



TC02156

Appeal number: TC/2011/4714

INCOME TAX – PENALTY - *Penalty imposed for making late payments of PAYE in seven months in 2010/11 – Did the Appellant have a reasonable excuse? – No – Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUTTON MCGRATH LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE
WARREN SNOWDON JP**

**Sitting in public at Phoenix House, Rushton Avenue, Bradford BD3 7BH on 12
July 2012**

The Appellant did not appear

Miss Joanna Bartup for HMRC

DECISION

The Appeal

1. The Appellant appealed against a penalty notice dated 3 June 2011 for late PAYE payments in the tax year ending 5 April 2011 in the sum of £2,389.08. HMRC after considering the Appellant's representations amended the penalty notice on 20 February 2012 by reducing the penalty to £1,274.25. HMRC decided that the Appellant had a reasonable excuse for the late payments in July, August and September 2010 because of the withdrawal of an £80,000 overdraft facility and the incidence of large bad debts.
2. The Appellant pursued its Appeal against the amended penalty notice, the details of which are as follows:

Month	Amount Not Paid on time (£)	Penalty (£)	Date Payment Made ¹	No of Days Late	Comment
5 May 2010	7,021.13	0.00	9 June 2010	21	No penalty for first default (Para 5(3), sch 56 FA 2009)
5 June 2010	6,275.78	188.27	22 September 2010	95	
5 July 2010	5,861.67	0.00	22 September 2010	65	No penalty: reasonable excuse
5 August 2010	5,861.67	0.00	8 January 2011	142	No penalty: reasonable excuse
5 September 2010	5,528.39	0.00	8 January 2011	111	No penalty: reasonable excuse
5 October 2010	4,947.64	148.43	8 January 2011	81	
5 November 2010	6,673.56	200.21	3 February 2011	76	
5 December 2010	6,206.19	186.19	3 February 2011	51	
5 January 2011	6,620.49	198.61	3 February 2011	15	

¹ Payments are due the 19 day of the month

5 February 2011	6,304.72	189.14	15 March 2011	24	
6 March 2011	5,446.82	163.40	31 March 2011	12	
Total	66,747.86 (42,475.20)	1,274.25			Penalty 3% of 42,475.20 (Para 5(6), sch 56 FA 2009)

3. The Appellant argued that it had a reasonable excuse for the late payments in June 2010, October 2010, November 2010, December 2010, January 2011, February 2011 and March 2011. The Appellant stated that the defaults arose from a lack of funds which was connected with the banking crisis, severe bad debt problems, the withdrawal of an £80,000 overdraft facility and drastically reduced turnover levels. According to the Appellant, it attempted to obtain alternative funding but was refused by its bank, Barclays, and Santander bank. In June 2012 the Appellant finally secured new finance from a *back street* asset finance company and have now brought all PAYE payments up to date. The Appellant acknowledged that for some months it may have been technically possible to pay the PAYE as it became due but it erred on the side of caution to make sure it could pay its wage bill which was the priority from the Appellant's perspective.

4. HMRC disagreed with the Appellant's contention of a reasonable excuse for the outstanding months. HMRC considered that it had given allowance for the points raised by the Appellant by agreeing a reasonable excuse for the defaults in July, August and September 2010. HMRC stated that the defaults for the outstanding months were not due to unforeseen matters outside the Appellant's control. A lack of funds in itself did not in law amount to a reasonable excuse. The Appellant failed to address the reasons for the defaults by finding other means of funding or contacting HMRC about the possibility of deferment.

5. The Appellant by letter dated 12 July 2012 advised the Tribunal that Mr Sutton, director, was unable to attend the hearing on its behalf due to unforeseen events (*unspecified*). The Appellant, however, requested the Tribunal to consider its defence of reasonable excuse in its absence.

6. The Tribunal decided that it was in the interests of justice to proceed in the Appellant's absence pursuant to rule 33 of the Tribunal Rules 2009. The Appellant was aware of the hearing and had requested the Tribunal to deal with the Appeal. The Appellant had set out its defence in various documents which were included in the agreed bundle and admitted in evidence.

Reasons

7. Paragraph 1 of schedule 56 of the Finance Act 2009 enables penalties to be imposed against a person who fails to pay the amount payable under the PAYE

regulations by the required date. In this case the Appellant accepted that it failed to render the PAYE due by the said date for the months in dispute. Given the Appellant's admission, HMRC was obliged in the absence of special circumstances and reasonable excuse to impose a penalty for the Appellant's default under paragraph 11 of schedule 56 of the 2009 Act. The size of the penalty was determined as a percentage of the total amount of tax paid late in the defaulting months. In the Appellant's case the applicable percentage was three per cent because it made seven defaults during the tax year 2010/11. The amount of PAYE paid late for those seven months was £42,475.20 which produced a penalty of £1,274.25.

8. Under paragraph 16 schedule 56 of the 2009 Act the Appellant may escape liability to a penalty if it satisfies the Tribunal that there is a reasonable excuse for the failure to make the PAYE payment by the due date. Paragraph 16(2) states that the following matters cannot constitute a reasonable excuse:

(1) An insufficiency of funds unless attributable to events outside the person's² control.

(2) Where the person relies on any other person to do anything unless the person took reasonable care to avoid the failure.

(3) Where the person had a reasonable excuse for the failure but the excuse has ceased unless the person remedies the default without reasonable delay after the excuse ceased.

9. In considering a reasonable excuse the Tribunal examines the actions of the Appellant from the perspective of a prudent tax payer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

10. The Tribunal makes the following findings of fact in relation to the Appellant's plea of reasonable excuse:

(1) HMRC had given the new PAYE penalties wide publicity on its website and in the Employer's Bulletins (September 2009, April 2010, August 2010 and February 2011), which included advice to contact HMRC's Business Payment Support Services if an employer is unable to make a payment on time. This advice stated that if the employer makes contact before the payment is due and a time to pay agreement is made no penalties would be charged.

(2) The Appellant is a firm of Chartered Accountants. Mr Sutton, the director, acknowledged in a telephone conversation with HMRC on 8 June 2010 that he was aware of the new penalty system.

(3) On 28 May 2010 HMRC issued the Appellant with a *Late Payment Penalty Warning* which stated that the Appellant had not paid its PAYE on time and that action would be taken against it. The warning also repeated the advice about contacting the Business Payment Support Service if the Appellant was unable to pay.

² Person refers to the person legally responsible for making the payment of tax on time.

- (4) On 8 June 2010 Mr Sutton informed HMRC by phone that he could not give a reason for the late payment and that he would make future payments on time.
- 5 (5) On 19 July 2010 HMRC issued the Appellant with a Notice requiring payment of the outstanding PAYE due within seven days from the date of the Notice.
- (6) On 13 August 2010 HMRC called the Appellant about taking distraint action to recover the outstanding PAYE. Mr Sutton was out of the office.
- 10 (7) On 19 August 2010 HMRC issued the Appellant with a Notice requiring payment of the outstanding PAYE due within seven days from the date of the Notice.
- (8) On 23 August 2010 a further distraint call made by HMRC to the Appellant.
- 15 (9) On 25 August 2010 Mr Sutton informed HMRC that he had overlooked the payment and that he would ensure payments were brought up to date.
- (10) On 15 September 2010 a further distraint call by HMRC to the Appellant.
- (11) On 16 September 2010 Mr Sutton phoned to say that a payment of £14,000 would be made. He explained that the delay in payment was due to cash flow difficulties. HMRC educated Mr Sutton about in-year penalties.
- 20 (12) On 9 November 2010 HMRC make another call to the Appellant about non-payment of PAYE.
- (13) On 11 and 25 November 2010 HMRC issued the Appellant with Notices requiring payment of the outstanding PAYE due within seven days from the date of the Notice.
- 25 (14) On 10 January 2011 HMRC contacted the Appellant about possible distraint action. The Appellant advised HMRC that it was unable to pay the PAYE balance owing because of bad debts.
- 30 (15) The record of contact between the Appellant and HMRC revealed that the Appellant did not of its own accord advise HMRC of its purported difficulties with paying the PAYE. The record showed that the Appellant waited for HMRC to contact it first before responding. Also there was no record of the Appellant requesting a time to pay arrangement.
- 35 (16) The record also showed that in the telephone conversations with HMRC in June and August 2010 the Appellant offered no reason for its default other than it had overlooked payment. The explanation of cash flow difficulties was first mentioned in September 2010, nearly four months after receiving the *Late Penalty Warning Notice from HMRC*.
- 40 (17) The Appellant supplied a copy of its Profit and Loss account for the year ended 31 August 2010 and the schedule of bad debts for the accounting years of 2009 and 2010. The 2010 Profit and Loss account showed a deterioration of the Appellant's financial position from that in 2009 with a decrease in net profit from £192,860 to £36,433 and an increase in bad debts from £39,404 to

£93,366. The Appellant provided on request to HMRC details of the five highest bad debts for 2010. This indicated that the Appellant was unable to recover four of those debts. The Appellant, however, had reached an arrangement with the debtor which owed £36,135.53 to pay it off at £2,500 a month with the debt now standing at around £16,000.

(18) The Appellant's evidence of its financial position, however, only related to one of the seven months in default. The Appellant did not provide details of its cash flows during the relevant period and supplied no information on its bad debts for the year ended August 2011.

(19) HMRC obtained a copy of the Appellant's *Unaudited Abbreviated Accounts* for the year ended 31 August 2011 from Companies House³, which covered the period from October to March 2011. The accounts for the year ended 2011 showed a much improved position from 2010 with net assets increasing from £10,857 to £189,169.

(20) At the start of 2010 the Appellant had separate overdraft facilities of £80,000 with Handlesbanken and Barclays Bank. In July 2010 Handlesbanken withdrew its facility leaving the Appellant with the approved overdraft of £80,000 with Barclays Bank which remained intact throughout the period of default. The Appellant's evidence on its efforts to restore the overdraft facility to its previous level of £160,000 was restricted to a mention in its letter of 12 July 2012 to the Tribunal that it had been refused by Barclays and Santander banks. The Appellant's evidence on the overdraft arrangements was cursory in the level of detail offered.

(21) The Appellant's statement in its letter of 12 July 2012 that it may have been technically possible to pay the PAYE in some of the months undermined the Appellant's case for a reasonable excuse.

11. The sole issue in this Appeal is whether the Appellant had a reasonable excuse for the late payment of PAYE in each of the months in question. The onus is on the Appellant to satisfy the Tribunal of the existence of a reasonable excuse. The Tribunal's findings in paragraph 10 demonstrate that the Appellant's evidence to substantiate its case of severe cash flow difficulties caused by events outside its control for the disputed months was weak or non-existent.

12. The Appellant offered no excuse for the late June payment except that it had been overlooked. The requirement to make the June payment predated the withdrawal of the overdraft facility by Handlesbanken. The Appellant adduced no evidence of the financial position in October 2010 to March 2011. The details contained in the *Unaudited Abbreviated Accounts* for the year ended 31 August 2011 questioned whether the Appellant had experienced severe cash flow difficulties during the period in question. Even if the Appellant had so suffered, the reliance on the withdrawal of the overdraft facility and its bad debts did not constitute events outside its control. The circumstances of these events were known in July which would have given the Appellant at least two months to take appropriate action by the time the October

³ Included in the document bundle at pages 115-123.

payment was due. In this respect the Appellant has secured a reduction in the penalty for its difficulties in July 2010 as a result of HMRC's decision to find a reasonable excuse for July, August and September 2010. The Tribunal finds there is no evidence to substantiate an application of the same excuse beyond September 2010.

5 13. The Tribunal's findings also revealed that the Appellant's actions during the
period of default were not those of a prudent tax payer exercising reasonable foresight
and due diligence and having proper regard for its responsibilities under the Taxes
Acts. A prudent tax payer would have anticipated the difficulties and followed
10 HMRC's advice to contact Business Payment Support Services with a view to
securing a time to pay arrangement. The Appellant acknowledged that it knew about
the penalty regime, and as a Chartered Accountant would have been more familiar
than the ordinary employer with the possible steps that could be taken to avoid
penalties. The record of contacts between the Appellant and HMRC, however, painted
15 a picture of an employer closing its eyes to its responsibilities to pay PAYE on time,
and awaiting action from HMRC which it would then stall with promises of payment.
The Appellant adduced no evidence that it had sought a time to pay arrangement with
Business Payment Support Services prior to the due date for the PAYE payment.

14. The Appellant believed that the First Tier Tax Tribunal decision in *Kincaid t/a*
AK Construction v HMRC [2011] UKFTT 225 supported its case for a reasonable
20 excuse. The Tribunal disagrees. The *Kincaid* case was concerned with an Appeal
against the withdrawal of gross payment status in the Construction Industry Scheme.
Further the facts of that case were qualitatively different from those found in this
Appeal. In *Kincaid* the Tribunal held that the Appellant had done all that he could to
avoid the problem and had addressed the issues by agreeing a time to pay arrangement
25 with HMRC.

15. The Tribunal for the reasons given above finds that the Appellant has failed to
establish on the balance of probabilities a reasonable excuse for its failure to pay the
PAYE on time in each of the months in question, namely, June 2010, October 2010,
November 2010, December 2010, January 2011, February 2011 and March 2011. The
30 Tribunal, therefore, dismisses the Appeal and affirms the penalty in the amount of
£1,274.25.

16. 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
35 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 TILDESLEY OBE
TRIBUNAL JUDGE**

RELEASE DATE: 30 July 2012