



TC02269

Appeal number: TC/2012/06176

TYPE OF TAX – PAYE – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009- whether the appellant had a reasonable excuse because of postal delays – no- with the exception of one month appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

METOKOTE UK LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
MR LESLIE HOWARD**

Sitting in public at Northampton on 14 August 2012

Mr M Ndekwe for the Appellant

Mr M Foster for the Respondents

DECISION

1. This is an appeal against the penalty of £7,371.73 imposed for the late payment of PAYE in months 6, 7, 8, 9 and 11 of tax year ended 5 April 2011.

The Legislation

2. Penalties for the late payment of monthly PAYE amounts were first introduced for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 (“Schedule 56”). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

3. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by subparagraphs (4) to (7):

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

In this and other paragraphs of Schedule 56 “P” means a person liable to make payments.

4. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

- (a) assess the penalty,
 - (b) notify P, and
 - (c) state in the notice the period in respect of which the penalty is assessed.
- (3) An assessment of a penalty under any paragraph of this Schedule—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
 - (b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

5. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had the power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

(a) to the same extent as HMRC...[...],or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

6. Paragraph 9 (referred to in paragraph 15) states:

(1) If HMRC think it right because of special circumstances, they may reduce the 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.

7. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and 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 has ceased.

Background and facts

8. In August 2011 HMRC established from the appellant's payment records that it had paid late multiple times in the tax year 2010/11 and imposed a penalty in the amount of £32,994.63.

9. On 9 September 2011 the appellant appealed on the basis that it had contacted HMRC to inform them that it could not pay on time due to unforeseen circumstances and later faxed HMRC a copy of their communication log. The payments were late because the appellant did not have a second signatory on site to sign the cheque.

10. The appeal was partly upheld and HMRC sent a letter informing the appellant that it was accepted that there was a reasonable excuse for months 2, 3, 4, 5, 10 and 12 on the basis that there were uncontrollable unforeseen circumstances that had affected payment for those months. The penalty was accordingly reduced to £7,371.73 and a revised penalty notice was issued.

11. HMRC also considered that the payment for month 6 was made late but as this was the first default it was ignored in computing the penalty.

12. The appellant requested a review on the grounds that all the payments in the months 6, 7, 8, 9 and 11 for which a penalty had been imposed had been made on time; that they had a rigid process for sending payment; and they had received no warning letters.

13. The review upheld the revised penalty notice and concluded that HMRC did not receive those payments on time. Cheques were given the date of payment as the date received by HMRC. Whilst HMRC accepted as a reasonable excuse the absence of a second signatory for the cheque it did not accept postal delays. A default notice had been issued to the appellant and the new penalty regime had been well publicised.

14. Mr Ndekwe explained that the appellant's systems were set so that it was not possible to pre date cheques although they could be post dated up to 5 days ahead.

15. His procedure was to requisition a cheque on the 14th of each month and when it was received to date the payslip with that day's date and place it into the post to be posted on that day or at the latest the following day. It was always sent by first class post and he did not realise that such post could take up to 3 days to reach its destination. He therefore believed that all the cheques in the relevant months for which a penalty had been imposed had been posted on time.

Appellant's submissions

16. Mr Ndekwe submitted that according to the appellant's records all the cheques in the relevant months had been posted on time. If they arrived late this must have been as a result of postal delays which were outside the appellant's control which he submitted was a reasonable excuse.

17. Mr Ndekwe submitted that the appellant had received no warning or late payment letters concerning the potential penalties or they might have been alerted sooner to the problem.

HMRC's submissions

18. Mr Foster pointed out that the payslips submitted and the cheques drawn indicated that payment was not made in accordance with the information provided by the appellant. He submitted that the cheque and payslip dates showed that the appellant could not have issued their cheques to HMRC to be received on time.

19. He submitted that the Schedule provided that HMRC must impose a penalty if the payment was late.

20. Whilst paragraph 16 of the Schedule allowed for the penalty to be avoided if the appellant had a reasonable excuse paragraph 16(2)(b) stipulated that the taxpayer could not rely on another person unless reasonable care had been taken to avoid failure of the payment to arrive on time. In relying on the postal service to deliver the payments on time the appellant had not taken reasonable care to ensure this was possible. Postal delays were not therefore a reasonable excuse. Three days should have been allowed for the payment to reach HMRC by first class post.

21. He submitted therefore that the reason the relevant payments were late was that they had not been posted early enough.

Findings

22. We found that the appellant always appeared to post date its payment cheques for the due date and therefore did not find it significant that this date was different to the payslip date.

23. We found Mr Ndekwe to be an honest and sincere witness and accepted his evidence regarding the procedure in the office. It appeared to us that the significance of the date on the payslip was that this was the date when he received the cheque from the accounts and put it in for posting. He admitted however that it might not be posted until the following day as the post might have gone by the time he had the cheque and payslip ready.

24. In month 7 the date on the payslip was the 16 November which was a Monday and therefore the cheque should have reached HMRC by the 19 November which was a Thursday. We found therefore that in respect of this month the appellant had posted the cheque in time to reach HMRC and had a reasonable excuse.

25. In month 8 the date was the 16 December which was a Thursday. As the 19th was a Sunday the cheque needed to reach HMRC by the following day, 17 December, which was virtually impossible particularly if it had not been posted until the following day. We found therefore that in respect of this month the appellant had no reasonable excuse.

26. In month 9 the date was 17 January which was a Monday but if it did not get posted until the following day it was unlikely to reach HMRC in time and therefore in respect of this month the appellant did not have a reasonable excuse.

27. In month 11 the date was 16 March which was a Wednesday and as the 19th was a Saturday the cheque had to reach HMRC by Friday 18 March. Again if not posted until the following day it was unlikely to do so and so the appellant had no reasonable excuse.

28. In conclusion we found that with the exception of month 7 the appellant did not take reasonable care in the relevant months to ensure that the payments were posted in time to allow the recommended three days for the cheques to reach HMRC. We found that postal delays were not a reasonable excuse. The appellant simply did not post the cheques early enough.

29. Paragraph 16(2)(b) of the Schedule provides that reliance on another person to do anything is not a reasonable excuse unless the appellant takes reasonable care to avoid the failure. We found that the appellant in relying on the postal service did not take reasonable care to ensure that they were posted early enough to reach HMRC by the due date.

Decision

30. We decided that on the balance of probabilities as regards month 7 it appeared to us that in that month the appellant posted the cheque in time to reach HMRC and so we hereby cancel the penalty in respect of that month.

31. In respect of months 6, 8, 9 and 11 the appeal is dismissed and the penalty is hereby confirmed.

32. 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.

**SANDY RADFORD
TRIBUNAL JUDGE**

RELEASE DATE: 17 September 2012