



TC02348

Appeal number: TC/2012/00502

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

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAPID LINK SERVICES LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE SANDY RADFORD
IAN ABRAMS**

Sitting in public at Bedford Square, London on 22 August 2012

Mr Gallagher, director of the Appellant, for the Appellant

Mr Robinson, Officer of HMRC for the Respondents

DECISION

- 5 1. This is an appeal against the penalty of £1,886.99 imposed for the late payment of PAYE for each month of the tax year 2010/11.

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):

(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.

- 20 (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.

- 25 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 –

- 30 (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—
- 35 (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-

10 (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-

15 (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

(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.

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. The appellant consistently paid PAYE late during the tax year and a penalty was charged and a penalty notice issued.

5 9. On 8 November 2011 HMRC received an appeal from the appellant dated 19 October 2011. The appellant stated that it was a small business which always made payments and had never been advised of the penalties even when speaking with HMRC.

10. Further, the appellant stated that in the current global climate, everything was a struggle and as a small business such penalties would have a knock on effect.

10 11. HMRC informed the appellant that their reasons for paying late did not constitute a reasonable excuse.

12. On 7 December 2011 the appellant appealed to the Tribunal.

15 13. Mr Gallagher confirmed that when speaking to HMRC the emphasis was always on querying when the payments of PAYE would be made and no mention was made of the penalties.

Appellant's submissions

20 14. Mr Gallagher submitted that although the PAYE payments had been late the appellant had made them all despite cash flow problems due to the appellant having to wait to be paid.

15. He submitted that the appellant had not received the warning letter which HMRC had claimed to have sent.

25 16. He submitted that the appellant had no knowledge of the new regime and although HMRC had spoken to the appellant all the emphasis of the conversation was on when the PAYE would be paid and no mention was made of the penalties.

17. He submitted that at some stage the appellant had been told that a penalty was possible but there was never any certainty about the warning.

30 18. Mr Gallagher submitted that his game was juggling with the appellant's available funds as there was so much to outlay.

19. He submitted that previously it had been possible to pay late but he always caught up by the end of the year.

20. He submitted that he had told HMRC repeatedly that the payment would be late but they did not warn him about the penalty.

21. The appellant further submitted that the charges were unjust and “out of scale for late payment”.

22. The appellant submitted that on many occasions during the year payments had been made around the end of the month due to shortage of funds. These cash flow problems arose due to their waiting to be paid as all their contracts were on end-of-month 30 day terms. If they did not have the money, they could not give it to HMRC when it was due.

HMRC’s submissions

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23. Mr Robinson submitted that the appellant had been sent a standard warning letter in May 2010 informing it that penalties might be charged if payment for PAYE was late.

24. Additionally the new penalty regime had been widely publicised to all employers. Its structure was widely consulted and considered by Parliament. The penalty rate which increases with the number of defaults is set by legislation.

25. He submitted that the appellant should have been in no doubt that payments were late and that there was a new penalty regime in place.

26. He submitted that in the case of *Dina Foods Limited* [2011] UKFTT 709 (TC) Judge Berner said:

“Having considered the evidence of the information provided by HMRC concerning the introduction of the PAYE and NIC penalties, we are of the view that no reasonable employer, aware generally of its responsibilities to make timely payments of PAYE and NIC amounts due, could fail to have seen and taken note of at least some of the information published and provided by HMRC.”

27. Mr Robinson submitted that HMRC was not required to warn employers of the possibility of penalties being charged for late payment of PAYE. He stated that Judge Berner in his judgement had stated further :

“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.”

28. This view was also taken in the case of *Rodney Warren & Co* [2012] UKFTT 57 (TC) when Judge Hellier said:

“The obligation is to make payment: the lack of warning (or early assessment) of a penalty is not an excuse for failing to make payment.”

29. Mr Robinson submitted that the penalties were not disproportionate. These staged increases to the rate of penalty charged provided for a proportionate penalty which took account of the number of defaults and the amounts unpaid. Further, he submitted that the penalty was fair as it was progressive. At the first default there was no penalty and as the defaults increased so the penalty charged increased.

30. He submitted that in the case of *Agar Limited* [2011] UKFTT 773 (TC) the appellant relied on *Energys Holdings UK Limited* [2010] UKFTT 20 (TC) to contend that the penalties were disproportionate. The decision of the Tribunal was that the penalties were not “plainly unfair” within the meaning of the *Energys* decision and so were not disproportionate.

31. Mr Robinson submitted that insufficiency of funds did not constitute a reasonable excuse under the legislation unless caused by events outside their control. He submitted that this was not the case in this matter as the appellant’s normal practice was to issue contracts on 30 day terms.

32. He submitted that HMRC had considered whether there were any special circumstances which would lead them to conclude that the penalty charged under the statutory provisions should be reduced under paragraph 9 of Schedule 56 and had found that there were no such special circumstances.

Findings

33. The Tribunal found that the appellant had no reasonable excuse for the regular late payment of its PAYE. The appellant knew when it would be paid on its contracts each month and should have made the necessary arrangements to ensure that the PAYE payments were available at the due date for their payment.

34. We found that the penalties had been correctly assessed in accordance with the legislative scale.

35. We found that penalty was not out of scale as submitted by the appellant because the size of the penalty was dictated by the number of late payments made by the appellant.

36. We found that HMRC had adequately publicised the new regime. We found that HMRC was not required to issue warnings and such lack of warning was not of itself capable of amounting to a reasonable excuse or special circumstances.

Decision

37. The appeal is dismissed and the penalty is hereby confirmed.

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.

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SANDY RADFORD

TRIBUNAL JUDGE

RELEASE DATE: 31 October 2012