said to have been paid late for 11 months because the company was awaiting payment of £65,000. On the balance of probabilities, the PAYE and NIC was paid late because the company was using its bank facility and had to decide which creditor was paid when. That fits entirely with Mr Duncan's argument that, had he known about the scale of the penalties which might be imposed, matters would have been arranged differently. The Tribunal finds that the company has not established that there was a reasonable excuse for the failure to comply with its obligations to make timeous payment of PAYE and NIC.

20. Accordingly, for all these reasons, in summary, the Tribunal finds that:-

- (a) there was late payment for every month bar one in the 2010-11 tax year,
- (b) the company has not established a reasonable excuse for the defaults,
- (c) HMRC's decision that there were no special circumstances was not flawed
- (d) the penalties have been appropriately assessed and are neither excessive nor disproportionate.

Accordingly, the appeal fails and the penalty of £5,986.02 is confirmed.

21. 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.

TRIBUNAL JUDGE

RELEASE DATE: 30 March 2012

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