



**TC02173**

**Appeal number: TC/2012/05505**

***INCOME TAX – PENALTY - Penalty imposed for making late payments of PAYE in ten months in 2010/11 – Did the Appellant have a reasonable excuse? – Yes for the months June, July and August 2010 – Penalty reduced - Appeal allowed in part***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VISUAL PACKAGING (PLASTICS) LIMITED                      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY, OBE  
MARYVONNE HANDS**

**Sitting in public at Employment Tribunal 4<sup>th</sup> Floor, Byron House, 2A Maid Marian Way, Nottingham on 24 July 2012**

**Robert Morley, director for the Appellant**

**Philip O’Borne for HMRC**

## DECISION

### The Appeal

1. The Appellant appealed against a penalty notice dated 29 June 2011 for late PAYE payments in the tax year ending 5 April 2011 in the sum of £6,325.94. HMRC after considering the First Tier Tribunal decision in *Agar* [2011] UKFTT 773 (TC) reduced the penalty to £5,765.75.

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 <sup>1</sup>	No of Days Late	Comment
5 May 2010	14,180.82	0.00	28 May 2010	9	No penalty for first default <sup>2</sup>
5 June 2010	14,528.63	581.15	30 June 2010	11	
5 July 2010	14,185.64	567.43	30 July 2010	11	
5 August 2010	14,416.10	576.64	28 August 2010	9	
5 September 2010	14,884.46	595.38	2 October 2010	13	
5 October 2010	14,244.09	569.76	29 October 2010	10	
5 November 2010	14,923.83	596.95	30 November 2010	11	
5 December 2010	14,101.26	564.05	24 December 2010	5	
5 January 2011	14,177.99	567.12	1 February 2011	13	
5 February 2011	14,598.89	583.96	26 February 2011	7	
6 March 2011	14,083.02	563.32	2 April 2011	14	
<b>Total</b>	<b>144,143.91</b>	<b>5,765.75</b>			Penalty 4% <sup>3</sup>

<sup>1</sup> Payments are due the 19 day of the month or 22 day if made electronically.

<sup>2</sup> (Para 5(3), sch 56 FA 2009)

3. The Appellant argued that its primary focus in the recession had been the survival of its business. In the Appellant's view, HMRC should have adopted a more lenient approach in its application of the new penalty regime given the ongoing difficult economic environment. Further the Appellant contended that the amount of penalties being sought was disproportionate to the loss to the Revenue. The Appellant asserted that if it had been advised of the penalty earlier it would have updated its procedures to ensure that the payments were received by HMRC on time. The Appellant pointed out that it had always met its liability for PAYE before the next monthly payment was due. The delay in making the PAYE payments during the disputed months was minimal. Finally the Appellant stated that the commencement of the new penalty regime happened at the same time of a very difficult period for Mr Morley's family arising from the tragic death of his son. The Appellant argued that its default took place during the worst recession for years when Mr Morley was concentrating on his business and a significant loss in his family. In conclusion the Appellant considered having regard to all the circumstances that it had a reasonable excuse for the late payments and that the penalty should be waived.

4. HMRC disagreed with the Appellant's contentions. HMRC pointed out that the Appellant had been late with its payment every month for the year in question. HMRC warned the Appellant about potential penalties for late payment by letter and verbally. According to HMRC the new penalty regime was introduced to encourage more employers to pay by the due dates and that the amount of the penalty was set by legislation. HMRC noted the unfortunate death of Mr Morley's son but felt that as this occurred in 2009 it did not constitute a reason for the default. HMRC also observed that Mr Morley had a business partner who had equal responsibility to ensure that payments were made on time. HMRC argued that the Appellant did not have a reasonable excuse and requested the Tribunal to confirm the penalty.

5. The Tribunal heard evidence from Mr Morley for the Appellant. Mr Osborne made submissions on behalf of HMRC. The Tribunal admitted various documents in evidence.

### 30 **Reasons**

6. 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 had not paid the PAYE by the due date for the months in dispute. The Tribunal is, therefore, satisfied that the Appellant paid the PAYE late every month for the year ending 5 April 2011.

7. Given the Tribunal's finding in paragraph 6 above, 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 four per cent

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<sup>3</sup> (Para 5(6), sch 56 FA 2009)

because it made ten defaults during the tax year 2010/11<sup>4</sup>. The amount of PAYE paid late for those ten months was £144,143.91 which produced a penalty of £5,765.75.

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's<sup>5</sup> 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 default in making late PAYE payments:

- (1) The Appellant was a small manufacturing company specialising in packaging. The Appellant employed 12 people and had a turnover of about £2.5 million. The Appellant had been in existence for 24 years and during that time had always met its tax obligations. The Appellant had not previously incurred a penalty for late payment of tax.
- (2) Mr Morley and his business partner were responsible for the management and direction of the Appellant's business. Mr Morley and his partner performed distinctive and separate management roles for the business. Mr Morley had sole responsibility for financial matters, and ensuring that the Appellant met its tax obligations. Mr Morley's business partner had no financial expertise.
- (3) Mr Morley had operated the same procedure for remitting PAYE to HMRC for a considerable number of years and without complaint from HMRC. The form P32 detailing the Appellant's liability for PAYE and National Insurance was printed off at the end of each monthly PAYE period, which Mr Morley initialled, and then wrote a cheque to HMRC for the amount specified in the P32. Mr Morley left the cheque in the tray for one of the staff members to post.

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<sup>4</sup> No penalty is imposed for the first default in May 2010. The *Agar* decision determined that HMRC was not entitled to impose a penalty for April 2011 in the 2010/11 year.

<sup>5</sup> Person refers to the person legally responsible for making the payment of tax on time.

5 (4) Mr Morley produced copies of the P32s with his authorisation and cheque stubs recording payment of the PAYE for 2010/11. The respective date on the P32s and cheque stubs was normally one or two days before the due date of the 19<sup>th</sup> in each month. Mr Morley, however, accepted that the payments were received by HMRC after the due date which suggested that the Appellant's default in 2010/11 was caused by delays in the Appellant's postal procedures.

10 (5) In August 2009 Mr Morley tragically lost his son who was aged 21 in a road accident. His son's funeral was held on 8 September 2009 after which Mr Morley returned to work. Mr Morley explained that the death of his son had a devastating effect on his wife which was further complicated by a serious illness to his father in law diagnosed on 13 September 2009. Mr Morley stated that it took a year for some semblance of equilibrium to return to his home life.

15 (6) 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.

20 (7) 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.

25 (8) HMRC issued the Appellant a notice requiring payment of PAYE on 28 May 2010, 31 August 2010, 1 October 2010, 25 November 2010, 26 January 2011 and 25 March 2011. The notices were addressed to the Appellant's address at Easter Park, Lenton Road, Nottingham NG7 2PX.

30 (9) On 28 August 2010, 1 October 2010, 27 October 2010, 25 November 2010, 26 January 2011, 28 February 2011 and 25 March 2011 HMRC contacted the Appellant by phone regarding its late payments. HMRC left messages with a member of staff requesting a director to return its call. The Appellant's directors did not respond to HMRC's messages.

35 (10) Mr Morley stated that he did not receive the late penalty warning and the notices requiring payment. Mr Morley stated that the members of staff who received the messages from HMRC would not understand their significance, which was why the messages were not passed onto him.

40 (11) Mr Morley asserted that he only became aware of the penalty for late PAYE payment when the Appellant received the penalty notice dated 29 June 2011. On receipt of the notice Mr Morley took immediate action by setting up a monthly BACS transfer to ensure that future payments were received by HMRC on time. The Appellant's record for 2011/12 showed that it paid its PAYE on time from July 2012 onwards.

(12) Mr Morley believed that he had no reason to suspect that the Appellant was not complying with its PAYE obligations until he received the penalty notice dated 29 June 2011.

11. The Tribunal has no discretionary power to mitigate the penalty. The Tribunal's  
5 jurisdiction on appeal is limited to deciding whether special circumstances exist to reduce the penalty or 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.

12. The Tribunal does not accept Mr Morley's criticisms of HMRC's conduct in  
10 informing employers of the new penalty regime and in notifying individual employers of potential penalties. The Tribunal is satisfied that HMRC gave wide publicity to the changes over a significant period of time. The Tribunal finds that HMRC took considerable steps of keeping individual employers informed of potential penalties. In the Appellant's case HMRC sent seven notices and left seven telephone messages in  
15 2010/11 about potential penalties.

13. The Tribunal considers there is no substance to Mr Morley's claim that HMRC were targeting small employers unfairly and imposing disproportionate penalties. HMRC is required to give effect to the legislation which seeks to provide both an  
20 incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so. Under the legislation the level of penalties is dependent upon the number of defaults in a tax year with the first late payment not counted as a default. The legislation also allows for a reasonable excuse defence, the ability to reduce a penalty in special circumstances and a right of Appeal to an independent judicial body. The Tribunal is satisfied that the legislation as a  
25 whole has a reasonable foundation and not plainly unfair.

14. The issue in this Appeal is whether Mr Morley's belief that he had no reason to suspect that the Appellant was not complying with its PAYE obligations until he received the penalty notice dated 29 June 2011 constituted a reasonable excuse for  
30 one or more of the defaults in 2010/11. During this period Mr Morley focussed his attention on keeping the business afloat in difficult economic times and supporting his family following the tragic death of his son. Mr Morley continued with the same procedure for discharging the Appellant's PAYE payments which hitherto had brought no complaint from HMRC. The Appellant had until the tax year 2010/11 an unblemished record of meeting its tax obligations, and took immediate action to  
35 remedy the default once Mr Morley became aware of the penalty for PAYE late payments.

15. The Tribunal is satisfied that the effect on Mr Morley and his family from the tragic loss of Mr Morley's son was capable of constituting a reasonable excuse for  
40 some of the defaults. The Tribunal places weight on the fact that this sad event happened at the time HMRC embarked on its publicity campaign of the new penalty regime. HMRC considered the tragic event was too remote from when the defaults occurred. In the Tribunal's view, HMRC overlooked the length of time necessary for a family to return to some form of normality after such a loss. The Tribunal accepts

Mr Morley's evidence that it took him and his family one year to come to terms with their loss.

16. HMRC also argued that the Appellant was not entitled to rely on Mr Morley's personal tragedy as an excuse because his business partner should have taken on more responsibility for the Appellant's financial matters during the crisis. The Tribunal is not persuaded by HMRC's argument. The Tribunal acknowledges the question of reasonable excuse should be viewed from the perspective of a prudent tax payer but that perspective must have full regard to the Appellant's individual circumstances. In this respect Mr Morley was carrying on with the Appellant's existing method of remitting PAYE to HMRC. He was authorising payment at around the due date. HMRC did not advise the Appellant during 2009/10 that there were problems with its payments. Mr Morley's business partner had no financial expertise. Given those circumstances and the fact that the publication of the new penalty regime happened at the time of Mr Morley's loss, the Tribunal is satisfied that a prudent tax payer would have had no reason to change the Appellant's existing arrangements for PAYE payments which had proven their worth during the past 20 years.

17. The Tribunal, however, accepts that on the facts of this case the Appellant's belief of no reason to suspect founded on Mr Morley's personal tragedy and hitherto unblemished record of compliance ceased to be a reasonable excuse at some point in 2010/11. The Tribunal decides that this point was reached at the beginning of September 2010.

18. The Tribunal considers that the Appellant would not have been put on notice that something was wrong by the April 2010 Employer's Bulletin. As far as the Appellant was concerned the existing arrangements for paying PAYE were compliant. The first inkling of something awry was the issue of a penalty warning notice on the 28 May 2010. The Tribunal accepts Mr Morley's evidence that the Appellant did not receive the Notice. The facts found showed that there were no significant events in June and July 2010 to disturb Mr Morley's reasonably held belief that the Appellant was doing nothing wrong.

19. The Tribunal finds that the position changed in August 2010 with the occurrence of three separate events. First, another Employer's Bulletin was issued which highlighted the fact that HMRC had received lots of calls from employers who mistakenly thought they had paid on time. Second, on 28 August 2010 HMRC made telephone contact with the Appellant requesting that a director return its call. Finally on 31 August 2010 HMRC sent a notice to the Appellant requesting payment of the outstanding PAYE. Mr Morley stated that he was unaware of the telephone call and the notice. Further Mr Morley considered that the Employer's Bulletin was not in an accessible format.

20. The Tribunal considers that the August events were of a separate magnitude from those that went before and undermined the reasonableness of the Appellant's belief of no reason to suspect. Mr Morley acknowledged that his personal life was reaching a semblance of normality after the tragic loss of his son the year before. A prudent tax payer in the Appellant's position would have read the August bulletin, and

checked its position following the report on employers who had hitherto believed they were compliant. At the end of August 2010 the Appellant was put on notice by letter and by telephone that all was not well with its tax affairs. The Appellant is not entitled to rely on Mr Morley's lack of knowledge of the notifications as an excuse for inaction. A prudent tax payer in the Appellant's position would have had systems in place to ensure that important messages and notices were passed onto the director. In this instance the Tribunal is satisfied that the Appellant received the notice requiring payment dated 31 August 2010. The Tribunal is not prepared to extend the benefit of doubt given to the Appellant in respect of non-receipt of the *Late Payment Penalty Warning* on 28 May 2010 to the subsequent HMRC correspondence starting in August 2010. The Tribunal considers that in the absence of evidence of specific postal problems it is within the realm of reasonable probability that the Appellant might not receive one letter with the correct address but not two or more letters. Mr Morley adduced no evidence that the Appellant was beset with postal difficulties.

21. The Tribunal for the reasons given above finds that the Appellant had a reasonable excuse for its late payment default in June, July and August 2010 but that the excuse ceased on 1 September 2010. The effect of this finding is that the Appellant is required to pay a penalty for its default for seven months from September 2010 to March 2011. This reduces the sum upon which the penalty is calculated and the appropriate percentage from four to three per cent. The revised penalty is £3,030.00.<sup>6</sup>

22. The Tribunal allows the appeal in part and reduces the penalty to £3,030.00,

23. 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 TILDESLEY, OBE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 August 2012**

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<sup>6</sup> £101,013.54 (£144,143.91 - £ 43,130.37) x 3% = £3,030.42. £144,143.91 = total for ten months default ; £ 43,130.37 = total for June, July, August 2010.