



TC02333

Appeal number: TC/2011/09896

TYPE OF TAX – PAYE – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009- although HMRC spoke to appellant on a monthly basis they failed to inform him that the penalty regime would be vigorously enforced and instead told him that they were not sure how it would work – in accordance with DMBM210105 this was a case where exceptionally the customer’s allocation was not in their best interests and PAYE staff could have suggested a different allocation – appeal allowed in respect of month 5 onwards

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KELCEY AND HALL SOLICITORS

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 M Bowden for the Appellant

Ms G Carwardine for the Respondents

DECISION

1. This is an appeal against the penalty of £5,624.58 imposed for the late payment of PAYE in every month of the tax year ending 5 April 2011. Although months 1 and 12 were paid late month 1 did not count being the first default and the late payment for month 12 was ignored as a result of the *Agar* case.

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 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.
- 10 (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.

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

- 20 (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
 - 25 (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.

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
35 excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Background and facts

8. Mr Bowden for the appellant stated that until he received the HMRC penalty notification letter on 3 June 2011 he did not realise what had occurred and the severity of the penalty.

5 9. Due to the defaulting of clients such as the Legal Services Commission and the
National Taxing Team the appellant did not have the money to pay the April payment
which was due on 21 May 2010. Mr Bowden's procedure was to make the PAYE
payments early in the month following payment of the salaries so that when he made
10 a payment on 8 June 2010 it was actually in respect of the salaries paid at the end of
May. However because the April payment had been missed due to lack of funds it was
allocated to April in respect of April salaries.

10. He stated that HMRC had called him every month to seek payment. He realised
now that this was because effectively every month became late. The 8 June payment
was allocated to April which payment should have been made by 21 May 2010.

15 11. During the calls the introduction of the new penalty regime which had come
into force was mentioned but the HMRC personnel to whom he spoke had said that
they did not know how it would be implemented in the first year. By this they were
not sure if businesses were going to be given a time frame and opportunity to get
themselves in order prior to the year 2011/12 in which year they knew that a no
20 tolerance approach would be applied.

12. During these conversations he had always agreed with HMRC personnel that
payments would be made by certain dates which he had always honoured without
exception.

25 13. He duly paid each payment in the sequence as they appeared in HMRC's
standard paying in book without fully realising the ramifications as regards the impact
of the penalties being incurred.

14. He stated that as a result of his honesty or naivety the appellant was being
treated harshly and unfairly on the back of a genuine misunderstanding.

30 15. He stated that he always paid early in the month following his payment of the
salaries. If he had realised the true extent of the situation he would simply have
defaulted with the April 2010 payment when the appellant did not have the money to
pay due to a client defaulting and paid every month thereafter on the same dates that
payments were actually processed throughout 2010/11 but using the paying in slips
for the months to which they actually related.

35 16. In other words having not had the money to pay early in May for April as he
would normally have done when he paid in early June that payment was attributed to
April rather than May and so on throughout the year, the payments were constantly
allocated to a month behind that to which they actually related.

17. He conceded that if he had skipped the April payment a repayment programme would have had to be approved by HMRC as concerned the April 2010 overdue payment but the penalties would have been averted.

5 18. He stated that following receipt of the HMRC letter of 3 June 2011 setting out the penalties he had defaulted on the May 2011 payment and instead when paying on 12 July 2011 he allocated the payment to June that is month 3 as it was actually intended.

10 19. This resulted in a visit from an HMRC inspector who asked why he had paid month 3 but not month 2. He explained to her what had happened and eventually a repayment programme was agreed with her whereby the appellant paid back £1,200 per month over eleven months. Mr Bowden confirmed that the debt had actually been repaid after nine months.

Appellant's submissions

15 20. Mr Bowden submitted that whilst HMRC might argue that the appellant had defaulted and they had no discretion to reduce the penalty this was a special circumstance such that HMRC could reduce or even waive the penalty.

21. He submitted that a genuine misunderstanding had occurred. The appellant had nothing to gain by deliberately paying late and knowingly incurring excessive penalties especially when his objective was to prevent such costs.

20 22. He submitted that at all times he had been sincere and honourable throughout his dealings with HMRC and therefore a genuine misunderstanding ought to constitute a special circumstance.

25 23. He submitted that at no time during the regular monthly telephone calls from the HMRC did anyone mention that it would be in the appellant's best interests to skip a month and pay for the following tax period to which the payment actually applied. He drew the Tribunal's attention to HMRC's Newsboard Message 276/11 which was addressed to all HMRC staff dealing with payment queries from PAYE employers and included in the bundle of documents. At DMBM210105 it clearly states:

30 "Where exceptionally you feel the customer's allocation would not be in their best interests, for example because a different debt is about to be enforced, you can suggest to the customer that it would be in their best interests to allocate differently"

35 24. Mr Bowden submitted several times that in the monthly conversations with HMRC officials he was persistently told that nobody knew how the new system would work and it was envisaged that it would only become truly effective in year 2011/12.

25. He submitted that if he had realised the true effect of the new regime he would have ensured that each payment that he made related to the current month although he realised that he would have had to make arrangements to clear month 1.

HMRC's submissions

26. Ms Carwardine submitted that the penalty had been correctly charged in accordance with the legislation.

5 27. Ms Carwardine submitted that HMRC did not believe that the appellant had a reasonable excuse for the late payments each month.

28. She submitted that at the time of the phone calls the HMRC did not know how many defaults there would be.

29. She submitted that the appellant should have told HMRC of their difficulty and it would then have been assisted.

10 30. She stated that HMRC would not reallocate payments without being asked. The first payment was due by 21 May 2010 but was not received until 8 June 2010.

31. She submitted that the appellant was fully informed by way of employer's packs, the internet and contact with HMRC.

Findings

15 32. We found Mr Bowden to be conscientious, honest and sincere. We found that he had been misled by the apparent relaxed attitude of the HMRC staff to whom he spoke and who certainly failed to inform him that the new regime was being vigorously applied from 2010/11.

20 33. We believed that he thought he was doing the right thing and found that even if he had read all the HMRC literature concerning the new regime he would still have been reassured by the apparent misinformation from the HMRC staff.

34. Referring to DMBM210105 we found that this was a case where exceptionally the "customer's allocation was not in their best interests and the staff ought to have suggested that he allocate differently".

25 35. We decided that certainly by time of the monthly conversation with the HMRC staff relating to the late payment in respect of month 5 either the HMRC staff ought to have known that the new regime was being immediately enforced or they ought to have suggested in accordance with DMBM210105 that he allocated differently.

30 36. For these reasons we found that there were special circumstances in this appellant's case. As soon as he became aware of the actual situation concerning the new regime he was able to correct the matter by his own allocation. In accordance with paragraph 9 of the Schedule we decided that in view of the special circumstances the penalty should be reduced.

35

Decision

37. The appeal is allowed in respect of the penalties in respect of months 5 onwards which are hereby cancelled. The appellant remains liable for penalties in respect of months 2, 3, and 4 as the first default in month 1 does not count towards the penalty.
5 In accordance with the legislation the penalty due is therefore 1% of the PAYE due in respect of these three months.

38. 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.
10

15

**SANDY RADFORD
TRIBUNAL JUDGE**

20

RELEASE DATE: 25 October 2012