



TC02244

Appeal number: TC/2011/09976

*INCOME TAX – PAYE – penalty for late payment – Schedule 56 FA 2009 –
reasonable excuse – payments sent by first class post on the working day prior to
due date – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BROWNS CTP LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR NOEL BARRETT**

Sitting in public at Manchester on 17 August 2012

Mrs Jodie Taylor, accountant for the Appellant

1.

Mr Anthony O’Grady of HM Revenue & Customs for the Respondents

DECISION

Background

2. This is an appeal against penalties for late payment of PAYE and National Insurance during tax year 2010-11. HMRC allege late payment in respect of 9 monthly periods. This would give rise to 8 defaults for the purposes of the penalty regime in *Schedule 56 Finance Act 2009* and a penalty at the rate of 3%.

3. The provisions of *Schedule 56 Finance Act 2009* operate so as to impose a penalty at the end of the tax year by reference to the number of defaults in the year. The amount of the penalty, after a reduction to take into account the decision of this tribunal in *Agar Ltd v HMRC [2011] TC 01625*, is £9,974.23.

4. *Paragraph 16 Schedule 56 Finance Act 2009* provides that failure to make a payment will not give rise to a penalty if the taxpayer satisfies the tribunal that there is a reasonable excuse for the failure.

5. It is not in dispute that in month 1, whilst the payment was 34 days late, the Appellant had agreed a time to pay arrangement with HMRC so that there was no default. In relation to month 5, payment was on time and there was no default.

6. The Appellant accepts that payment was late on 4 occasions during 2010-11. In relation to month 2, payment was 17 days late but as this was the first late payment in 2010-11 it is not treated as a default for the purposes of *Schedule 56*. In months 9, 10 and 11 payment was 6 or 7 days late. Particular circumstances involving the illness of a director gave rise to those defaults, but the Appellant accepts that they give rise to 3 defaults for the purposes of *Schedule 56*.

7. The issue before us concerns the payments made in respect of months 3, 4, 6, 7 and 8. Put briefly the Appellant says that these payments were sent prior to the date of payment and HMRC should have received them in the ordinary course of post on or before the due date. If as a matter of fact we find that the payments were made late, the Appellant relies on a reasonable excuse, namely that cheques were posted so that they might reasonably be expected to arrive on or before the due date.

The Evidence and our Findings of Fact

8. Based on the documentary evidence referred to by Mr O'Grady, we are satisfied that the cheques were received by HMRC after the due date for payment in respect of each month in issue. That evidence comprises computer records from an internal HMRC system known as *BROCS* which shows the effective date of payment, in other words the date on which the Appellant's cheques were received by HMRC. The question which then arises is whether the Appellant had a reasonable excuse for late payment.

9. Mrs Taylor gave evidence as to the system for posting PAYE cheques to HMRC. It is Mrs Taylor who writes out the cheque and places it before a director for signature. Because it can take a few days for the director to sign she generally dates the cheque for the 19th of the month which she knew to be the due date for payment. In normal circumstances the director will return the signed cheque to her before that date so that it can be sent to HMRC to arrive in time.

10. The returned cheques and paying in slips showed that there were two exceptions to this. Firstly, in October 2010 (month 6) the payslip was dated 18 October 2010 and the cheque dated 18 September 2010. The date on the cheque was clearly an error, and was intended to read 18 October 2010. Mrs Taylor stated that she used the 18th on that occasion because it was the date of posting. It was not clear why she did not follow her usual practice of inserting the 19th of the month on this occasion.

11. The second exception was December 2010 (month 8) where both the returned cheque and the paying in slip were dated 14 December 2010. Mrs Taylor explained that this was because 14 December was the appellant's last working day before Christmas and she wanted the cheques signed before then.

12. Once the cheque is signed by a director Mrs Taylor places it in a pre-printed HMRC envelope together with the HMRC payslip and gives it to the Appellant's receptionist for posting. The receptionist puts the letter in a nearby post box. This is always done before the last collection at 5.30 pm because the business closes at 5.00pm. Mrs Taylor has never known an occasion when the last collection time has been missed.

13. Significantly, Mrs Taylor also produced the Appellant's contemporaneous post book which is completed by the receptionist for each piece of post. The post book shows the date of posting, the recipient and a brief description of what is included in the letter, for example a cheque. Letters were always sent using first class stamps. The business did not use second class stamps for any letters.

14. The business is based in Middleton in Manchester. It sends cheques and payslips to an HMRC address in Bradford. There is no reason to consider that post between these two locations should be different to Royal Mail's usual standards.

15. We found Mrs Taylor to be an honest and straightforward witness and we accept her evidence. Based on that evidence and the evidence from HMRC as to the date of receipt we can summarise our findings of fact by reference to the following table:

PAYE Month	Date Posted	Due Date	Date Received by HMRC
3	16 July 2010 (Friday)	19 July 2010 (Monday)	22 July 2010 (Thursday)
4	18 Aug 2010 (Wednesday)	19 Aug 2010 (Thursday)	21 Aug 2010 (Saturday)
6	18 Oct 2010 (Monday)	19 Oct 2010 (Tuesday)	21 Oct 2010 (Thursday)
7	18 Nov 2010 (Thursday)	19 Nov 2010 (Friday)	23 Nov 2010 (Tuesday)
8	17 Dec 2010 (Friday)	19 Dec 2010 (Sunday)	22 Dec 2010 (Wednesday)

16. There were no entries in the post book for August 2010 (month 4). We accept that this was because the receptionist was away on holiday and that in her absence the recording of postage was not good. However we accept that as with the other months in issue the cheque was posted on the last working day before the due date.

17. In the table above the due date is stated as the 19th of each month. This derives from *Regulation 69(1)(b) Income Tax (PAYE) Regulations 2003* which states in relation to cheque payments that payment must be made “*within 14 days after the end of the tax period*”. The tax period ends on the 5th of each month, hence payment must be made on or before the 19th of the month. By *Regulation 219* if payment is made by cheque and the cheque is met on first presentation then payment is treated as having been made on the date HMRC received the cheque. There is no dispute that the cheques were all met on first presentation so the date of receipt is treated as being the date of payment.

18. Mr O’Grady submitted that where the 19th day of the month fell on a weekend, payment must have been received by the previous Friday or there would be a default. He was unable to direct us to any authority for this proposition. In fact it appears that the legislation is silent on this point, so that the key date is the date the cheque was in fact received by HMRC. The position is described in the HMRC website in relation to *PAYE and National Insurance Payments and Deadlines* where it states:

“If you pay by post

If paying by post, your cheque payment must be posted early enough to reach HMRC no later than the 19th of the month. To allow for possible postal delays, for which we are not responsible, please allow at least three working days for the payment to reach us.

For interest and penalty purposes we will treat your payment as being received on the day we receive your cheque. Where we receive it on a day that the office is closed the date used will be the day the office was first closed.

For example, when we receive a cheque on a Monday we will treat it as having been received on the Saturday before.”

19. This point arises in relation to Month 8 where the due date was Sunday 19 December 2010. It is important because on Mr O’Grady’s case the due date for payment was 17 December 2010 and the cheque was not posted until that date. However the statutory provisions referred to above establish the due date for payment as Sunday 19 December 2010 and the cheque was posted by the Appellant on Friday 17 December 2010.

20. In the light of the evidence we find that for each of the months in dispute the payment was received by HMRC after the due date. HMRC have therefore established a failure to make payment. The question is whether the Appellant has a reasonable excuse for that failure such that it should not be treated as a default.

Reasonable excuse

21. The burden of establishing a reasonable excuse lies on the Appellant. Mrs Taylor says that for each month in question the payment was posted by first class post such that it should have been received by HMRC in the ordinary course of post on or before the due date.

22. Mr O’Grady says that it is the taxpayer’s responsibility to make sure that payment is received on or before the due date. It would have been prudent for the

Appellant to send the cheque 4 or 5 days before the due date. In fact for each month payment was not sent until the last working day before the due date.

23. Mr O’Grady did not dispute that in the ordinary course of first class post a letter should be delivered the next day, excluding Sundays.

24. Neither party addressed us on any authorities or guidance in relation to this issue. Our own researches show that reliance on first class post has been held to be a reasonable excuse in at least one tribunal decision dealing with PAYE penalties. In *Crowson (t/a Mackenzies Smoked Products) v HMRC [2011] UKFTT 789 (TC)* the payments in question had been posted a few days before the 19th of the month, and in one case on the 18th of the month. The Tribunal found that there was a reasonable excuse where:

“sufficient time had been allowed for the payments to reach HMRC prior to the due date and that the Appellant had a reasonable expectation that such would be the case.”

25. The term “reasonable excuse” is not defined in the legislation. There is limited guidance in *Paragraph 16(2)(b) Schedule 15* which states as follows:

“where [the taxpayer] relies on any other person to do anything, that is not a reasonable excuse unless [the taxpayer] took reasonable care to avoid the failure.”

26. In contrast the VAT default surcharge regime contains a specific provision in relation to non-payment of tax by the due date. *Section 59(7) Value Added Tax Act 1994* provides as follows:

“(7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

he shall not be liable to the surcharge ...”

27. In relation to cheque payments for VAT we understand that HMRC’s practice, for businesses not required to pay electronically, has been to accept that cheques sent at least one working day prior to the due date are treated as posted in time. This derives from published correspondence referred to at [1991] STI 389 and applied by the VAT Tribunal in *Halstead Motor Company v HM Customs & Excise [1995] VTD 13373*. We have to consider whether that practice should by analogy be read across to the reasonable excuse provision in *Schedule 56*. Having said that we recognise that the PAYE penalty provisions contain no similar provision to *Section 59(7)*. What is reasonable in the context of PAYE will depend on the circumstances of the particular case.

28. One factor in considering whether the practice should be read across is the material which HMRC publishes specifically in relation to PAYE. As appears from the website extract, HMRC advise employers to post cheques at least 3 working days prior to the due date to allow for possible postal delays. Whilst we do not consider that HMRC can effectively set the standard of reasonableness themselves, we can consider what is reasonable in the light of their guidance. However the guidance quoted above merely states that HMRC will not be responsible for postal delays. That must be directed towards whether the payment is treated as being received on time, rather than the separate question of whether there is a reasonable excuse. Postal delays clearly can give rise to a reasonable excuse depending on the circumstances.

29. Another relevant factor is what we perceive to be deterioration in the service standards of Royal Mail in respect of first class post since 1995 when the *Halstead* case came before the VAT Tribunal. However we did not have any evidence in this regard because neither party addressed the issue in detail. It is however a factor which it is appropriate for a tribunal such as this to take into account.

30. In the present context what is important in our view is the reasonable expectation of the taxpayer when sending payment. If he has a reasonable expectation that the payment will be received on or before the due date then in our view he will have a reasonable excuse for non-payment if it is not received. We agree with Mr O'Grady that it may be prudent to leave more time, but that does not answer the question.

31. Mr O'Grady did not suggest any specific factors which would make reliance on next day delivery unreasonable in the circumstances of the Appellant. Nor have we identified any specific factors in considering this decision. In particular there is no evidence of anything that would put the Appellant on notice that it could not rely on the postal service between Middleton and Bradford.

32. Taking all these matters into account we consider that a reasonable employer, having due regard to his responsibilities in relation to PAYE, is generally entitled to rely on next day delivery in the ordinary course of first class post. The particular circumstances will still be relevant to individual cases. There is also still a burden on the employer to establish the actual date of posting by reference to cogent evidence.

33. It does strike us that this is an area where there ought to be more certainty for taxpayers. If HMRC do not consider that it is reasonable to rely on next day delivery by first class post we would suggest that they publicise that view in terms and the reasons for it. Taxpayers will then be put on notice that if they rely on next day delivery they are unlikely to have a reasonable excuse.

34. We find that the Appellant does have a reasonable excuse for non-payment in months 3, 4, 6, 7 and 8. We therefore reduce the penalty, in so far as it is referable to defaults in those months, pursuant to our jurisdiction in *Paragraph 15(2) Schedule 56*.

35. In all the circumstances we allow the appeal.

36. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 6 September 2012