



**TC02304**

**Appeal number: TC/2011/05332**

*Penalty – late payment of PAYE – FA 2009, Sch 56 – reasonable excuse –  
no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VIDHANI BROTHERS LIMITED  
T/A TERITEX SPORTSWEAR**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE J. BLEWITT  
MRS M. HANDS**

**Sitting in public at Nottingham on 21 August 2012**

**Mr Vidhani, the Appellant, was unrepresented**

**Mr Foster, of HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a penalty in the sum of £2,881.30 for late payment of PAYE payments during the tax year 2010/11.

### **The legislation**

2. Although the legislation was not in dispute, it may be helpful to set out the relevant provisions at this point.

3. Schedule 56 Finance Act 2009 provides:

*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...*

| <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                                       |

*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 sub-paragraphs (2) and (3)), and*

*(b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (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 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.*

### **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.*

*16 (1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—*

*(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and*

*(b) the failure does not count as a default for the purposes of paragraph 6 ...*

*(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.*

### **Facts**

4. Mr Vidhani is the sole shareholder of the Appellant Company, which was set up by his father in approximately 1978 and which has been run by Mr Vidhani for the last 18 years. The Company, which has between 20 and 25 members of staff, manufactures football scarves and ancillary souvenir products.

5. The Appellant made 11 late payments under the relevant PAYE and NIC regulations in the year ended 5 April 2011. A penalty notice was sent to the Appellant on 7 June 2011; the penalty was set at a rate of 4% in accordance with the legislation due to the number of late payments made by the Appellant.

### **The Appellant's case**

6. The Appellant appealed the penalty to HMRC by Notice of Appeal dated 11 June 2011. A letter of the same date annexed to the Notice of Appeal set out the grounds upon which the Appellant relied, which can be summarised as follows:

- A letter dated 27 May 2011 received by the Appellant stated that “*You can avoid these charges by paying any overdue PAYE now and make sure that all payments are made on time from now on.*” The letter clearly provides an option to avoid paying a penalty by complying with the requirements of the offer. Mr Vidhani acknowledges that the warning relates to the forthcoming 2011/12 year, but states that, in his opinion, it does not specifically state that the offer is only applicable to payments made in 2011/12;
- No warning letter regarding late payments was received in respect of 2010/11;
- Following May 2011, all payments were made before the deadlines;
- It is unfair to allow penalties to accumulate over the year without notifying a taxpayer;
- The penalty is disproportionate to the minor delays in payment.

7. At the hearing, Mr Vidhani helpfully provided the Tribunal with a written chronology of the background to this case. It would not be helpful to simply repeat the contents of the document verbatim, however the main points fell into two categories: the actions of HMRC and those of the Tribunal.

8. In summary, Mr Vidhani was dissatisfied by the lack of response received from HMRC and the errors made, for example by advising that the appeal was made out of time.

9. In respect of the Tribunal, the hearing had been postponed on a number of occasions. On one particular occasion Mr Vidhani had attended for the hearing at Birmingham only to be told that the Court had insufficient time to hear the case, which caused Mr Vidhani unnecessary expense and loss of time.

10. The key points made by Mr Vidhani were:

- That he had only received the penalty notice a few days after the warning letter relating to 2011/12 which was complied with;
- It is unfair to impose a retrospective penalty and allow penalties to accumulate without notice;
- HMRC failed to provide a breakdown of the calculation;
- The penalty is disproportionate and wrong in a democratic system;
- HMRC failed to adequately publicise the new penalty system.

11. In answer to questions from the Tribunal Mr Vidhani confirmed that he had been unaware of the change in legislation. He could not recall receiving the warning letter issued to him by HMRC on 28 May 2010 or the CD rom and employer bulletins issued to all employers by HMRC prior to the implementation of the legislation. Mr Vidhani was adamant that he had not been verbally warned about penalties in telephone calls with HMRC.

12. On behalf of HMRC, Mr Foster submitted that the penalty is set by statute and is graduated on the basis of the number of late payments made. In those circumstances, the penalty cannot be deemed to be unfair. Furthermore, the way in which the legislation applies means that it is not possible to calculate the amount of a penalty until the end of the tax year.

13. Mr Foster took us through the publicity both prior to and after the implementation of the new system. HMRC issued paper employer bulletins to all employers in September 2009 and April 2010. Thereafter electronic bulletins were sent which also drew an employer's attention to the legislation. Information is readily available on HMRC's website and a CD rom was issued to all employers in February 2010. Mr Foster also exhibited logs of telephone calls between HMRC and Mr Vidhani which showed that a warning as to penalties was given on 25 November 2010.

14. As regards the letter dated 27 May 2011 from HMRC to the Appellant which advised that penalties could be avoided, Mr Foster submitted that it is clear that the letter relates only to the year 2011/12 which is printed at the head of the letter. Mr Foster contended that there was no suggestion that the letter related to the previous years' penalties and it would be unreasonable to infer such.

### **Discussion and Decision**

15. We considered Mr Vidhani's written and oral submissions carefully. We were satisfied that HMRC had publicised the late payment penalties for PAYE extensively both prior to and after their implementation. The legislation does not require HMRC to issue warnings to individual employers, yet HMRC so did by issuing a letter to the Appellant in May 2010. Whilst Mr Vidhani did not recall receiving this letter or the employer bulletins, he was not able to say with certainty that they were not received. We have seen a number of letters of correspondence which reached the Company without difficulty and in those circumstances we found on the balance of probabilities that non-receipt was unlikely. In our view, Mr Vidhani's ignorance cannot amount to a reasonable excuse or a special circumstance; no reasonable employer aware of his responsibilities to make payments of PAYE prior to the deadline could fail to have been aware of the information published by HMRC.

16. The legislation on PAYE penalties is clear; the rate is set by the number of late payments in the tax year by the employer and HMRC correctly charged the penalty at the set rate of 4%. The penalty can only be assessed once the total number of late payments for a particular tax year is known. We found as a fact that any failure by

HMRC to issue regular warnings about accruing penalties could not amount to either a reasonable excuse or special circumstances.

17. As to the issue of proportionality, the test is whether the scheme is not merely harsh but plainly unfair. We found as a fact that the imposition of the penalty in this case, whilst no doubt considered by Mr Vidhani to be harsh, was not plainly unfair. The legislation seeks to provide an incentive to employers to adhere to their payment obligations and the imposition of penalties where they fail to comply with these requirements cannot in our view be described as lacking reasonable foundation.

18. As to the ancillary matters raised by Mr Vidhani in respect of the actions of HMRC and the Tribunal, we noted the following: as regards HMRC, we had insufficient information before us to enable us to make any comment. If Mr Vidhani feels dissatisfied, the proper avenue would be to contact HMRC's internal complaints department. We were invited by Mr Vidhani to consider the actions of HMRC as part of this appeal however we found as a fact that this was a matter which did not have any bearing on the issues to be determined, namely whether a reasonable excuse or special circumstances existed in relation to the late PAYE payments. In respect of the complaint made against the Tribunal, it is regrettable that the case was postponed on a number of occasions however we noted that Mr Vidhani had been compensated for his loss of earnings and we did not consider that the length of time which the Tribunal had taken to compensate him had any bearing on the issues before us. In our view these matters raised by Mr Vidhani had no prejudicial effect on his appeal and had no bearing on the issues to be determined.

19. The appeal is dismissed.

20. 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.

**J. BLEWITT  
TRIBUNAL JUDGE**

**RELEASE DATE: 8 October 2012**