



TC02232

Appeal number: TC/2012/00519

INCOME TAX – penalties for late payment of PAYE – whether reasonable excuse – late receipt of funding and mail not received the next day - No – Schedule 56 Finance Act 2006. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE BYRE THEATRE OF ST ANDREWS LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
PETER R SHEPPARD, FCIS, FCIB, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on
21 August 2012**

No appearance for the Appellant

**Mr William Kelly, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. This is an Appeal by The Byre Theatre of St Andrews Limited (“BT”) against a penalty determination issued by The Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) for the late payment of PAYE for the tax year 2010-2011.
2. BT intimated on 16 August 2012 that they would be unable to be represented at the hearing as they had to attend an announcement of a substantial public sector award on the day of the hearing.
3. BT admit that there were eight late payments of PAYE, five of which BT say were late because of a late receipt of funding for their theatrical activities and three where they say they posted the payments but they were received late as a result of delays by Royal Mail.
4. Following the case of *HMRC v Agar* when the Tribunal ruled that payment due in April 2011 should not be treated for the purposes of late payment penalties as a default during the tax year 2010-2011, the recalculated penalty charge at 4 April 2012 amounted to £2,159.12 being at the rate of 3% of the total amount of tax due in terms of the Finance Act 2006, Schedule 56, paragraph 6(6).

Legislation

FINANCE ACT 2009 Section 107

SCHEDULE 56

PENALTY FOR FAILURE TO MAKE PAYMENTS ON TIME

Penalty for failure to pay tax

1

- (1) A penalty is payable by a person (“P”) where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
- (2) Paragraphs 3 to 8 set out—
 - (a) the circumstances in which a penalty is payable, and
 - (b) subject to paragraph 9, the amount of the penalty.
- (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.
- (4) In the following provisions of this Schedule, the “penalty date”, in relation to an amount of tax, means the date on which a penalty is first payable for failing to pay the amount (that is to say, the day after the date specified in or for the purposes of column 4 of the Table).

	<i>Tax to which payment relates</i>	<i>Amount of tax payable</i>	<i>Date after which penalty is incurred</i>
<i>PRINCIPAL AMOUNTS</i>			
1	Income tax or capital gains tax	Amount payable under section 59B(3) or (4) of TMA 1970	The date falling 30 days after the date specified in section 59B(3) or (4) of TMA 1970 as the date by which the amount must be paid
2	Income tax	Amount payable under PAYE regulations . . .	The date determined by or under PAYE regulations as the date by which the amount must be paid

Amount of penalty: PAYE and CIS amounts

5

- (1) Paragraphs 6 to 8 apply in the case of a payment of tax falling within item 2 or 4 in the Table.
- (2) But those paragraphs do not apply in the case of a payment mentioned in paragraph 3(1)(b) or (c).

6

- (1) P is liable to a penalty, in relation to each tax, of an amount determined by reference to—
- (a) the number of defaults that P has made during the tax year (see subparagraphs (2) and (3)), and
- (b) the amount of that tax comprised in the total of those defaults (see subparagraphs (4) to (7)).
- (2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—
- (a) a payment under PAYE regulations;
- (b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001 (SI 2001/1004);
- (c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045);
- (d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 (SI 2009/470) or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (SR 2000 No 121).

(3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

(4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of the tax comprised in the total of those defaults.

(5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of the tax comprised in the total of those defaults.

(6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of the tax comprised in the total of those defaults.

(7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of the tax comprised in the total of those defaults.

(8) For the purposes of this paragraph—

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

(b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph.]

Special reduction

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

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

The Facts

5. Evidence was submitted of each tax month’s due payment dates and the actual payment dates for the tax years 2005-2012 which showed a repeated pattern of late payments of PAYE and, in each and every year, at least half of the payments were late and in the tax year 2006-2007, every payment was late.

6. HMRC's publications, including the Employer Bulletin issued in September 2009 (which gave advice on how to avoid penalties), stated clearly the dates by which payments should be made and also provided advice that if a business was unable to pay tax on time that they tell HMRC as soon as this was known.

7. Reference was also made to HMRC's Employer's CD-rom issued for the tax year 2009-2010 which stated that "you must make sure that your payment reaches us by the 19th of the month".

8. When there is a late payment of tax, a branch of HMRC contacts taxpayers by telephone and this happened on three occasions in September 2010, January 2011, and March 2011.

9. In addition, a penalty warning letter was sent on 28 May to BT by HMRC and a Notice Requiring Payment letters, P101s, were sent on 1 October 2010, 27 January 2011, 3 March 2011 and 25 March 2011.

10. HMRC have no requirement to issue P101 letters and, accordingly, they are not sent out on every occasion of a late payment.

11. Evidence of the definition adopted by Royal Mail of "first class post" stated "we aim to deliver most of first class mail by the next working day including Saturdays". It continued "although we aim to deliver mail the next working day for first class items, we cannot guarantee delivery".

12. Royal Mail's delivery proposition states that the aim is to deliver 93% of first class mail within one working day. The actual statistics for the first quarter of 2010-2012 was a success rate of 92.6%.

13. The Tribunal noted that Royal Mail's Special Delivery (Next Day) items achieved, in the same quarter, a 97.6% success rate of meeting that requirement.

14. BT requested a review of the decision on 23 September 2011.

15. HMRC replied on 10 November 2011 stating that the issue regarding funding came into effect at the very end of the PAYE 2010 tax year and HMRC did not understand how this affected the company's finances throughout the year in question; that a telephone call from HMRC took place on 3 March 2011 during which BT advised that payment had been overlooked and HMRC warned BT of penalties; that although BT were not aware of the Business Payment Support Services it was well advertised with the media and with accountants; and that external guidance is clear that when paying via cheque HMRC must be in possession of the cheque by the 19th of each month (weekends and non working days as well as other factors that may delay the postal service need to be taken into account).

16. The Appeal upheld the penalty charge.

BT Submissions

17. BT say that the delays in remitting the PAYE contributions for the later part of the year was caused by the failure of their funders to provide agreed transitional and capital funding.

18. BT were advised of an award on 9 February 2011 of £80,000 but they did not receive the payment until the end of June 2011 and parts of this were deferred until August 2011 with the balance not being paid until the end of November 2011.

19. Similarly, a Capital grant application to Creative Scotland, applied for on 14 February, was not paid until 12 April with the balance not paid until 23 September 2011.

20. BT say that the payments for the months 5, 9, 10 and 12 were substantially in arrears but that the months 3, 7 and 8 were despatched by first class post prior to the required date of receipt of the 19th of each month.

21. They feel they are entitled to rely on Royal Mail's "guarantee of next day delivery for first class post".

22. BT consider the penalty to be harsh and say that the Appeal should be allowed.

HMRC's Submissions

23. HMRC say that the burden is on the tax payer to show reasonable excuse once HMRC have demonstrated that the tax has not been paid; that there is no reasonable excuse and that the standard of proof is on the balance of probabilities.

24. HMRC say there were eight late payments which resulted in the 3% tax penalty rate being applied; that Royal Mail make no guarantees about delivery of any mail items, that BT are habitually late payers of PAYE payments and that BT had no reasonable excuse which existed throughout the whole period.

25. HMRC say that the issue is one of cash flow management which is part and parcel of running any business and they expect employers to arrange matters to pay tax by the due date; that the aim of the legislation is provide a deterrent effect for late payers and not to provide commercial restitution and that the staged increases and, consequently, the penalty of 3% take account of the number of defaults.

Reasons for the Decision

26. The Tribunal noted the consistent late payment of PAYE by BT over a long period and the fact that it was the payment of funding rather than the commitment to receive funding which it was thought might facilitate other financial arrangements, such as borrowing, to ensure payment of tax, which was put forward as a reasonable excuse.

27. The Tribunal noted that the later receipts of funding did not explain the earlier incidences of late payment of PAYE; that a number of warnings were given to BT about the late payment and the consequences of non payment; that HMRC publications are clear about the date of receipt of all payments, including non electronic payments and that there is no guarantee from Royal Mail that they will deliver any mail the next day.

28. BT failed to provide sufficient evidence to establish a reasonable excuse and, accordingly, 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 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.

**W RUTHVEN GEMMELL, WS
TRIBUNAL JUDGE**

RELEASE DATE: 29 August 2012