



TC02236

Appeal number: TC/2012/05107

INCOME TAX – penalties for late payment of PAYE – whether reasonable excuse – whether terms of warning letters and demands unclear – whether HMRC acted unfairly – Schedule 56 Finance Act 2006. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LOTHIAN LIGHT HAULAGE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
IAN CONDIE, CA**

**Sitting in public at George House, 126 George Street, Edinburgh on
23 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 Lothian Light Haulage Limited (“LH”) 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. LH intimated on 23 August 2012 that they would not be represented at the hearing as their representative was unable to attend.
3. The Tribunal sought and received clarification that the late payments for tax months one and two were received in 2010 and not 2012, as indicated on HMRC’s skeleton argument and that, accordingly, the number of days late, 39 and 34 respectively, were correct.
4. Paragraph 6(3) of Schedule 56 of the Finance Act 2009 determined that the first failure for that tax year did not count as a default for that year and, in terms of the *Agar* judgement, the payment due in April 2011, month 12, should also not be treated for the purposes of late payment penalties, as a default occurring in the tax year 2010-2011.
5. HMRC had, therefore, calculated their penalties after the first full tax year, as they are required to do so by Statute, and then recalculated the penalty charges as at 26 March 2012 in an amount of £4,388.77, being at the rate of 4% of the total amount of tax due in terms of the Finance Act 2006, Schedule 56, paragraph 6(7).
6. HMRC are required to prove that the tax has not been paid on time and LH to prove that they have either a reasonable excuse or that the penalties do not apply.

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

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(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

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- (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.

Cases Referred To

HMD Response International v HMRC Commissioners [2011] UKFTT 472 (TC)

Dina Foods Limited v HMRC Commissioners [2011] UKFTT 709 (TC)

The Facts

7. Evidence was submitted of the due payment dates and the actual payment dates for each month of the tax year 2010-2011 which showed a repeated pattern of late payments of PAYE in each and every month.

8. HMRC's publications and bulletins were issued between September 2009 and February 2011 which stated 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.

9. LH appealed, on September 2011 (action by HMRC on 13 September 2011) against the penalty determination issued on 11 August 2011 on the grounds that LH were not notified in a reasonable time that a penalty had occurred until after it could be rectified; that the application of the penalty is unfair and is unreasonable; that there was no prior notification of the penalty and that there was confusion as to the true position of PAYE contributions as a result of the operation of two accounts for contributions.

10. LH stated that they were not aware that the responsibility rested with them to ensure that the correct reference number was sent by their bank when making an electronic payment; that HMRC's dealings were below the standard of fair dealing and that HMRC had a common duty to act fairly.

11. HMRC issued a Penalty Default Warning letter on 28 May 2010 and made telephone calls to LH on 8 June 2010 and 3 February 2011 and contacted Mr Easton of LH on 23 March 2011, who was warned of the penalties, and issued extensive publications and bulletins on payment and penalties. HMRC said LH had continued receiving notices requiring payment which could only be estimates in circumstances of the company not paying PAYE on the due date. HMRC said they did not believe LH had a reasonable excuse being normally an unexpected or unusual event, either unforeseeable or beyond their control that prevented them from paying their PAYE on time.

12. HMRC wrote on 17 October 2011, stating that they did not believe that LH had a reasonable excuse for paying PAYE late, explaining that the first late payment did not attract a penalty unless it was six months or more late, something that could not be ascertained at the date the letter was sent; that the tax statutes and guidance to employers was clear about the dates of payment; that a CD-rom was mailed to employers in February 2010 and much other publicity was given concerning the dates of payment and the new penalty regime.

13. HMRC confirmed that, even in situations where the incorrect reference number had been used, any payment that needed to be reallocated would still retain the original "effective date of payment" so the company would not be disadvantaged in

any way and the Tribunal at the Hearing requested and received confirmation that was the case in relation to the penalties under appeal. HMRC consequently rejected LH's appeal and upheld the penalty charge.

14. LH replied on 24 October 2011, requesting a review of HMRC's decision and querying the amounts contained within the demands which appeared to be the incorrect amounts and stating that the letters referred to a penalty that "may" be charged; stating they had not received any default letter and that HMRC was not being fair; that they were entitled to know the point at which they incurred a penalty and to be notified of further alleged defaults.

15. LH also referred to the case of *HMD Response International* stating that, in terms of this case, LH believed that HMRC had acted "unlawfully, unfairly and without rational explanation in dealing with their case".

16. HMRC responded on 26 March 2012 stating that they did not believe the reasons constituted a reasonable excuse; that HMRC had received no indication that the calculation sent on 11 August 2011 had not been delivered; that in any event they had accepted the Appeal late; that the first payment "may" be charged because the first payment may incur a penalty only if it is six months or more late; that there had been wide publicity as to the payment dates and the penalty regime and the use of incorrect reference numbers and therefore the allocation to the wrong tax year had been rectified so as not to disadvantage the company as regards the date the payment was treated as paid to HMRC.

17. Notice Requiring Payment letters, P101, were sent on 22 July, 19 August, 26 August, 25 October, 25 November and 29 December, all 2010 and 31 January, 24 February and 24 March, all 2011.

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

19. The Appeal upheld the penalty charge.

LH Submissions

20. HMRC's review did not deal with the issues raised in the Appeal letters and LH does not agree with HMRC's meaning of a reasonable excuse.

21. HMRC has failed to take proper account of the grounds for the delay in payment including HMRC's operation of two PAYE accounts for them.

22. HMRC delayed in notifying LH that they may get a penalty and issued misleading notices regarding late payments.

23. LH had extensive conversations with HMRC to try and rectify the duplicate account situation which LH say resulted in the delay in payment.

24. LH does not accept HMRC's claim that the Tribunal's decision in *HMD Response International* is unique to that case.

25. The Decision is unlawful.

26. LH says the Appeal should be allowed.

HMRC's Submissions

27. HMRC say that the burden is on the taxpayer 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.

28. HMRC say that there were ten late payments which resulted in the 4% tax penalty rate being applied. LH had no reasonable excuse which existed throughout the whole period.

29. HMRC's records indicated that the payments were late and, unless some other provision of the legislation prevents it, a penalty must be payable for each month the payment was made late.

30. HMRC say that cash management 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 to provide a deterrent effect for late taxpayers and not to provide commercial restitution and that the staged increases and, consequently, the penalty of 4% took account of the number of defaults.

31. HMRC say that there were habitual defaults on the payment of PAYE; that they had set up a Business Payment Support Service to assist those experiencing financial difficulties which was not utilised by LH and that liability to taxes is inherent with running a business and certainly not unexpected.

32. HMRC say that they were unable to locate a second PAYE account and on 2 August 2012 contacted LH to request the other reference to ensure that HMRC had not missed any notes of contact, in preparation for the Tribunal hearing.

33. HMRC were advised that there was no other PAYE account and Mr Easton advised that a third party had put his application together and that the reference had been incorrect. It was subsequently clarified that the reference quoted was in the incorrect format and that the payments were allocated to the wrong year rather than to another account.

34. HMRC say that the incorrect allocation was made by LH that, is to say, the payments for months one, two and three were allocated to the year 2009-2010 but were subsequently re-allocated by HMRC to the year 2010-2011.

35. Thereafter, the payments from month four onwards for 2010-2011 were correctly allocated.

36. HMRC say that there is no record of LH contacting them saying they were delaying in payment as they were unsure which account to pay the tax to and HMRC do not accept this as a reasonable excuse.

37. HMRC issued a Penalty Warning letter on 28 May 2010 and telephoned LH on 8 June 2010, 3 February 2011, and 23 March 2011. In addition, at least eight default notices were issued.

38. The law allows HMRC, where after 17 days or more after the end of a tax period, an employer has not paid any tax to use their best judgment to specify the amount of tax they consider the employer is liable to pay and serve a notice requiring payment within seven days and this is what they did.

39. HMRC say the *HMD Response International* is not applicable to this particular case, in particular, because it refers to a failure to file a P35 which is different to a PAYE monthly payment.

40. HMRC say that they accept the issues regarding the burden of proof; that they must establish a default but once that has been established the onus passes to LH to demonstrate that no penalties apply or they have a reasonable excuse.

41. HMRC does not accept that administrative penalties such as these are criminal penalties; that HMRC have established 12 payments were made late and provided calculations; and that the default position runs from month two in terms of the legislation.

42. HMRC say they have proved that LH was in default and that the legislation at paragraph 11(1) of Schedule 56 says that a penalty must be levied.

43. HMRC rely on their interpretation of reasonable excuse as based on a Court of Appeal judgement (as being an unexpected or unusual event, either unforeseeable or beyond their control) which they rely on and not the interpretation given by the First-tier Tribunal interpretation in *HMD Response International*.

44. HMRC say that they are not required to charge a penalty during the tax year but instead only require a penalty to be made two years after the penalty was first payable or 12 months after the end of the appeal period for the assessment of the outstanding tax. They say they have no legal obligation to send reminders but, as good practice and as a customer service, as is the case for 2010-2011, they did.

45. Consequently, HMRC state that it has acted in accordance with the appropriate legislation; that a penalty is due under Schedule 56 and has been correctly calculated in line with that legislation.

46. HMRC considered whether a special reduction was applicable under paragraph 9 of Schedule 56 because of special circumstances.

47. They do not consider there are special circumstances which would allow the penalty to be reduced further.

Reasons for the Decision

48. It was clear in evidence that each and every PAYE payment for the tax year 2010-2011 was late.

49. The Tribunal's view was that LH habitually made late payments of PAYE and that the calculation of tax, based on the number of late payments, was accurately and lawfully calculated in terms of Schedule 56, as adjusted by the omission of the payment in month 12.

50. The Tribunal then considered the question of whether there was a reasonable excuse or whether there was a reason the penalties were not due.
51. The Tribunal could see no reason why the penalties were not due and then considered the issue of reasonable excuse.
52. LH's principal reasoning was a lack of warnings or, where warnings were given, that they were misleading.
53. The Tribunal considered that the wording of the letters were fully understandable in terms of the legislation, in particular in relation to the first late payment which "may" be subject to a penalty in certain circumstances.
54. The Tribunal considered, in any event, such a letter would act as a useful warning to any employer and might reasonably require them to make reference to the information they received from HMRC regarding employer payments of PAYE.
55. The Tribunal were satisfied that sufficient information about the penalty regime had been issued and that LH should have been aware of the new penalty provisions.
56. The Tribunal noted that LH had received at least eight P101(S) letters and accepted that, as each prior payment was made late, any subsequent notice was likely to be an estimate rather than an accurate reflection of the amounts due.
57. The Tribunal considered LH's argument that HMRC had acted unfairly in failing to warn it that LH had failed to make PAYE payments on time and reference to *HMD Response International*. In that case, it was held that the fact that HMRC delayed for four months before sending out a penalty notice (during which time additional penalties were incurred) in circumstances where the taxpayer honestly believed that it had discharged its obligation to file Form P35, amounted to unfair conduct allowing the taxpayer to rely on the reasonable excuse defence.
58. The Tribunal did not in the circumstances of this case believe the failure by HMRC to warn LH in the manner LH believes they should have been warned resulted in unfairness in the sense that the Tribunal can review the decision of HMRC under paragraph 15 of Schedule 56 Finance Act 2009.
59. The Tribunal noted that there is no statutory requirement that HMRC should issue penalty warnings before making a penalty decision and think that it would only be in exceptional circumstances that a failure by HMRC to give warnings in respect of penalties under Schedule 56 would amount to a reasonable excuse. In this regard the Tribunal agree with the views of the tribunal (Judge Berner and Mr Whiting) in *Dina Foods Limited*.

"38. In this context we have a number of observations to make concerning the scheme of Schedule 56 as a whole, as it applies to PAYE and NICs payments. The penalty regime is based on the number of defaults over a complete tax year. There is no separate penalty for each individual default; the penalty can only be assessed once the aggregate of the late paid tax comprised in the total of the defaults for a particular tax year has been ascertained. A taxpayer who continues to pay late, so increasing both the amount of tax (and NICs) on which the penalty may be levied and the rate of the penalty, may

well complain that his behaviour (and thus the amount of his liability) would have been different had a penalty been levied in respect of a default early in the tax year or at least a warning issued. But on the scheme of penalties that has been laid down, the total would not then have been capable of being ascertained, so the penalty could not at that earlier time have been assessed.

39. We do not therefore consider that any failure on the part of HMRC to issue warnings to defaulting taxpayers, whether in respect of the imposition of penalties or the fact of late payment, is of itself capable of amounting either to a reasonable excuse or special circumstances.”

60. The Tribunal is satisfied that HMRC's conduct in this case did not amount to a breach of HMRC's duty to act fairly. HMRC sent a warning letter to LH on 28 May 2010 advising that more than one late payment in a tax year could result in penalties. HMRC also telephoned LH on 8 June 2010, 3 February 2011 and 23 March 2011 and all this together with the information sent to all Employers discharged HMRC's duty to act fairly. The Tribunal feel that the circumstances in this present case are very different and distinguished from those in *HMD Response International*.

61. The Tribunal considered that HMRC's position was reasonable and did not accept that LH had a reasonable excuse in the plain and ordinary meaning that those words bear in everyday usage.

62. In this case, there were habitual late payments, even after the issue of the “incorrect account” was clarified and, even then, it was established that this was an error by LH not in relation to an account but to the year to which they directed their payment and that they had suffered no prejudice as regards the date at which payment was made by their error.

63. The Appeal is dismissed.

64. 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: 4 September 2012