



TC02331

Appeal number: TC/2012/01204

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009-whether lack of specific warning or cash flow problems a reasonable excuse –no –whether HMRC had acted unfairly –no- appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE BEECHES HOMECARE SERVICES

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
MRS NORAH CLARKE**

Sitting in public at Bristol on 21 August 2012

Mr W M Young for the Appellant

Mrs G Carwardine for the Respondents

DECISION

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1. This is an appeal against the penalty of £5,590.49 imposed for the late payment of PAYE every month during the tax year 2010/11. A penalty was not charged for month 12 as a result of the *Agar* case.

The legislation

10 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.

15 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):

20 (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.

25 (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.

30 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

35 (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 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:

10 (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.

15 (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.

20 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.

25 (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.

30 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.

Appellant's submissions

5 8. Mr Young on behalf of the appellant accepted that all the payments had been made late however he submitted that HMRC had acted unfairly in their treatment of the appellant.

9. The appellant had received one warning letter in May 2010 which had been sent to him as the appellant's agent and which he had forwarded to the appellant but the letter only stated that penalties might be charged.

10 10. The appellant was therefore oblivious of the penalties it was incurring by paying late. He submitted that the appellant had only received notification of the penalties on 15 August 2011 by which time it was too late to rectify the position. This he submitted was very unfair.

15 11. He referred to the cases of *Hok Limited* UKFTT 433 and *HMD Response International* UKFTT 472 in which the same principle of HMRC's unfairness had applied and caused Judge G Jones to allow the appeals. He submitted that at paragraph 7 of the judgement Judge Jones stated:

“So far as the State and its several organs are concerned (HMRC being one such organ) there is a common duty of fairness”

20 and further at paragraph 9 :

25 “Thus in our judgement the appellant is entitled to rely upon the common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers. We are in no doubt that such a body does not act fairly where it deliberately desists from sending a penalty notice for four months or more knowing that the effect will be to impose a minimum penalty of £500 upon somebody whose sin may be no more than oversight or forgetfulness”.

30 12. Mr Young submitted that in the appellant's case it did not receive the penalty notice for fourteen months. He submitted that HMRC could have sent the penalty notice in June 2010 in which case the penalty would only have been £148.

13. He submitted that although phone calls were made to the appellant's staff, penalties were not mentioned and the enquiry was solely around when the PAYE was going to be paid. The severity of the situation was thus not apparent.

35 14. He submitted that if he had been aware of the problem by a proper warning from HMRC he could have sorted it. The appellant however was completely unaware of the penalties and unfortunately did not contact him.

15. Mr Young submitted the appellant was reliant on the councils for payment and the current squeeze was seriously affecting the appellant's cash flow.

HMRC's submissions

16. Ms Carwardine submitted that there was no requirement in Schedule 56 that HMRC had to warn of the potential penalties. Nevertheless HMRC had decided that it would be a good customer service to issue a penalty warning after the first default. In addition phone calls had been made to the appellant. Whilst any letters went to the agent the phone calls are required to go to the taxpayer.

17. Additionally Ms Carwardine submitted that there had been considerable publicity concerning the new regime and it had been well noted in the employer packs which were included in the bundle.

18. She submitted that the cases of *Hok* and *HMD Response International* the penalties were imposed for the late submission of a P35. In those cases the penalty was fixed at £100 for each late month. In this matter however the penalty rate could not be determined until the end of the tax year.

19. It was HMRC's submission that even if these cases were correctly decided they had no application in this case. She submitted this was supported by the decision of the FTT in the case of *Dina Foods v HMRC* UKFTT 709 in which Judge Berner stated at paragraphs 37, 38 and 39:

37. Having considered all the evidence and material before us we can find no special circumstances that would justify a reduced penalty. This is a company that has habitually paid its PAYE late. We do not consider that the lack of awareness of Dina Foods Ltd of the penalty regime is capable of constituting a special circumstance. In any event, having considered the evidence of the information provided by HMRC concerning the introduction of the PAYE and NICs penalties, we are of the view that no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NICs amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC.

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.

20. Ms Carwardine confirmed that in accordance with paragraph 11 of Schedule 56 as the appellant was liable to a penalty under the Schedule “HMRC must assess it”.

21. Ms Carwardine submitted that in accordance with paragraph 16 of Schedule 56 it was not a reasonable excuse to rely on someone else.

5 22. Additionally she submitted that cash flow was specifically excluded as a reasonable excuse by that paragraph.

23. She submitted that the appellant had regularly paid late in previous years.

Findings

10 24. We found that the penalty had been correctly applied by HMRC. The penalty regime is based on the number of defaults over a complete tax year.

25. We found that the appellant regularly paid its PAYE late.

15 26. We found that the lack of awareness of the penalty regime by the appellant did not amount to special circumstances. Any reasonable employer aware of its responsibilities should not have failed to take note of at least some of the information provided by HMRC.

27. We considered the cases of *Hok* and *HMD Responses International* and found that these cases concerned a fixed penalty per month whereas the penalty in this matter could only be calculated at the tax year’s end.

20 28. As to unfairness we found that the test is not whether the scheme is merely harsh but whether it is plainly unfair. Whilst any penalty is harsh we found that the imposition of the penalty was not plainly unfair. We found that HMRC had acted strictly in accordance with the legislation which required them to impose a penalty if the PAYE payment was made late.

29. We found that lack of funds was not a reasonable excuse for the late payment.

25 30. We found that HMRC was under no obligation to send out any warning at all but did so to be helpful. We found that any reasonable employer on receiving the warning would have tried to investigate further at least by contacting their agent.

31. For the above reasons we found that the penalties were correctly imposed.

Decision

30 32. The appeal is dismissed and the penalty is hereby confirmed.

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.

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**SANDY RADFORD
TRIBUNAL JUDGE**

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RELEASE DATE: 24 October 2012