



**TC02182**

**Appeal number: TC/2011/10230**

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

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GLENDAIR DENTAL 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**

**The Appellant did not appear**

**Philip O'Boone for HMRC**

## DECISION

### The Appeal

1. The Appellant appealed against a penalty notice dated 21 July 2011 for late PAYE payments in the tax year ending 5 April 2011 in the sum of £4,208.57. HMRC after considering the First Tier Tribunal decision in *Agar* [2011] UKFTT 773 (TC) reduced the penalty to £3,883.62.

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	8,629.19	0.00	28 May 2010	7	No penalty for first default <sup>2</sup>
5 June 2010	10,108.57	404.34	24 June 2010	2	
5 July 2010	11,002.75	440.11	26 July 2010	4	
5 August 2010	11,303.58	452.14	26 August 2010	6	
5 September 2010	11,205.31	448.21	27 September 2010	5	
5 October 2010	8,951.35	358.05	27 October 2010	5	
5 November 2010	8,873.33	354.93	26 November 2010	4	
5 December 2010	8,751.16	350.05	3 January 2011	11	
5 January 2011	9,942.33	397.69	28 January 2011	7	
5 February 2011	8,664.73	346.59	3 March 2011	9	
6 March 2011	8,287.61	331.50	28 March 2011	6	
Total	105719.91 (97,090.72)	<b>3,883.62</b>			Penalty 4% of 97,090.72 <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 it had always paid the PAYE and National Insurance on the same day of the month for the last four years, and that this was the first time that it had been penalised for late payments. The Appellant considered HMRC's action of allowing an alleged debt to accumulate for a whole year without warning  
5 despicable and totally unreasonable. The Appellant contended that the penalty was unfair and that HMRC's conduct was unconscionable. The Appellant asked for its appeal to be allowed.

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.  
10 HMRC warned the Appellant about potential penalties for late payment by letter and verbally. HMRC made eight attempts to warn the Appellant by telephone of the accruing penalties. In HMRC's view the new penalty regime was introduced to target and improve the behaviour of employers like the Appellant. HMRC requested the Appeal to be dismissed.

15 5. The Appellant did not attend. The Tribunal granted HMRC's application to proceed in the Appellant's absence pursuant to rule 33 of the Tribunal Rules 2009. The Appellant had been notified and was aware of the hearing. The Tribunal decided that it was in the interests of justice to hear the Appeal in the Appellant's absence because:

20 (1) A previous hearing of the Appeal had been adjourned on 6 June 2012 at the Appellant's request. Although the Tribunal granted the adjournment, it expressed its strong disapproval of the Appellant's late application. The Tribunal also indicated that it would have ordered wasted costs against the Appellant if the HMRC presenting officer had not been involved in other cases  
25 on that day.

(2) The Tribunal only became aware that the Appellant was not attending this hearing when it contacted the Appellant on 23 July 2012 about the possibility of hearing the Appeal earlier in the day. A subsequent application for adjournment was refused by a resident Judge.

30 (3) The Appellant's representative has supplied three different accounts for requesting an adjournment. The representative first told the Tribunal Office that he had had to be in the Office on 24 July which was later changed to looking after his family at home. In contrast the representative informed Mr O'Boone of HMRC that he was acting as a caddy for his son on the golf course.

35 (4) After the adjournment application was refused the Appellant's representative requested a hearing by conference call. The Tribunal Office advised the representative that this would not be possible because the Nottingham Tribunal centre did not have conference call facilities. The representative then contacted Mr O'Boone of HMRC asking him to take a  
40 mobile phone into the hearing. This Tribunal was not prepared to conduct the hearing through the medium of a mobile phone.

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

(5) The Appellant's case was well-documented in the Tribunal's papers. The Tribunal was satisfied that the Appellant would not suffer prejudice to the presentation of its Appeal from the non-attendance of its representative.

### Reasons

5 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 adduced no evidence that it paid the PAYE due by the said date for the months in dispute. The Tribunal is, therefore, satisfied that the Appellant paid the PAYE late every month for the year  
10 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  
15 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 £97,090.72 which produced a penalty of £3,883.62.

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  
20 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  
25 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  
30 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:

35 (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

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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.

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.

5 (2) On 25 February 2010 HMRC advised Ms Harston, a director, by telephone that payment for month 10 in 2009/10 year was late. Although this was before the start of the 2010/11 tax year, the evidence of the call was relevant in that the Appellant was made aware of the importance of paying PAYE on time.

10 (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.

15 (4) HMRC issued the Appellant with eight notices under regulation 78 of the PAYE regulations requiring payment of PAYE.

(5) On 25 May 2010, 24 August 2010, 25 October 2010, 24 November 2010, 25 January 2011, 1 March 2011 and 24 March 2011 HMRC attempted to contact the Appellant by phone regarding its late payments. HMRC left  
20 messages for a director to call it but no-one from the Appellant responded.

(6) On 29 December 2010 HMRC spoke to Ms Harston, the director, about the late payment in month 8. Ms Harston stated that the payment had been overlooked. HMRC reminded Ms Harston of the due dates for payment and warned of penalties.

25 (7) The Appellant at no time throughout 2010/11 requested time to pay its PAYE liabilities.

(8) The Appellant has not provided an excuse for its late payments of PAYE. The Appellant's defence comprised assertions of unfairness and unconscionable conduct on HMRC's part.

30 11. The Tribunal has no discretionary power to mitigate the penalty. The Tribunal's 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 special circumstances and or a reasonable  
35 excuse. The Appellant has provided no evidence of special circumstances and or a reasonable excuse for its default.

12. The Appellant's defence comprised two elements. The imposition of a penalty was unfair and HMRC's conduct in imposing a penalty was unconscionable.

40 13. On the question of unfairness the Tribunal adopts the reasoning of the First Tier Tribunal's decision in *Dina Foods Limited* [2011] UKFTT 709 (TC) which stated at paragraph 42:

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“Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. We have described earlier the graduated level of penalties depending on the number of defaults in a tax year, the fact that the first late payment is not counted as a default, the availability of a reasonable excuse defence and the ability to reduce a penalty in special circumstances. The taxpayer also has the right of an appeal to the Tribunal. Although the size of penalty that has rapidly accrued in the current case may seem harsh, the scheme of the legislation is in our view within the margin of appreciation afforded to the State in this respect. Accordingly we find that no Convention right has been infringed and the appeal cannot succeed on that basis”.

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14. The Tribunal disagrees with the Appellant’s second ground of unconscionable conduct on the part of HMRC. The facts in this case demonstrated that HMRC made considerable efforts in informing employers generally of the new penalty regime, and equally took steps to advise the Appellant that it was in default with its payments. The Appellant’s actions of ignoring the written warnings and failing to return phone calls 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.

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15. The Tribunal for the reasons given above dismisses the Appeal and affirms the penalty in the amount of ££3,883.62.

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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 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: 13 August 2012**