



**TC02104**

**Appeal number: TC/2011/05668**

*PAYE – late payment – penalty – whether there was a reasonable excuse –  
appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SLBT LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE J BLEWITT  
MR. T BAYLISS**

**Sitting in public at Birmingham on 11 June 2012**

**Mr Alan Lediard, Company Secretary, for the Appellant**

**Ms Lisa Taylor, instructed by the General Counsel and Solicitor to HM Revenue  
and Customs, for the Respondents**

## DECISION

1. This is an appeal against a penalty in the sum of £2,895.17 issued by HMRC on  
5 16 June 2011 and amended on 12 April 2012. HMRC notified the Tribunal and  
Appellant of the amendment following the Tribunal case of *Agor* (TC/2011/04910) by  
letter dated 12 April 2012. The penalty was imposed in respect of the late payment of  
PAYE from May 2010 to March 2011 inclusive.

### *The Appellant's Case*

10 2. The Appellant appealed against the penalty by letter dated 17 October 2011.  
The grounds of appeal relied upon by the Appellant were helpfully set out in detail in  
the Appellant's document entitled "Details of Appeal and Response to HMRC's  
Statement of Case" which will not be repeated in detail here but can be summarised as  
15 follows: SLBT was a small company which employed one working director, Mr  
Steven Lediard, one administrative assistant and approximately 10 drivers. Mr Alan  
Lediard, the brother of Mr Steven Lediard, acted as honorary Company Secretary with  
responsibility for tax, VAT and PAYE returns/payments.

3. It was accepted that the monthly PAYE payments were made late from April  
20 2010 onwards, but none were more than 1 month overdue. It was submitted (relying  
on *Martin Stone v Revenue and Customs* [2010] UKFTT 414 and *HMD Response  
International v Revenue and Customs* [2011] UKFTT 472) that a reasonable excuse  
existed on the basis that Mr Alan Lediard was stretched at the time due to his second  
child being born in May 2010 and his father suffering symptoms of  
25 Alzheimer's/dementia which ultimately led to his move to a care home in March  
2011.

4. Mr Lediard drew to the Tribunals' attention the HMRC document "Impact  
Assessment of Meeting the Obligations to file Returns and Pay Tax on Time"  
("IAMO") which stated that the intended effects of the new penalty regime were to  
30 "*influence behaviour through fair and effective penalties and safeguards so more  
returns are filed on time and more tax is paid on time*". It was contended by the  
Appellant that HMRC claimed to have sent a warning letter to the Appellant on 28  
May 2010 which was not received. There were then several notices issued and  
conversations with the director where late payments and penalties were allegedly  
discussed. The Appellant argued that, had HMRC timeously notified the Appellant of  
35 the default, it would have been remedied far earlier (relying on *HOK Ltd v Revenue  
and Customs* [2011] UKFTT 433) and that notification, rather than imposition, of  
penalties improves compliance. The Appellant submitted that the IAMO was ignored  
by HMRC as greater efforts should have been made with respect to smaller  
employees with a history of late paying.

40 5. In reliance on *Energys Holdings UK Ltd v Revenue and Customs* [2010]  
UKFTT 20 it was submitted that the penalties imposed were not fair, proportionate or  
effective and that the Tribunal has the power to vary the level of penalty where  
appropriate.

### *HMRC's Case*

6. HMRC contended that a penalty warning letter had been sent to the appellant on 28 May 2010. On 27 June 2011 the Appellant appealed to HMRC on the basis that their payroll information was not always available and that the Appellant was not  
5 aware of the penalty warning letter. Furthermore there was no loss to the revenue and the penalty was disproportionate.

7. HMRC notified the Appellant that the penalty was upheld by letter dated 18 July 2011 on the basis that the penalty was due, the amount was correct and that there was no reasonable excuse.

10 8. HMRC submitted that the new penalty regime was widely publicised both prior to and after its introduction. An employer pack, including a CD-ROM was mailed to the Appellant in February 2010 in addition to the general availability of information contained on HMRC's website, leaflets sent to employers and various other methods of publicity utilised by HMRC.

15 9. The penalties are designed to be penal and are intended to encourage payment on time; they are not designed to reflect any loss to the revenue and the levels and rates are set in statute by virtue of Schedule 56 Finance Act 2009. A number of telephone calls were made to Mr Steve Lediard on 5 August 2010, 3 September 2010 and 3 December 2010 in which warnings in respect of penalties were given, in  
20 addition to enforcement letters but at no time did the Appellant take advantage of HMRC's facilities designed to assist employers who are unable to make payment on time.

### *Oral Submissions*

10. At the hearing, Mr Lediard summarised the grounds of appeal relied upon by  
25 the Appellant. He stated that it was accepted that payments had been made late and that, subject to the issues of reasonable excuse, proportionality and fairness, the penalty had been correctly calculated.

11. Mr Lediard, in response to questions from the Tribunal, clarified that his father had deteriorated increasingly since diagnosis, resulting in his move to a care home in  
30 2011. Mr Steven Lediard (director of the Appellant Company) is the eldest brother and was concerned as to whether the illness was genetic which limited the functioning of the Company due to the level of concern. Mr Lediard accepted that he was not the primary carer for his father, nor was his bother although he visited and assisted regularly. Mr Lediard clarified that his visits to the Appellant Company were limited  
35 to approximately three occasions.

12. Mr Lediard submitted that the penalty should be mitigated for the reasons set out in the letter of appeal. Mr Lediard accepted that the CD-Rom sent by HMRC had been received, but stated that he had not downloaded the information contained thereon.

13. It was accepted by Mr Lediard that his brother was not in attendance at the hearing and therefore he could not challenge the logs of telephone calls made by HMRC, which recorded warnings given in respect of penalties. Mr Lediard accepted that his brother, as director, was duty bound to comply with the legislation in respect of making PAYE payments, but stated that his brother had been busy.

14. HMRC responded by contending that any reasonable excuse must last throughout the period of default, and consequently the illness of Mr Lediard's father was not considered to be a reasonable excuse.

15. HMRC drew the Tribunal's attention to the contradiction in evidence in that the director, in a telephone call with HMRC, had stated the reason for late payments as being the lack of information needed to calculate the liability and that HMRC had never been informed of the issues now put forward and relied upon by the Appellant.

16. It was submitted that the penalties had been levied in accordance with legislation and were proportionate and fair.

#### 15 *Discussion*

17. The three issues raised by the Appellant are reasonable excuse, the new penalty regime and proportionality/fairness. The Tribunal considered the submissions of Mr Lediard carefully and each issue will be addressed in turn.

#### Reasonable Excuse

18. We considered the cases relied upon by the Appellant:

- *Martin Stone v Revenue and Customs* [2010] UKFTT 414
- *HMD Response International v Revenue and Customs* [2011] UKFTT 472)

19. We accepted illness can, in some circumstances, be sufficient to constitute a reasonable excuse, for example where a sole trader had been affected by a prolonged and serious illness throughout the default period. We also noted the (non binding) view of Judge Jones QC in *HMD* as to the meaning to be given to the words "reasonable excuse".

20. The evidence in this case was that the Appellant had a director, an administrative assistant and the assistance of Mr Alan Lediard as honorary Company Secretary. Whilst we were sympathetic to the concerns raised by Mr Lediard's father's illness and we did not doubt that his symptoms had deteriorated throughout the period with which we are concerned, we noted that neither Mr Alan Lediard or his brother, the director of the Appellant Company, were the primary carers for their father. We found as a fact that Mr Lediard's involvement with the Company's day to day running was limited and, in the absence of any evidence from Mr Steven Lediard, we were unable to conclude that the illness of Mr lediard's father had affected the running of the Company throughout the period of default to such an extent that would constitute a reasonable excuse. In our view, the case of *Martin Stone v Revenue and*

*Customs* is distinguishable on the basis that the Appellant is not a sole trader; the director had the assistance of a staff member and his brother and there was no evidence that, due to the illness of his father, he had been unable to continue with the running of the company.

5 21. Likewise, we did not consider the birth of Mr Alan Lediard's second child amounted to a reasonable excuse. The onus to ensure that his tax liabilities were met on time rested with the Appellant and we found as a fact that there was no evidence upon which we could conclude that the child's birth had any impact on the running of the company.

10 The new penalty regime

22. We considered the cases of *HMD* and *HOK*. The decisions of the First Tier (Tax) Tribunal are not binding upon us and we had doubts as to whether HMRC's conduct could be described as wilful desistance where there is no breach of statutory obligations on their part. We found as a fact that the regime had been widely  
15 publicised by HMRC and although we accepted, as asserted by Mr Lediard, that the notices requiring payment sent to the Appellant following each default did not refer to penalties, the liability of a taxpayer is set in statute and the onus rests with that taxpayer to ensure that the liability is met on time. There is no legal requirement on HMRC to issue a penalty notice at an earlier point and we noted that a warning letter  
20 had been sent to the Appellant on 28 May 2010. Whether or not that letter was received is a separate issue; in our view it cannot be said that HMRC had breached any legal requirement and in those circumstances whilst we agree it is unfortunate that HMRC does not issue penalty notices until the end of the tax year, we do not consider this can afford a reasonable excuse or mitigation to the Appellant for making late  
25 payment.

23. In respect of this issue we found as a fact that, even giving the Appellant the benefit of doubt that HMRC's warning letter of 28 May 2010 was not received, the Appellant had received (in addition to the CD-ROM) 2 telephone calls and a message from HMRC throughout the period of default which warned of the imposition of  
30 penalties and (as regards the message) requested that the Appellant return HMRC's call, which he failed to do. We found as a fact that, even if the fact that the penalty notice was not sent to the Appellant until the end of the tax year could be deemed to be unfair and unconscionable generally (an issue about which we make no further comment), in the particular circumstances of this case the attempts by HMRC to  
35 contact and ensure the Appellant's compliance with his statutory obligations were indicative of HMRC's endeavours to influence the Appellant's behaviour and ensure that the tax was paid on time and therefore cannot be said to be unfair or unconscionable.

24. Even if we were to follow the approach taken in *Hok* we found that the case is  
40 distinguishable on its facts; in *Hok* the Appellant believed he did not have to file the returns as the only employee had ceased employment part way through the year. In that case, the Tribunal took the view that HMRC had not proved that the default would have continued had a reminder been issued earlier by HMRC to the Appellant.

The same cannot be said of the present case; the director had been notified by telephone on 2 occasions that penalties accrued on the late payments, yet he failed to take any action to remedy the situation throughout the entire default period.

#### Fair and Effective Penalties

5 25. It was contended on behalf of the Appellant that, as identified in the IAMO, the biggest impact of penalties will be upon “employers with less than 250 employees who currently pay their...PAYE late and are not charged interest of late payment penalties” and consequently greater efforts should have been made by HMRC in respect of smaller employers. We did not accept this argument; in our view, HMRC  
10 had taken all reasonable steps to ensure that those upon whom the new regime would impact were informed of the new system and aware of its consequences. The fact that the Appellant chose to ignore the CD-ROM provided by HMRC was a matter for the Appellant and there was no suggestion that the Appellant was unaware (particularly bearing in mind the telephone calls made by HMRC warning of penalties) of the fact  
15 that penalties were imposed as a result of late payment. In those circumstances, we found as a fact that HMRC had made significant efforts with all employers, including smaller companies, and that it cannot be said to have acted unfairly.

26. The Appellant relied on the case of *Energys Holdings UK Ltd*. In our view the case is wholly distinguishable; in *Energys* the taxpayer incurred a substantial penalty  
20 for one payment made, the Tribunal found, inadvertently one day late. In the current appeal, the Appellant made persistently late PAYE payments in each month over the course of the 2010/2011 tax year despite warnings throughout that period from HMRC. We therefore found as a fact that the case of *Energys* did not assist the Appellant.

25 27. There is power, as adopted in the rare and exceptional circumstances of *Energys*, to quash a penalty as disproportionate if it is “not merely harsh but plainly unfair” however on the facts of this case, where continual late PAYE payments were made despite warnings given by HMRC, we are unable to agree that the penalty imposed was “plainly unfair” and therefore do not interfere with it on grounds of  
30 proportionality or common law fairness.

#### *Decision*

28. For the reasons set out above, the appeal is dismissed.

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  
35 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.

5

**J BLEWITT  
TRIBUNAL JUDGE**

**RELEASE DATE: 27 June 2012**