



TC02262

Appeal number: TC/12/05040

Penalty - Late payment of PAYE - FA 2009 Sch 56 - Reasonable excuse for late payment - Reliance on others - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FALKIRK FOOTBALL & ATHLETIC CLUB LTD Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
 PETER R SHEPPARD, FCIS, FCIB, CTA**

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

Mr M Ritchie and Mr P Kenny for the Appellant

Mrs Chris Cowan, HM Revenue and Customs, for the Respondents

DECISION

1. This appeal related to the late payment of PAYE payments in the year 2010-11 which triggered an assessment for penalties totalling £11,655.89.
2. Falkirk Football and Athletic Club Limited (the Club) was represented at the Hearing by Mr Martin Ritchie, the Chairman of the Club, who gave a wholly credible, honest and clear account of the difficulties that the Club had faced and by Mr Kenny their advisor and also a director.
3. It was a matter of agreement that in the year 2010-11, there had been six payments of PAYE, which had not been made on time and those were the payments due for the months May to September 2010 inclusive and February 2011.
4. The Club argued that as far as that February payment was concerned, £44,600.27 had been paid timeously and therefore only £86,898.99 should have triggered a penalty. HMRC had produced the screen prints relating to all payments received. At Tab G16 that payment is disclosed. The payment was made electronically and therefore would have been on time had it been paid by the 22nd of the month. The effective date of payment (EDP) on the screen print is Sunday 20 February 2011. Mrs Cowan confirmed that she had specifically checked the position and that because the monies were paid on that date they would then be treated as received on the 23rd notwithstanding the processing date described on the screen print. The same applied to all other electronic payments and the schedule at Tab A1 reflects that.
5. The BROCS screen prints are decidedly confusing, as indeed HMRC's own DM Guidance manual concedes. HMRC's BROCS system can hold only one date and, for administrative reasons, three calendar dates are always deducted from the EDP for electronic payments when inputting data. Accordingly, to ascertain the actual date of payment three calendar days must be added to the EDP on BROCS.
6. Therefore, the payment made on Sunday 20 February 2011 can only be treated as being received, at the earliest on 23 February 2011 and it is out of time. In fact, towards the end of the Hearing, Mr Kenny produced a list entitled "HMRC Payments made 2010-11 and beyond" and the Tribunal subsequently reconciled that with the schedule at Tab A1 and there are no matters of dispute. Accordingly, the Tribunal finds that the said schedule is an accurate record of the amounts due, dates of payment and number of days late for the default payments. That raises a further issue.
7. In this case, there are two different penalties, which have been levied in terms of the relevant legislation. The first is the Default Penalty for failure to pay on time in terms of Paragraph 6 Schedule 56 Finance Act 2009. Although there were six late payments in the year, the first does not count as a default when calculating the default penalty. Therefore, in summary, using the schedule, a total of £322,213.97 was not paid on time in the year for the purposes of this penalty and, since there is a sliding

scale for penalties, the penalty thereon is calculated at 2% and amounts to £6,444.27. That penalty has been correctly calculated by HMRC.

8. The issue, which arises, relates to the second penalty, which is levied on payments outstanding for more than six months, in terms of Paragraph 7 Schedule 56 Finance Act 2009. In calculating that penalty, HMRC worked on the basis that £104,232.47 was outstanding for more than six months. The “calculator” for that is at Tab A2 but the entries cannot be reconciled to the screen prints or to the Club’s list of payments. The schedule at Tab A1, which the Tribunal has adopted, clearly identifies only payments totalling £101,885.75 as being outstanding for more than six months. Accordingly, the total penalty at 5% would then amount to £5,094.28. Therefore the total amount of penalties in dispute amounts to £11,538.55 and not the £11,655.89 sought by HMRC: the difference being £117.32.

9. The issue for the Tribunal in this case was whether these penalties should be upheld as, if there was a reasonable excuse for the late payment, then the Club might have been able to escape some or all of the penalties.

10. In considering a reasonable excuse, the Tribunal must examine the actions of the Club from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence and having proper regard for its responsibilities under the Taxes Acts.

The Facts

11. In summary, the Club had faced a number of serious challenges in 2009-10. One of the major problems was that the club was in the Scottish Premier League (SPL) and suffered from the collapse of Setanta, the TV broadcaster that was due to pay large sums to the clubs in the SPL, and the loss for the Club was of the order of £400,000. The Club’s financial year ends on 31 May in each year. At the Board meeting at the end of that financial year the Directors were made aware that they owed HMRC sums of the order of £83,000. It was minuted by the Board, that the Club required to negotiate with HMRC urgently to seek some form of dispensation, that they needed to speak to HMRC about a payment plan (see the following paragraph). It was remitted to the Managing Director to do so. Previously, the Club had had the benefit of the services of a full time semi qualified person working on their finances but in the cut backs at the end of 2009-10 that ceased and the Managing Director, Mr Craig, undertook that role with the support of, what the Board believed to be, a reputable accountancy firm to whom the payroll function was outsourced. Miss Sinclair of that firm worked at the Club for one day per week.

12. Since the possibility of relegation intensified the financial pressures, the Board met twice a month instead of the usual monthly meeting. At each Board meeting until July 2010 that debt to HMRC was a standing item. At the July meeting the Managing Director, reported that a payment plan for the historic debt had been agreed with HMRC but the terms of that plan were not reported in full and therefore not minuted. The Board believed that that problem had been solved and it was no longer a standing

Agenda item. Therefore, as far as the year 2009-10 was concerned, there was a time to pay agreement (TTP) which was in place and implemented.

13. Further, since that season they were placed in the bottom few clubs in the League, the Club faced possible future relegation with the substantial consequential loss of income. The Board was well aware of the risks attached to that and had plans in place for that contingency. They were relegated in May 2010. The impact of relegation was considerable but it had previously been identified as a very high risk, they had prepared as well as they could for the contingency and they were aware of and received a “parachute payment” of £250,000 to ease the change process. They had put in place cost cutting measures and had a financial reporting system in place.

14. The Tribunal was provided with an example of the financial reports, which were provided to the Board for every meeting. It was explained that the Board had asked for these since it was important for the Board to know that the creditors were being managed appropriately. Those papers were detailed. In particular as far as creditors were concerned, the age of the trade creditors was analysed on a monthly basis, the creditors described as “significant” were identified both by name and by age of the debt. The Board received a cash flow report, Profit and Loss account, forecast Profit and Loss account to the end of the financial year and a balance sheet and they were all compared to the Budget, which was set at the end of each year for the following year and then was not changed in year. It was not in dispute that the Club had believed that careful cash management had been crucial because they were trying to “nurse” the Club through to the transfer window in January 2011.

15. The Board were aware of the cash risks and agreed loan funding from a group of major shareholders which could be drawn down when absolutely necessary: that drawdown was implemented in February 2011 when the size of the debt due to HMRC was disclosed to the Board of the Club.

16. The Club had other major creditors apart from HMRC and they agreed payment plans with them all. The Finance Report at October 2010, identifies the largest creditor at £39,698 and the longest outstanding was one of just over £12,000 for four months and older. The real issue is that the PAYE debt for May 2010 alone, was in excess of £75,000 and was only paid in 2011, and HMRC is referred to nowhere in these reports produced to the Tribunal. It was confirmed in evidence that the cash flow should have shown payments to HMRC and there may well have been entries in the Balance Sheet.

17. As is indicated in paragraph 10 above there was a TTP reached with HMRC in regard to the outstanding debt for 2009-10 and whilst that was adhered to HMRC took no further action in regard to that debt. That was the outstanding issue between May and July 2010. On 21 December 2010, HMRC wrote to the Club threatening to present a petition to the Court to wind up the company if outstanding debts of £308,038.76 were not paid within seven days. Mr Craig replied on 28 December 2010 offering a payment timetable but that offer was rejected by HMRC on 06 January 2011 and proceedings then commenced. There was no TTP for 2010-11 and no approach was made to HMRC about payments for 2010-11 until December,

notwithstanding the fact that a Penalty Default Notice, which warned about the penalty regime had been issued to the Club on 28 May 2010.

18. The Club also faced other financial pressures in 2010-11. Severe adverse weather meant that between 6 November and 29 December 2010 there were no home games and it is from them with the associated corporate activity that income is derived. The economic recession had an impact in that there was less financial support from both corporate and individual supporters. Royal Bank of Scotland changed the terms under which they remitted payment for the sale of season tickets so instead of receiving the funds in April or May 2010, they were received in tranches of approximately £99,000 in September 2010 and £55,000 in the following May. Lastly, the change in Government in May 2010 led to a fall in income from the public purse.

Arguments advanced by the Club

19. The Club argued that they had a reasonable excuse for late payment on a number of grounds. Firstly, they believed that they had good corporate governance and by outsourcing the payroll to a firm with a good reputation they had implemented their responsibilities. Secondly, they had relied on the assurances from Mr Craig that everything was “OK” with HMRC and he had misled them: the first they had known of the problems was when HMRC took action. Thirdly, the impact of the relegation together with the change in the treatment of season ticket receipts, the reduction in income from the public purse and the inability to play home games for weeks had placed exceptional and unforeseeable pressure on cash flow. Lastly, they believed that they had tried to be fair to HMRC in the past and on realising the problems had settled their debts so the penalty was perhaps unfair and disproportionate.

The Legislation

20. The relevant legislation is contained in Schedule 56 Finance Act 2009, as amended by Schedule 11 Finance (No 3) Act 2010. That amended legislation applies to penalty assessments raised after 25 January 2011, which is the situation in this case.

21. Paragraph 6 is the provision which sets out how the 2% penalty is to be calculated. It provides (since 25 January 2011), so far as relevant, as follows:

“(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);

....

(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.

....

(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.”

22. Paragraph 7 of Schedule 56 is the provision, which sets out the law in regard to the 5% penalty. It provides

“If any amount of the tax is unpaid after the end of the period of 6 months beginning with the penalty date, P is liable to a penalty of 5% of that amount.”

23. Paragraph 9 of Schedule 56 states as follows:

- (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.

24. Paragraph 16 of Schedule 56 states as follows:

- (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
 - (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
 - (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
 - (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Reasons for Decision

25. Undoubtedly, the Club did rely on Miss Sinclair in regard to payroll matters. It is clear from HMRC's screen prints that contact about payroll was with her and that HMRC had been told that payroll had been outsourced to her. As a professional advisor in these matters she should have been aware of the penalty regime, that the payments were not being made on time and that penalties would therefore accrue. If there were failings in what she did or did not do or advice she did or did not give, as to which there was no evidence available, then the Club's remedy lies with her. The fact that the Club relied on her does not amount to a reasonable excuse.

26. Two of the explanations given in the Grounds of Appeal in the Notice of Appeal appear to the Tribunal to be likely to be wholly accurate in the circumstances, namely "... the executive management did not fully understand the sequence of payments to HMRC and, ... relied on memory for payments made" and "... overzealous cash management and a lack of appreciation of paying particular debts on time – including HMRC" led to the problems. Neither amount to reasonable excuse.

27. The situation is rather different in regard to Mr Craig. Firstly, since he was Managing Director, he was in fact "the Club" and his actions in that role were as the Club. Accordingly, the fact that he did not ensure timeous payment, knowing as he did the problems in the previous year and the availability of TTP would make it very difficult to argue that he was unaware of the potential problems caused by late payment of PAYE. The Tribunal finds no reasonable excuse in his actions.

28. Even if it were to be accepted that the Club should be considered to be the Board of the Club as a whole and that they relied on and were misled by Mr Craig, there is still a problem when looking at reasonable excuse in that context. In terms of

Paragraph 16(2)(b) there can only be reasonable excuse, where there has been reliance on another person if the taxpayer “took reasonable care to avoid the failure”. The Tribunal finds that such reasonable care was not taken in this case.

29. The Board very carefully monitored every major creditor on a monthly basis and in detail. They ensured that they had arrangements in place with every major creditor. However, the single biggest creditor was HMRC. There were no monitoring arrangements in place. Clearly, all other creditors were monitored very carefully but HMRC were not. Certainly in the early months of 2010-11 they did monitor the position in regard to the historic debt and that was appropriate. Knowing that that debt had accrued, that their salary costs remained largely fixed and that they were moving into a period with significantly lower income available to cover those costs, a prudent Board should have been very concerned to monitor the cash flow and to ensure that there was no repetition of the 2009-10 debt. It should have been perceived as a major risk factor and yet is totally omitted from the financial reports tabled. Even if the payments to HMRC were monitored or disclosed through the cash flow, in 2010, there were only payments made on 5, 8 and 21 July, 6 September, 6 October and 8 November 2010. Accordingly, in May, June and August 2010 there were no payments. That alone should have alerted the Board (at their monthly meetings) to the fact that payments could not have been being made timeously. A prudent non-executive director, aware of historic problems with HMRC, should have questioned the quality of information received from the executive. The crucial problem in this instance is that debts due to HMRC were the only debts that the Club did not monitor and they should have done so. There was a failure in corporate governance. Accordingly, the Tribunal finds that there was no reasonable excuse on that basis.

30. The Tribunal carefully considered the cash flow problems in the context of reasonable excuse. The economic problems caused by relegation were wholly predictable and indeed the Club took appropriate action to manage that. No doubt the change in Government did impact on income streams but it was a planned General Election and most other businesses who depended on the public purse in any significant way had contingency plans in place. Royal Bank of Scotland had the power to change how they dealt with season ticket receipts and they did. That would have affected other football clubs. In any event, it was a timing difference and was a factor known to the Club at or about the beginning of the tax year. Lastly, as far as the bad weather is concerned, although income will have been affected that was in November, December and possibly January and there were no late payments in that period so it cannot amount to reasonable excuse. In summary, although the Tribunal accepts that the Club was under financial pressure for a number of reasons, none of the factors cited were outwith the normal range of business pressures to be managed on an ongoing basis.

31. A clear summary of Schedule 56 is set out by Judge Berner in *Dina Foods v HMRC* [2011] UKFTT 709 and we do not propose to repeat that here other than to adopt the reasoning in so far as it is applicable to this case and particularly as to whether the penalty regime is disproportionate and unfair, which it is not.

32. In the circumstances, the Tribunal is not satisfied on the evidence that there is a reasonable excuse for the late payments, or that there are special circumstances justifying a mitigation of the penalty, or that the penalty was disproportionate, or that the administration of the penalty regime was unfair. It follows that subject to the small reduction referred to in paragraph 8, the appeal must be dismissed.

33. 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.

**ANNE SCOTT ,LLB, NP
TRIBUNAL JUDGE**

RELEASE DATE: 13 September 2012