



TC02351

Appeal number: TC/2012/05366

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 knowledge of the penalty regime was a reasonable excuse-no-whether penalty disproportionate or unfair -no-appeal dismissed and penalty confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

INCITE OUT LIMITED

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 31 August 2012

Mr K Gough for the Appellant

Mr H O'Leary, Officer of HMRC for the Respondents

DECISION

1. This is an appeal against the penalty of £5,228.93 imposed for the late payment of PAYE every month of the tax year 2010/11.

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-

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.

Appellant's submissions

8. Mr Gough confirmed that he was a director and main shareholder of the company and he paid the PAYE. It is a marketing company.

5 9. He submitted that he was unaware that the appellant was accruing any sort of penalty which he thought was a reasonable excuse for the late payment of the PAYE.

10. He submitted that he could not afford a bookkeeper and the PAYE was paid when he paid his staff at the end of the month.

11. He submitted that as soon as he became aware of the penalties he amended his behaviour.

10 12. He submitted that it was unfair of HMRC not to issue the penalty notices during the year.

13. He submitted that it was a huge fine which was completely disproportionate to the offence.

15 14. He submitted that he was aware of the deadline of the 23rd of each month but had become confused and thought he was paying for the current month because the salaries were paid on the 30th of each month.

15. He submitted that it was never made clear to him that the payments were being received late on an ongoing basis at any point.

20 16. He submitted that he had never seen any communication explaining the new regime explicitly.

17. He submitted that the amount that was being charged as a penalty for a few days late per payment was totally unjust and disproportionate in relation to the actual damage caused to the Exchequer and could be considered manifestly excessive.

25 18. He referred to the case of *Hok Limited* TC/2011/01447 which he submitted was certainly relevant in this matter. He submitted that the Tribunal in that case had concluded that had HMRC notified the appellant promptly of its default it would have been remedied at a far earlier time. In that case Judge Jones had stated:

“It has long been part of the common law of this country that organs of the state must act fairly and in conscience with its citizens”

30 Mr Gough submitted that he did not see that failing to send any warning that a penalty would be levelled fulfilled this.

HMRC's submissions

35 19. Mr O'Leary submitted that a late payment penalty warning letter was issued on 28 May 2010. Additionally PAYE late payment penalties were mentioned in telephone calls to the appellant on 24 April 2010, 7 July 2010 and 1 October 2010.

20. Mr O’Leary submitted that HMRC had publicised the new late payment penalties for PAYE extensively before and after they came into effect. An employer’s pack featuring a CD-ROM was mailed to employers in February 2010, flyers mailed to contractors and fact sheets distributed at face-to-face events and published on the HMRC website. Late payment PAYE penalties had been featured in several issues of Employer Bulletin, on the PAYE pages of the HMRC internet site and in published guidance and employer help books.

21. Mr O’Leary referred to the case *Agar* [2011] UKFTT 773 (TC) in which Judge Poole stated that

“The appellant was very well aware of its obligations and of the fact that it was defaulting. What it really complains of is that it did not realise the full implications of its actions in terms of the new penalties they would attract. Effectively Mr Priddey was arguing that the appellant should be excused from the penalty by reason of its ignorance of the law. It is a long established principle of English law that this argument is doomed to fail.”

22. Mr O’Leary submitted that HMRC were under no obligation to issue a penalty notice during the year nevertheless the appellant had been sent a notice in May 2010.

23. Mr O’Leary referred to the case of *Rodney Warren & Co* [2012] UKFTT 57 (TC) in which Judge Hellier stated

“Thus the statute, whilst imposing an obligation on HMRC to assess and notify the assessment imposes no wider duty on HMRC than to notify P that its default will lead to a penalty.”

24. He submitted that the penalty was fair as it was progressive. After the first default there was no penalty and as the defaults increased so the penalty charged increased.

25. He submitted that in the case of *Agar Limited* [2011] UKFTT 773 (TC) the appellant had relied on *Energys Holdings UK Limited* [2010] UKFTT 20 to contend that the penalties were disproportionate but 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.

26. In conclusion Mr O’Leary submitted that the appellant had no reasonable excuse for the late payment of the PAYE and the penalty should be confirmed.

Findings

27. We found that the appellant had no reasonable excuse for the late payment of the PAYE each month.

28. We found that as the appellant paid its salaries on the 30th of each month it should have been perfectly possible to make the PAYE payment by the due date each month.

29. We found that the new penalty regime had been adequately publicised by HMRC and the penalty was not disproportionate as it increased according to the legislation according to the number of defaults.

30. We found that ignorance of the law was no excuse.

- 5 31. We agreed with Mr O’Leary that the penalty was fair as it increased according to the number of defaults and we found that the penalty was not “plainly unfair” within the meaning of the *Energys* decision.

Decision

32. The appeal is dismissed and the penalties are hereby confirmed.

- 10 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
15 “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

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