



**TC02353**

**Appeal number: TC/2012/00551**

*INCOME TAX – PAYE – Late payment - Whether reasonable excuse? None shown on the facts – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HARNEY & Co**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT  
JULIAN SIMS**

**Sitting in public on 13 July 2012 at Southampton Appeals Service, 83-85 London Road, Southampton, SO15 2SH on 13 July 2012**

**Stephen Harney of the Appellant for the Appellant**

**Gill Carwardine of HMRC for the Respondents**

## DECISION

### Introduction

1. 5 1. This is a full decision in this appeal following a request made by the Appellant for a full decision.
2. As recorded in the short form decision the Tribunal decided that that as a matter of fact the payments were late and no reasonable excuse within the meaning of the statute had been shown, the onus being on the taxpayer, the appeal was dismissed by the Tribunal. This was essentially a decision on the facts.

### Appeal and time

1. 15 3. This is an appeal by Harney & Co (“the Taxpayer”) against the default penalty imposed under paragraph 6 Schedule 56 Finance Act 2009 for failure to pay tax on time. The amount of the penalty is now £2030.99. It was reduced from £2,204.71 following the decision in *Agar*.
1. 20 4. Technically the appeal was made out of time and on that basis could not be heard without permission.
1. 25 5. The Respondents (“HMRC”) told us that they did not wish to take any point on this. To the extent that it is necessary we gave permission for the appeal to be bought out of time.

### Documents etc.

1. 30 6. We were provided with a number of documents which we considered carefully along with all the other evidence.

### Were the Payments Late?

1. 35 7. We find as matter of fact that the payments were made late. We do so having considering all the information available to us.
8. As we set out in short form decision the payment position from the evidence before us was as follows.

	<i>Period Ended</i>	<i>Paid on time</i>	<i>Counts towards default?</i>	<i>Unpaid after six months?</i>	<i>Comment</i>
1	5 May, 2010	No	No	No	<i>Agar</i> for period before
2	5 June, 2010	No	Yes	No	
3	5 July, 2010	No	Yes	No	
4	5 August, 2010	No	Yes	No	

5	5 September, 2010	No	Yes	No	
6	5 October, 2010	No	Yes	No	
7	5 November, 2010	No	Yes	No	
8	5 December, 2010	No	Yes	No	
9	5 January, 2011	No	Yes	No	
10	5 February, 2011	No	Yes	No	
11	5 March, 2011	No	Yes	No	

9. Based on the evidence before us we find as a fact that the payments were all more than twenty days late.

1. 5

10. There were 10 relevant defaults which gives a 4% rate under the penalty provisions below.

**The Legislation**

1. 10

11. The relevant legislation is found in paragraph 6 Schedule 56 FA 2009.

12. This provides:

1. 15

“(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

1. 20

(b) the amount of that tax comprised in the total of those defaults (see sub-paragraphs (4) to (7)).

1. 25

(2) For the purposes of this paragraph, P makes a default when P fails to make one of the following payments (or to pay an amount comprising two or more of those payments) in full on or before the date on which it becomes due and payable—

(a) a payment under PAYE regulations;

1. 30

(b) a payment of earnings-related contributions within the meaning of the Social Security (Contributions) Regulations 2001;

(c) a payment due under the Income Tax (Construction Industry Scheme) Regulations 2005;

1. 35

(d) a repayment in respect of a student loan due under the Education (Student Loans) (Repayments) Regulations 2009 or the Education (Student Loans) (Repayments) Regulations (Northern Ireland) 2000 (S.R. 2000 No 121).

1. 40

(3) But the first failure during a tax year to make one of those payments (or to pay an amount comprising two or more of those payments) does not count as a default for that tax year.

1. 5

(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.

1. 10

(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.

1. 15

(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.

(8) For the purposes of this paragraph—

1. 20

(a) the amount of a tax comprised in a default is the amount of that tax comprised in the payment which P fails to make;

(b) a default counts for the purposes of sub-paragraphs (4) to (7) even if it is remedied before the end of the tax year.

1. 25

(9) The Treasury may by order made by statutory instrument make such amendments to sub-paragraph (2) as they think fit in consequence of any amendment, revocation or re-enactment of the regulations mentioned in that sub-paragraph".The Taxpayer accepts the payments were made late. However, the Taxpayer considers that it has a reasonable excuse such that in the circumstances the penalty is not due.

1. 30

### **The Appellant's view**

1. 35

13. The grounds of appeal as set out in the Notice of Appeal were as follows:

1. 40

- "Never previously penalised for late payment or delivery of PAYE documents
- where returns were delivered late in the past these did not give rise to a penalty and I do not believe that our past record should be used against us because it is simply prudent business management to carry creditors in the most cost effective way. Where no penalties were involved it made simple economic sense to pay late rather than use overdrafts funds. The new penalty regime is entirely different!

1. 45

- We are accountants and did not know that penalties were an option for HMRC.
- We accept that we were warned that late payment could result in the imposition of penalties. In fact one officer advised us by phone but we could avoid these in

future simply by playing later months before earlier ones. Each late month would only count as one “trigger” if we did it this way!

- 1. 5 • We advised HMRC that the reason for late payment was shortage of funds due to the credit crunch and bad debts. They never ask for specific details which we would have been happy to provide them will provide in support of this appeal.
- 1. 10 • It is accepted that of funds is not a reasonable excuse unless the shortage is due to an unforeseeable events outside of our control. Total bad debts in the two years to 30/11/11 were made up of write offs of £77,129 though £12,190 had to be provided in previous years. For a small town practice this is incredibly damaging particular at a time when the country generally is in recession and all of our clients are taking longer to pay their bills. The credit crunch was outside of our control and was not foreseen by the finest economists in the land so surely this alone is sufficient to amount to a reasonable excuse. We’re still in arrears with PAYE not out of choice but out of necessity. Borrowing is at or near its limits and we will trade through this but need help from government not more disproportionate penalties.
- 1. 15 • These penalties are wrong in principle and disproportionate to the perceived offence. The suggestion in the review letter that they are intended to “encourage” payment by the due dates is simply offensive in the middle of a recession caused by governments and bankers”.
- 1. 20 •
- 1. 25 14. The taxpayer considers that the penalties should be completely written off. This is on the basis that there is a reasonable excuse.

#### **HMRC’s view**

- 1. 30 15. In essence, HMRC said that the tax was not paid by the due date and that accordingly the penalties stood unless the Taxpayer could show a reasonable excuse which had not been done.
- 1. 35 16. Reasonable excuse is not defined in the legislation but is usually taken to mean something that is unexpected or unusual as either unforeseeable or beyond the person’s control which prevents compliance with the obligation.

#### **Conclusion**

- 1. 40 17. The appeal is dismissed on the facts.
- 18. We find as a matter of fact that all the relevant payments were late.
- 1. 45 19. The issue then is whether the Appellant has shown a reasonable excuse. If the Appellant does not show that there was a reasonable excuse the penalty must stand. We have no discretion in this.

20. We find that the Appellant has not discharged this onus.

21. The Law has changed so that lack of penalties in the past is not in point.

1. 5 22. Ignorance of the law is not an excuse.

1. 10 23. Lack of funds is not a reasonable excuse, except in the limited circumstances discussed in Steptoe. Whilst, the Appellant referred in the grounds of appeal at 13 above that the extent of the credit crunch and specific bad debts amounted to unforeseeable events outside of his control, we find that these events were not sufficiently proximate to the defaults to amount to a reasonable excuse and in any case extended over such a period of time that an employer exercising reasonable foresight would be expected to have made appropriate arrangements to ensure the payments were made on time. We therefore find that the Appellant has not shown a  
1. 15 reasonable excuse applying to all or any of the late payments.

1. 20 24. Whether the penalties are wrong in principle and disproportionate to the perceived offence is an interesting issue. However, Parliament has imposed these penalties and in the particular circumstances of this case we do not consider the penalties are wrong in principle or disproportionate to the perceived offence on the information and evidence before us.

1. 25 25. As nothing amounting to a reasonable excuse within the statutory definition has been brought to our attention we find that the Taxpayer has not discharged the onus on him of showing that there was a reasonable excuse.

1. 30 26. Whilst we are sympathetic to the Taxpayer's position the employees were paid and the amount of PAYE should have been withheld out of those payments. That money should have been used to pay the PAYE rather than used as working capital.

27. Consequently, we dismiss the appeal.

1. 35 28. 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.  
1. 40

**ADRIAN SHIPWRIGHT  
TRIBUNAL JUDGE**

1. 45

**RELEASE DATE: 5 November 2012**

